State of Iowa
1952

TWENTY-NINTH BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

FOR THE

BIENNIAL PERIOD ENDING DECEMBER 31, 1952

ROBERT L. LARSON
Attorney General

Published by
THE STATE OF IOWA
Des Moines

PERSONNEL

DEPARTMENT OF JUSTICE

ROBERT L. LARSON.....Attorney General
CLARENCE A. KADING.....First Assistant Attorney General
OSCAR STRAUSS.....Assistant Attorney General
RAPHAEL R. R. DVORAK.....Assistant Attorney General
KENT EMERY.....Assistant Attorney General
EARLE S. SMITH.....Assistant Attorney General
HENRY W. WORMLEY.....Special Assistant Attorney General
—State Tax Commission
FOLSOM EVEREST.....Special Assistant Attorney General
—State Highway Commission
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—State Board of Social Welfare
EARL R. SHOSTROM.....Special Assistant Attorney General
—Claims
IRA A. BUCKLES.....Administrative Assistant
DONNA BEDIER.....Secretary
WINIFRED FOLEY.....Secretary
FERN G. HULTEN.....Secretary
BURDENA MUNGER.....Secretary
FAY STAFFORD.....Secretary

ATTORNEY GENERALS OF IOWA

1853-1953

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, 1952

HONORABLE WILLIAM S. BEARDSLEY

Governor of Iowa

Dear Governor:

In compliance with Section 17.6 of the 1950 Code of Iowa, I herewith submit the biennial report of the Attorney General covering the period beginning January 1, 1951, and ending December 31, 1952.

The opinions printed in the report represent only a minor part of the work of the office during the biennial period. In addition, many advisory opinions were issued in the form of letters to state and county officials.

The department has many duties of an advisory nature in connection with the operations of the State Highway Commission, the State Tax Commission and the State Board of Social Welfare which, by their nature, cannot be included herein.

The duties of the department also require preparation and appearance in all appeals to the Supreme Court in the criminal cases. During the biennium, sixty-six criminal cases were processed.

The department investigated many claims against the state, made recommendations thereon to the State Appeal Board and arranged for their proper presentation to the General Assembly.

In addition to the former duties of the department, the Fifty-fourth General Assembly added the duty to pass on and appove or reject all proposed rules and regulations promulgated by the administrative departments of the state government.

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

Respectfully submitted,

ROBERT L. LARSON

Attorney General of Iowa

DEPARTMENTS AND OFFICERS REQUESTING OPINIONS

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Officers

State of Iowa
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OFFICIAL OPINIONS

OF THE

ATTORNEY GENERAL

FOR

BIENNIAL PERIOD

1951-1952

January 3, 1951

VETERANS: **Return to military service—eligibility for benefits.** One who served in the military forces of the United States in any war does not lose his rights as an honorably discharged veteran by returning to the military service.

Mr. Edwin H. Curtis, Executive Secretary, Iowa Bonus Board: We have yours in which you have submitted the following:

"I am desirous of a legal opinion clarifying the status of a veteran in as far as the County Soldiers' Relief Commission's funds are concerned.

Section 250.1 provides a tax to be used for the relief of indigent men and women of the United States who served in the military or naval forces of the United States in any war, and their indigent wives, widows and minor children not over 18 years of age, having legal residence in the county. This fund provides for only honorably discharged veterans and their families.

A man served in World War II and was honorably discharged, he then returns to the armed services and leaves behind his wife and children. By returning to the service does this man lose his rights as an honorably discharged veteran and his eligibility to assistance for his family from the County Soldiers' Relief fund? In very few cases it will be necessary that some of these families may need such assistance. Such assistance, and the need therefore, will be determined by the County Soldiers' Relief Commission, but the question is can they legally extend this assistance?"

In reply thereto we would advise you that an honorably discharged soldier of World War II does not lose this honorable discharge and the benefits accruing therefrom by reason of his return to the military service of his country. Therefore, the indigent wives, widows and minor children of such honorably discharged soldiers are entitled to the relief provided by Section 250.1, Code 1950, notwithstanding the fact that these soldiers have returned to the armed services. The need and the amount of such assistance, of course, is still a matter to be determined by the County Soldiers' Relief Commission.

January 25, 1951

MOTOR VEHICLES: **Registration requirements for farm trailers.** A wagon box trailer or other trailer designed for farm purposes, used exclusively in farm operations, is an "implement of husbandry" and is exempt from registration unless a part of these operations include the transportation of farm products or supplies to and from market.

MOTOR VEHICLES: **Registration of farm trailers crossing highway.** A wagon box trailer or other trailer designed for farm purposes and otherwise qualifying as an "implement of husbandry" may be moved across the highway directly or at a perceptible angle without being subject to registration.

Mr. Pearl W. McMurry, Commissioner of Public Safety: An opinion is requested of this office as follows:

"May a wagon box trailer or a trailer, or either, under any circumstances, be classified as an 'implement of husbandry' in so far as the registration provisions of Chapter 321 are concerned?

May a wagon box trailer or a trailer, or either, be driven or moved at any time upon our highways unless the same is registered in accordance with the provisions of Chapter 321? If so, to what extent and under what circumstances?

What distance may a trailer operate on our highways before crossing such highway from one property to another in order to remain within the exceptions of subparagraph 2 of section 321.187? Would it be three miles, two miles, one mile, one half mile, or a lesser distance?

Would a person owning and operating several farms and a cannery in a particular locality be allowed to use his wagon box trailer or a trailer on our highways between such farms and the cannery without complying with the registration requirements of Chapter 321, when moving such trailers either empty, with tools or other property carried thereon, or with supplies or his own produce as a load not hauling to or from market?"

An "implement of husbandry" is defined in subsection 16 of section 321.1, Code of Iowa, 1950, as follows:

" 'Implement of husbandry' means every vehicle which is designed for agricultural purposes and exclusivly used by the owner thereof in the conduct of his agricultural operations."

Under the provisions of section 321.18 "implements of husbandry" are excepted from the registration provisions of Chapter 321 of the Code, as follows:

"Every motor vehicle, trailer, and semitrailer when driven or moved upon a highway shall be subject to the registration provisions of this chapter except:

1. Any such vehicle driven or moved upon a highway in conformance with the provisions of this chapter relating to manufacturers, transporters, dealers, or nonresidents as contemplated by section 321.53, or under a temporary registration permit issued by the department as hereinafter authorized.

2. Any such vehicle which is driven or moved upon a highway only for the purpose of crossing such highway from one property to another.

3. Any implement of husbandry. * * *"

Section 321.123 of the code provides in pertinent part to your inquiry:

"When equipped with pneumatic tires:
Wagon box trailers used by a farmer in transporting produce, farm products or supplies hauled to and from market, five dollars."

An "implement of husbandry" as defined supra would appear to include a wagon box trailer or other trailer exclusively used by the owner in the conduct of his agricultural operations. Also it would appear proper to say that the transportation by a farmer of produce, farm products or supplies to and from market would be in the conduct of agricultural operations. Therefore some inconsistency develops between the exemption of implements of husbandry and the requirement of registration of wagon box trailers engaged in transporting farm products. The exemption is general in its terms and the registration requirement is specific. In such a situation it is a rule of statutory construction that the specific provision will be given effect over the general provision. It fol-

lows that a wagon box trailer used in the manner set forth in section 321.123 is subject to registration regardless of the general exemption. Nevertheless the general exemption would apply as to a wagon box trailer which was used exclusively in the conduct of agricultural operations provided in those operations it is at no time used to transport produce, farm products or supplies to and from market.

In answer to your question number 1 it therefore may be said that a wagon box trailer or any other trailer designed for agricultural purposes would be an "implement of husbandry" within the exception from registration, if used only in the conduct of agricultural operations excluding transportation of the type hereinbefore mentioned.

In answer to your question number 2 it is first to be noted that a wagon box trailer or other trailer designed for agricultural purposes may be driven or moved upon the highways without registration within the limitations set forth in the answer to question number 1 above. Such vehicles may also be driven or moved without registration under the provisions of subsection 1 of section 321.18, that is, in conformance with the provisions of Chapter 321 relating to manufacturers, transporters, dealers, or nonresidents granted reciprocity, or under a departmental temporary permit, and as hereinafter set forth in answer to your question number 3.

The word "across" is defined by Webster's International Dictionary as follows:

"So as to intersect or pass at an angle, especially a right angle; at an angle with the length, direction, or course of; as to lay one stick across another."

Funk & Wagnalls New Standard Dictionary defines "across":

"In a direction or position transversely over".

"Transverse" is defined by the Funk & Wagnalls Dictionary as follows:

"Lying or being across or in a crosswise direction". The concept of the foregoing definitions does not include the idea of "along", as in traveling "along the highway".

That the intent of the legislature is expressed by the dictionary definitions of the word "across" is emphasized in that an absurd situation would result if a vehicle could move onto the highway, travel along the highway and then cross over, but could not, after traveling along the highway, leave the highway on the same side. There would appear to be no logical reason for granting the privilege provided that the vehicle crossed over, but denying the privilege, even though the distance were the same if no crossing over were involved.

Therefore the provisions of subsection 2 of section 321.18 permit an unregistered vehicle to enter upon the highway and proceed in a direct line on a perceptible angle to the other side of the highway. The angle

is not necessarily a right angle but certainly the thought is conveyed that the angle should be of sufficient degree that there is no question that the vehicle is in the process of moving to the other side to a destination directly in line with the point where the vehicle entered the highway and the position of the vehicle at the instant of observation.

It is believed that the answer to your question number 4 is found in our answer to your question number 1. However it is to be noted that the load or lack of load on the vehicle at any given time is immaterial if the vehicle is at that time and at all times exclusively used in the conduct of agricultural operations. The load may be evidence that the vehicle is or is not being used exclusively in such operations. For example, if the vehicle were empty but was on a trip in connection with the conduct of agricultural operations rather than as a mere personal conveyance for the operator, it would not negative its identity as an "implement of husbandry". On the other hand if the vehicle were being used merely as a personal conveyance or in connection with the operation of the cannery business it would not be an implement of husbandry. The remaining alternative is "use under the provisions of section 321.123, in which event it would be subject to registration as provided in that section.

You are therefore advised that it is the opinion of this office:

1. That a wagon box trailer or other trailer designed for agricultural purposes, used exclusively by its owner in the conduct of his agricultural operations is an implement of husbandry and is exempt from registration unless a part of those operations include the transportation of produce, farm products or supplies to and from market.

2. A wagon box trailer or other trailer designed for agricultural purposes when an implement of husbandry as set forth in (1) above, or when crossing a highway from one property to another, moving across the highway at a perceptible angle or when driven or moved under the provisions of Chapter 321 relating to manufacturers, transporters, dealers, or nonresidents under reciprocity, or under a departmental temporary permit, is exempt from the registration requirements of Chapter 321.

February 1, 1951

MOTOR VEHICLES: Corn sheller as "implement of husbandry." A corn sheller is an "implement of husbandry" only when used by the owner exclusively in the conduct of his own agricultural operations, but is subject to registration and to the safety equipment provisions of section 321.398.

Mr. Pearl W. McMurry, Commissioner of Public Safety: An opinion has been requested of this office as follows:

"1. 'A' is a farmer who owns his own corn sheller mounted on a truck, such corn sheller receiving its power from the engine of the truck. He uses this corn sheller only for shelling his own corn. Does this vehicle or unit under this set of circumstances qualify as an 'implement of husbandry' as defined in section 321.1, paragraph 16, Code of 1950?

2. 'A' is a farmer who owns his own corn sheller mounted on a truck, such corn sheller receiving its power from the engine of the truck. In addition to shelling his own corn and occasionally shelling that of a neighbor on an 'exchange of work' plan, he also does custom shelling for hire in his community. Does this vehicle or unit under this set of circumstances qualify as an 'implement of husbandry' as defined in section 321.1, paragraph 16, Code 1950?

3. 'A' is a trucker, living in town. He engages in no farming operations himself but has a corn sheller mounted on a truck, such corn sheller receiving its power from the engine of the truck. With this equipment he does a custom shelling business in his community. Does this vehicle or unit under this set of circumstances qualify as an 'implement of husbandry' as defined in section 321.1, paragraph 16, Code 1950?

4. In any of the above situations if the vehicle or unit described is held to be an 'implement of husbandry', and if it were driven or moved upon our public highways, would it be subject to the safety standards contemplated by sections 321.381 et seq., Code 1950, and more particularly those relating to lighting equipment, or would the exceptions of section 321.383 apply regardless of the provisions of section 321.393?"

Subsection 16 of section 321.1 provides:

" 'Implement of husbandry' means every vehicle which is designed for agricultural purposes and exclusively used by the owner thereof in the conduct of his agricultural operations."

Attention is particularly invited to the language of the above quotation, "*exclusively used by the owner thereof in the conduct of his agricultural operations.*"

In view of this definition a corn sheller used by a farmer for shelling his own corn is an "implement of husbandry." A corn sheller used by a farmer for the shelling of his own corn and the corn of others is not an "implement of husbandry" within the contemplation of the statute. This is true regardless of whether the work done for others is on an "exchange of work" plan or for some other consideration. Sections 321.381, 321.383, 321.393, and 321.482, Code 1950, provide:

321.381. "It is a misdemeanor, punishable as provided in section 321.482, for any person to drive or move, or for the owner to cause or knowingly permit to be driven or moved on any highway any vehicle or combination of vehicles which is in such unsafe condition as to endanger any person, or which does not contain those parts or is not at all times equipped with such lamps and other equipment in proper condition and adjustment as required in this chapter, or which is equipped in any manner in violation of this chapter."

321.383. "The provisions of this chapter with respect to equipment on vehicles shall not apply to implements of husbandry, road machinery, road rollers, or farm tractors except as herein made applicable."

321.393. "No lighting device or reflector, when mounted on or near the front of any motor truck or trailer, shall display any other color than white, yellow, or amber; provided that installations heretofore in place and otherwise complying with the law may display a green light until replacements are made. No lighting device or reflector, when mounted on or near the rear of any motor truck or trailer, shall display any other color than red, except that the stop light may be red, yellow, or amber."

321.482. "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 a violation of any of the provisions of this chapter for which another penalty is not provided shall be punished by a fine of not more than one hundred dollars or by imprisonment for not more than thirty days."

Under section 321.383 the provisions of Chapter 321 relating to safety equipment are not applicable to "implements of husbandry" unless they are made applicable by specific reference.

Section 321.398 is the only instance in which such specific reference is found. This section provides:

"All vehicles, including animal-drawn vehicles and including those referred to in section 321.383 not hereinbefore specifically required to be equipped with lamps, shall at the times specified in section 321.384 be equipped with at least one lighted lamp or lantern exhibiting a white light visible from a distance of five hundred feet to the front of such vehicle and with a lamp or lantern exhibiting a red light visible from a distance of five hundred feet to the rear."

Section 321.384 which is mentioned in section 321.398 provides in pertinent part:

"Every vehicle upon a highway within this state at any time from a half hour after sunset to a half hour before sunrise and at any other time when there is not sufficient light to render clearly discernible persons and vehicles on the highway at a distance of five hundred feet ahead shall display lighted lamps and illuminating devices as hereinafter respectively required for different classes of vehicles, subject to exceptions with respect to parked vehicles as hereinafter stated."

Thus it results that the only safety requirements relating to "implements of husbandry" are that such vehicles shall be equipped with at least one lighted lamp or lantern exhibiting a white light visible from a distance of five hundred feet to the front of such vehicle, and with a lamp or lantern exhibiting a red light visible from a distance of five hundred feet to the rear, and shall display the lighted lamps or lanterns mentioned when upon a highway at any time from a half hour after sunset to a half hour before sunrise and at any other time when there is not sufficient light to render clearly discernible persons and vehicles on the highway at a distance of five hundred feet. The provisions of section 321.482 apply as enforcement measures for this regulation.

You are therefore advised that under the definition of subsection 16 of section 321.1, Code 1950, a corn sheller is an "implement of husbandry" only when it is used by the owner thereof exclusively in the conduct of his own agricultural operations, and then only, so far as safety equipment provisions are concerned. They are nevertheless subject to registration under Section 321.118. In the situations set forth in questions 2 and 3 a corn sheller is not an "implement of husbandry" and therefore is not exempt from the provisions of Chapter 321 relating to safety equipment. You are further advised that a corn sheller which qualifies

as an "implement of husbandry" as above defined with respect to safety equipment under Chapter 321 is subject only to the provisions of section 321.398 which may be enforced under the provisions of section 321.482.

March 8, 1951

ADOPTION: New birth certificate for adopted child. A new birth certificate made to replace the original birth certificate of an adopted child appears of record only in the office of the state registrar of vital statistics and certified copies can only be issued by him.

Mr. L. E. Chancellor, Director, Division of Vital Statistics, State Department of Health: This acknowledges receipt of your letter dated March 1, 1951, which is as follows:

"Inquiry has been received from several county registrars (clerks of the district court) as to whether they are authorized to issue a new birth certificate following a decree of adoption of a child whose original birth certificate is recorded in the office of the clerk where the adoption decree was entered.

Since Section 144.44 requires that the copy of the original birth record in the county office will be covered over and no provision is made to establish a new record at the county level, we fail to see how a copy of the new certificate could be issued by the county office.

Your opinion as to whether the county registrar is authorized to establish a new birth certificate for an adopted child is hereby requested."

An examination of the general provisions of Chapter 144, Code 1950, reveals that the primary responsibility for the execution of an original birth certificate is vested in the person in attendance at the birth. There is a provision in Section 144.16 for the local registrar to prepare the proper certificate of birth in case there was no one in attendance at the birth and Section 144.17 et seq, authorizes the local registrar to obtain and supply missing information on incomplete certificates but nowhere in that chapter do we find even such authority vested in the county registrar.

Originally all certified copies of vital statistics required to be recorded under the provisions of Chapter 144 were obtainable only from the state registrar. By the provisions of Section 16, Chapter 117, Acts of the 49th General Assembly (1941), the words "or any county registrar" were inserted in what now appears as Section 144.41, Code 1950, which is as follows:

"144.41. CERTIFIED COPIES. The state registrar or any county registrar shall, upon request, supply to any applicant for any proper purpose, a certified copy of the record of any birth, death, or marriage registered under the provisions of this chapter, for the making and certifying of which he shall charge a fee of fifty cents."

It is evident from an examination of the provisions of this section that the words "certified copy" have reference to the record of birth, death, or marriage registered under the general provisions of the chapter and therefore this section has no bearing on the question you ask.

Prior to the enactment of Chapter 98, Acts of the 51st General Assembly (1945), the statutes of this state contained no provision regard-

ing the execution of a new birth certificate after entry of a decree of adoption to replace the original birth certificate of the adopted child. Sections 1 and 2 of that act now appear as Sections 144.44 and 144.45, Code 1950. The answer to your inquiry is dependent upon whether or not either of those sections authorize a county registrar to issue a new birth certificate under the circumstances you set out. Section 144.44 is as follows:

"144.44 ADOPTED CHILDREN — CERTIFICATES OF BIRTH. When a decree declaring a child legally adopted or annulment of adoption is entered in any court of record in this state, an abstract of the decree upon a form provided for that purpose shall be forwarded by the clerk of said court to the state registrar of vital statistics on or before the tenth day of the succeeding month. This certificate or abstract of the decree of adoption shall be filed with the original record of birth and shall remain a part of the records of the state bureau of vital statistics, and shall not be accessible to any one except upon order of court. Upon request a certificate of birth shall be issued bearing the name of the child as shown in the decree of adoption, but no reference to the adoption shall be made in any birth certificate. The certificate of birth shall contain the name of the parents, who adopted the child, as the father and mother of the adopted child.

When a new birth certificate is made to replace the original birth certificate of an adopted child, the state registrar shall inform the county registrar whose records contains copies of the original certificate that he shall effectively seal a cover over such copy in a manner as not to deface or destroy such copy and that thereafter the information contained in such copy shall only be available upon court order.

A new certificate of birth may be issued by the state registrar in accordance with this chapter in the case of a child born in the state, but adopted by a legal proceeding in another state, in the District of Columbia, or in any territory of the United States which has jurisdiction of the child, upon the filing with the state registrar a copy of the decree, judgment or other certification as may be required by the registrar from the judge who entered it or the person having the legal custodianship of the records in the proceeding. When any such certificate is issued, it shall be treated in all respects the same as, and governed by, all the provisions of this chapter pertaining to a certificate issued in the case of a child adopted in this state. If the birth occured outside the state of Iowa, the state registrar shall forward the certificate of said decree to the appropriate registration authority. All certificates of birth shall contain the name of the parents, who adopted the child, as father and mother of said child.

Upon receipt of a certificate of annulment of adoption, the state registrar shall restore the original certificate of birth to its original status in the files, and shall notify the county registrar to do likewise."

From a reading of the provisions of the foregoing section we are forced to the conclusion that the state registrar is the only official authorized to execute a new birth certificate following a decree of adoption; that the only duties of the clerk of the district court are to abstract the decree of adoption and forward the same to the state registrar of vital statistics and later as county registrar to comply with the notification received from the state registrar to effectively seal a cover over the copy of the original birth certificate of the child in question. In this connection it should be noted that provisions of Section 600.9, Code 1950, require that after the abstract of the adoption decree has been prepared,

the clerk shall seal the complete record in the adoption proceedings and the same shall not thereafter be opened except on order of court.

It is our opinion, therefore, that a new birth certificate made to replace the original birth certificate of an adopted child can only be executed by the state registrar and the fact that the original birth certificate of the adopted child happened to have been of record in the same county where the adoption proceedings were had would not in any way vest such authority in the county registrar. The authority vested in the county registrar by the provisions of Section 144.41, Code 1950, is limited to certifying the record of any birth as recorded in his office from the original birth certificate but naturally, after the required sealing of such record of birth following adoption even that authority is automatically terminated. It follows, therefore, that a new birth certificate made to replace the original birth certificate of an adopted child appears of record only in the office of the state registrar of vital statistics and certified copies thereof, through necessity, can only be issued by him.

What has been said regarding the issuance of new birth certificates under the provisions of Section 144.44 is equally applicable to such certificates issued under the provisions of Section 144.45, Code 1950, which deals with those cases where an adoption was consummated under previous laws.

March 13, 1951

HIGHWAYS: Secondary road improvement—priority lodged in discretion of board of supervisors. The priority of improvement of secondary roads lies in the sound discretion of the supervisors, taking due consideration of the factors enumerated in section 309.25.

Mr. Harold R. Grigg, County Attorney, Cherokee, Iowa: In a letter dated March 9, 1951, you say:

"Section 309.25 provides that the Board of Supervisors and the County Engineer shall give due and careful consideration to three specified items in planning and in adopting a program for secondary road improvement.

Cherokee County, through its Board of Supervisors, has adopted a program to improve by grading and graveling one mile of a county road in Afton Township. The particular one mile stretch of road runs east and west between sections 9 and 16.

There is another one mile stretch of road running east and west between sections 20 and 29 in the same township. The Board of Supervisors have elected to improve the first mentioned road. Opposition has been made to the suggested improvement because of the fact that the second mentioned road is a rural mail route while the first mentioned road is not. It is therefore the opinion of the Post Office Department that the second rather than the first road mentioned should be first improved.

Assuming that all other factors are equal but that one road is a rural mail route, does it then become mandatory on the part of the Supervisors and County Engineer to improve the road which is the mail route first, or does the Board still have discretion in determining which road shall be improved."

The section of the statute to which reference is made reads as follows:

"Material considerations for farm-to-market roads. In planning and in adopting said program or project by the board of supervisors, said board and the county engineer shall give due and careful consideration, (1) to the location of primary roads, and (2) to the market centers and main roads leading thereto, and (3) to rural mail and school bus routes, it being the intent of this chapter that said program or project will, when finally executed, afford the highest possible systematic, intracounty and intercounty connections of all the roads of the county."

The assumption that you make in the last paragraph of your letter quoted above is not a reasonable assumption. The statute numbers three things to which the board and the county engineer must give due and careful consideraton, but when you come to enumerate them there are actually more than three, and these include:

1. The location of primary roads;
2. The location of roads heretofore improved if county roads;
3. Location of market centers;
4. Location of main roads leading to market centers;
5. Rural mail routes;
6. School bus routes.

To all of these careful consideration must be given to the end that "said program or project will, when finally executed, afford the highest possible systematic, intracounty and intercounty connections of all roads of the county." To say that all of the factors with reference to the two different routes are identical in fact or identical in the minds of the individual members of the Board of Supervisors charged with the duty of making the decision would necessarily assume the two roads to be identical, and, of course, this is not the fact. The statute does not require that any one of the six factors be given weight in preference to any other, and for the Court to impose its notion of the value of these several factors with respect to each road on the board of supervisors would be to substitute the judgment of the Court for the judgment of the board who may possibly have been selected by the electorate because of their assumed familiarity with questions having to do with the location of highways.

The Iowa court has pointed out the difference between ministerial acts and acts involving discretion in the case of First National Bank vs. Hayes, 186 Ia. 292, 171 N. W. 715, which was quoted approvingly in Taylor County Farm Bureau vs. Board of Supervisors, 218 Ia. 937, 252 N. W. 498, where the Court said:

"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 minister-

ial, but where the act to be done involves exercise of discretion or judgment 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.' "

The determination of this matter does not involve the application of a mathematical formula; it requires judgment, foresight, and wisdom in the proper evaluation of the several factors enumerated by the Legislature in the light of the objective laid down in the statute. Unless the record of the Board of Supervisors affirmatively disclosed that the board had ignored the existence of a rural mail route on one or the other of the roads in question, or unless the record disclosed that a majority of the Board of Supervisors failed to take cognizance of such a fact in the determination of the question the judgment of a court should not be substituted for the judgment of the Board of Supervisors.

The conclusion is that if the Board of Supervisors took into consideration the rural mail route question their decision as to which road should be improved was arrived at in the exercise of a proper discretion.

March 15, 1951

SCHOOLS AND SCHOOL DISTRICTS: Election of directors — snow storm preventing opening of polls. Where, due to a severe snow storm, the regular school election could not be held, a vacancy occurs on the board for the term of any directorship due to be filled at that election, which vacancy can only be filled by appointment under section 279.6 — the incumbent director sitting in appointment of his successor — or by special election under section 279.7. A regular school election may not be postponed.

Mr. Donald E. Smith, Assistant County Attorney, Cedar Rapids, Iowa: We have yours of the 13th instant in which you have submitted the following:

"A number of questions have arisen by reason of the snow storm on Monday, March 12th, preventing the opening of school district polls for holding the regular school election as required by statute. Particularly in the rural districts, many of the subdistrict polls were not opened and the election was not held. In one consolidated district the polls were not opened and the election was postponed to March 15th by action of the school board in that district. The following questions presented must be decided immediately because the reorganization meeting of the school boards must be held on the third Monday of March, according to the statutes, which would be March 19 of this year. The particular questions for decision may be stated as follows:

1. In a school township where there has been no election in a subdistrict on the second Monday in March, does the old director have a right to hold over for the ensuing term, or is there a vacancy under the provisions of Section 277.29, Code 1950?

2. At the reorganization meeting of the Board of a school township where there is a vacancy on the Board by reason of the failure to elect at the regular school election, or because the old director refuses to serve for the ensuing term, does the old Board or the new Board have the right to appoint a director to fill such a vacancy?

3. If the authority to appoint a director to fill a vacancy at the reorganization meeting rests with the new Board, and there are not enough members in the new Board to form a quorum, what procedure must then be followed under the statute?

4. May a regular school election be legally postponed?

In addition to the foregoing fact situation, we are advised that the township district has been divided into nine subdistricts, and each subdistrict elects a member of the school board for a term of one year.

We advise you as follows:

(1) In answer to your question number 1, we would advise you that according to opinion of this Department, appearing in the Report of the Attorney General for 1944 at Page 39, the failure to elect a school director at the regular school election, results in a vacancy in the board, and the former director does not hold over. The foregoing opinion is an interpretation of Section 4216.29 of the 1939 Code, now appearing as Section 277.29, Code 1950, Section 4223.2, Code 1939, now appearing as Section 279.6, Code 1950, and Section 426.24, Code 1939, now appearing as Section 277.24, Code 1950, which statutes are exhibited as follows:

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

"279.6. Vacancies occurring among the officers or members of a school board shall be filled by the board by appointment. A person so appointed to fill a vacancy in an elective office shall hold until the organization of the board the third Monday in March immediately following the next regular election and until his successor is elected and qualified. A person appointed to fill a vacancy in an appointive office shall hold such office for the residue of the unexpired term and until his successor is appointed and qualified. Any person so appointed shall qualify within ten days thereafter in the manner required by section 277.28."

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

Pursuant to these statutes and the interpretation thereof by the foregoing designated opinion, failure to elect directors in the school

township at the regular school election on the second Monday in March, creates a vacancy in these directorships, and such vacancy is required to be filled under the provisions of Sections 279.6 and 279.7, Code 1950. According to these sections the board has the power and the duty to fill these vacancies by appointment, but if no appointment is made within ten days after the occurrence of the vacancy, then a special election is required to fill the vacancy. It is apparent from the foregoing that the present director does not hold over for the new term, but only until a successor is elected or appointed and qualified.

(2) This leads to an answer to your second question as to which board has the right to fill the vacancy by appointment. There appears to be no statutory direction with respect to this question. However, our Supreme Court has spoken thereto in the case of Cowles v. Independent School District, 204 Iowa 689, to the effect that under a statute couched in the terms hereinbefore exhibited, that is, that the term of the director shall be for one year and until his successor is elected or appointed and qualified, and the duties and responsibilities of the director still continue until his successor is appointed or chosen and qualified. It is there said:

"Was the board, at the time it employed Miss Talbot and at the time it employed plaintiff, competent to take such action? Its members might be directors de jure or de facto. By Section 1265, Code of 1897:

'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.'

It is somewhat otherwise provided with regard to school directors, by Section 2758, Code Supplement, 1913, that the director 'shall hold the office for the term to which he is elected, and until his successor is elected and qualified. In case of a vacancy, the office shall be filled by appointment by the board until the next annual meeting.' By Section 1266, Code 1897, it is provided that:

'Every civil office shall be vacant upon * * * 4. The resignation or death of the incumbent.'

Section 1268, Code of 1897, provides how resignations of sundry civil officers — not including, however, school directors — may be made. The resignation involves the intent on the part of the resigning official whether to make a present immediate resignation or to make one to take effect when accepted, or on some other event. His intent to resign with immediate effect involves the question of public interests, — whether the necessary performance of the duties of the office which he holds and the interests of the public will permit an immediately effective resignation. The resignation involves also the understanding and intent of the officer or board to whom it is made, whether they are advised of it, whether they accept it, and upon what condition as to time of taking effect. In State ex rel. Westfall v. Blair, 87 W. Va. 564 (105 S.E. 830), it is said:

'It is the policy of our laws that officers elected or appointed shall serve until their successors are elected or appointed and qualified. * * * The services of officers are necessary to government, and any vacancy in office, especially in an office which is necessary for government, tends to disorganization and disruption. In our form of government citizens must, in order to carry it on, accept public office and render official service. The state has the right to demand faithful official service from every citizen selected, within proper limitations and conditions, and under this

principle laws in some jurisdictions have been predicated and upheld which impose penalties on a citizen who refuses to serve after having been selected for an elective office.'

Referring to People ex rel. Illinois M. R. Co. v. Supervisor, 100 Ill. 332, it is further said:

'The court held that, under the laws, a person elected should serve until his successor was elected, or appointed, and qualified, and that the same rule would apply to a resignation; and an officer who had resigned was not functus officio until his successor was selected and qualified. * * * The Supreme Court of the U. S. made a similar decision, holding that, where a town officer seeks to prevent the performance of a duty by a hasty resignation, he must see that he resigns not only de facto, but de jure; that he resigns his office not only, but that a successor is appointed. The court said: "An attempt to create a vacancy at a time when such action is fatal to a creditor will not be helped out by aid of the courts." Badger v. Belles, 93 U. S. 599. "An officer whose resignation has been tendered to the proper authorities and accepted, continues in office and is not released from its duties and responsibilities until his successor is appointed or chosen and qualified." Jones v. City of Jefferson, 66 Texas 576. See Dillon, Mun. Corp. (5th Ed.), Sec. 1522. A resigning officer must continue in the discharge of his duties until his successor is elected or appointed and qualified, and mandamus will lie to compel him to perform his duties."

Therefore, among his duties and responsibilities is the duty imposed upon such director to sit in appointment of a successor under the provisions of Section 279.6.

(3) In view of the foregoing conclusion, answer to your question number 3 is not required.

(4) In answer to your question number 4, we would advise you that a regular school election may not be legally postponed. A legal election must be called and held under the sanction of the law. It must be called by one authorized under the law to call an election, and the notices must be issued under authority of law by a person designated in the law to give the notice. There is no such thing as a voluntary election, by which the minority can be bound by the act of the majority. (Leslie v. Barnes, 201 Iowa 1159, 1161)

(5) In the event the vacancy is not filled by appointment by the board, pursuant to the terms of Section 279.6, then the vacancy should be filled at a special election to be called by the secretary of the board, if there be one, or, if not, by the county superintendent of schools. See Section 279.7, Code 1950, for procedure in this situation.

March 27, 1951

TAXATION: Television sets taxed as personal property. A television receiving set does not come within the definition of household furniture or other provisions of the tax exemption statutes.

Mr. George Cosson, Jr., Director, Property Tax Division, State Tax Commission: This will acknowledge your letter in which you state you have received a number of inquiries from assessors as to whether or not television receiving sets are to be classed as household furniture and taxed

in accordance with the provisions of Section 427.1, subsection sixteen (16), or whether such receiving sets and aerials are to be listed and taxed as other personal property.

The pertinent statute is Section 427.1, subsection sixteen (16), we quote:

"Family pictures; household furniture to the taxable value of $300.00, and kitchen furniture; beds and bedding requisite for each family; all wearing apparel in actual use; all food provided for the family.

The exemptions allowed in this subsection shall not apply to hotels and boarding houses except so far as the exempted classes of property shall be for the actual use of the family managing the same."

It is to be noted that the foregoing section has a limitation of $300.00 on household furniture, and if a television receiving set were to be classed as household furniture under this limited exemption we doubt if the net result, so far as taxation is concerned, would be materially affected in view of the fact that at the present time the taxable value of the average household furniture exceeds the sum of $300.00.

We have been unable to find any cases concerning this particular question. It is a rule of law that exemption statutes are strictly construed against the party claiming the exemption and that one who claims the benefit of an exemption must show himself to come within the terms thereof.

An examination of the foregoing statute warrants the conclusion that it was not the legislative intent to provide a broad, general and unlimited exemption; in fact, the converse is true. The statute, by its very terms, is limited and confined to what is necessary or requisite for the actual use of the family. For example, "family pictures," which term is restrictive and does not include any other pictures but limits the exemption strictly to family pictures. The term "beds and bedding requisite for each family" again evidences the intent of the legislature to confine the exemption to what is requisite for each family. The statute provides "wearing apparel in actual use and all food provided for the family" — here again the legislature has seen fit to limit the wearing apparel in actual use and does not exempt such other wearing apparel as might be owned by members of the family and which is not in actual use at the time of making the assessment.

The exemption further provides "household furniture to the taxable value of $300.00". This again evidences an intent to restrict the exemption because if the legislature had not calculated that the owner would have household furniture in excess of $300.00, there would be no need for this limitation.

As we view the statute, it is restrictive in its nature and is to be so construed as to limit the exemption to that which is necessary or requisite to the family. In Reynolds vs. Iowa and Nebraska Insurance Company, 80 Iowa 563, the Court stated "The term 'household furniture' includes goods, vessels, utensils and other articles necessary and convenient

for housekeeping". However, we are of the opinion it is not necessary to determine this question on that premise alone. Webster's New Collegiate Dictionary defines televisor as a television apparatus, and the term "apparatus" is defined as "any complex instrument, appliance or piece of machinery". No one would argue that a television receiving set was not a complex instrument or appliance or that it could be operated and reproduce a scene or program unless there was some other device or sending set at some distant point transmitting a scene or program which would be reproduced by the television receiving set.

It is true that television receiving sets are frequently encased in beautiful cabinets, which cabinets might be said to be an article of ornamentation or serve as a piece of furniture; however, we are not dealing with the highly polished cabinets but have under consideration a television receiving set. A television receiving set is primarily a complex instrument or appliance regardless of how it is encased, and in order to decide the posited question we must consider the set as such and how it operates, giving due consideration to its internal construction without undue emphasis on its external appearance.

We believe that the exemption section under consideration should be given the strict construction intended by the legislature, and that it should not be extended beyond its express terms.

We are of the opinion that a television receiving set is primarily a complex instrument or appliance and that it does not come within the definition of household furniture or any of the other provisions of the exemption statute under consideration but should be separately listed by the assessor and taxed as other personal property.

March 28, 1951

TAXATION: Exemption allowable to charitable institution. The Friendship Haven Home together with its superintendent's dwelling in Fort Dodge, Iowa is a charitable and benevolent institution and exempt from taxation within the purview of the statutes.

Mr. George Cosson, Jr., Director, Property Tax Division, State Tax Commission: This will acknowledge your inquiry as to whether a dwelling house located in Fort Dodge, Iowa, and owned by Friendship Haven, Incorporated, is exempt from assessment and taxation under the provisions of Section 427.1, subsection nine (9), of the Code or any other section in the statute.

Friendship Haven, Incorporated, as exhibited by its Articles of Incorporation, is under the supervision of the Northwest Iowa Conference of the Methodist Church and is a corporation organized under Iowa laws not for profit.

According to the information submitted none of the officers or trustees of Friendship Haven, Inc. receive any compensation for their services, or mileage or expense money for attending meetings. A substantial portion of the persons cared for in the Home are unable to pay the full cost of

their maintenance, and the balance must be made up by contributions. All of the money used for the building and institution was raised by donation.

If the Superintendent's house is entitled to an exemption from taxation it must come within the terms of subsection nine (9) above quoted. It clearly is not a literary, scientific, agricultural or religious institution, and, if any exemption is granted, it must be on the basis that Friendship Haven, Inc. is a charitable or benevolent institution or society, and that the property in question is used solely for the appropriate objects of such institution or society.

Under date of November 19, 1943, the Attorney General in an Opinion held "that the Burlington Railroad Veterans Organization was exempt from taxation under the above section as a charitable and benevolent society, for the reason that it was organized and operated for the purpose of reviving old acquaintance, discussing topics of mutual interest and promoting every measure which shall be for the best interest of its members and to help bring sunshine into the declining years of their lives in every way possible."

The object of Friendship Haven, Inc., as stated under paragraph IV of their Articles of Incorporation, is as follows:

"The object of this Corporation is to establish and maintain a home and care for aged and infirm ministers and members of the Methodist Church and any other aged persons of good moral character, who would be at home in a Christian environment."

Benevolence and charity do not always consist wholly of almsgiving or the relief of the wants of the needy or helpless. It includes also the gratuitous or partly gratuitous improvement of spiritual, mental, social and physical conditions of people, by the maintenance of courses of study, lectures, religious services, libraries, entertainments, gymnasiums, recreation grounds, and other activities, by various institutions. See Andrews v. Y.M.C.A., 226 Iowa 383; Stiles v. Des Moines Council Boy Scouts, 209 Iowa 1235; Philadelphia v. Y.W.C.A., 125 Pa. 572.

In Fredericka Home for the Aged vs. San Diego, 221 Pac. Rep. (2d) at page 68, the Court stated "The concept of charity is not confined to the relief of the needy and destitute for 'aged people require care and attention apart from financial assistance, and the supply of this care and attention is as much a charitable and benevolent purpose as the relief of their financial wants.' " It states further "Charge of fees does not destroy its classification if such sums go to pay the expenses of operation and not to the profit of the founders or shareholders."

The trustees have deemed it necessary to have a superintendent to look after and operate this home and, for the purpose of furnishing the superintendent a residence, they have purchased the property in question in the City of Fort Dodge, Iowa, and claim that because it is used solely for the objects of Friendship Haven, Inc. that it is entitled to an exemption from taxation.

The only case we have been able to find which approaches the matter under consideration is Trustees of Griswold College vs. State of Iowa, 46 Iowa 275. In that case a residence was furnished to the professors upon the grounds of the institution and dwellings were furnished to the clergymen and were used exclusively for such dwellings without any income to the owners. The Court in the foregoing case stated:

"This construction of the statute in its strictures would exempt nothing but the college building and the church edifice and the land absolutely necessary for their use. We do not believe that the statute is susceptible of any such narrow and restricted construction.

The buildings and land in question are not leased or otherwise used with a view to pecuniary profit. No parts of the buildings are used for any other purpose than the residence of the professor in one case, and the residence of the Bishop in the other. They are solely used for these purposes. Now, if this use be appropriate, that is, fitting and proper to the objects of the church and the college, the buildings and lands are exempt. * * * * *"

The true inquiry should not be what is actually necessary, but what is proper and appropriate to effectuate the objects of the institution. The Court held the property to be exempt from taxation.

We are aware that public policy demands that nontax-paying property should not be increased, but our duty is to construe the valid acts of the legislature in this class of cases, as in all others, as we find them and by proper rules of interpretation. If it be the legislative will that the exemption of this class of property be further restricted than it now is, that will can easily be expressed in appropriate legislation.

We are of the opinion that the residence is to be used solely to effectuate the objects of the institution and is within the rule laid down in the Griswold College case, and entitled to an exemption from taxation under the foregoing statute.

April 5, 1951

GAMBLING: Lotteries and tournaments distinguished. A lottery is an enterprise where there is a consideration for a chance to win a prize. A tournament is an enterprise where a closed group compete in equal opportunity to win acclaim and is not considered gambling. Where a machine is operated upon payment of a coin, by any person who cares to operate it, in such a way that by skill or prowess a certain score is achieved and then pays to the highest scorer a prize, gambling is involved.

Mr. E. W. Adams, County Attorney, Marshalltown, Iowa: Your letter of March 28, 1951, requests an opinion on the following question:

A business institution maintains on its premises a coin-operated machine upon which a game may be played by the deposit of a dime in the machine. If a prize is awarded to the player making the highest score each day or each week or for the achievement by any player of a certain score, would gambling be involved, or would the enterprise constitute a nongambling tournament?

Lotteries have been defined as enterprises in which there is (1) a consideration (2) for a chance (3) to win a prize. In State v. Hun-

dling, 220 Iowa 1369, the Court held that "bank nite" was not a lottery because it was not necessary to give a consideration (purchase a ticket in the theater) for the chance to win. It is universally held that when it is necessary to make a purchase of merchandise, amusement, etc., to gain the chance, a lottery is involved.

Lotteries, of course, are only one form of gambling. The "chance" element distinguishes the lottery. Gambling may be defined in general terms as (1) something of value ventured (2) *for the opportunity* (3) to win a prize. This of course includes enterprises of skill and prowess as well as chance enterprises.

Legal tournaments have several distinguishing features from gambling enterprises. The concept of a tournament is that of a closed group of competitors, each competitor having an equal opportunity to win the tournament. Obviously where the number of opportunities a competitor has is determined by the amount of money he is willing to pay "the equal competition to determine the champion" concept is violated. Also the "closed group" concept is violated when there is no determined list of entrants and all who desire may "take a chance" at any time.

The courts have particularly emphasized with relation to tournaments that the primary motive in entering and paying an "entrance fee" is for the opportunity to compete, rather than for the chance to win a prize. A tournament award is a symbol of victory. Of course all who enter hope to win but the emphasis on the inducement of entering is to become the champion and to have the pleasure of the competition. The spirit of competition would certainly be minor in any enterprise in which it is not known how many competitors there may be, who they may be, *or how much money or other thing of value each chooses to venture.*

Of course there is nothing magical in the word "tournament" and no enterprise, if otherwise illegal, can be legalized by the simple expedient of dubbing it a "tournament". Each case must be determined upon its own facts. When the facts are applied to the long established rules the conclusion is not difficult.

You are advised that in our opinion, enterprises such as you have outlined would constitute gambling under Iowa law.

April 10, 1951

VETERANS: Service compensation bonus checks to incompetent veterans. World War II Service Compensation checks issued to mentally incompetent veterans can only be endorsed by a legally appointed guardians of their property. The manager of a Veterans Hospital where such a veteran is confined has no authority so to do.

Mr. Edward J. Kallemyn, Executive Secretary, World War II Service Compensation Board: We have your letter of March 9, 1951 in which you ask:

"Whether or not warrants may be reissued as suggested (where veteran is a patient in the Veterans Administration Hospital, Knoxville, Iowa) or arrangement made whereby the manager of the Veterans Ad-

ministration faculty could be authorized to endorse warrants for and in behalf of incompetent veterans as indicated."

We refer to our opinion dated July 28, 1949 in which we held as follows:

"It would be highly desirable to make conditions concerning the payment of World War II Compensation to minor beneficiaries as convenient and easy as possible. However, in view of Section 668.3 of the Code and the cases cited and in view of the apparent total lack of authority to the contrary, it is our opinion that a guardian of the property of eligible minor beneficiaries must be appointed by a court of competent jurisdiction before checks in payment of World War II Service Compensation as provided by Chapter 59, Acts of the 52nd General Assembly of Iowa can be honored, or satisfactory evidence is furnished to the Board that the states having jurisdiction of such minors do not require guardianships. Such checks must be endorsed by the duly appointed guardian for such eligible minor beneficiaries."

Section 668.3 of the Code provides:

"If a minor owns property, a guardian must be appointed to manage the same."

Section 670.1 of the Code provides as follows:

"The provisions of Chapters 668 and 669 and all other laws relating to guardians for minors and regulating or prescribing the powers, duties or liabilities of each and of the court or judge thereof so far as the same are applicable shall apply to guardians and their wards appointed under Sections 670.2 to 670.6 inclusive.

We said in our opinion of July 28, 1949 that a guardian would have to be appointed for a minor and by virtue of the statutes herein quoted, the same is true as to persons of unsound mind. It does not matter whether they are in the Veterans Hospital or not.

You are, therefore, advised that warrants may not be reissued to the manager of the Veterans Administration Hospital for the account of the veteran and the manager cannot endorse the bonus checks he now has.

You are further advised that in the cases which the Veterans Administration Hospital outlined in their letter of March 7, 1951, guardianships must be instituted for the veterans concerned.

April 26, 1951

COUNTIES: Salaries based on population — census publication. Increases or deductions in salaries of county officers based on population changes are effective on the date the Secretary of State certifies and publishes the official census figures.

Mr. James R. Brown, County Attorney, Mason City, Iowa: This will acknowledge receipt of yours of the 17th instant in which you have submitted the following:

"Now that the Federal Census figures have been certified to the Secretary of State and which census advances the county officers in this county into a higher pay bracket, we would like to know when the raise in pay becomes effective.

As I remember you issued an opinion some time ago stating that the salary increase, due to the raise in population would not be effective until 1952, but it seems as I remember of reading that you had withdrawn this opinion.

I would like to know if the salary increase becomes effective as of now or effective in 1952."

In reply thereto we advise you that the 54th General Assembly, by House File 422, authorized increases in the compensation of county officials, but made no provision therein as to when the increases would become effective. In that aspect, whether the Act of the legislature results in any changes in compensation of county officers or not, the salaries fixed by the legislative Act become operative upon the effective date of the Act. See opinion of the Attorney General, appearng in the Report for 1948, Page 55. However, whether, as a result of such Act, salaries are changed by reason of population changes, will depend upon the effective date of the Federal census. The supreme court has supplied this effective date in the case of Broyles v. Mahaska County, 213 Iowa 345, where it appeared that Broyles, as constable serving in Oskaloosa Township, embracing the city of Oskaloosa, had served as constable for the years 1925, 1926, 1927 and 1928. He claimed compensation for these four years and for the period from January 1, 1929 to July 1, 1929, less a credit. He made a claim to the county for his services as constable for the period less the credit at $800.00 a year, making a total of $3,600.00. After analyzing the several statutes respecting the compensation of justices of the peace and constables, the court concluded that in so far as Broyles was concerned, in a township having the population of Oskaloosa Township, he was entitled to receive $800.00 per year as his compensation but restricting such compensation subsequent to the year 1925 and the first month of 1926. This was based upon the fact that the census of Iowa for 1925 was officially declared by certificate of the Secretary of State on February 1, 1926. In that respect the court said, after considering the several statutes concerned with the declaration of the official State or Federal census, this:

"As applied to this case, the evidence shows this certificate was dated February 1, 1926. It must be held, therefore, that the new 1925 census was not effective until the last-named date, and prior to that, the city of Oskaloosa had, in law, a population of less than 10,000. This is in line with the holdings in other states. As throwing light on this question see State v. Smith, 270 Pac. (Wash.) 306; Holcomb v. Spikes, 232 S.W. (Texas) 891; Wolfe v. City of Moorhead, 107 N.W. (Minn.) 728; State v. Brooks, 109 Pac. (Wash.) 211.

When said date is officially determined, it does not relate back and give the fact force as of the date of which the census was taken. Lewis v. Lackawanna County, 50 Atl. (Pa.) 162.

We must hold, therefore, that if plaintiff is entitled to recover anything, no recovery can be had for such services prior to February 1, 1926." and specifically stated, page 350, "This salary of $800.00 per year, however, under the former part of this opinion, should not cover the year 1925 or the first month of 1926." Chapter 26, Code 1950 is a substantial re-enactment of the sections considered and interpreted in the foregoing case. It therefore follows:

1. That House File 422 [Ch. 136], Acts of the 54th General Assembly, fixing the salaries of county officers, becomes effective on the 4th day of July, 1951, and is based on the census then in effect.

2. If the Secretary of State has certified and published the Federal census figures for 1950 prior to July 4, 1951, in accordance with the provisions of Chapter 26, Code 1950, increases or decreases in the salaries of such officials will be operative on the date of said publication.

3. If the Secretary of State has not on or prior to July 4, 1951 certified and published the 1950 Federal census figures in accordance with the foregoing designated chapter, then the salaries of such officials will be again adjusted in accordance with the census so published, on the date of said publication.

P.S. The official opinion as issued by this department on January 11, 1951, addressed to Mr. K. C. Acrea, has been withdrawn.

May 9, 1951

SCHOOLS AND SCHOOL DISTRICTS: **County Superintendent—continuing contract law not applicable.** The County Superintendent of Schools is in effect an administrative officer and as such does not come within the provisions of the continuing contract law as found in section 279.13.

Miss Jessie Parker, Superintendent of Public Instruction; Attention R. A. Griffin: This will acknowledge receipt of yours of the 4th instant in which you have submitted the following:

"In 1944, your office held that the superintendent of schools was in effect an administrative officer and would not come within the provisions of the continuing contract law as found in section 279.13. On or about June 15, 1949, the district court in and for Howard County, Iowa, the Honorable G. B. Richter presiding, rendered an opinion in which he held that the superintendent comes within the provisions of the continuing contract law as found in the above cited section. In the court's decision no reference is made to section 279.14, which authorizes the board to employ a superintendent of schools.

Because this question is coming to our office quite frequently during the present emergency we are requesting an official opinion in which due consideration is given to the different interpretations expressed in the opinions attached hereto."

In reply thereto we advise you as follows:

For an understanding of the problem, we exhibit herein copy of letter opinion of October 26, 1944, to which you refer:

"I have before me a letter from A. E. Harrison of date October 25, addressed to you, as follows: 'A question has arisen here relative to the continuing contract as related to the superintendent. In my opinion given to a board, I held that the continuing contract applies to the superintendent as I can find nothing in the law that indicates that a superintendent is not a teacher.

I am aware, of course, that a board may give the superintendent a three year contract which rather sets this position out from others, but it seems to me that at the termination of this contract or rather the year

when the contract is to expire, that the board should give him the regular notice not later than April 15th that they do not want to continue his services. It also seems to me that where the board just contracts with the superintendent from year to year as is the situation in the above named case, that there should be no question about the application of the continuing contract to his case and he must have the notice prior to April 15th if the board does not want him to continue.

How about this? Perhaps I am wrong and I should like very much to have your opinion. It seems to me that whether the continuing contract law applies or does not apply that the board would not be wrong in serving the notice anyway.'

In my view the option of termination of a teacher's contract by notice, not later than April 15 of each year, has no application to the contract of a superintendent. The law providing for such notice was enacted by the 49th General Assembly as an amendment to section 4229 of the Code of 1939, which section controls the making of contracts with teachers. By the plainest rule of statutory construction, such amendment has no applicability to section 4230, under which a superintendent is employed.

Of course, no harm can be done if the notice is served on or before April 15th of any year. In that event, the legal effect of the notice will be drawn in question. As will be seen by the foregoing, I am of the opinion that it has no effect upon the contract of the superintendent."

As will be noted, the conclusion there reached is based upon the legislative intention with respect to the continuity of a teacher's contract. It was the view, as expressed therein, that the legislative intent, as expressed by the 49th General Assembly, Chapter 157, such chapter with its title in terms as follows:

"An Act to amend section four thousand two hundred twenty-nine (4229), Code 1939, relating to teachers' contracts, and to provide for continuing contracts for teachers.

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

Section 1. Section four thousand two hundred twenty-nine (4229), Code, 1939, is hereby amended by adding at the end thereof the following:

'Such contract shall remain in force and effect for the term stated in the contract, and shall be automatically continued from term to term thereafter, except as modified by mutual consent of the school board and the teacher until terminated by a majority vote of the full membership of the school board or by written resignation of the teacher before April 15th of each year. Such termination shall take effect at the close of the school year, in which the contract is terminated in the manner aforesaid. Provided, further, that such contract may be terminated at any time by mutual consent of the school board and the teacher, and provided further that this act shall not affect the powers of a school board to discharge a teacher for cause under and pursuant to section four thousand two hundred thirty-seven (4237).'"

is clearly an amendment of Section 4229, Code 1939, and no other section. That it was the legislative intent that the termination provisions provided in Chapter 157, Acts of the 49th General Assembly, was confined to teachers' contracts alone, is confirmed by the legislative intention exhibited by Chapter 129, Acts of the 51st General Assembly, which enactment, with the title thereto, provided as follows:

"An Act to amend section four thousand two hundred twenty-nine (4229), Code 1939, as amended by chapter 157, Acts of the 49th General Assembly, relating to teachers' contracts, their continuation and termination.

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

Section 1. Section four thousand two hundred twenty-nine (4229), Code 1939, as amended by Chapter 157, Acts of the 49th General Assembly, is amended by striking all that part of section 4229 added thereto by said chapter 157, Acts of the 49th General Assembly, and adding at the end of said section 4229 as found in the Code 1939, the following:

'Said contracts shall remain in force and effect for the period stated in the contract and thereafter shall be automatically continued in force and effect for equivalent periods, except as modified or terminated by mutual agreement of the board of directors and the teacher, until terminated as hereinafter provided. On or before April 15, of each year the teacher may file his written resignation with the secretary of the board of directors, or the board may by a majority vote of the elected membership of the board, cause said contract to be terminated by written notification of termination, by a registered letter mailed to the teacher not later than the tenth day of April; in event of such termination, it shall take effect at the close of the school year in which the contract is terminated by either of said methods. The teacher shall have the right to protest the action of the board, and to a hearing thereon, by notifying the president or secretary of the board in writing of such protest within twenty (20) days of the receipt by him of the notice to terminate, in which event the board shall hold a public hearing on such protest at the next regular meeting of the board, or at a special meeting called by the president of the board for that purpose, and shall give notice in writing to the teacher of the time of the hearing on the protest. Upon the conclusion of the hearing the board shall determine the question of continuance or discontinuance of the contract by a roll call vote entered in the minutes of the board, and the action of the board shall be final. The foregoing provisions for termination shall not affect the power of the board of directors to discharge a teacher for cause under the provisions of section 4237.'"

The foregoing intention is further confirmed by the fact that Section 4230, Code 1939, now exhibited as Section 279.14, Code 1950, is concerned specifically with the employment of superintendent of schools and sets out the terms of such superintendent's employment. As showing these specific terms, Section 279.14, Code 1950, is exhibited as follows:

"The board of directors of any independent school district or school township where there is a township high school shall have power to employ a superintendent of schools for one year. After serving at least seven months, he may be employed for a term of not to exceed three years, but such re-election or re-employment shall not be prior to the organization of the board of the year during which an existing contract expires. He shall be the executive officer of the board and have such powers and duties as may be prescribed by rules adopted by the board or by law. Boards of directors may jointly excerise the powers conferred by this section."

It is obvious that if there be any legislative intent to have Section 4230 of the Code of 1939 to be embraced within the terms of Chapter 157, Acts of the 49th General Assembly and Chapter 129, Acts of the 51st General Assembly, the legislature would have so provided. Not having done so, it is not only a reasonable but an unavoidable conclusion that

there was no intention to incorporate in Secton 4230, Code 1939, concerning the superintendent's contract, the teacher continuing provisions which are incorporated in Section 4229, Code 1939. The case arising in the Howard County District Court does not vary this conclusion. The case there is entitled "Independent School District of Elma vs. N. C. Groth", and was decided September 9, 1949 by Judge Richter. While the facts in such case show that it involved the continuation or termination of the contract of the superintendent of the plaintiff school district, it was determined upon the fact situation existent in that case and Section 279.13 that it was held to be applicable to the contract. However, the case is in no way authority to a conclusion contrary to that here reached. The point here under consideration was by the Court expressly excluded. In a letter accompanying its decree, the Court stated with respect to this, the following:

"I did not specifically include in the original decree, as a conclusion of law, that superintendents are to be treated as teachers within the meaning of Sec. 279.13, as it did not seem necessary to go that far. However, I have referred to this phase of the case because the point was touched upon in oral argument and considerable reliance seemed to be placed on the Minnesota case cited."

By reason, therefore, of the foregoing, we are confirming the letter opinion issued to you October 26, 1944. We are not determining herein the availability of the provisions of Section 279.13, Code 1950, to a situation where a superintendent's contract also contains provisions for teaching by him.

May 9, 1951

VETERANS: Service compensation bonus payable to minor. The World War II service compensation payment may be made to the parent or natural guardian of a minor without appointment of a legal guardian where the total property including the bonus does not exceed $500 and where proper written assurance of such fact is given.

Mr. Edward J. Kallemyn, Executive Secretary, World War II Service Compensation Board: You have asked us:

"Whether or not by virtue of House File 199 [Ch. 219], Acts of the 54th General Assembly, your board may make payment of compensation claims in the sum of $500.00 or less to persons specified therein, regardless of whether the money or property of a minor beneficiary presently exceeds the sum of $500.00 after receipt of the amount of World War II Service Compensation payable" and

"Whether the verified, written assurance as to the value of minor's estate and receipt for payment of World War II Service Compensation of *such person* shall be acquittance of the person (State of Iowa) making such payment of money or delivery of such property, whether or not the minor payee already owns property in excess of $500.00 in value or will own property in excess of $500.00 in value upon receipt of the compensation payment involved."

House File 199 [Ch. 219], Acts of the 54th General Assembly, was regularly passed by the House and Senate and approved by the Governor of Iowa on March 22, 1951. It did not contain a publication clause

and, therefore, does not become law until July 4, 1951. (See Section 3.7, 1950 Code of Iowa.)

Section 668.3, Code of Iowa 1950, reads as follows:

"If a minor owns property, a guardian must be appointed to manage the same."

House File 199 [Ch. 219] is as follows:

"If no guardian has been appointed, money due the minor or other property to which the minor is entitled, *not exceeding in the aggregate* the sum of five hundred dollars ($500) in value, may be paid or delivered *to a parent of the minor entitled to the custody of the minor or to the natural guardian, or to the person with whom said minor resides,* for such minor, upon written assurance verified by the oath of such person that all of such money or property of the minor does not exceed in the aggregate the sum of five hundred dollars ($500); and the written receipt of such person shall be acquittance of the person making such payment of money or delivery of such property."

We also call your attention to our opinion dated August 24, 1950 which involved the identical question for minor beneficiaries who lived in the states of Florida and California.

On July 28, 1949, we rendered an opinion to the effect that a guardian must be appointed before payment of World War II Service Compensation could be made to a minor beneficiary of a deceased veteran and we quoted Section 668.3 as the law.

In view of the amendment to Section 668.3 as provided for by House File 199, Acts of the 54th General Assembly, you are now advised that *after* July 4, 1951 you may make payment of compensation claims in the sum of $500.00 or less to "a parent of the minor entitled to the custody of the minor *or* to the natural guardian, *or* to the person with whom said minor resides" *only* if the total property of the minor does not exceed $500.00 in money and property, including the World War II Service Compensation, and proper, written assurance is given.

The verified, written assurance as to the value of the minor's estate (including the World War II Service Compensation) will suffice to acquit the State of Iowa and your board in such cases.

May 17, 1951

AGRICULTURE: Seed corn treated with poison—hauling in excess of weight limits. The twenty-five per cent excess allowance in the weight provisions of the motor vehicle law does not apply to farm products which have been subjected to any mode, method, treatment or operation whereby a result or effect is produced, such as seed corn treated with poison to repel rodents.

Mr. Richard T. Smith, County Attorney, Primghar, Iowa: By letter dated May 8, 1951, you have requested an opinion as follows:

"I wish to submit for your opinion the following: A truck owned by a man in this county, who is a raiser of Hybrid seed corn, was stopped by the Iowa Highway patrol and found to be carrying a load in excess of the registration requirements except for the fact that the load consisted

of sacked seed corn and was being transported under the 25% excess allowance as contained in the last paragraph of Section 321.466 and the load was under such 25% excess permission.

The question arises as to whether or not seed corn, sacked or otherwise, is under the exemption of the above section provided by raw farm products. Two things are also involved in this matter. First, the corn was poison treated so that it could not be used for animal feed and, second, the corn was not a finished product but was being transported to a planting lot for cross-pollination and was the final planting before the finished seed to be produced. As I understand it, the different cross-pollinated plants are planted in plots of land far removed from each other and the corn received is planted and replanted in succeeding years until the finished product is obtained. The corn on this load was not such finished product but was in the process of a cross-pollination. It could not be used for feed because it was poison treated."

Section 321.466 of the code, 1950, provides in pertinent part as follows:

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

With reference to section 321.466 of the Code, in State v. Bauer, 236 Iowa 1020, 20 NW (2nd) 431, the Supreme Court of Iowa said:

"The first reference to cargo in the proviso is a load of raw farm products. The word raw is again used in the expression raw dairy products or livestock. Live poultry is next mentioned. Repeated use of the words raw and live clearly indicates the legislature intended the proviso to apply to such products as originally produced and in their natural unprocessed states only. Moreover, the use of the words ground limestone in connection with fertilizers indicates that when the legislature intended to include the proviso a substance not in its original form, such intention was plainly stated."

Your attention is invited to the language of the Court interpreting "raw farm products" as such products "in their natural *unprocessed* states only."

In Moore v. Farmers Mutual Manufacturing & Ginning Co. (Ariz.) 77 Pac. (2nd) 209, the Arizona Court stated:

"The word 'process' means to subject, especially raw material, to a process of manufacturing, development, preparation for the market, etc., and to convert into marketable form, as livestock by slaughtering, grain by milling, cotton by spinning, milk by pasteurizing, fruits and vegetables by sorting and repacking."

The Supreme Court of the United States said in Cochrame v. Deener, 94 U.S. 780:

"A process is a mode of treatment of certain materials to produce a given result."

In Sokol v. Stein Fur Dyeing Co., 216 App. Div. 573, it was held that under the workmen's compensation law an employee to recover for occupational disease resulting from aniline poisoning, must have been poisoned while engaged in a "process involving use of" aniline, which in the fur-dyeing business involves application of dye to furs. The employee in his employment handled furs after the dyeing was complete. The New York Court in defining "process" stated:

"A process is defined in Webster's International Dictionary as follows: 'A series of actions, motions, or occurrences; progressive act or transaction; continuous operation; normal or actual course or procedure; regular proceeding; as, the process of vegetation or decomposition; a chemical process; processes of nature.' We think that 'any process involving the use' of anilin is descriptive of a chemical process, and in the fur dyeing trade involves the application of the chemical to the furs."

In Kirschberger v. American Acetylene Burner Co. 124 Fed. 764, it was said:

"A 'machine' is a thing. A 'process' is an act or mode of acting. The one is visible to the eye, an object of perpetual observation; the other is a conception of the mind seen only by its effects when being executed or being performed. Either may be the means of producing useful results. The mixing of certain substances together or the heating of certain substances to a certain temperature is a 'process' ".

In Cincinnati Soap Co. v. United States, 22 Fed. Sup., 141, it was held:

"Refining or suponification of coconut oil is a 'processing' or use thereof, and if the refining or suponification is the first processing or use of the oil in the United States, and occurs in the course of the manufacture or production of any article intended for sale, it is the 'first domestic processing' within the statute taxing the first domestic processing."

In Nye & Nisson v. Weed Lumber Co., 92 Cal. App. 598, 268 Pac. 659, the court held:

"The term 'processed eggs' in a contract for sale thereof meant that the egg was to be dipped or the shell glazed with a solution intended to fill the pores of the shell to prevent penetration of air or bacteria, and to thereby deter fermentation or deterioration, in view of the meaning of the term 'in poultry industry.' "

In Bedford v. California Fuel & Iron Corporation, 81 Pac. (2nd) 752, the court said:

"Processing is an action, operaton, or method of treatment applying to some thing."

In Kelly v. Coe, 99 Fed. (2nd) 435, process was defined as follows:

"A 'process' is a mode, method, or operation whereby a result or effect is produced."

In Kennedy v. State Board of Assessment & Review, 224 Iowa 405, 276 NW 205, the Supreme Court of Iowa said:

"As the court understands the matter, processing is some change made in the natural product as the curing of meats, canning of vegetables and it has been held that the glazing of an eggshell to better preserve the egg is a processing."

It would appear from the foregoing authorities that seed corn which had been treated would in law be considered as "processed". In view of the pronouncement of the Supreme Court of Iowa in State v. Bauer, supra, that the 25% overload tolerance applies only to farm products in their "natural unprocessed states" tolerance will not be permitted as to loads of treated grain.

You are therefore advised that it is the opinion of this office that the 25% excess allowance set forth in section 321.466 of the code does not apply to farm products which have been subjected to any mode, method, treatment or operation whereby a result or effect is produced.

June 5, 1951

TAXATION: Use tax—intent at time of purchase controlling. Where tangible personal property is purchased outside the state, the imposition of the tax depends on the intent of the purchaser. Use outside the state prior to its entry in Iowa frees it from tax, if at the time of purchase he had no intent to use it in Iowa. If he intended to use it in Iowa, delivery is not essential and the tax applies. Residence of the buyer is immaterial and in all questions the burden is on the taxpayer.

State Tax Commission of Iowa: This will acknowledge your letter containing four questions which have arisen due to the decision of our Supreme Court in Morrison-Knudsen Company, Inc. v. State Tax Commission which appears in 242 Iowa 33; 44 N.W. (2nd) beginning at page 449. You pose the following questions and ask that you be given an answer to be used as a guide in handling claims for refund or in auditing accounts so that you may proceed correctly in the refund or assessment of use tax.

1. Is it a prerequisite to impose a use tax under Chapter 423, Code of Iowa 1950, that the tangible personal property be sold for delivery in Iowa by the vendor and that the property actually be delivered by the vendor into Iowa, in so far as sections 423.2 and 423.3 are concerned?

Answer. It is not necessary that the property be sold for delivery in Iowa by the vendor and that it actually be delivered by the vendor into Iowa. The Court stated in paragraph three (3) of the opinion that the statute imposed a tax on the use in this state of all personal property purchased for use here. The Court, likewise, stated in paragraph ten (10) of the opinion that if the property was originally sold and used in another state, providing the same were purchased for use in this state, that it would still be subject to the imposition of the Iowa Use Tax. The controlling factor is "purchased for use in this state" and not delivery.

2. Does the use of tangible personal property by the purchaser in a state other than Iowa, prior to the use of the property in Iowa by said purchaser, free the use of the property in Iowa from use tax under the provisions of sections 423.2 and 423.3, Code of Iowa 1950. If so, of what must the use outside the state of Iowa consist? In other words, is the

use in a foreign state, prior to the use in Iowa, to be interpreted as the same type of use as defined in subsection one (1) of Section 423.1 Code of Iowa 1950?

Answer. The use of property in a state other than Iowa, prior to the use of the property in Iowa by said purchaser, frees the use of the property from tax in Iowa unless it was intended to be used in Iowa later. The use outside the state must be the same type of use as is defined in subsection one (1) of Section 423.1, Code of Iowa 1950, and would consist of storage, leasing or any other use within the terms of the statute.

3. In the above propositions, 1 and 2, would your opinion differ if the purchaser was a nonresident person of Iowa from a situation where the purchaser was an Iowa resident?

Answer. "No". The opinion is not based on residence or nonresidence of the purchaser. The Court interprets the taxability as being based on the fact, "Was the property purchased for use in Iowa?"

4. Is the burden of proof upon the state to prove the purchaser purchased the property "for use in Iowa" when the property is found to actually be physically present in the State of Iowa. If upon the state, what would constitute sufficient proof of the purchaser's intention to "purchase for use in Iowa", in order that a tax could legally be imposed, in so far as sections 423.2 and 423.3 are concerned?

Answer. "No". The burden is upon the owner of the property to show it was not purchased for use in Iowa when the property is found to be actually physically present in the State of Iowa. We think this was the intent of the Legislature as is evidenced by Section 423.5 which provides:

"For the purpose of the proper administration of this chapter and to prevent evasion of the tax, evidence that tangible personal property was sold by any person for delivery in this state shall be prima facie evidence that such tangible personal property was sold for use in this state."

If the fact that property was sold for delivery in this state is to be prima facie evidence that it was sold for use in this state, it is a reasonable interpretation to require that the owner of the property show it was not purchased for use in this state when the property is found to actually be physically present in the State of Iowa.

June 7, 1951

COUNTIES: Adjustment of salary of county assessor. Even though the salary of the county assessor has been fixed under a prior law for his four-year term, where the General Assembly later provides for a new adjustment, his salary can be changed for the remainder of the term after the new law goes into effect.

Mr. George Cosson, Jr., Director Property Tax Division, State Tax Commision: This will acknowledge your inquiry of recent date requesting an opinion as to whether or not the county conference can consider and fix the

salary of the county assessor in harmony with the provisions of House File 422 [Ch. 136], 54th General Assembly, which Act will become effective as of July 4, 1951.

House File 422 contains provisions relative to the salary of other county officers and deputies, assistants and clerks, and the pertinent provision relating to the county assessor is contained in section nine (9), which we quote:

"Section four hundred forty-one point six (441.6), Code 1950, is hereby amended by striking from line nine (9) the word 'less' and inserting in lieu thereof the word 'more'. Further amend section four hundred forty-one point six (441.6), Code 1950, by striking the period (.) at the end thereof and inserting the following: "provided, however, that with the approval of the board of supervisors the county conference may fix such salary in excess of the salary of the county auditor."

The effect of this amendment is that the salary of the county assessor can be acted upon and determined to be the same as the county auditor's or more or less than the county auditor's salary. When the salary is to be fixed at a figure which is more than the county auditor's it must be with the approval of the board of supervisors.

County assessors under the Act are appointed for a four-year term and their salary has heretofore been fixed by the various conference boards in their respective counties.

We are not unmindful of the case of Kellog v. Story County, 219 Iowa 399 wherein the Court held that where the salary had once been fixed during the term of office that it could not be changed during that term.

We do not believe that Kellog v. Story County, supra, is controlling in the instant case because the 54th General Assembly amended the law under which the salaries were originally fixed and the law, as amended, is a new and distinct act relative to the salaries of the county assessors and one under which the conference board or the board of supervisors have not fixed the salary of the county assessors. In other words, they have not exercised their right to fix the salary of the county assessor under the provisions of the Act of the 54th General Assembly. We are of the opinion that to hold otherwise would be to ignore the express intent of the Legislature. They certainly did not intend to revamp the salaries of all the other officers and leave the salary of the county assessor unchanged. If this were true, this Legislature would not have needed to pass any act because many of the unexpired terms run for a period of two years or more, and if the Act were to have no effect the result would be that the legislation would be idle.

Seeking further to determine the intent of the Legislature, we are permitted to examine the Title of the Act which contains the following language:

"An Act * * * *, all relating to the compensation of county officers and deputies, assistants and clerks, county attorneys and assistant county attorneys, and county assessors, and providing for annual adjustment of compensation."

We are of the opinion the conference board would have a right to fix the salary of the county assessor under the provisions of House File 422, and, when they have so acted, the salary would be fixed for the remainder of the term in the absence of other legislation, and the rule above referred to and laid down in Kellog v. Story County would be controlling.

We are of the opinion that under the provisions of House File 422 the conference boards of the various counties are directed to review the salary of the county assessor and fix such salary to be effective from July 4, 1951.

June 12, 1951

MOTOR VEHICLES: Taxation of house trailers and special equipment. House trailers and commercial trailers in the hands of a registered dealer are exempt from taxation. Special equipment mounted on a motor vehicle and operated by auxiliary power and not specifically exempt, is taxable. House trailers used for dwelling purposes for six months prior to January 1 are taxable as personal property.

Mr. Allan R. Shepherd, Asst. County Attorney, Des Moines, Iowa: This will acknowledge your letter together with an inquiry from Mr. Bert L. Zuver, City Assessor, relative to an interpretation of Chapter 136 of the Acts of the Fifty-Third General Assembly, which amended section 321.130 of the Motor Vehicle Laws. The questions, as stated, are as follows:

1. Are house trailers in the hands of a dealer and/or manufacturer assessable as personal property even though the dealer and/or manufacturer is in possession of a Dealer registration issued by the Motor Vehicle Department of the State of Iowa?

2. Are Commercial Trailers with the identical conditions existing as in question No. 1 assessable?

Questions one (1) and two (2) can be answered together as they both relate to the same subject, and you are advised that house trailers (if not lived in for more than six months) and commercial trailers in the hands of a registered Iowa dealer are exempt for assessment under the provisions of section 321.130 as amended by Chapter 136 of the Acts of the Fifty-Third General Assembly which provides:

"The registration fees imposed by this chapter upon private passenger motor vehicles, house trailers or semitrailers shall be in lieu of all taxes, general or local, * *."

Under an opinion appearing in the 1942 Attorney General Opinions at page 50 it was decided all automobiles owned by a dealer were exempt from taxation as personal property because the dealer's registration covered all of the automobiles and, therefore, the dealer's registration brings them under the provisions of Section 321.130.

We think the foregoing opinion applies with like force to house trailers and commercial trailers which are now included in section 321.130.

3. Is special equipment mounted on trucks assessable as personal property, such as cement mixers operated by auxiliary power, gas and oil delivery tanks, and all other special equipment except cornshellers and feed grinders which are specifically exempted under Section 321.118?

The opinion of February 17, 1949, in the last two paragraphs held cement mixers operated by auxiliary power and mounted on trucks are assessable, but oil tanks, dump bodies, stock racks and other equipment used with a truck for the transportation of property were to be considered part of the truck and were exempt from taxation granted on the truck as such. The theory is the equipment used for transportation or the carrying function of the truck is considered part of the truck and exempt but that if the equipment is used for some other purpose such as a portable welding machine or cement mixer operated by auxiliary power, then the property is asessable. This opinion, as then announced, is still controlling.

4. Since all personal assessments are made as of January 1, is the Assessor to assess as personal property those house trailers which were actually being used for dwelling purposes at least six months prior to January 1, or what six months is the test to determine whether it is being used for dwelling purposes?

Section 321.130, as amended by the Acts of the Fifty-Third General Assembly, provides:

"* * *, and if a motor vehicle or house trailer or semitrailer 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 or house trailer or semitrailer shall have been in storage continuously as an unregistered motor vehicle or house trailer or semitrailer during the preceeding registration year or unless the same is actually being used for dwelling purposes for more than six months during each calendar year."

Exemption statutes are strictly construed, and, under the provisions of the statute above quoted, if the property is being used for dwelling purposes at least six months prior to January 1, then in that event the property would be subject to taxation as omitted property for the preceding year. The question on January 1 as to the current year is a fact question and the facts as they appear would indicate that the house trailer was being used for dwelling purposes and the burden would be on taxpayer to convince the assessor that the property should not be taxed for the current year.

5. Is a house trailer assessable as personal property on January 1, 1951, if the owner has purchased a trailer registration therefor and he did not occupy it for more than six months as a home in 1950?

If the owner has purchased a trailer registration, it can not be taxed on January 1 of the current year as personal property; however, if during that calender year the taxpayer uses the property as a dwelling for more than six months, it would be subject to taxation as omitted property.

Your question six (6) has been fully answered in the preceding questions and so we make no answer to the same.

June 13, 1951

COUNTIES: **Fee charged for birth, death or marriage certificate.** The fees that the clerk of the district court acting as county registrar of vital statistics may charge were not changed by Chapter 137, Acts of the 54th General Assembly.

Mr. F. R. Curry, County Attorney, Osceola, Iowa: This will acknowledge receipt of yours of the 4th inst. in which opinion is requested as to what charge should be made by the Clerk of the District Court for certified copy of vital records such as birth certificates, etc., in view of the fee change made by House File 421 [Ch. 137], Acts of the 54th General Assembly, and in connection with your request Alfred J. Klocke, Clerk of the District Court of Carroll County, Iowa, sets forth more particularly his view of this change made by the 54th General Assembly in terms as follows:

"In Re: Taxing of Certified Copies of Vital Records.

In compliance with the new fee schedule effective May 11, 1951, I am directed by law to increase my charges as set out by Section 15 of House File 421, which states as follows: 'Section six hundred six point fifteen (606.15), Code 1950, is amended by increasing by one hundred per cent the amount of the various fees therein directed to be charged by the clerk of the district court, except that the amount of the fees directed to be charged by the said clerk under the provisions of subsection twenty-nine (29) shall be increased fifty per cent.' You will please note that there are no exceptions other than that of subsection twenty (29). You will also please note that subsection thirteen (13) reads as follows: '13. For certificate and seal, fifty cents'. Which under the revised set-up is one dollar.

In this morning's mail I received a letter from the Iowa State Department of Health, stating that since section 144.41 of the Code was not amended, no change in fees for a certified copy of a vital record should be made. Section 144.41 sets the fee for certified copies of birth records, death records, marriage records, at fifty cents.

I believe I should be justified in charging a dollar for a certified copy of a vital record in so far as statute clearly points out that the fee of one dollar be charged for a certificate and seal and in so far as the letter received from the health department is not an Attorney General's Opinion."

In reply thereto we advise you as follows:

It is true that House File 421 [Ch. 137] of the 54th General Assembly does increase by 100% the amount of the various statutory fees to be charged by the Clerk of the District Court, and that among these fees is the fee directed to be charged by the Clerk pursuant to the provisions of Section 606.15, subsection 13, Code 1950, for certificate and seal 50 cents. This fee for that service as fixed by House File 421 is now one dollar. This statute of general application to certificates and seals attached thereto, however, does not prevail as against the statute prescribing in specific terms the fee to be charged for the issuance of a certificate of a specific record. That is the situation existent with respect to the issuance of certificates of the record of births, deaths, or marriages.

Section 144.41 of the Code provides:

"The state registrar or any county registrar shall, upon request, supply to any applicant for any proper purpose, a certified copy of the record of any birth, death, or marriage registered under the provisions of this chapter, for the making and certifying of which he shall charge a fee of fifty cents."

This section is authorization for the county registrar to certify the record of birth, death or marriage, and for which the charge shall be fifty cents. The county registrar by the terms of section 144.34, Code 1950, is the Clerk of the District Court. The power of the Clerk to issue such certificates arises out of his official character as registrar and he performs the duty and exercises the power by reason of his position as registrar and not as a specific duty of the Clerk.

By reason of the foregoing, therefore, we are of the opinion that House File 421 of the 54th General Assembly is not authority for the Clerk of the District Court to charge more than fifty cents for a certified copy of a birth, death or marriage certificate.

June 13, 1951

COUNTIES: Appointment and salaries of deputy officers. The power of appointment and determination of qualifications of deputies in the various county officers rests in the heads of the departments subject to approval by the board of supervisors, which board determines their number and fixes their salaries.

Mr. Clyde E. Herring, County Attorney, Des Moines, Iowa: This will acknowledge receipt of yours of the 21st ult. in which you submit the following:

"This office has been requested by the board of supervisors and the Budget Director to render an opinion relating to House File 422, [Ch. 136, 54 G.A.] and, believing that an interpretation of this new legislation would be desired by other counties, may I respectfully request your reply to the following questions?

Section 4 of House File 422 amends Section 340.2 of the 1950 Code, by striking all of subsections 1 to 5 inclusive, and inserting, in addition to other provisions, the words, 'In any county in which more than two deputies are required and such additional deputies are of equal ability, such deputies shall receive an annual salary of not more than 65% of the salary of his or her principal. The board of supervisors shall fix all compensation for extra help and clerks.' The questions which arise concerning the above are as follows:

1. Does this amendment place upon the board of supervisors, or the auditor, treasurer, recorder and clerk the responsibility of determining the relative equality of ability of additional deputies?

2. Does it place upon the above named office heads or the board of supervisors the duty of setting the amount of salary, subject of course to the limitation of 65% of the principal?

This particular bit of legislation is explicit as to the duty of the board of supervisors in fixing compensation for extra help and clerks, or the salary of deputy sheriffs, or the salary of deputies in counties having two county seats, but with reference to the above section, the omission

to designate the board of supervisors as the party to fix the amount of compensation plus the use of the words 'equal ability' has given rise to the above questions."

1. In answer to your question number 1, we would advise you that while the board of supervisors possesses the power to fix the number of deputies for each county office, the power of appointing the persons to occupy these deputyships is bestowed upon the several county officers subject to the approval of such appointments by the board of supervisors. See Section 431.1, Code 1950. This power of appointment vested in the county officers implies in them the power to judge the ability and other qualifications necessary to discharge the duties imposed upon a deputy. Clearly in that view whether the deputies, additional to the two deputies otherwise provided for, are of equal ability is within the power and the duty of the appointing officer. Thus the county auditor and county treasurer, county recorder and county clerk respectively would bear the responsibility of determining the relative equality of ability of these additional deputies.

2. In answer to your question number 2 we advise that the duty of fixing the salaries of these additional deputies is not specifically provided in House File 422 [Ch. 136], of the 54th General Assembly. Specific authority is conferred upon the board of supervisors to fix all compensation for extra help and clerks. However, this lack of authority to so fix the compensation of the additional deputies in House File 422 sets into operation the general statute with respect to fixing compensation of county officers, to-wit: Section 322.3, Subsection 10, in terms as follows: "The board of supervisors at any regular meeting shall have 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 the same."

The foregoing view conforms with the principles that county officers are ministerial officers and possess the powers expressly conferred upon them by the legislature. The power of appointment of the several deputies conferred upon the several county officers by the Act, does not carry with it the power of fixing their compensation unless expressly provided. In exercising this power of fixing compensation, the Board should bear in mind that in so far as deputies are concerned, the compensation attaches to the office and not to the person who occupies the office. In so far as extra help and clerks are concerned, the standard should be the nature and amount of service required of such extra help and clerks.

June 13, 1951

COURTS: Municipal court fees. Where municipal court fees chargeable by the clerk are controlled by the statute applicable to the clerk of the district court any increase in such statutory fees will likewise apply to the clerk of the municipal court.

Honorable George E. O'Malley, State Senator, Des Moines, Iowa: This will acknowledge receipt of yours of the 16th ult. in which you have submitted the following:

"I have a request on my desk to ask for an opinion as to whether or not the recent Legislative Act increases the filing fees in the Municipal Court. I believe it was House File 421, and I do not remember in the legislature that the matter of the Municipal Court was ever discussed.

Apparently the Des Moines Municipal Clerk has raised the fees. Therefore, for the benefit of the bar in Des Moines, I would like to get your decision on this matter. Incidently, the same rule would apply to Sioux City, Clinton and the other counties which have a Municipal Court."

While House File 421 [Ch. 137] of the 54th General Assembly increases the amount of the fees directed to be charged by the Clerk of the District Court by specifically amending Section 606.15, Code 1950, this specific designation, according to established rules, would not authorize increases in the fees to be charged by the clerk of any other court. However, in so far as municipal court is concerned, it is to be observed that no specific fees to be charged by the Clerk of Court are prescribed by statute. The power of the Clerk to charge fees for services in the Municipal Court is authorized by this general statute conferring upon the Municipal Court and its judges the provisions of law relating to the District Court and its judges. Section 602.23, Code 1950, in that respect provides as follows:

"All provisions of law relating to the district court and the judges and jurors thereof shall, so far as applicable and when not inconsistent with this chapter, apply to the municipal court and the judges thereof. * * *"

Supplementing the foregoing numbered statute is Section 602.32, Code 1950, which with respect to fees, costs and expenses, provides as follows:

"If no provision is made in the laws applicable to the district court for fees, costs, and expenses, they shall be the same as in justice of the peace courts. * * *"

Under this statute it has been held by this Department by opinion appearing in the Report of the Attorney General for 1934 at Page 133 that the filing fee for filing a petition in the Municipal Court would be the same as that provided for filing fee of such petition in the District Court. This opinion is exhibited as follows:

"We are in receipt of your letter of March 7th, with which you enclose a letter received from the Clerk of the Municipal Court of Sioux City, asking for an opinion on the following:

'What fee should be charged as a filing fee in Class A and B cases in the Municipal Court?'

It is the opinion of this office that the Clerk should charge $1.50 filing fee. * * *

The laws applicable to the District Court provide for the filing fee of $1.50 for any case filed there, and it is therefore our opinion that the same charge should be made in the Municipal Court."

Based upon the foregoing, in so far as House File 421 of the 54th General Assembly is applicable, the fees for services performed by the

Clerk of the Municipal Court are controlled by Sections 602.23 and 602.32. In that aspect the Clerk of Municipal Court is authorized to exact a fee of $3.00 for the filing of the petition in Class A and B cases of the Municipal Court. In Class B cases, where no petition is filed, the fee will be that fixed for such service in the Justice of the Peace Court.

June 22, 1951

HIGHWAYS: Secondary road contruction—preference. When a proper petition for secondary road improvement is filed it shall retain its preference in succeeding years, on a township basis, and on a county-wide basis only so long as that township has not exceeded its prorata share on the area basis of the secondary road funds available to the county in any three-year period.

Mr. Clare H. Williamson, County Attorney, Greenfield, Iowa: In your letter of June 9th you say:

"The Board of Supervisors of Adair County, Iowa, have requested an opinion on the following questions:

Under Section 311.7 of the 1950 Code of Iowa, the board of supervisors of this county were giving preference in the surfacing of petition roads in the order in which they are filed on a county wide basis. The construction program was planned yearly and petition roads which were not completed in the year following that of filing took preference in the succeeding year.

Under Section 311.7 of the 1950 Code of Iowa as amended by House File 365 [Ch. 106, 54 G.A.], the following question will arise. At the end of this year some of the townships will have used up their prorata share of the secondary road funds legally expendable over a three year period on the area basis. These townships still have petitions on file. All townships of Adair County have had petitions filed during the first two years of the three year period.

When it becomes apparent that a township has used up its prorata share of the secondary road funds legally expendable on the area basis will the petitions in that township lose their preference to the next numbered petition in the order filed in one of the other townships of the county which has not used its prorata share?

If so, in the following year if funds are then available for construction in that township are we correct in assuming that the first petition road in point of time filed in that township should be completed first?

Is the following a correct statement of the application of 311.7 of the 1950 Code of Iowa as amended by H. F. 365? *When a proper petition is filed it shall retain its preference in succeeding years, on a township basis, and on a county-wide basis only so long as that township has not exceeded its prorata share on the area basis of the secondary road funds available to the county in any three-year period.*"

This office finds no fault with the statement of law in the italicized passage and concurs therein.

June 22, 1951

COURTS: Probate fees—when increase effective. Where an estate is in probate at the time that the rate of fees is increased by law, the amount charged and collected in so far as such estate is concerned should be at the prior rate.

Mr. Donald G. Beneke, County Attorney, Laurens, Iowa: We have yours of the 14th ult. in which you have submitted the following:

"House File 421 [Ch. 137] of the 54th General Assembly recently became a law and increases many fees which may be charged by county officers.

Our clerk of court inquires about probate fees in a large number of situations where probate matters were opened before the new law took effect. Her inquiry can be summarized in two questions:

1. Where fees have been charged but not collected in a probate proceeding opened prior to the effective date of House File 421 are fees to be collected at the old rate or the new rate?

2. Are fees contemplated by Subsection 29 of Section 606.15 of the Code to be charged at the new rate or the old rate where probate was commenced prior to effective date of H. F. 421?

It is my thought that as to most services performed or furnished prior to effective date of the new law the clerk has already taxed the fee and would have been entitled to collect it in advance. Therefore, the old schedule of fees should apply upon collection. However, as to fees contemplated by Subsection 29 of Code Section 606.15 it is possible that the majority of services in some estates will be performed after the effective date of the law. In view of the old case of Dickerson v. Shelby, 2 G. Greene, 460 it appears that these fees might also be collected in advance by the clerk and it is my opinion that the old rate should prevail."

In reply thereto we would advise you as follows:

Section 606.15, Code 1950, provides, "The clerk of the district court shall charge and collect the following fees, all of which shall be paid into the county treasury." The duty has been interpreted to entitle the clerk to his fees before he has parted with his services (Dickerson v. Shelby, 2 G. Greene 460) but that he may demand prepayment of the fee for filing papers (Ripley v. Gifford, 11 Iowa 367) and he should collect in advance at the time of filing the statutory fee for filing any petition, appeal, or writ of error, and for docketing thereof (Report of Attorney General 1928 page 292). In so far as fees in estates are concerned, "The propriety of demanding the fees in advance is not questioned by appellant and for this reason is not considered." (In re: Estate of Pitt, 153 Iowa 269, 271.) Bearing in mind that the foregoing Section 606.15 imposes on the clerk the duty of charging and collecting the fees prescribed in such section, that is, that the fee should be charged and collected at the time the petition is filed or before the services are rendered, limits the field in which the amendment to Section 606.15, made by the 54th General Assembly will operate. Such amendment contained in Section 15 of House File 421, provides as follows:

"Section six hundred six point fifteen (606.15), Code 1950, is amended by increasing by one hundred per cent the amount of the various fees therein directed to be charged by the clerk of the district court, except that the amount of the fees directed to be charged by the said clerk under the provisions of subsection twenty-nine (29) shall be increased fifty per cent."

Subsection 29 of Section 606.15, Code 1950, prior to the amendment provides as follows:

"For all services performed in the settlement of the estate of any decedent, minor, insane person, or other persons laboring under any legal disability, except where actions are brought by the administrator, guardian, trustee, or person acting in a representative capacity or against him, or as may be otherwise provided herein, where the value of the property of the estate does not exceed three thousand dollars, three dollars; where such value is between three thousand dollars and five thousand dollars, five dollars; where such value is between five thousand dollars and seven thousand dollars, eight dollars; where such value is between seven thousand dollars and ten thousand dollars, ten dollars; where such value is between ten thousand dollars and twenty-five thousand dollars, fifteen dollars; for each additional twenty-five thousand dollars or major fraction thereof, there shall be taxed the further sum of ten dollars."

In view, therefore, of the foregoing, specifically the fees in estates, are payable in advance of administration by the court. It is clear that where estates in process of probate on the effective date of House File 421, to-wit: May 11, 1951, the fees scheduled to be collected by the clerk are those prescribed in Section 606.15, Code 1950. Administration initiated prior to such date, in view of the fact that fees are payable in advance, would be controlled by the fee schedule existent prior to the amendment by the 54th General Assembly.

You are therefore advised as follows:

1. That in an estate in process of probate at the effective date of House File 421 where the fees have been charged but not collected, the fees scheduled to be collected by the clerk are those scheduled in Section 606.15, Code 1950, prior to the amendment of the 54th General Assembly.

2. Where fees in estates in process of probate at the time of the effective date of the act, which should have been charged and collected but were not, such fees are payable under the schedule of fees provided by Section 606.15, Code 1950, prior to the amendment of the 54th General Assembly.

3. In fixing the value of the estate for the purpose of imposing the fees imposed by Section 606.15, Subsection 29, as amended by House File 421, real estate is not included. (See opinion in Report of Attorney General for 1940, page 273 and opinion in Report of Attorney General for 1923-24, page 145.)

July 3, 1951

BEER: Authority of state permit board. The state beer permit board has the duty to withhold a state permit from any person where it appears that the local permit was issued illegally. Also where it has reason to believe, after a permit has been issued, that the law is being violated, it is empowered to investigate and cancel or revoke the permit.

Mr. George Robb, Chairman, State Permit Board: We are in receipt of your recent letter requesting an opinion in regard to the powers and duties of the State Permit Board in connection with the issuance of beer permits to Class B and C applicants under Chapter 124, 1950 Code of Iowa. Chapter 124 contains the laws of the state of Iowa in regard to beer and malt liquors.

The State Permit Board was created by Chapter 16, Section 2, Acts of the 46th General Assembly, and is now a part of Section 124.3, which provides in part as follows:

"In order to promote uniform compliance with the provisions of this chapter there is hereby created a state permit board to be composed of the chairman of the state tax commission, the secretary of the state, and the auditor of the state, which board shall issue state permits and shall have the power to revoke the same upon hearing as provided in this chapter and to review actions of the city or town councils, including cities under special charter, and boards of supervisors, in refusing to revoke permits, as hereinafter provided."

In view of the above quoted section, it is clear that the General Assembly established the State Permit Board for the purpose of seeing that the provisions of Chapter 124 were uniformly complied with in all parts of the state of Iowa.

Permits for sale of beer are divided into three classes, known as A, B, and C permits. This opinion is concerned with B and C permits only.

Under section 124.5, the authority to issue B and C permits within certain prescribed limits, in cities and towns, including cities under special charter, is granted to the city or town council. The boards of supervisors are granted the authority to issue B and C permits within certain prescribed limits, in their respective counties outside cities and towns, and then only in villages platted prior to January 1, 1934, and to clubs as defined in Section 124.16.

The machinery for the issuance of B and C permits is set in motion by the filing of an application with the authorities empowered to issue the permits. Sections 124.9 and 124.10 list certain information which must be contained in a written application to be made under oath. Both B and C permit applicants under the above sections are required to establish that they are persons of good moral character, and a Class B applicant must further establish that the location and place or building where he intends to operate, conforms to all laws, including health and fire regulations applicable thereto, and is a safe and proper place or building.

Under sections 124.9 and 124.10 the city or town council or board of supervisors is given the initial discretion to determine whether the applicant is of good moral character, and whether his place of business conforms to the standard set out above. However, Section 124.2, subsection 6 *specifically excludes* from the term, good moral character, "Any person, firm or corporation who, preceding the making of an application for any permit under the provisions of this chapter, has been found guilty of violating any of the provisions of the beer act or any of the intoxicating liquor laws of the state, or who has been convicted of a felony or indictable misdemeanor."

Therefore, under Iowa law (1) any person found guilty of violating any of the provisions of the beer act, or (2) any of the intoxicating liquor laws of the state, or (3) who has been convicted of a felony or an in-

dictable misdemeanor, cannot meet the prerequisites for securing a beer permit in the State of Iowa.

Section 124.6 provides in pertinent part:

"Permits hereunder defined shall be issued only to persons who are citizens of the state of Iowa, who are of good moral character and repute; * * * "

Therefore, it is clear that the law prescribes the minimum requirements for "good moral character" but that the city or town council or board of supervisors may consider other facts and circumstances pertinent in determining (1) good moral character and (2) repute.

Under Section 124.5, each applicant for a class B or C permit shall, in addition to securing a permit from the council or board of supervisors, "also make application through such city or town council or board of supervisors for a state permit from the State Permit Board."

The fact that an application must be made to the State Permit Board obviously gives the State Permit Board the duty, power and authority to prescribe the application form to be filed with said board. The State Permit Board cannot perform its statutory duties and secure uniform compliance with the beer laws in all parts of Iowa without the use of detailed written applications.

When the city or town council or board of supervisors has issued a local permit, their action is certified to the State Permit Board, together with the application for a state permit on the prescribed form accompanied by the proper fee.

Section 124.5 provides in part:

"The State Permit Board shall promptly issue a state permit to all applicants to whom a permit has been issued by a city or town council or by a board of supervisors * * *".

While this language standing alone may seem to be mandatory, it cannot be construed to mean that the State Permit Board must blindly issue a state beer permit to all applicants certified to them by city or town councils or boards of supervisors, regardless of whether or not it would violate the law. We call to your attention the fact that Section 124.4 gives the State Permit Board the power and authority to revoke permits.

All sections of Chapter 124 must be construed together and harmonized to determine the legislative intent. Therefore the above quoted part of Section 124.5 must be construed in the light of the charge to the State Permit Board set forth in Section 124.3 supra, Supreme Court decisions and Section 124.23 which provides as follows:

The authorities empowered by this chapter to issue permits *shall* make a thorough investigation to determine the fitness of the applicant and the truth of the statements made in and accompanying the application, and the decision of such authority on the application shall be rendered within thirty days after the application is received."

Recently our Iowa Supreme Court stated in Bankers Life and Casualty Company v. Alexander, 242 Iowa 364; 45 NW 2nd 258, that the power to refuse a license is coextensive with the power of revocation. At page 372, [265] the Court said:

"If the commissioner has the power to revoke plaintiff's license upon the ground asserted by him, he may refuse to issue a license upon such ground. His power to refuse a license is coextensive with his power of revocation. It would of course be useless to compel issuance of a license which might at once be revoked. See State ex rel. National Life Ass'n of Hartford v. Matthews, 58 Ohio St. 1, 49 N.E. 1034, 1035, 40 L.R.A. 418; Bankers Life Ins. Co. v. Read, supra, 182 Okl. 103, 77 P. 2nd. 26, 29."

Sound reason dictates that it would be useless to require the issuance of a state beer permit which might at once be revoked.

Therefore, if upon consideration of the application made to the state permit board, it appears that the local permit was issued illegally, such as the issuance of a permit to a person not of good moral character or good repute, as defined by statute, or to a person whose location, place or building does not conform to the requirements, etc. the state permit board should withhold the issuance of a state permit, and the state permit board should forthwith advise the council or board of supervisors of that fact.

It is clear that no applicant can legally operate until he receives his state beer permit. See Section 124.5.

If at any time after the issuance of a state beer permit the state permit board has reason to believe that the provisions of Chapter 124 have been or are being violated by a permit holder or that the permits should not have been issued to the holder in the first instance, said State Permit Board is empowered to investigate any such case and to determine whether permits which have been granted should be cancelled or revoked.

Any prior opinions inconsistent herewith are hereby withdrawn.

July 11, 1951

BANKS AND BANKING: Investment of funds in U.S. public housing bonds. Bonds issued by public housing agencies under the provisions of the United States Public Housing Act of 1949 are not legal investments for state banks.

Mr. Newton P. Black, Superintendent of Banking: By letter dated July 6, 1951, you have requested an opinion of this office on the following question:

Are public housing agency bonds issued under the provisions of the United States Public Housing Act of 1949, a legal investment for banks and trust companies chartered under the laws of the State of Iowa.

Your attention is invited to the provisions of Sections 526.25, 526.28 and 526.32, Code of Iowa 1950, as amended, which provide:

526.25. Each savings bank shall invest its funds or capital, all moneys deposited therein, and all its gains and profits, only as follows:

1. Federal securities. In bonds of interest-bearing notes or certificates of the United States.

2. Federal farm loan bonds. In farm loan bonds issued under the act of congress approved July 17, 1916, as amended, where the corporation issuing such bonds is loaning in Iowa; and in bonds of the home owners' loan corporation, as provided for in the act of congress, approved June 13, 1933 (12 USC, §§1461-1468) or in any amendments thereto and in class "A" stock of the federal deposit insurance corporation, as provided for in the act of congress, approved June 16, 1933 (12 USC §221a et seq.) or in any amendments thereto.

3. State securities. In bonds or evidences of debt of this state, bearing interest.

4. Municipal securities. In bonds or warrants of any city, town, county, school district, or drainage district of this state, issued pursuant to the authority of law; but not exceeding twenty-five percent of the assets of the bank shall consist of such bonds or warrants.

5. Real state bonds and mortgages. In notes or bonds secured by mortgage or deed of trust upon unencumbered real estate located in Iowa or upon unencumbered real estate in adjoining states, worth at least twice the amount loaned thereon, provided, however, that no loan shall be made upon any town or city real estate located beyond the first two tiers of counties of any adjoining state.

a. Any such loan may be made in any amount not to exceed sixty percent of the appraised value of the real estate offered as security and for a term not longer than ten years if the loan is secured by an amortized mortgage, deed of trust, or other such instrument under the terms of which the installment payments are sufficient to amortize forty percent or more of the principal of the loan within a period of not more than ten years, and

b. The foregoing limitations and restrictions shall not prevent the renewal or extension of loans heretofore made and shall not apply to real estate loans which are insured under the provisions of the national housing act, as amended;

c. Nor shall such limitations and restrictions apply to real estate loans which are guaranteed or insured by the administrator of veterans' affairs under the provisions of title III of the servicemen's readjustment act of 1944, as amended, otherwise known as the "G.I. Bill of Rights", when such loans fully comply with the provisions of that act as amended and with all regulations promulgated thereon; provided the amount of such loans held at any one time shall not exceed in the aggregate twenty-five percent of the assets of such bank and provided further, that said loans shall be upon real estate located in Iowa or in the first two tiers of counties in bordering states adjoining Iowa.

Provided, however, that no such loan shall be made upon any real estate located west of the one-hundredth meridian line.

6. Federal reserve and land bank stock. An amount not exceeding ten percent of their capital stock and surplus in the capital stock of corporations chartered or incorporated under the provisions of section 25a of the federal reserve act, approved December 24, 1919, (12 USC §§611-631), and a like amount in the capital stock of corporations organized under the laws of this state for the purpose of extending credit to those engaged in agriculture and to agricultural organizations, and an

amount not in excess of fifteen percent of their capital stock and surplus in capital stock of any national mortgage association authorized under title III of the national housing act (12 USC §§1716-1723) approved June 27, 1934, or any amendments thereto, subject, however, to the approval of the superintendent of banking; provided that said investments by savings banks shall in no event exceed in the aggregate twenty percent of the capital stock and surplus of said bank.

7. Federal housing securities. In bonds and notes secured by mortgage or trust deed insured by the federal housing administrator, and in debentures issued by the federal housing administrator pursuant to the national housing act, or amendments to said act, and in securities issued by national mortgage associations or similiar credit institutions now or hereafter organized under title III of the national housing act, or amendments to said act; but not exceeding twenty-five percent of the assets of the bank or trust company shall consist of such investments."

526.28. "The provisions governing the investment of funds or capital, all money deposited therein and all gains and profits of savings banks shall apply with equal force and effect to all state banks and trust companies."

526.32. "The directors of any savings bank, state bank or trust company may set apart from its earnings, over and above expenses, a surplus fund to be maintained as such, separate and apart from earnings usually carried and designated as undivided profits, and which surplus fund shall not be drawn upon for the payment of expenses or dividends, except that it may be made use of as a stock dividend for increasing the capital of the bank. Such surplus shall be invested in the same manner as the capital of the bank, as provided in Section 526.25."

The United States Public Housing Act of 1949 (P.L.171-81st Congress, approved July 15, 1949) provides for public housing agencies to be created under a State Housing Authority. A public housing agency is a governmental entity or public body, excluding the Public Housing Administration, which is authorized to engage in the development of low rent housing or slum clearance. Such agencies are organized by cities and other political subdivisions under a state housing authority law. Each local housing agency will issue bonds which will be obligations of the local issuing agency. The bonds will be secured by the income of the local agency. The Public Housing Administration is authorized to make commitments to the local agency for an annual contribution in such sums as are necessary to meet principal and interest obligations of the bonds after the income of the agency has first been applied. In carrying out the development of low rent housing or slum clearance, loans will be made to private concerns who will engage in such projects.

The legislature of the State of Iowa has not enacted a housing authority law. Therefore projects under the public housing act of 1949 cannot be undertaken in this state. Neither has the legislature amended the investment laws to authorize investment by banking institutions in bonds issued under this federal act.

Your attention is invited to the prohibitive nature of the pertinent Iowa statute relating to investments by banks and trust companies. The statute prohibits investments except as expressly authorized. Examina-

tion of the seven categories of investments set forth in Section 526.25 of the Code, supra, discloses no category within which public housing agency bonds are included. A superficial reading of subparagraph 7 may lead to a first impression that such bonds may qualify under that subparagraph. However it is to be noted that the bonds are not bonds secured by mortgage or trust deed insured by the Federal Housing Administrator nor are they debentures issued by the Federal Housing Administrator. Of course the bonds cannot be classed as securities issued by national mortgage associations or similar credit institutions.

You are therefore advised that it is the opinion of this office that bonds issued by public housing agencies under the provisions of the United States Public Housing Act of 1949 are not legal investments for banking institutions chartered under the laws of the State of Iowa.

July 12, 1951

HIGHWAYS: Secondary road improvement—deposits to secure priority. In order to establish the priority in improvement of a secondary road as contemplated by section 311.7 of the Code, by the "subscribe and deposit" method, the deposit with the county treasurer must be in cash.

Mr. Charles N. Pettit, County Attorney, Bloomfield, Iowa: In your letter of June 19th you state the following case in connection with the interpretation of Section 311.7, Code of Iowa.

"Petitioners filed their petition prior to December 1, 1950, for the improvement by surfacing of a certain secondary road in Davis County, Iowa, in which said petition the petitioners stated that they desired to avail themselves of the provisions of said Section 311.7 whereby they are to subscribe and deposit with the County Treasurer an amount not less than 50% of the Engineer's estimated cost of surfacing said Secondary Road and that the Board of Supervisors therefore should not establish a special assessment district but shall accept said donations in lieu of an assessment and proceed to the improvement of said Secondary Road.

The Engineer's cost of surfacing and report was duly filed in the County Auditor's office, and some of the petitioners now desire to comply with the provisions of Section 311.7 by depositing a promissory note and/or subscription agreement with the County Treasurer. By the terms of said subscription note, the amount of each petitioner's assessment is due upon completion by surfacing of said Secondary Road."

The question is whether the language of Section 311.7 requires the petitioners to deposit cash with the County Treasurer or permits the deposit of something other than cash, such as a promissory note. You suggest that the significant words of the statute are "subscribe", "deposit", and "donations". Reference to Words and Phrases with respect to these terms lends little clarification to the problem, but the examination should not be limited to these terms alone.

Consideration of the statute as a whole throws some light on the legislative intent. In this section of the statute the Legislature is setting up not merely an additional method for the improvement of the roads by the establishment of a secondary road assessment district, but a

means of establishing a priority with respect to the doing of the work requested in the petition. While the amendment to this section enacted by the 54th G. A., as House File 365, (ch. 106) to some extent limits this priority it does not destroy it, as will be seen from an examination of the opinion of the Attorney General's office dated June 22, 1951.

This section of the statute establishes two methods by which priority may be acquired. The first involves the signing and filing of a petition signed by "any owner or group of owners of not less than 75% of the lands adjacent to or abutting upon any secondary road or roads * * * * and for the assessment of not less than 50 per cent * * * * of the cost of such improving * * * * to the lands adjacent to, or abutting upon said road or roads * * * *." The selection of this method of establishing a priority would leave the Board of Supervisors with all of the remedies for the collection of the cost of the improvement provided by our statutes for the collection of special assessments.

The second method of establishing a priority provides that the owner or owners shall "subscribe and deposit with the county treasurer an amount not less than 50 per cent * * * * of the engineer's estimated cost of the surfacing of the road or roads included in said project * * * *." If the owner or owners were permitted to establish a priority by depositing with the county treasurer their promissory notes or other undertaking to pay the county it would be limited in its attempt to collect the cost of the completed improvement to a suit upon the promissory note or such other undertaking to pay as might be given. It is not necessary to labor the point to demonstrate that such a remedy may be a very empty one, and that it would be empty in this case is confirmed by the fact that the attempt to establish a priority by the "subscribe and deposit" method does not contemplate the establishment of a special assessment district. It is suggested that at this point the board of supervisors might find it impossible to retrace its steps and establish a special assessment district.

In the one instance it would have to be supposed that the Legislature very carefully provided for the establishment of a special assessment district with all of the incidents that inhere for the collection of the assessments made for the improvement as a prerequisite to the securing of the priority contemplated by this section of the statute, and in the other instance it would have to be supposed that the priority could be established by the petitioners on the filing of their simple and unsupported promise to pay. To give the statute this latter construction seems to this office to be an unwarranted perversion of Legislative intent.

It is the conclusion of this office that in order to establish the priority contemplated by Section 311.7, Code of Iowa, 1950, by the "subscribe and deposit" method the deposit with the County Treasurer must be in cash. Our conclusion in this respect is strengthened by the provision in the latter part of the section that "any balance then remaining of the funds provided by the sponsors shall be returned to them according

to their respective interests, providing all guarantees made by such sponsors have been fulfilled." If a naked promise to pay had been accepted in lieu of cash it follows that there might be nothing to return even though the cost of the improvement is less than the estimate.

July 16, 1951

TAXATION: Bonds and interest thereon of public housing agencies. The bonds issued by public housing agencies under the United States Public Housing Act of 1949, are subject to ad valorem tax and the interest earned by such bonds is subject to state income tax.

Mr. Ray E. Johnson, Chairman, State Tax Commission: Under date of July tenth you requested an opinion as to whether or not the interest earned on the bonds to be issued under the provisions of the United States Public Housing Act of 1949 is exempt from income tax under the laws of Iowa. You have also inquired as to whether or not such bonds are exempt from property tax.

The United States Public Housing Act of 1949 (P.L. 171-81st Congress) approved July 15, 1949, provides for public housing agencies to be created under a state housing authority. A public housing agency is a public entity or public body, excluding the Public Housing Administration which is authorized to engage in the development of low rent housing or slum clearance. These local public housing agencies customarily bear the name of the community within which they are located, are vested with the necessary powers to borrow money and incur debts, to raze blighted areas and to replace slums so eliminated with safe and sanitary housing facilities for the lowest income group. The bonds will be issued by local public housing agencies created under the laws of the various states and are authorized to co-operate with the federal government in carrying out the express policy of the agency. The bonds will be general obligations of the local agency and will be secured by the income of the local agency. The Public Housing Administration is authorized to make commitments to the local agency for an annual contribution in such sums as are necessary to meet the principal and interest obligations of the bonds after the income of the authority has first been applied.

The Legislature of the State of Iowa has not enacted a housing authority law and, hence, projects under the Public Housing Act of 1949 will not be undertaken in this state.

There is no provision for exemption in the income tax law which would apply to the interest received on such bonds. The exemption provisions relating to the taxation of property contained in Section 427.1, subsection 2, is as follows:

"2. Municipal and military property. The property of a county, township, city, town, school district or military company of the state of Iowa, when devoted to public use and not held for pecuniary profit."

and paragraph 5 which is as follows:

"5. Public securities. Bonds or certificates issued by any municipality, school district, drainage or levee district, river-front improve-

ment commission or county within the state of Iowa. No deduction from the assessment of the shares of stock of any bank or trust company shall be permitted because such bank or trust company holds such bonds as are exempted above."

have no application.

Our search has disclosed no express provision which would exempt the bonds from property tax or the interest received thereon from income tax. Forty-three states have adopted a housing authority act and of these Arkansas, Illinois, Missouri, Montana, Nevada, Ohio and Virginia did not extend exemption from local taxes to bonds issued under a housing authority act or interest received thereon. These bonds clearly are not federal obligations or obligation of any distinct federal agency. There is no provision of federal law which prohibits taxation by the State of Iowa of these bonds or the interest thereon. From our search we have discovered that the model law providing for the organization of local public housing agencies contains a provision which leaves to the states the right to exempt from taxation such bonds if they so desire.

We are of the opinion that the language employed by the Supreme Court of Iowa in re: Appeal of Dubuque Bridge Commission, 232 Iowa 112 at page 133, is pertinent and controlling:

"Our conclusion must be that since the Commission operates only under the authority granted by the act creating it, we must look to that act or to our Iowa statutes for any right to exemption from state or local taxation. Taxation is the rule, exemption the exception. We hold that the state law does not grant immunity. * * * * No burden on the federal government is created, and there is no substantial interference with governmental powers by the imposition of a tax as other like property is taxed. * * * *."

You are, therefore, advised that the bonds issued by the public housing agencies are subject to ad valorem tax and that the interest earned by such bonds is subject to the income tax under the laws of the State of Iowa.

August 21, 1951

COUNTIES: Director of social welfare serving as overseer of the poor. The county board of supervisors may not pay directly to the director of the county department of social welfare any compensation for services rendered as overseer of the poor without jeopardizing the said director's status as an employee of the state department of social welfare.

Mr. Samuel O. Erhardt, County Attorney, Ottumwa, Iowa: This will acknowledge receipt of your letter of July 27th in which you have submitted the following:

"The welfare director in Wapello County serves in the dual capacity of director of social welfare and overseer of the poor.

"The Board of Supervisors, on recommendation of the Board of Social Welfare, has agreed to supplement his salary because of his duties as overseer of the poor. It is the feeling of the local boards that the di-

rector's present salary does not provide sufficient compensation, considering the duties he is expected to perform in administering the public assistance programs of Old Age Assistance, Aid to Dependent Children, Aid to the Blind, the Child Welfare Services program, and also in addition, the county assistance and service programs.

"The Board of Supervisors is interested in your opinion regarding the legality of salary supplementation for work performed as overseer of the poor."

Under Chapter 251 of the 1950 Code of Iowa, the State Board of Social Welfare became vested with certain duties, among which was the responsibility for supervising the administration of Emergency Relief funds through the various county poor funds. In carrying out this mandate, the State Board of Social Welfare ordered that its directors of social welfare within the county administer these relief funds. This is the historical basis for what is now commonly referred to as an "integrated" county.

After the Emergency Relief funds were no longer available to the counties, under the provisions of Chapter 251, 1950 Code of Iowa, in many cases, *by agreement,* the directors continued to administer the poor fund of the county at the request of the county concerned. Under this system, the State Board bills the county for the amount of time the local director devotes to the poor fund activities. This billing is based upon the compensation paid to the local director by the State Board.

Section 252.26 of the 1950 Code of Iowa provides that the compensation of an Overseer of the Poor who administers the county poor funds, shall be fixed by the County Board of Supervisors. However, in those cases where the counties have requested the State Board to order the local director of the county department of social welfare to administer the county poor fund, the Board of Supervisors has agreed to pay the State Board for the services of the county director, at the rate agreed upon by the State Board and the County Board of Supervisors. This rate, as pointed out above, is tied in with the amount of compensation that the Director receives from the State Board.

If Wapello County wishes to employ the individual who has heretofore served as the director of the Wapello County Department of Social Welfare, as the Overseer of the Poor of Wapello County, they may quite properly do so and fix his compensation under the provisions of Section 252.26. However, it might be well to point out that the Directors of the county departments of social welfare are deemed to be state employees, and because of this, they fall within the rules and regulations propounded by the Merit System Council of the State of Iowa. Rule 18 of said regulations reads as follows:

"No employee shall hold other public office, or have conflicting employment while in the employ of the agencies. Determination of such conflict shall be made by the agency concerned and the Council."

The Overseer of the Poor is a public office, so employment as such, would be tantamount to violating the above quoted rule and regulation.

This office concludes, therefore, that the Board of Supervisors of Wapello County may not pay directly to the Director of Wapello County Department of Social Welfare any compensation for services rendered without jeopardizing the said director's status as an employee of the State Board of Social Welfare. The director cannot be employed at the same time by both the Board of Social Welfare and the Board of Supervisors.

August 23, 1951

SCHOOLS AND SCHOOL DISTRICTS: County superintendent as employee—workmen's compensation. The county superintendent of schools, or other employees of the county board of education, is not an employee of the county and the county is not liable under the workmen's compensation act. Moreover the county board of education is not such an employer as is included within the terms of the act.

Miss Jessie M. Parker, Superintendent of Public Instruction; Attention R. A. Griffin, Legal Advisor: This will acknowledge receipt of yours of the 9th ult. in which you have submitted the following:

"Under the statutes of Iowa the county board of education appoints a county superintendent and such other employees as are necessary to carry on the business of the county superintendent's office. Under this set-up,

'Is the county superintendent of schools still a county official or an employee of the county? If an employee of the county, is the county liable for the injuries to the employees of the county board of education under the workmen's compensation law, or does this liability rest upon the county board of education?'"

The county board of education is created by the 52nd General Assembly for the purpose of administering the county school system as part of the public school system of the state. Members of the said county board are required to be electors, and are elected by the electors of the county in accordance with the terms of Sections 273.4, 273.5, 273.6 and 273.7, Code of 1950. The members are required to qualify by taking the oath required of county officers, but are not required to give bond and they serve without compensation. Its powers and duties in general, according to Section 273.12 relate to matters affecting the county school system, as a whole, rather than specific details relating to individual schools or districts. Among its specific powers, however, is the power and duty to appoint the county superintendent and fix his salary and recommendation of the county superintendent to appoint an assistant county superintendent and such other supervisory, and clerical assistants, as are deemed necessary, and shall fix their salaries and duties. They have power to select a county attendance officer; approve the curriculum as recommended by the county superintendent; to purchase and provide such general school supplies, school board supplies, and other materials necessary to the conduct of its office; adopt rules and regulations deemed expedient; enforce all laws, and rules and regulations of the Department of Public Instruction for the transportation of pupils to and from public school in all school districts of the county; act with

the county superintendent as an appeal board in and for all school districts of the county, in all matters properly brought before it; cooperate with federal, state and county and municipal agencies; to consider the budget submitted by the county superintendent and certify the same to the board of supervisors; to audit all bills and claims, which, upon approval, shall be paid by the warrants of the county auditor upon the county board of education fund; all its regular employees shall be paid monthly by warrants drawn on the same fund.

From the foregoing it seems quite clear that the county board of education is not a political subdivision and is not an entity that may sue or may be sued. It is not a person, firm, or corporation, and therefore not an employer within the terms of the workmen's compensation law. One section of that law, namely, Section 85.61, as amended by Chapter 165, Acts of the 54th General Assembly, provides as follows:

"In this and chapters 86 and 87, unless the context otherwise requires, the following definitions of terms shall prevail: 1. 'Employer' includes and applies to any person, firm, association, or corporation, state, county, municipal corporation, school district, and the legal representatives of a deceased employer. * * * "

While Section 85.2 imposes compulsory participation by the state, county, municipal corporation, school district or city in the compensation act, the county board of education and other like instrumentalities are not expressly included in the class of public corporations to be controlled by the workmen's compensation act. By its characteristics and its powers, in so far as its relations to the workmen's compensation act are concerned, it is comparable to a township. A township, like the county board of education, is not expressly made subject thereto. While it was sought to be made in the case of Hop v. Brink, 205 Iowa 74, the Supreme Court said this:

"It is obvious that the statuory duties of township trustees are many and varied, and that some of them are quasi judicial in nature, and others may be classified as executive or administrative.

It may be noted, in passing, that this court has repeatedly held that a civil township is not a corporation, and cannot be sued. Austin Western Co. v. Township of Weaver, 136 Iowa 709.

It may also be observed that the members of a board or council, acting in a representative capacity, are not, in the absence of specific legal grounds, individually liable. Farmers' L. and Tr. Co. v. City of Newton, 97 Iowa 502.

In the instant case, it is obvious that the contract in question (which is not found in the record before us, but admitted to have been made) was entered into between the plaintiff and the defendants for the benefit of Sherman Township. Such contract must be interpreted in the light of statutory provisions. The duties of the road superintendent are primarily supervisory, as his official title indicates. He is not a 'road patrolman.' That office is also created and defined by statute, and the appointment to the office is made by the board of supervisors of the county. Section 4774 et seq.

With these preliminary statements and observations in mind, we turn to the basic and controlling question, which involves the interpretation of certain provisions of the Workmen's Compensation Law of Iowa.

Is a civil township an employer, within the definition of the act? Is a road superintendent an employee, within the meaning of the act? The act provides:

'Where the employer and employee have not given notice of an election to reject the terms of this chapter, every contract of hire, express or implied, shall be construed as an implied agreement between them and a part of the contract on the part of the employer to provide, secure, and pay, and on the part of the employee to accept, compensation in the manner as by this chapter provided for all personal injuries sustained arising out of and in the course of employment.' Section 1377, Code of 1924.

It is further provided (Section 1421) that the following definitions of terms shall prevail:

'1. 'Employer' includes and applies to any person, firm, association, or corporation, state, county, municipal corporation, city under special charter and under commission form of government, school district, and the legal representatives of a deceased employer. 2.'Workman' or 'employee' means a person who has entered into the employment of, or works under contract of service, express or implied, or apprenticeship, for an employer, except as hereinafter specified. 3. The following persons shall not be deemed 'workmen' or 'employees': * * * c. An independent contractor. d. A person holding an official position, or standing in a representative capacity of the employer, or an official elected or appointed by the state, county, school district, municipal corporation, city under special charter or commission form of government.'

Did the legislature, by omitting to include townships, intend that such townships as employers should not be within the scope of the chapter? Every other body politic within the state having authority to employ labor has been included within the terms used. It would be but a fiction to bring a civil township under the term of 'municipal corporation,' for the simple reason that it is not a corporation. It is an unincorporated civil district, created by the county for governmental purposes. The township acts through its board of trustees, whose powers are defined by statute. Clearly, the township is not a governmental employer, upon whom the compensation act is made obligatory. Section 1362, Code of 1924. Nor does the township fall within the definition of employer, since is is not a person, firm or association."

We conclude therefore as follows:

1. That the County Board of Education is not an employer within the terms of the workmen's compensation act.

2. The superintendent, or other employees of the County Board of Education, not being employees of the county, the county is not liable under workmen's compensation act.

August 30, 1951

BEER: State permit—pardon following conviction of a felony. Conviction of a felony or indictable misdemeanor will not, by itself, be sufficient to cause the state permit board to revoke a beer permit, where the licensee has been granted a full pardon and restoration to all the rights, privileges, and immunities of citizenship.

Mr. Clark O. Filseth, County Attorney, Davenport, Iowa: This will acknowledge receipt of your letter of recent date in which you have submitted the following:

"It is my understanding that your office has ruled that in the event the holder of a Class 'B' beer license has been convicted of a felony or an indictable misdemeanor that such conviction would be grounds for the State Permit Board to revoke his State Permit to sell beer and that his beer license would also be revoked.

I have had presented to me a situation where the holder of such permit was convicted of a felony in Federal Court in about '32 or '33 and that subsequently and about in the year 1940 a Presidential Pardon was issued restoring to this person the full rights of citizenship.

This person has been a good law-abiding citizen during these years since his conviction:

My question is whether or not the fact that he has been extended a Presidential Pardon would in any way have any effect on the duty of the State Permit Board to revoke his license on the grounds that he has been convicted of a felony."

In reply thereto we wish to call your attention to the case of Slater v. Olson, which is found in 230 Iowa 1005:

"Stiger, J.—Section 5701, Code 1939, designates the qualifications required of employees under civil service. The section reads in part as follows:

'5701 Employees under civil service—qualifications, * * * In no case shall any person be appointed or employed in any capacity in the fire or police department, or any department which is governed by civil service, unless such person: * * *'

2. Is of good moral character;

* * *

5. Has not been convicted of felony.'

On January 5, 1934, plaintiff was convicted of larceny of a motor vehicle in Polk County, Iowa. On January 25, 1935, he was granted a full pardon by the Governor which restored him to all his rights of citizenship.

On September 19, 1940, plaintiff filed his application with the Civil Service Commission of Des Moines for the position of Assistant Smoke Inspector.

Prior to the date set for the civil service examination, plaintiff was notified by the commissioner that his application was rejected because of his failure to meet the requirements of section 5701, subsection 5, that is, because he had been convicted of a felony.

Plaintiff, in the certiorari proceeding, stated that he had been granted a full pardon and restoration to all the rights, privileges and immunities of citizenship which were forfeited by reason of his conviction; that the Des Moines Civil Service Commission exceeded its jurisdiction in denying plaintiff the right to take the examination and that paragraph 5 of section 5701 is unconstitutional as being a limitation upon a restriction of the pardoning power exclusively vested in the governor of the state by both constitutional and statutory provisions.

The trial court sustained the writ of certiorari on the following grounds:

'(a) The Civil Service Commission, in denying plaintiff the right to take the civil service examination, exceeded its jurisdiction, authority and power.

(b) That paragraph 5, section 5701, Chapter 289, Code of Iowa (1939) is an unlawful invasion of the pardoning power conferred on the Governor of Iowa by Article IV, Section 16 of the Constitution of this state, and can not be sustained."

Section 16, Article IV of the Constitution of the State of Iowa vests in the governor the exclusive power to grant pardons after conviction.

We are not concerned on this appeal whether the legislature acted wisely in enacting subsection 5 of Section 5701, which, in effect, provides that a prior conviction conclusively establishes the bad moral character of the applicant or whether it violates the constitutional prohibitions against the passage of a bill of attainder or ex post facto law, or with its application, to a person who has been convicted of a felony but has not received a pardon.

(1) The sole issue presented by this appeal is whether paragraph 5 of section 5701 constitutes an encroachment by the legislature upon the exclusive constitutional power to pardon lodged in the chief magistrate and the decision of the issue rests primarily upon the legal effect of a pardon on the status of a person convicted of a felony.

In State v. Forkner, 94 Iowa 1, 18, 62 N. W. 772, 777, 28 L.R.A. 206, 212, the opinion states:

'No doubt a pardon, in its strict sense, contemplates a remission of guilt, both before and after a conviction. Ex parte Wells, 18 How 309; Ex parte Garland, 4 Wall 333; 4 Blackstone, Comm. 316.'

In Ex parte Garland, 4 Wall (71 U.S.) 333, 380, 18 L. Ed. 366, 371, the opinion states:

'If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attacking; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.'

It is now accepted doctrine that a full pardon absolves a party from all legal consequences of his crime. Osborn v. United States, 91 U. S. 474, 23 L. Ed. 388.

'Amnesty or pardon obliterates the offense, it is true, at least to such extent that for all legal purposes the one-time offender is to be relieved in the future from all its results; but it does not obliterate the acts themselves. It puts the offender in the same position as though what he had done never had been unlawful;' etc. United States v. Swift, 186 F. 1002, 1016.'

The case of People v. Biggs, 9 Cal. 2d 508, 71 P. 2d 214, holds a legislature has the power to impose a heavier penalty on account of a prior conviction although the offender has received a pardon. However, the court, in the course of its opinion, states it is universally established that a pardon exempts the individual from the punishment which the law inflicts for the crime which he has committed; and, generally speaking, it also removes any disqualifications or disabilities which would ordinarily have followed the conviction. We do not approve the statement in the case of Ex parte Garland, 71 U. S. 333, supra, that the effect of a full pardon is to make the offender 'a new man' that 'in the eyes of the law the offender is as innocent as if he had never committed the offense' because of the broad implications that may be attributed to them. The statements have been approved by some courts, but are strongly disapproved by many authorities. See People v. Biggs, supra; Beck v. Finegan, 3 N.Y.S. 1009; U.S. ex rel Palermo v. Smith, 17 F 2d 534, and generally on the effect of a pardon, 46 C. J. 1192, section 32, and cases cited.

(2) We do hold however, that a full pardon granted after conviction contemplates, as stated in State v. Forker, 94 Iowa 1, 62 N. W. 772, supra, a remission of guilt, 'both before and after conviction, forgives the offender and relieves him from the results of the offense, relieves not only from the punishment which the law inflicts for the crime but also exempts him from additional penalties and legal consequences in the form of disqualifications or disabilities based on his conviction. Undoubtedly the legislature may prescribe qualifications for office but the power must be exercised subject to the right of the pardoned man to be exempt from additional disabilities or disqualifications imposed because of the conviction. When, through the power of the pardon, the doors of the penitentiary opened to plaintiff, he took his place in society with all his civil rights restored entitled to start life anew unburdened of the onus of his conviction.

(3) The Constitution vests the pardoning power exclusively in the governor, and, because of the division of the powers of government by section 1, Article III of the Constitution, neither the judiciary nor the legislature may interfere with or encroach upon this constitutional power lodged in the chief executive of the state. Section 5701, subsection 2, provides that one of the qualifications of civil service employment is a good moral character. Subsecton 5 of said section disqualifies a person from employment under civil service solely because he has been convicted of a felony. The result is that it establishes a conclusive presumption that a person who has been convicted of a felony is not of good moral character and imposes legal consequences and disabilities because of the conviction for which plaintiff was exempted by the pardon, which, as stated, not only removed the statutory penalties prescribed for the crime of larceny, but also prevented other disabilities and penalties from attaching because of the fact of conviction.

To interpret subsection 5, section 5701, as applicable to one who has received a full pardon would render it unconstitutional as a clear encroachment by the legislature upon the pardoning power of the chief magistrate.

While the pardon did not, of itself, conclusively restore the character of the plaintiff, and although the acts done by him were not obliterated by the pardon they were purged of their criminality and plaintiff was entitled to an opportunity of proving to the commission that, although he committed the acts resulting in his conviction, he is now a man of good moral character. In this connection, we deem it appropriate to quote the language of Tennyson, presented to us by counsel for plaintiff. 'I hold it true * * * that men may rise on stepping-stones of their dead selves, to higher things.' "

We wish to call to your attention that this decision of the court was based on facts where a full pardon and restoration to all rights, privileges and immunities of citizenship, which were forfeited by reason of his conviction, was given to the defendant.

There are many forms of pardons. Many of them containing clauses to the effect that the pardon was not granted by reason of innocence or that it should not be construed as a remission of guilt or forgiveness of the offense, and other clauses specifying that said pardon should not operate as a bar to greater penalties for second or subsequent convictions. And because of the language used in many of the pardons granted by the President of the United States, or Governors of the various states, each pardon should be scrutinized to see whether or not the same was a *full pardon* without reservations.

We conclude therefore that if a person is granted a full pardon and restoration to all the rights, privileges and immunities of citizenship, which were forfeited by reason of his conviction of a felony or an indictable misdemeaner that such conviction, by itself, would not be sufficient cause for the State Permit Board to revoke the class "B" permit license to sell beer.

September 6, 1951

SCHOOLS AND SCHOOL DISTRICTS: **City limits changed—change in district boundaries.** Chapter 110, Acts 53rd General Assembly was not included in the repeal by section 3, chapter 94, Acts 54th General Assembly.

Miss Jessie M. Parker, Superintendent of Public Instruction; Attention Paul F. Johnston, Director Administration and Finance: We refer herein to your request for official opinion concerning the act of the 54th General Assembly, Senate File 203, (ch. 94) which became effective March 30, 1951. You state,

"Section 3 of Senate File 203 reads as follows:

'Sec. 3. Section four (4), chapter one hundred fifty (150), Acts of the fifty-second (52nd) general assembly is hereby repealed and the following enacted: "The county board of education shall prepare and approve tentative plans for reorganization of school districts within the county after consultation with the boards of the various districts in the county and the state department of public instruction. Within ten (10) days after the county board has approved their tentative plan they shall file such plan with the state department of public instruction. Any proposal for merger, consolidation or boundary change shall first be submitted to the county board of education for approval before being submitted to the affected districts at an election. Such proposal shall in no way interfere with the countywide plan for reorganization which has been approved by the county board.'

Section four, chapter 150, Acts of the Fifty-second General Assembly, reads as follows:

'From the effective date of this act until June 30, 1953, no new school districts may be formed, nor shall any school district boundary be changed either by consolidation, merger or otherwise under the laws of this state, except under the provisions of this chapter.'

Further Chapter 110, section one, Acts of the Fifty-third General Assembly, reads as follows:

'Section four (4) of chapter one hundred fifty, Acts of the Fifty-second General Assembly is hereby amended by adding thereto the following: 'The provisions of this section shall not apply when any city or town of the first or second class having therein an independent school district, extends its corporate limits so as to include the whole or a part of a contiguous school district. In such cases the boundaries of the districts may be changed by concurrent action of the boards of directors of the affected districts so that all or a part of the territory included within the boundaries of such city, so extended, shall become a part of the independent school district therein. The concurrent action of the boards to become effective shall have the approval of the county board of education and the state department of public instruction.'

The specific question which we would like to have answered is as follows:

When the Fifty-fourth General Assembly repealed section four (4) of Chapter 150, Acts of the Fifty-second General Assembly, did it also repeal Chapter 110, Acts of the Fifty-third General Assembly, which was an amendment to section four (4) of Chapter 150, Acts of the Fifty-second General Assembly, or is said Chapter 110 still in full force and effect?"

In reply to the foregoing we would advise you as follows:

Section 4 of Chapter 150, Acts of the 52nd General Assembly, quoted in your letter, is a suspension of the power to form any school districts or change school districts' boundaries under the laws of the State, except under the provisions of said Chapter 150, Acts of the 52nd General Assembly. Subsequent thereto the 53rd General Assembly, by Chapter 110, Section 1, amended the foregoing Section 4, Chapter 150, Acts of the 52nd General Assembly, by adding thereto the provisions set forth in your letter, which provisions bestowed upon school districts, within the terms thereof, a power to change boundaries in the manner therein provided, notwithstanding the suspension of such changes by the provisions of Section 4 of Chapter 150, Acts of the 52nd General Assembly. The situation then is this:

The 54th General Assembly, by Senate File 203, now Chapter 94 of the 54th General Assembly, specifically repealed Section 4, Chapter 150, Acts of the 52nd General Assembly, and enacted a substitute therefor. However, the amendment to the said Section 4 of Chapter 150, Acts of the 52nd General Assembly, was not repealed. In that situation the following principles of law control:

"511. Presumptions—In General. It will be presumed that the legislature, in enacting a statute, acted with full knowledge of existing statutes relating to the same subject; and where express terms of repeal are not used, the presumption is always against an intention to repeal an earlier statute, unless there is such inconsistency or repugnancy between the statutes as to preclude the presumption, or the later statute revises the whole subject matter of the former.

512. Express Repeal. Where a statute expressly repeals specific acts, there is a presumption that it was not intended to repeal others not specified. In such case there is an implied approval of the statutes not specified, as well as evidence of an intention to leave them undisturbed, and the doctrine of implied repeal does not apply. However, a repeal of all but one of a number of statutes of one purport has been held an implied repeal of the one, which was evidently omitted because overlooked.

Repeal of sections. The specification of certain sections in an act as repealed is equivalent to a declaration that remaining sections shall continue in force, unless they are absolutely inconsistent with the repealing act, or a general intent to effect a further repeal is otherwise manifested." (Sections 511 and 512, 59 C.J. 909, title 'Statutes')

In another aspect of this situation a like result is reached. It will be noted that Chapter 110, Acts of the 53rd General Assembly, which was not specifically repealed, amended Section 4 of Chapter 150, Acts

of the 52nd General Assembly, by making provision for a merger or consolidation by change of boundary where the limits of a city have been extended. This provision is a wholly, new, original and affirmative authorization disconnected in its entirety from the language and the purpose of Section 4, which is amended. To that situation 59 C. J., Para. 549, spoke as follows:

"Amended Act. Ordinarly a repeal of a statute which has been amended operates on and carries with it, the amendment, at least where the amendment merely enlarged and extended the provisions, and did not affect the identity, of the original statute; but it is otherwise where the repealing statute expressly saves amendments, or where a so-called amendatory act is in reality affirmative and original in its character. Also, where a section of a statute is amended, and afterward such section, 'as amended,' is repealed, the original section, and not the amendment merely, is repealed. It has been both affirmed and denied that an amendment and reenactment which omits a former amendment is a repeal thereof."

The case of State v. Young, 9 S.E. 355, 358, states the same rule of law where the situation herein exists. There it is said:

"But it is earnestly insisted that, if there was no implied repeal here, there was an indirect repeal, based on the doctrine that the repeal of an act necessarily carries with it all 'amendments' made to said act, and that therefore the act of 1807, being, as stated in its title, an 'amendment' of the act of 1768, fell with the latter act when it was repealed. We know of no inexorable rule of law which peremptorily requires that every act which is entitled as 'an amendment' to a former act must therefore be carried back and 'ingrafted' upon that act, so as to become part and parcel of it, for all purposes. It is well settled that the title is no part of the act. 'There is nothing in a name.' It seems to have been the practice formerly to incumber the titles of acts by repeating fully the formal titles of former acts upon the same subject. The question must always be one of intention, to be reached by considering the character and objects of the acts. As stated by Mr. Endlish, (section 294) 'But even where the amendment merges portions of the original act in the new provisions, so that, from the time of the amendment, the whole force of the enactment, as to transactions subsequent to it, rests upon it, the old act retaining no vitality distinct from the new one, it may be referred to as controling past transactions, and even an amendment of an act 'so as to read' in a prescribed way has no retroactive force, but is to be understood as enacted when the amendment takes effect.' * * * We think that the act of 1807, although entitled as 'an amendment to an amendment', was in its provisions affirmative and original. It was upon an important subject, which the legislature, in accordance with its duty, always claimed the right to control. It has stood upon the statute book as the existing law, unchallenged for nearly a century, and we do not see anything in the law which requires the court to declare that it has been repealed, either intentionally or by implication, or indirectly by the operation of a fixed Procrustean rule, as to the effect of amendments, leaving the whole subject absolutely 'derelect,' as to any legislative regulation or control. We think the act is of force, and that makes it unnecessary to consider the other exceptions."

We are of the opinion, therefore, that in the situation presented, Chapter 110, Section 1, Acts of the 53rd General Assembly, survives the repeal of Section 4, Chapter 150, Acts of the 52nd General Assembly, and such Chapter 110 is still in full force and effect. As a result

therefore, of the foregoing, and the holding of the survival of Section 1, Chapter 110, 53d General Assembly, the said statutes as codified appear as follows:

"The county board of education shall prepare and approve tentative plans for reorganization of school districts within the county after consultation with the boards of the various districts in the county and the state department of public instruction. Within ten (10) days after the county board has approved their tentative plan they shall file such plan with the state department of public instruction. Any proposal for merger, consolidation or boundary change shall first be submitted to the county board of education for approval before being submitted to the affected districts at an election. Such proposal shall in no way interfere with the countywide plan for reorganization which has been approved by the county board."

"The provisions of this section shall not apply when any city or town of the first or second class having therein an independent school district, extends its corporate limits so as to include the whole or a part of a contiguous school district. In such cases the boundaries of the districts may be changed by concurrent action of the boards of directors of the affected districts so that all or a part of the territory included within the boundaries of such city, so extended, shall become a part of the independent school district therein. The concurrent action of the boards to become effective shall have the approval of the county board of education and the state department of public instruction."

October 2, 1951

COUNTIES: Official newspapers—population change of after selection of number. In the selection of official newspapers for a county the official population of the county at the time of selection, to-wit: January first, fixes the power of the board in determining the number for the ensuing year. A later change in official population gives no power in the board to alter such determination during that year.

Mr. Charles D. Riter, County Attorney, Rock Rapids, Iowa: We have yours in which you have submitted the following:

"By the 1940 Census, Lyon County had a population in excess of 15,000. Under the 1950 census figures recently certified by the Secretary of State, Lyon County has a population of less than 15,000. At the January, 1951, session of the Board of Supervisors of Lyon County, three newspapers were selected to publish the official proceedings for the ensuing year in compliance with Sections 349.1 and 349.3 of the Code of Iowa for 1950.

Would you please advise whether the three newspapers as above selected may continue publication, and be compensated for the year 1951, or if the Board of Supervisors must immediately make a new selection of newspapers to be effective from the date of the certification of the 1950 census until January 1, 1952, such selection being limited to two newspapers."

In reply thereto we advise as follows:

Section 349.1 bestows on board of supervisors the power and duty of selecting newspapers in which official proceedings shall be published in the following terms:

"The board of supervisors shall, at the January session each year, select the newspapers in which the official proceedings shall be published for the ensuing year."

The number of such newspapers is determined according to the formula set up in Section 349.3 in terms as follows:

"The number of such newspapers to be selected shall be as follows:

1. In counties having a population of less than fifteen thousand, two such newspapers, or one, if there be but one published therein.

2. In counties having a population of more than fifty thousand, divided into two divisions for court purposes, three such newspapers in each such division, not more than two of which shall be published in the same city or town.

3. In counties having a population of less than fifty thousand, divided into two divisions for court purposes, two such newspapers in each such division.

4. In all other counties, three such newspapers, not more than two of which shall be published in the same city or town."

It now appears that at the January session in 1951 at which time the three newspapers were selected to publish official proceedings the population of Lyon County exceeded 15,000. The 1950 census of Lyon County certified by the Secretary of State fixes the population of Lyon County at less than 15,000, and therefore if selection were to be made at this time, the Board is empowered to select only two newspapers instead of three for the publication of official proceedings. Accordingly, bearing in mind the foregoing two sections, the population of a county at the time of selection, to-wit: January of each year, fixes the power of the Board in determining the number of such papers. The designations, when made, are made for the year (Sec. 349.1), and there is neither express, nor implied intention in the statute to terminate such designation prior to the end of the year of appointment.

We are of the opinion, therefore, that in designating the number of official newspapers at the January session of the Board of Supervisors, accordng to the population limitations fixed by Section 349.3, the power of the Board to change the number of such newspapers by reason of a change in the population of the county is exhausted.

October 11, 1951

COUNTIES: Township officers salaries—change in population certified. Changes in the populations of townships as affecting salaries of justices of the peace and constables are effective on the day that the Secretary of State publishes the official census of counties, cities, and towns as provided by law.

Mr. Clyde E. Herring, County Attorney, Des Moines, Iowa; Attention Allan R. Shepherd, Assistant County Attorney: This will acknowledge receipt of yours of the 5th ult., supplemented by a letter of the 6th. Your letter of the 5th ult. sets out the situation as follows:

"Two Justices of the Peace and two Constables in this County have submitted claims for increased salaries under the provisions of Chapter 205 of the Laws of the 54th General Assembly, amending Section 601.131 of the 1950 Code to increase such salaries for townships having a popu-

lation of more than ten thousand people. The claim is made that the township in question showed an increased population of more than ten thousand under the 1950 census. We expect similar claims from other townships, based on increased population as shown by the 1950 census.

Sections 26.2 and 26.3 of the 1950 Code direct the Secretary of State to procure, from the Federal Authorities, a report of the census of the State by counties, cities and towns and to publish such report. Two opinions of the Attorney General, appearing on pages 808 and 809 of the opinions for 1919 and 1920 and pages 83 and 84 of the opinions for 1925 and 1926, hold that changes of pay of county officers, based on changes of population, take effect from and after such publication. Broyles versus Mahaska County, 213 Iowa 345, holds as to a township officer, that the population of the township, which appeared to be identical with a city, was fixed as of the date the Secretary of State certified to a report of the 1925 Iowa census. This opinion is based, in part, on some statutes which were repealed by the 45th General Assembly.

We cannot find any provision in the Code as to when changes in the population of a township become effective. We understand that the Secretary of State procured a report from the Federal Authorities as to the 1950 census as to counties, cities, and towns and published this report pursuant to Code Section 26.3, July 23, 1951. This report did not, however, contain any information as to the population of townships. Today, we were advised further, by an obliging lady in the Secretary of State's office, that that office, on August 27, 1951, received a pamphlet from the Federal Bureau of the census, released August 12, 1951, showing the population of the townships.

Will you kindly review this information and any other information you may have at your disposal and advise us when our County Auditor may start issuing warrants for increased salary to township officers, based on census figures shown in the 1950 census?"

In reply to the foregoing we advise as follows:

The increases for which justices of the peace and constables are now making claim are authorized by Chapter 205, Acts of the 54th General Assembly. This chapter is an amendment to section 601.131, Code 1950. That section as amended by the foregoing Chapter 205 is now codified as follows:

"601.131 Accounting for fees—compensation.

1. Justices of the peace and constables in townships having a population of ten thousand or more 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 ten thousand shall pay into the county treasury all criminal fees collected in each year in excess of the following sums:

(a) In townships having a population of four thousand and under ten thousand, justices one thousand two hundred dollars plus an amount equal to fifty per cent of fees collected in excess of one thousand two hundred dollars; constables eight hundred dollars.

(b) In townships having a population of under four thousand, justices one thousand two hundred dollars plus an amount equal to fifty per cent of fees collected in excess of one thousand two hundred dollars; constables six hundred twenty-five dollars.

(c) In addition they shall pay into the county treasury all criminal fees collected in proceedings in townships other than that in which they were elected.

3. In townships having a population of ten thousand or more, justices of the peace and constables shall receive in full compensation for their services performed in criminal cases during the year, the following sums which shall be paid monthly out of the county treasury;

(a) In townships having a population of forty thousand or more, justices thirty-three hundred seventy-five dollars; constables twenty-eight hundred twelve dollars and fifty cents.

(b) In townships having a population of twenty-eight thousand and under forty thousand, justices twenty-eight hundred twelve dollars and fifty cents; constables twenty-two hundred fifty dollars.

(c) In townships having a population of twenty thousand and under twenty-eight thousand, justices twenty-two hundred fifty dollars, constables eighteen hundred seventy-five dollars.

(d) In townships having a population of ten thousand and under twenty thousand, justices eighteen hundred seventy-five dollars; constables fifteen hundred dollars.

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

This section, in its several salary provisions, fixes the salaries of justices and constables on the basis of *population.* The legislature has provided a method of determining the population of townships by the provisions of section 4.1, subsection 26, in terms as follows:

"4.1 Rules. In the construction of the statutes, the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the general assembly, or repugnant to the context of the statute; * * *

26. Population. The word 'population' where used in this code or any statute hereafter passed, shall be taken to be that as shown by the last preceding national census, unless otherwise specially provided."

Correlating the word "population" as it appears in section 601.131, and the above numbered section 4.1, subsection 26, defining the word "population", leads to the conclusion that the salaries fixed for justices of the peace and constables under the provisions of section 601.131, as amended, are fixed by the census of townships as shown in the 1950 national census. The official 1950 census of the townships of Iowa is in the possession of the Secretary of State of Iowa. Certification to the several counties of the 1950 population of the several townships of the state may be made by the Secretary of State as shown by such 1950 census without charge. Salary adjustments authorized by the 54th General Assembly shall be effective from the 23rd of July, 1951, such being the date when the Secretary of State certified and published the official census of counties, cities and towns, as certified to him by the

proper federal agency. Chapter 26 of the 1950 Code, providing for certified, or certified and published official census is not applicable to the situation. The difference between Section 4.1, subsection 26 and Section 26.6, Code 1950, and their respective applicability, is explained in State v. Seaton, 191 Iowa 81, 83, where in referring to those sections then designated as subsection 26 of Section 48, Code 1897, and Section 177-c of the 1913 Supplement to the Code, it is said:

"Section 177 of the Code appears in the chapter relating to the census. Therefore, in the construction of statutes, the word 'population' must be taken to refer to the number of inhabitants as shown by the last preceding state or national census, unless it is otherwise specifically provided therein. Subdivision 26 of Section 48 of the Code and Section 177-c of the Supplement do not relate to the same matter. The former, as stated, defines the meaning of the word 'population' as it is to be applied in the construction of statutes; whereas the portion of Section 177-c quoted provides that the population of any city, county, or town shall be determined by the last certified, or certified and published, official census, whether the same be state or national. One relates to the construction of statutes, and the other creates a rule of evidence. They are not in any sense in conflict, and subdivision 26, Section 48, was not repealed by implication by either Chapter 8, Acts of the Thirtieth General Assembly, or Chapter 3, acts of the Thirty-fourth General Assembly."

October 11, 1951

HIGHWAYS: Farm-to-market road right of way—payment from secondary road funds—reimbursement. Where a county has advanced money out of the secondary road fund to expedite acquisition of right of way for a farm-to-market road it may be reimbursed from the farm-to-market road funds.

Mr. K. L. Hart, Auditor, Iowa State Highway Commission: You have invited my attention to Sec. 310.22, Code of Iowa, 1950, (formerly Sec. 310.22, Code of Iowa 1946, as amended by Sec. 8, Chap. 127, Acts of the 53rd G. A.) and to the Attorney General's opinion of May 3, 1939, found in Opinions of the Attorney General 1940 at page 208, as well as unofficial memorandum opinions dated May 18, 1948, Jan. 25, 1949, and Jan. 16, 1951, respectively. You are concerned as to whether the Highway Commission may reimburse a county out of farm-to-market funds for the purchase of right of way where the county has acquired the land and in order to avoid delay and take immediate possession of the right of way has advanced the money out of the secondary road fund.

Whatever may have been the position as expressed in the opinions heretofore referred to, it should be observed that both the 53rd and the 54th General Assemblies have made substantial changes in the applicable statutory law.

Sec. 310.22 as it appeared in the Code of 1946 read as follows:

"Right of way for farm-to-market road projects under this chapter may be acquired by the county. However, the county board may request the state highway commission to acquire such right of way and in such event such right of way shall be paid for out of the county's allotment of the farm-to-market road fund."

Sec. 8, Chap. 127, Acts of the 53rd G.A., changed the word "such" to "either" and the word "shall" to "may" in the last sentence of the section, so that it now reads:

"Right of way for farm-to-market road projects under this chapter may be acquired by the county. However, the county board may request the state highway commission to acquire such right of way and in *either* event such right of way *may* be paid for out of the county's allotment of the farm-to-market road fund."

It is probable that this change in language was made for the purpose of avoiding the construction previously placed on the statute by the Attorney General's office in the opinion referred to above.

Without repealing the section of the statute last referred to Sec. 14, Chap. 103, Acts of the 54th G.A., provided with reference to the purchase or condemnation of the right of way the following procedure:

"Proceedings for the condemnation of land for any highway shall be under the provisions of chapter four hundred seventy-one (471) and chapter four hundred seventy-two (472), Code 1950, or as said chapters may be amended.

Provided that, in the condemnation of right of way for secondary roads, the board of supervisors may proceed as provided in sections three hundred six point fifty-one (306.51) to three hundred six point fifty-nine (306.59), both inclusive, and three hundred six point sixty-one (306.61), Code 1950."

A farm-to-market road is, of course, only a specialized type of secondary road and the county board of supervisors therefore still has the right if it elects to proceed by the somewhat obsolete method of appraisal provided by the sections of Chap. 306, above referred to, or under the power of eminent domain established and prescribed by Chaps. 471 and 472 Code of Iowa 1950.

There seems to be no question that regardless of the method of acquisition payment could be made in the first instance out of the county's allotment of the farm-to-market road fund. The only remaining question is whether if the initial payment has been made from the secondary road fund, as distinguished from the farm-to-market road fund proper, the county can subsequently be reimbursed for such a payment. It is the opinion of this office that such reimbursement can properly be made since the expenditure could have been incurred out of this fund in the first instance.

By far the better procedure would be to present the claim in the first instance for payment out of farm-to-market funds, but if the necessity for prompt action makes it desirable to make the payment in the first instance out of the county's secondary road fund the claim for reimbursement should follow promptly. It should not be permitted to accumulate over a period of years and presented for payment at a time when the balance in the allotment of farm-to-market funds to the particular county may have materially altered. Delay imposes additional and unnecessary administrative burdens on the Highway Commission.

October 18, 1951

HIGHWAYS: County trunk roads as through highways. The county board of supervisors has no power to lift the statutory requirement of a stop before entering a county trunk road. It may, however, require that traffic on such road be required to stop at any particular intersection with a local county road, i. e. a four-way stop may be established.

David B. Evans, County Attorney, North English, Iowa: In your letter of October 12th you say:

"We have a local problem which has arisen and to which I would like an answer. An Iowa County trunk road runs east and west. Crossing this trunk road running north and south is an Iowa County local road which, however, is a rather important graveled local road. There are stop signs so placed as to direct traffic to stop before it enters the county local road from either side of that local road. That is, at this point, traffic upon the local road is given precedence over the traffic on the trunk road, and trunk road traffic, according to the stop signs, is required to stop before crossing the local road. There are no stop signs placed on the local road indicating that local road traffic should stop before entering the trunk road.

A short time ago an automobile proceeding toward the intersection from the east failed to stop at the stop sign above described and entered the intersection where it ran into a car which had been travelling on the north, south local road. Now this is our question: Sec. 321.351 designates trunk roads as through highways. Sec. 321.235 provides that the provisions of this chapter shall be applicable and uniform throughout this state. However, Sec. 321.236 under the heading "powers of local authorities" provides that local authorities may designate any highway as a through highway and require that all vehicles stop before entering or crossing the same. In our present case, I can find no action by the supervisors designating the county local road above referred as a through highway. Nor can I find any records of any action by the county Board of Supervisors directing that a stop sign be erected in the spots above referred to. However, the stop signs were in the spots referred to and had been for many years. In your opinion was this particular stop sign legal, or illegal? Further, was the failure to stop at this stop sign such an act as to justify our filing charges of stop sign violation against the driver of the car which drove through the stop sign.

This particular case is quite important. As a matter of fact, a lady was killed in the accident above referred to, another lady seriously injured, and a child permanently injured, seriously. Furthermore, there are many other instances in our county of stop signs being erected against county trunk road traffic where the trunk road intersects with certain well travelled county roads. If such stop signs are, in the circumstances above described, illegal, I should like to know it and recommend to the Board of Supervisors that they take appropriate action."

In so far as your letter inquires about pending or threatened litigation it may not be answered in an official opinion. The response to your letter will be limited to an attempt to answer those questions which bear on the future action of the Board of Supervisors.

Sec. 321.351 reads as follows:

"County trunk roads (now farm-to-market roads) outside of cities and towns are hereby designated as through highways."

The following section of the statute requires the Board of Supervisors to erect suitable warning signs. In the construction of Sec. 321.351 the Supreme Court has held that a county road which is a county trunk highway is a "through highway" by legislative mandate without further action on the part of the Highway Commission or the Board of Supervisors, and although the Highway Commission and the Board of Supervisors may place stop signs, traffic control devices, or officers at any intersection with a through highway the absence of such devices does not excuse a motorist from stopping before entering upon a county trunk highway. Davis vs. Hoskinson, 228 Ia. 193, 290 N.W. 497.

Sec. 321.236 prohibits local authorities from enactments in conflict with, contrary to, or inconsistent with the provisions of Chap. 321 except in certain enumerated circumstances considered to be within the reasonable exercise of police power, among which is:

"Designating any highway as a through highway and requiring that all vehicles stop before entering or crossing the same or designating any intersection as a stop intersection and requiring all vehicles to stop at one or more entrances to such intersection."

This, however, is a power to enlarge the stop requirement rather than a power to limit it.

It is the opinion of this office that any attempt by local authorities to abrogate by ordinance or rule a specific mandate of the Legislature such as that embodied in Sec. 321.351 and 352 is futile. In other words, by appropriate action the Board of Supervisors might have created a four-way stop at the intersection in question but could not reverse the procedure established by the Legislature, lift the requirement to stop on the county trunk road and impose a requirement to stop before entering the local road (now local secondary road). This opinion is confirmed by an examination of Sec. 321.347, where, with reference to primary highways and primary highway extensions in cities and towns the city council with the approval of the State Highway Commission is specifically enabled to make such a change. The conferring of this specific power on city councils excludes the idea that similar power is conferred on any other local authority.

October 18, 1951

MINORS: Change of name of unmarried mother. An unmarried female, without distinction of whether she was never married or is unmarried at the time of application under section 674.10, may change her name, however, the change of her name will not change the surname of her minor child.

Mr. Clark O. Filseth, County Attorney, Davenport, Iowa: We have yours of the 11th instant with enclosure of copy of a letter received by you from Elmer Jens, Clerk of the District Court in which he states for opinion the following:

"The question has arisen in this office as to whether an unmarried female (divorced) can file a Statement for Change of Name under Section

674.1 of the Code of Iowa, 1950 in which she states that she has a minor child and wishes his surname changed to the new surname she is taking for herself.

Section 674.10 of the Code of Iowa, 1950, provides that 'the surname of such new name shall become the legal surname of the wife and minor children of such person.' We are uncertain as to whether or not such change of surname applies to the minor child or children of an unmarried divorced woman, and request that you obtain for us a ruling from the Attorney General on said question."

In reply to the foregoing we advise you that this chapter, in substantially the form in which it now exists, was enacted by the 30th General Assembly, Chapter 127. The same act repealed the previous statutory provisions for change of name. It thereby changed the procedure from change by the court to the procedure here set forth in Chapter 674. Section 674.1 fixes the class who may avail themselves of this method in the following terms:

"Any person, under no civil disabilities, who has attained his or her majority and is unmarried, if a female, desiring to change his or her name, may do so as provided in this chapter."

Who is an unmarried female within the foregoing section has not been determined by our court or by previous opinion. However, other jurisdictions have defined the word. According to Cheek v. Walker, 50 S.E. 863, 864, it is said:

"Primarily the word 'unmarried' means never having been married." and in re Marshall's Estate, 252 N.Y.S. 683, 686, it is stated:

" 'Unmarried' is a word of flexible meaning, and may be interpreted either as 'never having been married,' or 'not having a husband or wife at the time.' "

and in Peters v. Balke, 48 N.E. 1012, 1014, 170 Ill. 304; Muller v. Balke, 47 N.E. 355, 357, 166 Ill. 150, it is stated:

"The word 'unmarried' originally and ordinarily means never having been married. But the term is a word of flexible meaning, and slight circumstances will be sufficient to give the word its other meaning of not having a husband or wife at the time in question."

and in Hall v. Robertson, 21 Eng. Law & Eq. 504; Maberly v. Strode, 3 Ves. 450, 454, it is stated:

"The ordinary meaning of the word 'unmarried' is never having been married; so that a legacy to the unmarried daughters of the testator cannot be claimed by a daughter who was a widow at the death of the testator."

Bearing in mind the primary meaning of an unmarried female as set forth by the foregoing cases, we look to the chapter to determine whether the flexibility which attached to the word "unmarried" is applicable in the situation here presented. In so far as the change of name of a minor is concerned, the only provision authorizing or permitting such a change, is that contained in Section 674.10, as quoted in your letter. Clearly, however, this change of name of a minor takes place when the husband and father changes his name. This automatically

operates to change the legal surname of his wife and the minor children. No other provision is made for change of name of a minor, and this statutory situation bears an inference that the name of no other minor is authorized to be changed under the provisions of Chapter 674.

We are of the opinion, therefore, that while the statute does not bar an unmarried female, without distinction of whether she was never married or is unmarried at the time the application is made, from changing her name, the change of her name will not change the surname of her minor child.

November 9, 1951

PROBATE: Fees for filing and docketing transcript from another county. The amount of fees which should be charged by the clerk of the district court in probate proceedings from another county is determined by the nature of the services required. Controlling statute correlated and discussed.

Mr. L. S. Hendricks, County Attorney, Rockwell City, Iowa: This will acknowledge receipt of yours of the 26th ult. in which you have submitted the following:

"The Clerk of the District Court of Calhoun County has asked me to request your opinion on the following: What fee should be charged by a Clerk of a District Court for filing and docketing a transcript of probate proceedings had in another county of the State of Iowa?"

In reply thereto we would advise you that the amount of fee to be charged by the Clerk of the District Court in the foregoing situation is determined by the nature of the services required to be performed by the Clerk. In that aspect, in so far as testate estates are concerned, the power and duty of the Clerk of the District Court respecting the transcripting of probate proceedings to another county is contained in Section 633.25, Code 1950, in terms as follows:

"Whenever it shall appear that the testator died seized of real estate located in a county of this state other than that in which probate is granted, a complete transcript, properly authenticated, of the record entry of the order of court admitting the will to probate, and, if a copy of such will is not contained therein, a certified copy of such will shall be attached thereto and the same shall be filed by the clerk in the office of the clerk of the district court in such other county, who shall cause the same to be entered in the probate docket, and said transcript shall be recorded in full in the book kept for the recording of wills in such county. When so recorded such record may be read in evidence in all courts without further proof."

And, in so far as this same power and duty concerns intestate estates, Section 635.38 provides as follows:

"When the subject of the sale, conveyance, or mortgage is located in a county other than that in which administration is granted, a complete transcript of the record of all proceedings relating thereto shall be filed by the administrator in the office of the clerk of the district court in such county, and he shall cause the same to be copied at length in the probate records of such county."

While it appears from the foregoing what portions of proceedings the transcript shall include, the duty of the clerk of the foreign county is the same—i.e., first, to docket such transcript, and second, to record the said transcript in the probate records of the county, and in so far as the transcript of a testate estate is concerned, the recording thereof shall be in the book kept for recording of wills. The fees to be charged by the clerk for performing the services prescribed by the foregoing sections in making of record such proceedings, are not specifically prescribed by the statute. In so far as the recording of the transcript in a testate estate is concerned, Section 633.26, Code 1950, is as follows:

"The cost of such transcript and of the recording thereof shall be taxed against the estate of the decedent unless administration thereof is closed, in which event it shall be paid by the owner of the real estate involved."

However, the general power and duty of the clerk to charge and collect fees is applicable to the services here required to be performed by him, to-wit: docketing the estate and making of the record. For such services, Section 606.15, as amended, provides for the docketing for all counties other than those having a population of 160,000 or over, a fee of three dollars; and for making a complete record, the fee to be charged, according to Subsection 21 of Section 606.15, as amended, is twenty cents for each one hundred words.

December 6, 1951

SCHOOLS AND SCHOOL DISTRICTS: **Consolidation election—"village" defined.** The term "village" as used in section 276.13 relating to school elections for consolidation of districts, contemplates first, a platted area, second, an assemblage of houses in greater density than ordinary rural territory, and third, stores, churches and other similar characteristics of urban territory. A name therefor is not a prerequisite but is usual. The population requirement of the statute can only be met by a special school census.

Miss Jessie M. Parker, Superintendent of Public Instruction; Attention Paul F. Johnston, Director, Administration and Finance: This will acknowledge receipt of yours of the 19th of November in which you have submitted the following:

"Proposed consolidation of certain independent districts in Polk County makes desirable an official interpretation of Section 276.13 of the Code which requires separate ballot boxes when a school corporation containing a 'village' is to be included in the new consolidated district.

We have examined the following Supreme Court cases:
Haines v. Board, 184 Iowa 401
Consolidated District v. Martin, 170 Iowa 262

The proposed consolidated district would take in several independent districts occupied by unincorporated 'fringe' areas just beyond the corporate limits of the city of Des Moines and beyond the Des Moines Independent School District boundary.

It becomes necessary to determine whether such unincorporated fringe settlements are 'villages' within the meaning of section 279.13. The aforesaid cases seem to say that the following tests determine whether a 'village' exists.

1. Platted territory.

2. Residences in greater density within the platted area than is usual in strictly rural territory.

3. Stores, churches and other similar characteristics of urban territory.

4. A name by which the settlement is commonly referred to.

Must all the above tests be met to constitute a village? Are there additional tests? How is the population of a village to be ascertained?"

In reply thereto we would advise you as follows:

Section 276.13, referred to in your letter, provides as follows:

"When it is proposed to include in such district a school corporation containing a city, town, or village with a population of two hundred or more inhabitants, the voters residing upon the territory outside the limits of such school corporation shall vote separately upon the proposition to create such new corporation."

This section, in its present form, was enacted by the 37th General Assembly, Chapter 432, with the exception that a village to be included was one having a population of 100 inhabitants. This number was increased by Chapter 149 of the 38th General Assembly to the present village qualification of 200. Prior to the enactment of the statute, as it now exists, the section existed as Section 2794-a, Code Supplement of 1913, which provided as follows:

"When it is proposed to include in such district a city, town or village, the voters residing upon the territory outside the incorporated limits of such city, town or village shall vote separately upon the proposition for the creating of such new district. The judges of said election shall provide separate ballot boxes in which shall be deposited the votes cast by the voters from their respective territory, and if a majority of the votes cast by the electors residing either within or without the limits of such city, town or village, is against the proposition to form a consolidated independent corporation, then the proposed corporation shall not be formed. If a majority of the votes so cast in each territory shall be in favor of such independent organization, the organization of the proposed consolidated independent school corporation shall be completed by the election of a board of directors for said school corporation."

It was under the terms of the foregoing section that the description of what constituted a village was made. However, under either statute this term has a like legal meaning. There is no express statutory definition of what constitutes a village. Section 363.1, Subsection 4, Code 1950, appears to be the only classification of what may constitute a village. This section provides as follows:

"The municipal corporations referred to in this title shall be divided into cities of the first class, cities of second class, and towns. * * *

4. Villages. Town sites platted and unincorporated shall be known as villages."

The foregoing provision was repealed by the 54th General Assembly, Chapter 145, Section 43.

But in the same Chapter, Section 73, it was re-enacted in the following terms:

"Chapter three hundred fifty-four (354), Code 1950, is amended by adding the following new section: 'Town sites platted and unincorporated shall be known as villages.'"

With respect to the definition of a village the case of Haines v. Board, 184 Iowa, 401, stated as follows:

"The only definition of village to be found in the Code appears in Code Section 638, where it is said that 'town sites platted and unincorporated shall be known as villages.' This does not mean that, though platted, a locality may be regarded as a village in the absence of houses or residences. Consolidated Ind. School Dist. v. Martin, 170 Iowa 262. A village ordinarily is defined as a small assemblage of houses, whether situated upon a platted district or not. State v. Booth, 169 Iowa 143. Usually, its character is urban, or semi-urban, and the density of population is greater than found in rural districts. The vocation of the inhabitants is not important or controlling. The definitions vary somewhat, as appears from an examination of the decisions, but all seem to include the elements mentioned. People v. McCune, 14 Utah 152 (35 L.R.A. 396, with valuable note); Herbert v. Lavalle, 27 Ill. 448; Tilford v. Wallace, 3 Watts (Pa.) 141; State v. Lammers, 113 Wis. 398; Mikael v. Equitable Sec. Co., 32 Tex. Civ. App. 182; Bouchard v. Bourassa, 57 Mich. 8 (23 N.W. 452); State ex rel. Young v. Village of Gilbert, 107 Minn. 364 (120 N.W. 528); 40 Cyc. 207.

All accomplished by Section 638 of the Code is to restrict the term 'village' to platted ground; but how this ground shall be platted has not been prescribed. The lots need not be a uniform size or shape, nor is it essential that the name of the village be of record on the plat. A village ordinarily may be assumed to be a name by which to identify the locality; for the statute specifies with particularity the procedure to effect a change thereof. Section 460 et seq., Code.

It appears that what is claimed to constitute a village known as Wright is located at the intersection of the Chicago & Northwestern Railroad Company's railway and that of the Minneapolis & St. Louis Railway Company, on each of which roads is a station. In the place are two stores, an elevator, a hotel, a restaurant, a lumber yard, a cement factory, two stockyards, two churches, and 33 residences,—all situated on platted ground,—and there is a population of 138. We entertain no doubt that this constituted a village, such as contemplated by Section 279-a, Code Supplement, 1913; and there is no escape from the conclusion that the electors thereof should have been provided with a separate ballot box, and that the electors residing in the territory proposed outside of the village should have been provided with another. Only one ballot box was provided, and the ballots cast throughout the territory of the proposed district were mingled; and no finding was made by the judges of election as to whether a majority of the ballots cast within the village and outside of it was in favor of or opposed to the establishment of the proposed Consolidated Independent District. The evidence that a majority of the votes cast by electors residing outside of the village of Wright was opposed to the formation of such a district was undisputed. The omission to provide separate ballot boxes, then, was prejudicial and in violation of the statute, and all subsequent proceedings of no validity. Had such ballot boxes been supplied, the proposition to organize the consolidated district must have been defeated."

And in the case of State v. Village of St. Anthony, 26 N.W. 2d, 193, it is defined as follows:

"No better definition of a 'village' or the fundamental requirements of one under the statute can be found than that in State ex rel. Childs

v. Minnetonka Village, 57 Minn. 526, 533, 59 N.W. 972, 974, 25 L.R.A. 755, where Mr. Justice Mitchell, speaking for the court said: 'A village means an assemblage of houses, less than a town or city, but nevertheless urban or semiurban in its character; * * *' "

It will be noted therefore that whether or not a place constitutes a village, is not the subject of exact definition, and in each instance where the question arises as to whether there is a village or not, would be determined by the facts in said matter, taking into consideration the principles cited herein as a basis for determining whether there was a village or not. It may be fairly said from the foregoing discussion that to constitute a place or village, first, it must be platted territory, second, containing an assemblage of houses less than a town, but having the characteristics, urban or semiurban, and third, while a place meeting the foregoing tests constitutes a village, a name therefor is not a prerequisite, but ordinarily a name is attached to a village. This is presumed from the detailed statutory method contained in Chapter 354, Code 1950, for changing the names of villages. Section 276.15 places upon the judges of an election the obligation to "provide separate ballot boxes, in which shall be deposited the votes cast by the qualified electors from their respective territories." The respective territories in which the ballot boxes will be provided shall be, according to Section 276.13, a school corporation that may contain a city, town or village of two hundred inhabitants, and the territory outside the limits of such school corporation. In the view that the limits of a school corporation and the limits of a school district are one and the same, Section 274.1, Code 1950, where the contemplated district will include not only a school corporation containing a city, town or village of two hundred inhabitants, but school corporations or districts barren of such communities, the obligation to provide separate ballot boxes for the qualified electors from the respective territories would include placing separate ballot boxes in each of the school corporations having a city, town or village located therein, and one ballot box for the remainder of the territories in the proposed district.

In answer to your question as to how the population of a village is to be ascertained, we would advise you that there is no statutory method for ascertaining such population. The only method that will accomplish the requirement is a census by the school board or by its authorization of the number of inhabitants in the village.

December 11, 1951

AGRICULTURE: **Movement of farm machinery on highway in tandem prohibited.** Section 321.453 providing for exceptions from the law of the road in the case of implements of husbandry, as to size, relates to a privilege of necessity and does not contemplate a combination in tandem of farm implements which may be moved severally. Such a combination would be a special privilege and be unlawful.

Mr. Isadore Meyer, County Attorney, Decorah, Iowa: In your letter dated November 28, 1951, an opinion is requested as follows:

"One of the State Highway Patrolmen has served a summons upon a resident of this county charging him under Section 321.457 (3) of the 1950 Code of Iowa. The defendant was accused of operating farm equipment on a public highway overlength. The defendant was pulling two wagons with a tractor in front of which was mounted a corn picker. The over-all length was about 49 feet.

Since these are instruments of husbandry temporarily moving upon the public highway, does Section 321.453 govern? Your attention is called to the fact that in Section 321.457 fire fighting equipment is excepted. It is also excepted in Section 321.453. My thought is that if Section 321.453 governed, and implements of husbandry are not mentioned in Section 321.457, that the legislature did not intend this section to apply to implements of husbandry. In addition, does size also refer to length? If it does, then it would seem to me that Section 321.453 would apply to the facts of this case.

Your attention is called to opinions, Attorney General 1940, Page 114, Attorney General 1940, Page 304 and Page 309, and Wood Brothers Thresher Company vs. Eicher, 1942, 231 Iowa 550, 1 NW 2d 655.

It is my understanding that the State Highway Patrol have given quite a number of summonses to farmers where the over-all length is greater than 45 feet. If they are excepted under provisions of Section 321.453, it is a matter that should be clarified."

The Code sections referred to in your letter state:

"321.453. The provisions of this chapter governing size, weight, and load shall not apply to fire apparatus, road machinery, or to implements of husbandry temporarily moved upon a highway, or to a vehicle operated under the terms of a special permit issued as provided in sections 321.467 to 321.470, inclusive."

"321.457. The maximum length of any motor vehicle or combination of vehicles, except fire fighting apparatus, shall be as follows:

1. No single truck, unladen or with load, shall have an over-all length, inclusive of front and rear bumpers, in excess of thirty-five feet.

2. No single bus, unladen or with load, shall have an over-all length, inclusive of front and rear bumpers, in excess of forty feet, provided that a bus in excess of thirty-five feet in over-all length shall not have less than three axles.

3. No combination of truck tractor and semitrailer, nor any other combination of vehicles coupled together, unladen or with load, shall have an over-all length, inclusive of front and rear bumpers, in excess of forty-five feet."

Your inquiry may be restated as follows: When a number of farm implements are attached in tandem by hitches are they exempt from the prohibitions set forth in section 321.457, Code of Iowa, 1950 by section 321.453 of the Code?

In Wood Brothers Thresher Company vs. Eicher, 231 Iowa 550, 1 NW (2nd) 655, the Supreme Court of Iowa held that by this exception the legislature intended to exempt an implement of husbandry engaged in a movement which is reasonably short in distance, such as movements commonly necessitated in the carrying on of farming operations. The Court distinguished such a necessary movement from a movement of one or more farm implements from a factory to a buyer's farm, and held that such latter movement was not contemplated by the legislature as excepted by the provisions of section 321.453.

It is pertinent to note that the Court observed that there are implements of husbandry which exceed the limitations set forth on vehicles under the provisions of Chapter 321, which implements of necessity must at times be moved over the highways. It seems clear that the Court was thinking in terms of necessity owing to the size of particular implements. This thought is found in the following statements by the Court:

"The chapter which contains this and other sections covers over 50 pages of the Code. It is entitled 'Motor Vehicles and Law of Road'. The last four words of the title are indicative of the purpose of the legislation. One of the purposes, if not the primary purpose of the legislation, is to make travel upon the highways as safe as it can reasonably be made consistent with their efficient use. 'In construing a statute we must never lose sight of its object and intent.' Beatty v. Cook, 192 Iowa 542, 545, 185 NW 360, 361. Each section of such legislation must be construed with the act as a whole, and with every other section. * * *

The legislature realized that there were vehicles of a greater width than eight feet, and that at times it is necessary that they move or be moved over the highways. * * *

There are instruments of husbandry which are wider than eight feet. In the operation of farming, it is often necessary that they move or be moved on the highway either to different parts of the farm or to other farms. During the farm changing season before March 1st., or at other times, all of the implements of a farmer must be moved to the new location. If the implements are to be moved on a railroad car, it will be necessary to pass over the highway to the railroad loading dock. Most farm implements for use in the field operate on wheels. And these reasonably short, temporary movements just mentioned, are ordinarily accomplished in the same manner on the highways."

It seems reasonable to conclude that the Supreme Court regarded the legislation as intended to apply to cases where exemption was necessary rather than a grant of special privilege. To construe the legislation as a grant of special privilege would raise serious questions of constitutionality. Further, it would without any justification result in creating hazards which it is the very purpose of the statute to avoid.

The purport of the ruling of the Supreme Court appears to be that the exception statute is to be construed as limiting the provisions thereof to, (1) single units of farm implements, and certain loads carried thereon, which, owing to the physical facts of the implements and loads, cannot comply with the provisions of section 321.457, and (2) to necessary combinations, which, owing to the physical facts, cannot comply with the said provisions, such as an implement which, with its motive power, must necessarily travel in combination. Such construction does not contemplate the movement of a train of farm implements as necessity does not demand such movements. There is the alternative of moving the units individually. In other words, if two wagons could be drawn by a tractor simply because each unit is a farm implement, 20 wagons or other attached units could likewise qualify as exempt. Obviously such construction would result in creating a special privilege, rather than a privilege of necessity, and as

previously indicated, would do violence to the very purpose and intent of the provisions of the chapter relating to highway safety. The legislation was designed to meet conditions where otherwise it would be impossible to move certain implements, and was not intended to provide a mere convenience.

You are therefore advised that it is the opinion of this office that the exceptions set forth in Section 321.453, Code of Iowa, 1950, do not include a combination of farm implements which may be moved severally, and that the facts set forth in your request constitute such a combination as is not included within the exceptions of said Section 321.453.

December 13, 1951

TAXATION: **Homestead credit—what constitutes good faith occupation.** Although an applicant for homestead tax credit, for valid reasons absents himself from the premises, if he has a bona fide intention and right to return and occupy his home on the premises for six months each year at any time when his occasion for temporary absence is ended, then in that event, he is entitled to the credit. Good faith of such intention may be shown by retention of living quarters exclusively under his control, having dining and sleeping facilities, as well as equipment and furnishings. Clothing and personal effects kept on the premises are also pertinent facts to consider.

Mr. Dayton Countryman, County Attorney, Nevada, Iowa: We have yours of recent date in which you have submitted the following:

"I have been requested by the County Assessor to write for an opinion with reference to Section 425.11, Code of Iowa, 1950, and in particular the part of Subsection 1,a which I quote:

'. . . dwelling house in which the owner is living at the time of filing the application and said application must contain affidavit of his intention to occupy the said dwelling house in good faith as a home for six months or more . . .'

There is an Attorney General's opinion, 1938, at page 598, which covers this particular section of the Code under the 1939 Code and up until 1941 when the Forty-ninth General Assembly deleted part of the law with reference to actually living six months or more in the year in said dwelling house.

Therefore our question is:

1. Does the Attorney General's opinion of 1938 at page 598 still apply to Section 425.11, 1950 Code of Iowa, in view of the change that the legislature made in 1941, Forty-ninth General Assembly wherein that part pertaining to the owner actually living six months or more of the year was deleted?

2. In case the Attorney General's opinion above referred to no longer applies, kindly advise as to whether or not the following person is entitled to homestead exemption.

A, who owns a small farm outside of town and usually rents the house with the exception of one room which she reserves for herself and declares this to be her home, and which room this owner occupies only infrequently because she owns and runs a nursing home in town where she of necessity must spend a good share of her time, over six

months of actual time each year. Yet, A wishes to and does in fact claim her homestead on the farm where she maintains a room which she uses infrequently throughout the year. Can A get credit for homestead exemption on 40 acres of her farm?"

In answering your inquiry it is necessary we examine in detail the Homestead Tax Credit Act. This Act was passed by the 47th General Assembly and became effective March 25, 1937, and the legislative purpose, as recited in the Act, was to encourage home ownership and occupancy in order to promote the social and economic life of the people of Iowa. The Preamble states in part:

"Whereas, a healthier and more prosperous condition exists in the state when the owner occupies his own farm or dwelling, and it is for the best interests of the people as a whole when such condition exists; and

Whereas, it is the intention of the legislature, and the purpose of this act to encourage and foster home ownership and occupancy, * * *"

The statute contains, among other things, the definitions which are, of course, controlling in interpreting the Act. This is not a credit to the owner but to the homestead, although this results in benefit to the owner, and cash refunds were allowed to taxpayers who had paid such taxes prior to the allowance of the credit. That the credit is to the property as distinguished from the owner is evident from the provisions of the Act as the credit is given against the tax on the homestead, and the taxpayer makes claim therefor as owner of such property. The homestead exemption law was not adopted on the premise that a homestead credit is a gift or bonus with no consideration requirements in return. As consideration for exemption, it might be said that the homestead earns its credit each year of its existence. See Ahrweiler v. Board, 226 Iowa 230 at page 236.

This is an act 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 relating to tax exemptions. 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 Bldg. Assn. v. Board of Review, 217 Iowa 1181;
Samuelson v. Horn, 221 Iowa 208;
Grand Lodge of Iowa v. Madigan, 207 Iowa 224;
Readlyn Hospital v. Hoth, 223 Iowa 341;
Ahrweiler v. Board, 226 Iowa 230.

It is to be noted that in attempting to arrive at the correct interpretation of any particular provision of the Act and the intention of the legislative body, as expressed therein, it is necessary to consider the entire act and, so far as possible, construe its various provisions in the light of their relation to the whole.

"Owner" is defined in such clear terms that we do not believe the language admits of construction and the extent of the homestead is

clearly defined in the Act. The credit, unless applied for, is waived under the provisions of Section 425.6. The section which seems to present the most difficulty is 425.11 which provides:

"The homestead must embrace the dwelling house in which the owner is living at the time of filing the application and said application must contain an affidavit of his intention to occupy said dwelling house in good faith as a home for six (6) months or more in the year for which the credit is claimed."

This provision was inserted in the law in 1941 and, previous to that time, the law required that the owner actually live in the premises six (6) months or more in the year. Under the law as it previously existed this office has issued several opinions which, of course, are not pertinent or controlling in an interpretation of the statute in its present form.

As we view the above quoted paragraph, the provisions as to good faith are clear and require the applicant, at the time of making the application, to do so in good faith and such good faith must be actual and not a figment of the mind or an assumed attitude which is contrary to the undisclosed intentions of the applicant at time of filing of the application. The nub of the controversy is what was intended by the legislature when they employed the language, "the dwelling house in which the owner is living at the time of filing the application", and "an affidavit of his intention to occupy said dwelling house in good faith as a home". The legislature did not use the words "residence" or "domicile" but expressed themselves and their intent by employing the language "is living", and "intention to occupy". One could live in a dwelling or occupy it by being physically present therein or under certain circumstances a person might be constructively living in or occupying a place. We do not believe that the legislature intended that the statute should be so strictly construed, even though a tax exemption statute, as to deprive an owner of credit where he was in good faith actually or constructively living in or occupying the premises as a home. One who occupies premises and has established therein his homestead, but who, due to illness or some other valid reason, leaves his premises temporarily, cannot be denied a credit because he is not physically present there at the time of making application or during the statutory period. If the person establishes his homestead right in the premises, the right attaches to the homestead as defined by the terms of the statute, namely, "not to exceed one-half acre in town or a value of $2,500 or forty (40) acres where the homestead is located outside a city or town." We do not mean to say that one can constructively occupy premises and obtain the credit under every circumstance, and each and every case must be determined on its facts, which facts, of course, include the good faith of the applicant. That the legislature intended that the facts in each case should be controlling is evidenced by Section 425.2 which requires the applicant to qualify for credit; Section 425.3 which provides that all applications shall be examined and verified by the board of super-

visors, and section 425.7 which provides in paragraph three that if a claim is allowed by the board of supervisors that the State Tax Commission, upon investigation, may set aside such allowance.

The foregoing all indicate that each application must be examined so as to determine whether or not, under the facts, the applicant brings himself within the provisions of Chapter 425 and is entitled to the credit. If the applicant leases the entire premises, such fact should be construed as an abandonment of the homestead and the right to claim the credit. If a person, who is qualified and has made application, absents himself from the premises in good faith and for valid reasons and with a bona fide intention and right to return and occupy his home on the premises at any time when his temporary absence has ended, then in that event he is within the terms of the statute and entitled to the credit. Facts tending to show good faith occupation as a home, though physically absent, may be: Retention of living quarters exclusively under his control, having dining and sleeping facilities, as well as equipment and furnishings. Whether he keeps his clothing and personal effects, except those that might be temporarily used elsewhere, at these quarters, is also pertinent.

In the submitted case you have not stated facts which we deem sufficient on which to determine whether or not the party is entitled to the homestead credit, so we have set out a rule or guide by which you may determine this case yourself.

December 20, 1951

SCHOOLS AND SCHOOL DISTRICTS: **Noncontiguous isolated subdistricts—consolidation with another district.** Where two noncontiguous subdistricts of a township, each containing fewer than four government sections, are isolated as a result of the formation of a consolidated district, each becomes thereby a rural independent corporation and can be consolidated and attach itself with an adjacent area without including the other.

Miss Jessie M. Parker, Superintendent of Public Instruction; Attention: R. A. Griffin, Legal Advisor: We acknowledge receipt of yours of the 5th in which you have submitted the following:

"We are herewith requesting your official opinion concerning the following situation:

Delaware Township School District in Polk County comprises two subdistricts, No. 3 and No. 5. Each of these subdistricts contains less than four government sections of land. These two subdistricts are not, however, contiguous. A map showing these subdistricts is attached hereto.

The following question has arisen on which we would like your considered opinion.

Is there a legal procedure whereby one of these subdistricts can consolidate with or attach itself to another area without including the other subdistrict?"

In reply thereto we advise you that of two noncontiguous subdistricts, each containing less than four government sections of land, one such subdistrict can be consolidated with or attach itself to another area as a part of a consolidated district without including the other district under Section 276.21, Code of 1950, the pertinent portion of which provides as follows:

"Where, after the formation of a consolidated corporation, one or more parts of the territory of a school township is left outstanding, each piece shall constitute a rural independent school corporation and be organized as such unless two or more contiguous subdistricts are left, in which event each of such remaining portions of territory shall constitute a school township."

The legislative history of this section justifies this conclusion. Section 2794-a of the Supplemental Supplement of 1915, with respect to this situation, provided as follows:

"No school corporation from which territory is taken to form such a consolidated independent corporation shall, after the change, contain less than four government sections, which territory shall be contiguous and so situated as to form a suitable corporation. And where after the formation of such consolidated school corporation, whether heretofore or hereafter formed, there is left in any school township one or more subdistricts each of such subdistricts containing four or more government sections, each of such pieces of territory shall thereby become a rural independent school corporation, * * *"

The foregoing section was repealed by Chapter 432 of the 37th General Assembly and as a substitute therefor, and specifically the portion relating to the matter under consideration, provided therein as follows:

"And where after the formation of such consolidated school corporation, there is left in any school township one or more pieces of territory containing four or more government sections, each of such pieces of territory shall thereon become a rural independent school corporation, unless two or more subdistricts remain in a contiguous body, in which event such remaining portion of territory shall constitute a school township, and it shall be the duty of the officers of the former school township to call an election in each of such remaining pieces of territory for the purpose of electing school officers in the manner provided by law for the election of officers in rural independent school and school township corporations."

Chapter 149, Acts of the 38th General Assembly, amended Section 2794-a of the Supplemental Supplement of 1915, as amended by Chapter 432, Acts of the 37th General Assembly, as pertinent to the situation here under consideration, and substituted therefor the following:

"And where after the formation of such consolidated school corporation, there is left in any school township one or more pieces of territory containing four or more government sections, each of such pieces of territory shall thereon become a rural independent school corporation, unless two or more sub-districts remain in a contiguous body, in which event such remaining portion of territory shall constitute a school township. * * *"

Chapter 175 of the 39th General Assembly repealed Section 2794-a of the Supplemental Supplement of 1950, as amended by Chapter 432,

Acts of the 37th General Assembly, and Chapters 116 and 149, Acts of the 38th General Assembly (Chapter 116 having no bearing upon the question here under examination) and substituted therefor Section 21 of such Chapter 175 the following:

"Where, after the formation of a consolidated corporation, one or more parts of the territory of a school township is left outstanding, each piece shall constitute a rural independent school corporation and be organized as such unless two or more contiguous sub-districts are left, in which event each of such remaining portions of territory shall constitute a school township. * * *"

Such enactment by the 39th General Assembly has remained unchanged and appears now as a portion of Section 276.21, Code 1950, heretofore exhibited. It is clear from these statutory changes made by the several Legislatures that noncontiguous subdistricts, containing fewer than four government sections, isolated as the result of the formation of the consolidated district, become thereby each a rural independent school corporation. See as sustaining this conclusion State v. Thompson, 190 Iowa 1160, decided under Section 2794-a of the Supplemental Supplement of 1915. Therein it was said the following :

"It seems to us that Section 2794-a contemplates that, in the formation of consolidated districts, a subdistrict composed of four or more sections might be isolated, and could better conduct its affairs as an independent corporation than as a part of a corporation to which it was not contiguous; and hence provision is made that same shall automatically become an independent school corporation; and that it has no reference to subdistricts, or parts thereof, contiguous to and remaining in the school township after the formation of a consolidated district."

December 27, 1951

SCHOOLS AND SCHOOL DISTRICTS: **Sick leave of employees—maximum.** A public school employee may accumulate a maximum of thirty-five days leave of absence for sickness with pay, however he may not use the time granted in any subsequent year to augment such accumulated leave so as to exceed said maximum.

Miss Jessie M. Parker, Superintendent of Public Instruction; Attention: R. A. Griffin, Legal Advisor: We acknowledge receipt of letter of J. H. Peet, Superintendent of Schools, Cedar Falls, Iowa, in which he states and submits the following:

"We are having a little difficulty in the interpretation of the leave of absence law passed by a recent state legislature. To make the matter clear, I will state a hypothetical case: A teacher has accumulated thirty days of sick leave. She becomes ill during her sixth year and loses forty-four days because of the illness. May she apply the nine days of her sixth year in addition to the thirty-five days? If not, does she accumulate nine days in this sixth year to apply on the next thirty-five days of sick leave?

The Board of Education has asked me to write you regarding this matter."

In respect to the foregoing we advise as follows:

The Act of the Legislature under which this question arises is now Section 279.40, Code 1950, providing as follows:

"Public school employees are granted leave of absence for personal illness or injury with full pay in the following minimum amounts:

1. The first year of employment..... 5 days
2. The second year of employment..... 6 days
3. The third year of employment..... 7 days
4. The fourth year of employment..... 8 days
5. The fifth and subsequent years of employment..... 9 days

The above amounts shall apply only to consecutive years of employment in the same school district and unused portions shall be cumulative to a maximum of thirty-five days. The school board shall, in each instance, require such reasonable evidence as it may desire confirming the necessity for such leave of absence."

It will be noted therefrom that the maximum leave of absence for personal illness or injury with pay that can be secured is thirty-five days. This thirty-five days is the cumulative amount of leave provided by the statute during the first five years of employment. At any time during the sixth year, and at any time in each subsequent year, the employee is entitled to nine days leave in each such year. However, the aggregate of the amount of the leave with pay cannot exceed thirty-five days, which thirty-five days leave with pay, or any unused portion thereof, may be used by the employee at any time during his employment in the same school district. According to the foregoing rules in the hypothetical case submitted by you, we assume that while the teacher has accumulated thirty-five days, she has already used five days, leaving thirty days leave accumulated during the first five years of employment. Being entitled to thirty-five days, she may use only five days of the nine days to which she is entitled in the sixth year, and apply such thirty-five days upon the forty-four days of illness which she suffered in the sixth year. The employee, in the seventh year, will be entitled to nine days leave, and each subsequent year until the employee has accumulated again thirty-five days, which, as previously stated, is to the credit of the employee to be used in whole or in part during the period of his or her employment.

January 3, 1952

COUNTIES: Secret investigations by county attorney—reimbursement. The county attorney may incur the expenses of secret investigators and seek reimbursement from the county, and the board of supervisors, in their discretion, may allow the claim and in so doing the board is not required to demand the names of the undercover investigators.

Mr. Clyde E. Herring, County Attorney, Des Moines, Iowa: This will acknowledge receipt of yours of the 10th ult. in which you have submitted the following:

"On November 6th this office submitted to the Polk County Board of Supervisors a claim in the amount of $60.00, representing funds disbursed by the County Attorney to a member of the Des Moines Police force and the First Assistant County Attorney. Signed receipts from

both the officer and the assistant were attached to the claim. Both the receipt and the claim itself stated that the amount represented funds expended in the investigation of a case which later resulted in indictments being returned and pleas of guilt on the part of the defendants. The Board of Supervisors refused payment of the claim on the basis that the name of the actual recipient of the fund was not given, nor the type of services performed set forth.

Since the naming of the agent who actually performed certain services in the investigation of the criminal case would have destroyed his anonymity and thus made him possibly subject to physical harm, this office refused to provide this information to the Board of Supervisors.

It was further claimed by the Budget Adviser of Polk County that both the member of the Des Moines Police Force and the First Assistant County Attorney were adequately reimbursed through their salaries and thus were not eligible to receive any additional warrants for any purpose, even though it represented a sum of money paid to another person.

I would appreciate the opinion of the Attorney General as to whether or not said claim was legitimate."

In reply thereto we would advise you that the exact situation described by you has not previously been presented to the department. As you know, claims are generally presented to the County Board of Supervisors pursuant to the provisions of sections 331.20 and 331.21, which are exhibited as follows:

"331.20. Claims generally. Claims filed shall be numbered consecutively in the order of filing, and shall be entered on the claim register alphabetically, so as to show the date of filing, the number of the claim and its general nature, the name of the claimant and the action of the board thereon, stating, if allowed, the fund upon which allowance is made. A record of the allowance of claims at each session of the board shall be entered on the minute book by reference to the numbers of the claims as entered on the claim register."

"331.21. Unliquidated claims. All unliquidated claims against counties and all claims for fees or compensation, except salaries fixed by statute, shall, before being audited or paid, be so itemized as to clearly show the basis of any such claim and whether for property sold or furnished the county, or for services rendered it, or upon some other account, and shall be duly verified by the affidavit of the claimant, filed with the county auditor for presentation to the board of supervisors; and no action shall be brought against any county upon any such claim until the same has been so filed and payment thereof refused or neglected."

As a result of the foregoing enactments, and interpretation thereof by opinions of this department (See Report of Attorney General for 1909 at page 228, and Report of Attorney General for 1918 at page 84) claims for expenses should be itemized and verified by the affidavit of the person to whom the fees are payable. Whether claims of the character described by you and made by you in your official capacity as County Attorney, are controlled by the same interpretation, has not been the subject of opinion.

However, the power of the County Attorney and of the Board of Supervisors in entertaining and paying a claim for expenditures for

undercover investigations has had the consideration of the department in opinion of the Attorney General, appearing in the Report of the Attorney General for 1936 at page 522, where, in respect thereto, it was stated:

"The legal question requested by you refers to the joint powers of the County Attorney and the Board of Supervisors to make reasonable and necessary provisions for the expenditure of county funds for the purpose of defraying the expenses of under-cover investigations in criminal matters authorized by the County Attorney and also by the Board of Supervisors. It is true that there is no express statutory provision for this purpose. However, this is not controlling for the reason that the Legislature cannot anticipate each and every situation that might arise wherein it is necessary for county officials to incur necessary expense where the same is not specifically mentioned in the statute.

It is true that Section 5184 of the Code authorizes a sheriff to make special investigations of alleged infractions of the law when so directed in writing by the County Attorney. This section simply adds an additional duty to the sheriff's office under certain conditions. This statute does not exclude other investigations that might be necessary to be made for the purpose of enforcing the criminal laws of the state by the County Attorney and in accordance with the expressed duty of the County Attorney is contained in Paragraph 1 of section 5180 of the 1935 Code of Iowa, which is as follows, to-wit:

"5180. Duties. It shall be the duty of the County Attorney to: 1. Diligently enforce or cause to be enforced in his county, all of the laws of the state, actions for a violation of which may be commenced or prosecuted in the name of the State of Iowa, or by him as County Attorney, except as otherwise specifically provided."

This section of the Code makes it the express duty of the County Attorney to diligently enforce or cause to be enforced the criminal laws in his jurisdiction. It is the general rule of law that where a county official has express authority to do or to perform a certain duty, he necessarily has the additional implied authority to incur necessary expense for the purpose of carrying out and administering his duties as expressly provided for.

A similar situation is true with respect to the powers of the Board of Supervisors. The following paragraphs of section 5130 of the 1935 Code of Iowa illustrate this principle of law:

"5130. General Powers. 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. * * * 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."

On June 7, 1933, this office issued an official opinion to the County Attorney of Polk County, Iowa, holding that the Board of Supervisors have the power and authority to hire a parole agent for Polk County where the same was necessary and where such employment would not conflict with the duties of any office already created by law, and where it did not exceed an express statutory provision regarding employment, and where such employment was for the best interests and benefit of the county. In this opinion we stated the rule of law, as follows:

"Our Supreme Court has consistently upheld the action of the county boards in agency employment for various special services, the need thereof, the good faith of the board and the elimination of the two restricted conditions hereinbefore referred to, being the basis of its approval of such employment."

See Report of Attorney General, 1934, pages 241 and 242.

Some of the decisions of our Supreme Court in line with this proposition at law are as follows:

Campbell vs. Polk County, 3 Iowa 467.
Bean vs. Board, 51 Iowa 53.
Grimes vs. Hamilton County, 37 Iowa 290.
Mills County vs. Burlington & M. R. R. Co., 47 Iowa 66.
Collins vs. Welch, 58 Iowa 72.
McCarty vs. Eggert, 154 Iowa 28.
Poweshiek County vs. Stanley, 9 Iowa 511.
Heller vs. Montgomery Co., 188 Iowa 981.
Allen vs. Cerro Gordo Co., 34 Iowa 54.
Page County vs. American Em. Co., 41 Iowa 115.
Call vs. Hamilton Co., 62 Iowa 448.
Hawk vs. Marion Co., 48 Iowa 472."

Having the legal power and authority to so undertake an investigation of the character described, it would follow that the county is liable for the cost of such investigation, provided the Board finds such costs reasonable, and the investigation undertaken within the sound discretion of the county attorney. The power thus vested in the county attorney may not be abused. It is to be observed that his actions in incurring expenses of investigators, may, under pertinent situations, be subject to investigation by the grand jury, who can elicit the name of a secret investigator or, the board of supervisors, within their powers, and in their discretion, could deny payment of the claim. In the latter event the county attorney would be compelled to secure payment by plenary action against the county.

In reaching our conclusion we are not unmindful of the opinion under date January 21, 1947, appearing at page 6 of the 1948 Report of Attorney General. However, it will be noted that in that opinion it was pointed out that the facts in the 1936 opinion were distinguishable. The facts herein presented also are distinguishable from the facts of the opinion of 1947. In the case under examination the investigation had been completed. The specific use of the fund for which claim is made appears, and the actual expense involved is a liquidated sum. There were no county funds advanced.

You are therefore advised that it is the opinion of this office that the Board of Supervisors, in their discretion, may allow the claim if the find it to be a reasonable expense, and in so allowing the claim the board is not required to demand the name of the undercover investigator.

January 24, 1952

MOTOR VEHICLES: Red lights displayed on front of road machinery. Tractors, road graders, road drags, and road machinery must display red signal lights on the front and rear whenever operated or stationed at night upon any public highway open to traffic regardless of the prohibition of section 321.422.

Mr. W. H. Root, Maintenance Engineer, Iowa State Highway Commission, Ames, Iowa:

In a recent memorandum you invite attention to an apparent conflict in the provisions of secs. 321.399, 321.400, and 321.422, Code of Iowa 1950, as amended by sec. 1, Chap. 126, Acts of the 54th General Assembly. The sections in question are here set out.

"321.399 Road machinery—lights required. No tractor, road grader, road drag, or other piece of road machinery operated by motor fuel, kerosene, or coal shall be used upon any public highway in this state which is open to traffic by the public, unless there is carried at least *two red danger signal lanterns or lights*, each capable of remaining continuously lighted for at least sixteen hours."

"321.400 Number of lights—duty to maintain. It shall be the duty of each person charged with the operation of any tractor, road grader, road drag, or other piece of road machinery which is required by section 321.399 to carry red danger signal lights, to place and maintain in a lighted condition at least *one signal light upon the front and one upon the rear* of any such tractor, grader, drag, or other piece of road machinery from the time the sun sets until the time the sun rises the following day, whenever the same is being operated upon any public highway open to traffic by the public."

"321.422 Red light in front. No person shall drive or move any vehicle or equipment upon any highway with any lamp or device thereon displaying or reflecting *a red light visible from directly in front thereof*. This section shall not apply to authorized emergency vehicles. No person shall display any color of light other than red on the rear of any vehicle except that stop lights may be red, yellow, or amber."

Italics are added to emphasize conflicting provisions.

Lest it be supposed that the recent amendment to sec. 321.422 may have some cogent force in dissolving the conflict it should be pointed out that the amendment consisted simply of the addition of the words "or reflecting" following the word "displaying". For that reason it is not helpful and none of these sections attains any special dignity by reason of its date, since they were enacted respectively as secs. 424, 425 and 447 of Chap. 134, Acts of the 47th G. A.

Section 321.422 is penal in character and purports to be of general application, that is to say, it relates to all persons and all vehicles and all equipment operating upon the highway and contains a universal prohibition against a red light on the front of the vehicle, and the only exception found in the statute itself relates to authorized emergency vehicles.

Sec. 321.482 of the Code of 1950 makes it a misdemeanor for any person to do an act forbidden by any of the provisions of Chap. 321

(unless a specific violation has been declared to be a felony). It follows that sec. 321.422, as amended, is a penal statute and as such subject to the rule of strict construction. Secs. 321.399 and 321.400 while they are likewise penal statutes have to do with a limited class of motor vehicles and must be given the effect of an additional exception to the broad general prohibition relating to all persons and all vehicles embodied in sec. 321.422.

Such a construction has the merit of giving force and effect to all three sections of the Code, while a contrary interpretation would result in nullifying the provisions of sec. 321.400 Code of Iowa 1950.

It is the opinion of this office that despite the general prohibition of sec. 321.422, tractors, road graders, road drags, and road machinery used on a public highway in Iowa open to traffic by the public must carry a red traffic signal light on the front and on the rear of such machinery between sunset and sunrise whenever the same are operated or stationed upon any public highway open to traffic by the public.

January 31, 1952

INSANE PERSONS: **Commitment to county home—screening provisions of chapter 86, Acts 54 G. A. not applicable.** The statutory requirement for observation and treatment at a screening center prior to a final order of commitment to a state hospital by a county commission of insanity is not applicable in proceedings by that commission to provide restraint, protection and care of alleged insane persons in the county home.

Mr. Robert C. Lappen, Chairman, Board of Control of State Institutions:

This is in answer to your recent request for an official opinion as to whether the provisions of section 1 of Chapter 86, Laws of the 54th General Assembly, relating to screening center observation, are applicable when a county commission of insanity is proceeding under the authority vested in them as to the commitment of an alleged insane person direct to the county home.

It should first be noted that the early statutes of the state of Iowa relating to the care and treatment of the insane required the state to furnish the building and necessary personnel to operate the state hospitals for the insane but provided that the respective counties pay the expenses of the care and treatment of patients therein from each county, and provided for a special tribunal in the form of the county commission of insanity for the purpose of determining what patients were to be sent to such hospitals for treatment. This authority of the county commission of insanity was the subject matter of an early opinion by this department, appearing in Attorney General's Report of 1898 at page 324, where it was said:

" * * * subject to certain limitations within the statute, the commissioners of insanity is the board or tribunal which has control of the insane that must be cared for at the expense of the county, and it is within its sound discretion to determine what patients are fit subjects

for treatment in the hospital and should be sent there, and what patients should be cared for by the county elsewhere".

In the foregoing opinion reference was made to the statute providing for the determination of the fitness of subjects for treatment in the hospital, as well as to those provisions authorizing the commission to provide for custody outside state hospitals and within the county. These same provisions have continued and appear in the Code of 1950. Those relating to the determination of fitness of a subject for treatment in a state hospital appeared as section 229.9, Code 1950, as follows:

"If the commission finds from the evidence that said person is insane and a fit subject for custody and treatment in the state hospital, it shall order his commitment to the hospital in the district in which the county is situated and in connection with such finding and order shall determine and enter of record the county which is the legal settlement of such person. If such settlement is unknown the record shall show such fact. * * *"

Those relating to the authority to provide for care by the county elsewhere appeared in the Code of 1950 in section 229.27 in the following words:

"The commission of insanity may grant applications, made in substantially the form provided in this title, for the restraint, protection and care, within the county and outside the state hospitals, of alleged insane persons, either as public or private patients, but all patients so cared for shall be reported to the board of control."

Chapter 99, Laws of the 53rd General Assembly, sometimes referred to as the State Mental Aid Law, currently appearing in Chapter 227, Code 1950, reveals a legislative intent to encourage proceedings as authorized in section 229.27, Code of 1950, as to the type of mental cases falling within the scope of section 227.11, Code 1950, namely, those where the patient is found to be suffering either from chronic insanity or senility and will receive equal benefits by being commited to a county home. The inducement to encourage such proceedings appears in section 227.16 of the Code of 1950, wherein it is provided that "For each patient * * * committed to a county home by a commission of insanity the county shall be entitled to receive the amount of three dollars per week" from the state mental aid fund existing by virtue of the provisions of section 227.17, Code 1950. It is apparent from the State Mental Aid Law that the legislature thereby intended to accomplish a reduction or prevention of an over-crowded patient population in the various state mental health institutes.

It must be noted that the provisions of section 1, Chapter 86, Laws of the 54th General Assembly, relating to observation and treatment at a screening center prior to a final order of commitment by a county commission of insanity, were expressly amendatory to the provisions of section 229.9, Code of 1950. The words of the amendment are indicated by the following italicized portion of said section as amended by section 1 of Chapter 86, Laws of the 54th General Assembly.

"If the commission finds from the evidence that said person is insane and a fit subject for custody and treatment in the state hospital, it shall order *first his observation and treatment at the screening center located at the hospital in the district nearest to the county in which the hearing is conducted and no order of commitment shall issue until the superintendent of the hospital at which said screening center is located shall find and recommend that such order should be issued and, in the event that such recommendation of commitment is made, the commission shall order* his commitment to the hospital in the district in which the county is situated and in connection with such finding and order shall determine and enter of record the county which is the legal settlement of such person. If such settlement is unknown the record shall show such fact. * * *"

As amended, the foregoing statute specifies the two conditions precedent to an order providing for observation or treatment at a screening center. These remain the same as were previously required prior to a final order of commitment to a state hospital for the insane. They are (1) a finding from the evidence that the person is insane, and (2) that said person is a fit subject for custody and treatment *in a state hospital.* In view of the requirement as to a specific finding on the second of these conditions, and the fact that section 229.27, Code 1950, was not mentioned in the amendment, we reach the conclusion that the legislative intent in the enactment of section 1 of Chapter 86, Laws of the 54th General Assembly, was to provide an additional method to alleviate or prevent an over-crowded patient population in the various mental health institutes in the form of a screening of the persons prior to their final commitment as patients therein. We find no evidence of any intent to set up the personnel of the screening centers, established under the provisions of section 218.46, Code 1950, with power to pass upon *all* actions of a county commission of insanity with regard to an order for the restraint, protection and care of an insane person. Rather, we find the authority of such personnel to be limited to those cases where the person has been found by the county commission of insanity to be a "fit subject for custody and treatment in the state hospital."

It is the opinion of this department, therefore, that the provisions of section 1, Chapter 86, Laws of the 54th General Assembly requiring observation and treatment at one of the established screening centers prior to a final order of commitment by a county commission of insanity are not applicable in proceedings by that commission under the authority vested in it to provide for restraint, protection and care of alleged insane persons outside the state mental health institutes.

February 7, 1952

SCHOOLS AND SCHOOL DISTRICTS: **Sick leave for teachers—when cumulative—absence for maternity.** A school district may not pay a teacher accumulated sick leave beyond the statutory maximum of 35 days. Such leave continues to accumulate during the statutory leave of absence for illness or injury, however leave of absence beyond the accumulated sick leave for maternity or other reasons cannot be deemed statutory employment within the period of such leave for the purpose of accumulating sick leave.

Mr. Donald E. Smith, Assistant County Attorney, Cedar Rapids, Iowa: We have yours of the 29th ult. in which you have submitted the following:

"The school districts of our county have been confronted with some problems arising under the provisions of Chapter 112, Acts 53rd G. A., sec. 279.40, Code of Iowa, 1950, with reference to sick leave of public school employees. That statute provides that the accumulation of sick leave as therein specified shall accumulate to a maximum of 35 days. One of our school districts has a plan in operation which has been in effect for some time prior to the enactment of the above law, which permits an accumulation of 50 days sick leave. One of the teachers who has accumulated 50 days sick leave prior to the commencement of the present school year, has been ill for some period of time and has already been paid for 33 days of her accumulated sick leave and the school district is now faced with the problem of starting to pay the remainder of the accumulated sick leave of 50 days which the teacher has accumulated under their plan. We would appreciate your official opinion as soon as possible on the plan, as follows:

1. May the school board pay to this teacher her accumulated sick leave beyond the maximum of 35 days specified in section 279.40, Code of Iowa, 1950?

2. Does sick leave continue to accumulate for an employee during leave of absence for illness or injury? If not, when do such days of sick leave again commence to accumulate following a leave of absence for sickness?

3. What effect does a leave of absence for maternity or other reason for a period of one or more years have upon the provision 'consecutive years of employment in the same school district' with reference to the cumulation of sick leave where the employee returns to work in the same school district at the end of such period of leave of absence?"

In reply thereto we advise you as follows:

1. In answer to your question number 1, sick leave under the provisions of section 279.40, Code 1950, may be accumulated with pay to a maximum of thirty-five days and no more. (See opinion of Attorney General appearing in the Report of the Attorney General for 1952, dated December 27, 1951.)

2. In answer to your question number 2, we would advise you that sick leave continues to accumulate during the statutory leave of absence for illness or injury. Such leave of absence is to be deemed a privilege granting to the employee a benefit during his year of employment. Accepting the benefit of this statutory leave for illness or injury does not operate as a penalty imposed upon the employee. Therefore, the sick leave continues to accumulate during the period of the statutory leave of absence.

3. In answer to your question number 3, we would advise you that leave of absence for maternity or other reason for a period of one or more years, or for any period beyond the accumulated statutory sick leave, is not to be deemed statutory employment within the period of such leave for the purpose of accumulating the sick leave provided by section 279.40. To give credit for absence for sickness or other reason extending beyond the statutory time amounts to an indirect method of gift of tax money. This conclusion arises because the amount of

tax money granted for leave of absence, under the foregoing section 279.40, is dependent under the time of employment. If voluntary absence is to be deemed employment within the terms of the foregoing statute, it would require the expenditure of tax money the same as if the leave were a statutory leave. In Standard School District vs. Healy, 79 Pac. 2d, 123; 26 Calif. Appeals, 2d, 172, it was held that statutes relating to compensation for absences resulting from illness or causes other than illness, and which presumably relate to absences from duty for which no leave has been granted, cannot be held applicable to voluntary absences with leave for the absentee's own convenience. Such voluntary leave of absence, while not to be deemed statutory employment for the purpose of accumulating sick leave, any accumulated unused statutory sick or injury leave is a continuation of employment at the time the employee begins his voluntary leave of absence, and is preserved to the employee if and when he returns to such employment in the same school district.

4. A school district sick leave plan or policy in effect at the time and prior to the enactment of section 279.40, Code of 1950, more liberal in its terms than the foregoing numbered section, must yield to the provisions of that section.

February 21, 1952

(See Opinion of April 17, 1952)

CITIES AND TOWNS: Parking lot fund and parking meter funds not transferrable. The parking lot fund and the parking meter fund in cities or towns are not parts of the street fund and not being functional funds authorized by chapter 159, Acts 54 G. A., transfer therefrom to the sanitation fund or any other fund is not permissible.

Mr. Glenn D. Sarsfield, State Comptroller: We have yours of the 5th inst. in which you have submitted the following:

"Under the provisions of sec. 5, Par. 4, Chapter 159, 54th G. A., municipal corporations may fit their income to their needs by transfers from one functional fund to another in the manner provided by sec. 24.22, Code of Iowa, 1950.

A resolution and application has been filed by a municipal corporation, requesting approval to make a temporary transfer of $20,000.00 from the Parking Lot Fund to the Sewage Rental Fund, same to be returned within one year from date of transfer.

1. I respectfully ask for an opinion as to whether or not either the Parking Lot Fund or the Parking Meter Fund is a part of the Street Fund, as set out in sec. 7, Chapter 159, 54th G. A.

2. In the event you should rule that both or either the Parking Lot Fund or the Parking Meter Fund is not a part of the Street Fund, I respectfully ask for an opinion as to whether or not a temporary transfer from the Parking Lot Fund or the Parking Meter Fund to the Sewage Rental Fund (Sanitation Fund) may be approved."

In reply thereto we would advise you as follows:

1. In so far as the question as to whether the Parking Lot Fund is now a part of the Street Fund, authorized by section 7, Chapter 159,

Acts of the 54th General Assembly, the legislative intent is discovered from the following statutory situation. The Parking Lot Fund is provided by section 390.2, Code of 1950, in terms as follows:

"Payment—funds—tax. Any such city or town is hereby authorized and empowered to acquire by purchase, gift, lease, or otherwise, real estate for parking purposes and pay the costs thereof either out of the general fund or in the event the required sum is not available in such fund, the city or town administration shall have the right to levy a tax to be known as the parking lot fund, to provide the amount required, but in no event in excess of one-half mill in any fiscal year."

In lieu of the tax authorized by the foregoing Parking Lot Fund there appears in section 404.5, Subsection 34, Code of 1950, the following:

"404.5 Taxes for particular purposes. Any city or town shall have power to levy annually the following special taxes: * * * 34. Parking Lot Fund. Whenever parking lots shall have been authorized or established as provided in section 390.1, in lieu of the tax provided for in section 390.2, there may be levied a tax not exceeding one-half mill, the proceeds of which shall be credited to and known as the 'parking lot fund'. Such fund shall be used only to acquire or improve real estate, including the erection or improvement of buildings thereon or for any or all said purposes for the parking of vehicles, and including the payment of bonds and interest thereon issued in anticipation of the collection of such tax. Such fund shall be used to meet maturities of such bonds and interest thereon from year to year, but only to the extent that after the application of all net returns available from the income of said parking lots or parking meters, or both, as specified by law, the same shall be required to meet such maturing bonds or interest thereon."

However, Chapter 159, Acts of the 54th General Assembly, repealed Chapter 404, including the foregoing section 404.5, subsection 34.

While section 390.2 was not repealed, section 7, subsection 5 of Chapter 159, Acts of the 54th General Assembly, being the Street Fund, provided a substitute for the tax provision of section 390.2, in terms as follows:

"Street Fund. Municipal corporations shall have power to annually cause to be levied for a fund to be known as the street fund a tax not to exceed seven (7) mills on the dollar on all taxable property within the corporate limits and allocate the proceeds thereof to be spent for the following purposes; * * * 5. In lieu of the tax provided by section three hundred ninety point two (390.2) to acquire and improve real estate and to erect or improve buildings thereon for the parking of vehicles to the extent that income from parking meters or parking lots is insufficient for said purposes;"

As a result of the foregoing statutory situation, there remains power in any city to levy the tax not in excess of one-half mill to be used for the acquisition by purchase, gift, lease, or otherwise, real estate for parking purposes and to pay for the same out of the foregoing tax, if the general fund is not sufficient to pay the cost of the purchase of the foregoing real estate for parking purposes. In lieu of the tax provided for such payment by section 390.2 the Street Fund created by section 7, Chapter 159, Acts of the 54th General Assembly, is made

available for the purpose of acquiring and improving real estate and to erect and improve buildings thereon to the extent that the income from parking meters or parking lots is insufficient for that purpose.

It seems quite clear, therefore, from the foregoing that the Legislature, not having repealed section 390.2, authorizing the creation of the Parking Lot Fund, but having repealed section 404.5, subsection 34, which provided for the use of the tax therein provided to pay deficiencies in the principal and interest of bonds issued for the purpose after applying thereto the available income from parking lots or parking meters, and, having by section 7, subsection 5 of Chapter 159, Acts of the 54th General Assembly, provided a comparable use for the tax of section 390.2, intended to maintain the Parking Lot Fund, authorized by section 390.2, as a separate and distinct fund external to the Street Fund authorized by section 7 of Chapter 159, Acts of the 54th General Assembly.

2. In so far as parking meters are concerned, it is to be observed that cities and towns have power and authority to purchase or lease, install, maintain, repair and operate, under section 390.7, Code 1950, and the funds arising from the operation thereof, shall, according to section 390.8 be used for the following purposes and none other;

"1. Payment of the cost of acquisition and installation of meters purchased.

2. Payment of the cost of maintenance and repair of meters, the collection of meter taxes, and the enforcement of traffic laws in the parking meter district.

3. Payment of the purchase and installation costs of other parking or traffic control devices installed on such portions of streets as are equipped with parking meters.

4. Payment of the cost of acquiring by purchase, lease or similar arrangement of parking lots or other off-street parking areas, including operation, enlargement or improvement thereof or the facilities thereof, within four-tenths of a mile of the metered portion of the streets within the meter district.

5. Retirement of revenue bonds issued pursuant to the provisions of this chapter; and cities and towns may pledge such funds not required for the payment of costs under subsections 1, 2 and 3 hereof to the payment of such bonds.

Until such time as there shall have been provided adequate parking lots or other off-street parking areas in any city or town operating parking meters, all revenues derived from the operation of such parking meters or other similar devices not required for the payment of costs under subsections 1, 2 and 3 hereof shall be expended for the acquisition of such facilities, provided, however that the total expenditures for items 2 and 3 shall not exceed twenty-five per cent of the total meter income and provided further that such funds may be retained and accumulated for such purpose for such length of time and in such amount as may be reasonably necessary to effectuate such program of acquisition of parking lots or other off-street parking areas. No part of the street area in any parking meter district shall be set aside or used for parking purposes at a charge less than the ordinary charge for parking throughout the parking meter district, ex-

cept such part of the street area in any parking meter district set aside for the vehicles used by any person, firm, or corporation engaged in public passenger transportation which are required by law to pay a tax (for the use of the streets)."

That the foregoing Parking Meter Fund is not part of the Street Fund and not subject to transfer to the Sanitation Fund is shown by the following:

(a) The 54th General Assembly, in enacting Chapter 159 of its laws, did not expressly include the Parking Meter Fund in the Street Fund, and it did not repeal the Parking Meter Fund exhibited in the statute, heretofore quoted, section 390.7. It therefore must be concluded that the Legislature intended the Parking Meter Fund to survive as a separate and distinct fund and like the Parking Lot Fund is external to the Street Fund.

(b) Section 390.8 is a further delegation to cities of the state's right to control and regulate the use and manner of use of the highways of the state, and such use and control of public streets is admittedly a matter of police regulation by the municipality. (East Boyer Tel. Co. v. Town of Vail, 166 Iowa 226, 231). Therefore, in the installation, maintenance and repair of parking meters, the city is exercising a police power conferred upon it by the Legislature, or as said in the case of Ex parte Duncan, 65 Pac. 2d. 1015, quoting from a decision of the New York Court of Appeals,

"The power to regulate the use of the streets is a delegation of the police power of the state government, and whatever reasonably tends to make regulation effective is a proper exercise of that power. It justifies the charge of a fee and the imposition of the penalty, and the regulative measure is not invalidated because, incidentally, the city's receipts of moneys are increased."

The foregoing statute, therefore, being a regulatory measure under the police power, its use must be restricted to the uses designated by the foregoing section 390.8. Its diversion to any other use, such as use in the Street Fund, than that prescribed in the foregoing section 390.8, would place the foregoing statute in constitutional jeopardy. This jeopardy would arise if and when the parking meter fund, limited in its use to the installation and maintenance of meters and traffic control devices, is diverted into the Street Fund where it might be used for the several purposes therein defined. According to Hickey v. Riley, 162 Pac. 2d. 371, following other cited cases, states this:

"The right to apply the revenue not only to the narrow and restricted purposes of the mere installation, operation and maintenance of the meters, but also to the broad purposes of general traffic control where authorized by the enabling ordinances, has been upheld in a number of well-reasoned decisions."

(c) Because of the very terms of the statute, 390.8, parking meter funds can be used only for the purposes set forth in the statute and none other. The statute so reads:

"Funds derived from the operation of parking meters shall be used for the following purposes and none other,"

3. By reason of the foregoing, it now appearing that the Parking Lot Fund and the Parking Meter Fund are not parts of the Street Fund, and the Parking Lot Fund and the Parking Meter Fund not being functional funds authorized by Chapter 159, transfer from the Parking Lot Fund and the Parking Meter Fund to the Sanitation Fund is not permissible. This conclusion is deduced from subsection 4 of Section 5, Chapter 159, Acts of the 54th General Assembly, providing with respect to transfers as follows:

"Municipal corporations may fit their income to their needs in the following ways: * * * 4. By transfers from one functional fund to another in the manner provided by chapter twenty-four (24), or by creating an emergency fund in the manner provided by that chapter."

February 21, 1952

SCHOOLS AND SCHOOL DISTRICTS: Number of pupils to open school—"term" defined. The word "term" as used in section 279.15 of the Code is the period fixed by the board at the beginning of the school year. It may be quarters, semesters, thirty-six weeks or other periods of time and if not so fixed is presumed to be the entire school year.

Mr. Donald E. Smith, Assistant County Attorney, Cedar Rapids, Iowa: This will acknowledge receipt of yours of the 4th inst. in which you have submitted the following:

"We would appreciate your official opinion concerning an interpretation of the provisions of section 279.15, Code of Iowa, 1950. That section uses the language 'last preceding term' and 'next ensuing term' but have found nothing in the Code nor in the decisions which defines the meaning of the word 'term'.

We are advised in our rural schools that there are no definite periods separating the school year into semesters or terms but in some instances teachers are teaching by contract with the board for a period not to exceed three months although we do not see that a 'term' in any such school could be defined or limited by such a contract with the teacher. The above provision of our Code also provides that the County Superintendent may give permission to a board to contract with a teacher under stated conditions for a period of time 'not to exceed three months', but the statute does not say whether this is for the number of school days within three months on the calendar or three months of actual days of teaching.

We would appreciate an interpretation of the foregoing as soon as possible."

In reply thereto we would advise you that the word "term" as concerns time of holding school, has not been specifically defined by the Legislature. However, "The word 'term' implies a period of time with some definite termination". (Rooney v. City of Omaha, 181 N. W. 143, 144, 105 Neb. 447.) "Term, as applied to time, signifies a fixed period, a determined or prescribed duration." (Carpenter v. Okanogan County, 299 P. 400, 404, 163 Wash. 18.)

Therefore, in using the foergoing language in section 279.15, Code of 1950, to-wit: "The last preceding term" and "the next ensuing term",

it must be assumed that the Legislature was attaching a specific meaning thereto, for it is a rule that "A statute is a solemn enactment of the state acting through its legislature and it must be assumed that this process achieves an effective and operative result. It cannot be presumed that the legislature would do a futile thing. Thus, legislative language will be interpreted on the assumption that the legislature was aware of existing statutes, * * *" (Sutherland Statutory Construction, 3rd Edition, Paragraph 4510.)

Bearing this rule in mind, it is apparent that the Legislature had reference to such period of school time as it previously by statute had authorized. In that view, we note that section 279.10, Code of 1950, provides as follows:

"School year. The school year shall begin on the first of July and each school regularly established shall continue for at least thirty-six weeks of five school days each and may be maintained during the entire calendar year."

Section 279.11, Code of 1950, confers upon school boards power to extend the foregoing school period, providing specifically as follows:

"Number of schools—attendance—terms. The board of directors shall determine the number of schools to be taught, divide the corporation into such wards or other divisions for school purposes as may be proper, determine the particular school which each child shall attend, and designate the period each school shall be held beyond the time required by law."

The Legislature, within its powers, has, by section 279.10, provided that a common school continue for at least thirty-six weeks of five school days each year. The foregoing thirty-six weeks of five school days each, may be the term which the Legislature intended in the enactment of Section 279.15, dependent upon the action of the Board of Directors of each school district, who, in the absence of statutory definition of the term, possesses the power to fix the length of a school term in each school district. Such period of time, when fixed by the Board of Directors, whether it be quarters, semesters, thirty-six weeks, or other periods of time, shall be the "term" meant when used in section 279.15, Code 1950. This period is fixed by the board by resolution at the commencement of each school year, and, if not fixed, is presumed to be the entire school year.

"Under the common school law, the length of the time each year, during which the school shall be kept open, is left to the discretion of the Board of Directors acting in good faith and for sufficient cause." *Headnote to Morely v. Power, 10 Lea (Tenn.) Page 219.*

Once open, the school must be left open for the school year of at least thirty-six weeks. Whether or not the school opens the succeeding fall depends upon the prerequisites prescribed by section 279.15.

Therefore, it is our view that when the school does not have the required number of pupils for the last preceding term, then the school board may not contract with a teacher or open the school unless and until that school will have the required number of pupils in the next

term, evidenced by the written statement duly sworn to by the parents or guardians of seven or more such elementary children before the county superintendent or a notary public certifying that such children will enroll in and will attend such elementary school if opened. Nor shall it be opened when it is apparent that the average daily attendance of elementary pupils will be less than five or the enrollment less than six pupils of school age, resident of the district or subdistrict, regardless of the average daily attendance in such school during the last preceding term.

March 6, 1952

HIGHWAYS: Vacating or closing—notice of time and place of hearing. A county board of supervisors desiring to vacate or close a road under its jurisdiction must send notice of the time and place of hearing to the state highway commission and any other boards or commissions which it is apparent may have an interest. The same rule is required of the state highway commission as to primary roads.

Mr. E. W. Adams, County Attorney, Marshalltown, Iowa:

In your letter of February 23rd you refer to the requirements of sec. 7, Chap. 103, Acts of the 54th G. A., as to notice and hearing in connection with the vacation and closing of highways. As I understand it you are concerned with procedure as to roads which are presently a part of the farm-to-market system, but it will be apparent from the reasoning of this opinion that the rule does not differ in the disposition of a secondary highway which is not a part of the farm-to-market system.

It should be borne in mind that Chap. 103, which was House File 59, Acts of the 54th G. A., explained this proposed legislation as essentially a Code revision bill. It pointed out that the act repealed all but a few sections of Chap. 306, Code of Iowa 1950, relating to the establishment, alteration and vacation of highways and enacted a substitute therefor. The bill repealed a total of 69 sections of the Code and enacted 22 sections to cover the same matter. In doing so it repealed numerous sections of other chapters of the Code relating to highways and it is apparent that the act deals generally with the highway situation and that in the application of those chapters of the Code relating to secondary roads, farm-to-market roads and primary highways aid must be sought from this more recent and general enactment. We refer to this explanation not as necessarily controlling but as indicating the concept of the legislation in the minds of the proponents thereof. It is fully appreciated that the actual meaning must be derived from the language employed by the legislative draftsmen.

Sec. 20, Chap. 103, divides the highways of the state into the primary system, the state park and institutional system, and the secondary road system. Sec. 4 confers jurisdiction and control over such highways on the State Highway Commission as to primary roads, the board of supervisors as to secondary roads, and the board or commission in control of state park or institutional roads, as the case may be. Sec.

5 relates to and confers the power to establish, alter, or vacate on the board or commission having control and jurisdiction. Sec. 6 requires the board or commission to fix the time and place for a hearing in connection with the vacation or closing of a road, and sec. 7 compels notice thereof to be given by the agency having jurisdiction of the road. "Board" as here employed might mean the Board of Supervisors, the State Board of Education, the Board of Control, etc., in so far as such boards are vested with control over specific highways. The term "commission" in addition to the State Highway Commission might also refer to the State Conservation Commission. Any of the foregoing in addition to the State Highway Commission and the County Board of Supervisors might exercise road jurisdiction within the contemplation of Chap. 308 of the Code with respect to park and institutional roads.

Regardless of the board or commission exercising jurisdiction and control over a specific highway it should be readily apparent that the highways of the state are all part of an interlocking network of communication and transportation, and from the standpoint of a member of the general public who is seeking to travel from point "A" to point "B" he is not concerned about which of several agencies of the state exercises jurisdiction and control over the road on which he travels, but he is concerned that his travel shall not be interrupted or prolonged by excessive detours or roundabout routes prolonging his journey to his destination, particularly when such diversion might have been caused by the closing of highways, or parts of highways, due to lack of co-operation between the responsible governmental agencies. This statement may seem to somewhat labor the point but it is necessary to understand the necessity for integration, and such necessity highlights the intent of the Legislature with respect to the notice contemplated by sec. 7, Chap. 103, Acts of the 54th G. A.

In addition to this general consideration your attention is invited to the fact that even with respect to secondary roads, the control and jurisdiction of which is in the county board of supervisors, the State Highway Commission has certain duties and responsibilities as indicated by sections 309.39, 309.42, 309.69, 309.70, 309.79 and 309.80. It is obvious also that secondary roads as well as farm-to-market roads and primary roads may cross, intersect, or border on property under the control and jurisdiction of other of the agencies referred to above, as a result of which both have an interest in the kind, type, and location of the highway.

It is further apparent that with respect to farm-to-market roads, over which boards of supervisors have jurisdiction and control, the consent of the State Highway Commission is made necessary to a modification or change in such system by the specific requirements of sec. 310.10 Code of Iowa 1950; whereas, with reference to the primary system sec. 313.2 Code of Iowa 1950, provides for the elimination of portions of the primary system, with the consent of the federal authorities, by the State Highway Commission, and that upon such elimination

the eliminated portions shall revert to and become a part of the secondary road system. Hence it is apparent that the boards of supervisors have an interest to protect in connection with the vacation of a primary highway, and the section last referred to also provides that for certain purposes additions may be made to the primary system which might come from the secondary road system, the taking of which would definitely be a concern of the board of supervisors of the county involved.

The foregoing merely serves to point out the conditions and the reasons which may have moved the legislature to require the county board of supervisors to mail a notice of the proposed vacation of any secondary road not only to the Highway Commission but to the State Board of Education or the Conservation Commission if such secondary road impinges upon an institution under the control of either of such agencies. Conversely it highlights the reason why the Legislature might require the Highway Commission to give notice to the board of supervisors of the county concerned of the vacation or closing of a primary highway within such county.

With this background we turn to a consideration of the precise language of sec. 7, Chap. 103, Acts of the 54th G. A. and find that it reads as follows:

"Notice of such hearing shall be published in some newspaper of general circulation in the county or counties where such road is located at least twenty (20) days prior to the date of hearing. The *board or commission which instituted said proceedings* and is holding such hearing, shall notify the state highway commission, the board or boards of supervisors, or board or commission in control of affected state lands, as the case may be, of the time and place of such hearing by registered mail addressed to the state highway commission, the county auditor, or the board or commission in control of affected state lands, as the case may be."

From this it seems clear that the county board of supervisors in vacating or closing any road under its jurisdiction must send a notice of the time and place of hearing thereon to the State Highway Commission and that it may be required similarly to send such a notice to other state boards or commissions if it becomes apparent that any of them have an interest. It seems likewise clear that in the vacation or closing of a primary highway the State Highway Commission must send by registered mail to the board of supervisors of the county in which such highway is located a notice of the time and place of hearing on such vacation and that it also may similarly be required to give such notice to any other state institution having an interest in such highway by reason of its location.

It has been suggested that the language of this statute might require a board or commission instituting the proceedings to direct a notice thereof to itself. Such a suggestion is upon its face absurd in the light of a commonly understood rule that actual knowledge obviates the necessity of notice, the purpose of the notice being to give knowl-

edge. Knowledge of a public agency or corporation or quasi-corporation, whichever the county or the State Highway Commission may be considered to be, is certainly to be found in the official acts of such agency and incorporated in the official proceedings thereof. Since there is knowledge no such absurdity as that embodied in the suggestion is contemplated.

With the knowledge it has of the purpose behind the enactment of Chap. 103, Acts of the 54th G. A., it had never occurred to this office that any question would arise as to the application or interpretation of sec. 7 with respect to notice, but since the question has apparently afforded difficulty to other counties than your own the somewhat labored and detailed explanation which precedes the foregoing conclusion is believed justified.

March 13, 1952

HIGHWAYS: Advancement of county road funds for farm-to-market construction—reimbursement. The county board of supervisors may undertake to improve a section of farm-to-market road and advance funds therefor from the county road funds and be reimbursed from the farm-to-market road funds, but only to the amount actually spent from the county road funds.

Mr. John Butter, Administrative Engineer, Iowa State Highway Commission, Ames, Iowa:

Re: O'Brien County—Project SN-725.

Attention has been focused on the above entitled project by objections to expenditures in connection with it by O'Brien County raised by the examiners in the State Auditor's office. The specific objection is that the cost of the project was originally advanced from the secondary road maintenance funds of the county although subsequently reimbursed from farm-to-market funds. An opinion of the Attorney General's office as to the illegality of the contract is referred to without citing the opinion. This may be the opinion found at page 624 of the Opinions of the Attorney General 1938. It was written prior to the enactment of what is now sec. 310.2, Code of Iowa 1950, which specifically authorizes such an arrangement.

Front Street in Primghar, O'Brien County, Iowa, is a farm-to-market highway extension and involves .463 miles of paving. After the required preliminaries the project was advertised for letting as a farm-to-market project by the State Highway Commission on September 13, 1949. One bid was received for $18,983.10. The bid was rejected as too high since the estimate for the project was only $16,056.00. The Highway Commission then proceeded to negotiate what is described on its face as a "private contract" with the Board of Supervisors of O'Brien County for $16,194.16, relying for its authority on section 308A.10, Code of 1950. The county proceeded to do the work on a day labor basis at an actual cost of $5,505.57 less than the amount of the contract, so that the total cost was $8,294.51 less than if the

contract had been awarded to the single bidder. The county advanced the money out of secondary road maintenance funds without going through the formality of transferring the money from the maintenance fund to the construction fund as authorized by sec. 309.15 Code of 1950. The work was accepted on October 24, 1949, and on January 5, 1950, the farm-to-market fund reimbursed O'Brien County in the amount of the contract and the maintenance fund was credited with the money so received.

It is likewise true that the minutes of the Board of Supervisors of O'Brien County failed to reflect the authorization for this contract, and in that respect the contract is irregular. It is likewise true that the advancement of this money out of the maintenance fund without making the transfer contemplated by the statute is irregular. Aside from commenting on the irregularity the auditors quite properly made no particular issue of this aspect of the matter since the fund in question at the time of the audit had already been reimbursed in an amount exceeding the advancement.

This so-called "private contract" was negotiated subsequent to the enactment of sec. 2, Chap. 125, Acts of the 53rd G. A., which now appears as sec. 308A.10 Code of 1950. For that reason we are not concerned with the more restrictive provisions of previous legislation. The section referred to provides that in the award of contracts for the construction of any highway the board having jurisdiction and control may reject any or all bids received and let by private contract or build by day labor at a cost not in excess of the lowest bid received. This is what the Highway Commission was attempting to do by the so-called "private contract" with O'Brien County.

Under sec. 4, Chap. 103 Acts of the 54th G. A., jurisdiction and control over secondary roads is vested in the board of supervisors of the respective counties where such highways are located. This was true before the enactment of the specific statute cited and even though the particular project had to do with an extension of a farm-to-market highway the responsibilities with respect to which might be assumed by the board of supervisors under sec. 308A.15 Code of 1950. The farm-to-market road fund is allocated to the credit of counties and has to be expended by and within the county to which the allotment is made. In other words, the farm-to-market road fund is simply a method of making additional moneys available for the construction of certain types of secondary highways in counties. One distinction between this fund and other county highway funds is that the approval and concurrence of the Highway Commission is required in order to properly effectuate the construction.

Since the construction of this particular farm-to-market extension had become responsibility of the county we have no difficulty in sanctioning the expenditure of secondary road funds for that purpose, provided the requirements of the statutes in other respects are met, but, as pointed out, the obligation to do this work when once assumed

was primarily the obligation of the county and we fail to see how a contract could be negotiated by the Highway Commission with the county under which for a consideration, the county undertook to discharge what had become its own responsibility under the statute.

If, in this instance, the language of sec. 308A.10 had been strictly applied, and the county had undertaken to do the work contemplated by day labor upon the undertaking of the Highway Commission that the county would be reimbursed out of farm-to-market funds upon the satisfactory completion of the project, there would be no objection. This would have meant simply that the county road fund would have received back out of the farm-to-market road fund the money advanced, but in this instance it received better than $5,500.00 more than the amount advanced, and this is irregular. The county road fund, whether construction or maintenance, may be spent on all highways of the county, while the farm-to-market road fund may only be spent on farm-to-market highways, so that as a result of this transaction there became available to O'Brien County almost $5,505.57 more than it was entitled to spend in this less restricted fashion.

It is the opinion of this office that the amount of the savings, $5,505.57, should be turned back to the farm-to-market road fund where it will be credited to O'Brien County for expenditure on farm-to-market roads only.

March 13, 1952

INTOXICATING LIQUORS: **Keeping and consumption of liquor in clubs—club defined.** The mere possession or consumption, in a bona fide club, of Liquor purchased under the provisions of the Liquor Control Act is not per se illegal, however no club may engage in the sale of liquor. Consumption of liquor in a public place is illegal and if a so-called club is in reality a business enterprise it is in fact a public place. Likewise the keeping of liquor in a public place for purposes of consumption therein is a violation of the Act.

Mr. Clyde E. Herring, County Attorney, Des Moines, Iowa: By recent letter you have requested an opinion of this office specifically inquiring whether the keeping of liquor by a club on its premises is in violation of law. The factual background set forth in your letter and accompanying materials indicates that your question of law is predicated upon conditions which may be briefly summarized as follows:

Institutions designated "clubs" provide on their premises a place for the storage of intoxicating liquor owned by individuals who are designated "members". Each "member" has access to the liquor owned by him which is kept in the possession of the "club". The "member's" liquor is consumed by the "member" and his guests on the premises of the "club".

In some instances the assets of the "club" are owned by the "members" either directly, or indirectly as members of a nonprofit corporation. In such cases the "club" is not operated as a business enterprise for pecuniary gain of any individual or particular group of individuals or other legal entity. In this type of institution membership is gained by

election of those who are already members. An initial "membership" fee is exacted and monthly dues must be paid to maintain "membership". The fees and dues involve sums which are substantial rather than nominal.

In other cases the assets of the "club" are owned by one or more individuals or other legal entity and the "club" is operated with a view to pecuniary gain by such owner. The facilities provided are analogous to those referred to in the preceding paragraph. "Membership" fees are charged and monthly "dues" are paid by the "members". The fees and dues are relatively nominal, usually involving an initiation fee of two or three dollars and monthly dues in a similar sum, although in some instances the dues are more substantial. In this type of "club", "membership" is gained very informally and the owner either determines or is influential in determining the "membership". Usually in this type of "club" the owner of the assets leases the assets to the "club". Frequently the owner-lessor is the manager or controls the manager. The operation of the "club" is usually very profitable to the owner and manager but results in little or no gain to the "club".

In considering questions arising under the liquor laws of Iowa two fundamentals of these laws are always prominent.

1. The possession of liquor in containers bearing Iowa Liquor Control Commission Seals is not per se a violation.

2. The consumption of liquor in a public place is a violation.

By enactment of the "Mulct Law" in 1894, the sale of intoxicating liquor was prohibited in Iowa with the exception that sale was permitted by persons who were licensed in accordance with the provisions of the said law. In 1915, by Act of the 36th General Assembly the licensing provisions of the Mulct Law were repealed. New prohibitions were enacted relating to the possession, sale, transfer and transportation of intoxicating liquors. These new provisions, together with provisions of then existing law which were not repealed amounted to state prohibition. Principally these statutes are found in Chapter 125, Code of Iowa 1950, and have never been directly repealed. These provisions constituted the Prohibition Law of Iowa.

Subsequent to repeal of the Eighteenth Amendment to the Constitution of the United States (Federal Prohibition) and repeal of the "Volstead Act" the Forty-fifth General Assembly of Iowa in Regular and Extraordinary Sessions, enacted a body of law relating to alcoholic beverages. (Chapters 37 and 38, Acts of the Forty-fifth General Assembly, and Chapter 24 Acts of the Extra Session of the Forty-fifth General Assembly). These laws resulted in legalizing the sale of intoxicating liquors through a state-owned and operated Liquor Store System and the sale of beer (which was excluded from the definition of "Intoxicating Liquor") under a licensing system, and further legalized the possession of such products within certain limitations. The legalizing effect, as previously indicated, was not achieved by a direct repeal of the General Prohibition Law, but rather by the enactment of provisions which in many instances supersede the general prohibition statutes. In this regard the title to House File 292, Acts of the 45th G. A. Extraordinary Session (Chapter 24 of the said Acts; Chapter 123 Code of Iowa 1950) states in pertinent part:

"to provide that whenever the provisions of any existing laws relative hereto are or may be inconsistent or in conflict with the provisions of this act that the provisions of this act shall control and supersede such laws and providing that the passage of this act shall in no manner affect Chapter Thirty-seven (37) and Chapter Thirty-eight (38) of the Acts of the Forty-fifth General Assembly, it being the intent of this Act that said Chapters Thirty-seven (37) and Thirty-eight (38) Acts of the Forty-fifth General Assembly, shall remain in full force and effect as enacted or as hereafter amended."

The substantive provisions effecting the purpose declared in the title above set forth are found in section 2 of the said chapter 24 and in section 123.2, Code of 1950, as follows:

"Wherever any provisions of the existing laws are in conflict with the provisions of this chapter, the provisions of this chapter shall control and supersede all such existing laws."

One of the statutes which was enacted in 1897 and is found in the chapter of the present code, entitled "General Prohibitions" (Chapter 125) is section 125.13:

"Every person who shall directly or indirectly, keep or maintain, by himself or by associating or combining with others, or who shall in any manner aid, assist, or abet in keeping or maintaining, any club-room or other place in which intoxicating liquors are received or kept for the purpose of use, gift, barter, or sale, or for distribution or division among the members of any club or association by any means whatever, and every person who shall use, barter, sell, or give away, or assist or abet another in bartering, selling, or giving away, any intoxicating liquors so received or kept, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail not less than thirty days nor more than six months."

In view of the provisions of the foregoing quoted section it is necessary to determine whether the said provisions are superseded by any provisions of Chapter 123 of the Code under section 123.2 thereof hereinbefore set forth. Under section 123.3 of the Code, 1950, the possession of alcoholic beverages is declared illegal except when possessed within the limitations of Chapter 123. The section provides:

"It shall be unlawful to manufacture for sale, sell, offer or keep for sale, possess and/or transport vinous, fermented, spirituous, or alcoholic liquor, except beer as defined in chapter 124, or as the same may hereafter be amended for any purpose whatsoever, *except upon the terms, conditions, limitations and* restrictions as set forth herein."

An analysis of Chapter 123 in its entirety and Supreme Court decisions thereon, indicates that generally speaking the possession of alcoholic beverages is not illegal. In the main, possession is illegal when such beverages are *kept for sale or illegal use.* (State v. Arluno, 222 Iowa 1, State v. Johnson, 222 Iowa 1204).

As a *person* may legally possess liquors, it remains to be determined whether a "club" as a result of the enactment of Chapter 123 of the Code has the same status and privileges of persons generally. Section 123.5 of the Code provides in pertinent part:

"For the interpretation of this chapter, unless the context indicates a different meaning:
* * *

6. 'Person' includes any natural person, association, partnership, corporation, and club."

From this definition it results that whenever the word "person" occurs throughout the chapter, it refers to clubs as well as individuals. It follows that all of the rights, privileges, and prohibitions relating to individuals by express reference or by implication, also relate with equal force and effect to clubs. A conflict thus develops between the provisions of Chapter 123 and section 125.13 supra, resulting in nullifying the provisions of the said section 125.13.

Attention is invited to the fact that in addition to "clubs", the word "person" as defined in Chapter 123 also includes "associations, partnerships and corporations". It follows that all such legal entities may possess alcoholic beverages in a public place under the same provisions that apply to individuals.

On the question of possession it is, therefore, immaterial whether a "club" is a "public place". However, under section 123.42 of the Code intoxicating liquors may not be consumed in a public place. Section 123.42 of the Code provides:

"It is hereby made unlawful for any person to use or consume any alcoholic liquors upon the public streets or highways, or in any public place, and no person shall be intoxicated nor simulate intoxication in a public place; and any person violating any provisions of this section shall be fined not to exceed one hundred dollars or sentenced not to exceed thirty days in the county jail."

A "public place" is defined in section 123.5 hereinbefore mentioned as follows:

"19. 'Public place' includes any place, building or conveyance to which the public has or is permitted to have access and any place of public resort."

Whether in a particular instance a "club" is a "public place" is a fact question. The quarters of a "bona fide club" in substance as well as in form are recognized in law as a private place as distinguished from a public place under statute and statutory definitions analogous to that of sub-paragraph 19 of section 123.5 supra.

The Illinois Dramshop Law R. S. 1874 p. 438, declared to be "nuisances" all places where intoxicating liquors are sold in violation of law and any shift or device to evade provisions of the act to be an illegal sale. In City of Decatur v. Schlick, 109 N. E. 737, the defendants prior to the local option election of 1914 conducted a licensed saloon. After the election they closed the saloon and subsequently opened on the premises a place under the name of the "Business Men's Club". Lunches, soft drinks and tobaccos were sold. The ice box was divided into compartments. Intoxicating liquors which were the property of the patrons was stored, each person having a separate storage place, labeled with his name. Such owner was served with his liquor on request for him-

self or for himself and his friends or guests who accompanied him. The Supreme Court of Illinois held that such facts did not constitute a "club" and affirmed the judgment of the lower court that an illegal shift or device existed and that defendants were guilty of maintaining a nuisance.

Under Massachusetts statutes in 1884 the sale of liquors by a club to its members was legal. In Commonwealth v. Pomphret, 137 Mass. 584, 50 Am. Rep. 340, the defendant was charged with keeping intoxicating liquors with unlawful intent to sell the same. The Supreme Judicial Court of Massachusetts said:

"The word 'club' has no very definite meaning. Clubs are formed for all sorts of purposes and there is no uniformity in their constitutions and rules. It is well known that clubs exist which limit the number of members and select them with great care, which own considerable property in common, and in which the furnishing of foods and drink to the members for money is but one of the many conveniences which the members enjoy. If a club were really formed solely or mainly for the purpose of serving intoxicating liquors to its members, and any person could become a member by purchasing tickets which would entitle the holder to receive such intoxicating liquors as he called for, upon a valuation determined by the club, the organization itself might show that it was the intention to sell intoxicating liquors to any person who offered to buy, and the sale of what might be called a temporary membership in the club, with a sale of the liquors, would not substantially change the character of the transaction. One inquiry always is, whether the organization is bona fide a club with limited membership, into which admission cannot be obtained by any person at his pleasure, and in which the property is actually owned in common, with the mutual rights and obligations which belong to such common ownership, under the constitution and rules of the club, or whether either the form of the club has been adopted for other purposes, with the intention and understanding that the mutual rights and obligations of the members shall not be such as the organization purports to create, or a mere name has been assumed without any real organization behind it."

In Commissioner of Corporations and Taxation v. Chilton Club, 318 Mass. 285, 61 N. E. 2d, 335 (1945) it was again said:

"One inquiry always is whether the organization is bona fide a club with limited membership * * * or whether the word 'club' is a mere name assumed without any real organization behind it."

In Portuguese-American Independent Social Club v. Costello, 63 R. I. 4, 6 A. 2d. 717, there was evidence which showed that there was practically no limit on the membership; that no vote was passed upon the admission of new members; that no election of officers was held for two years; that no record of the members voting any salaries was kept; that certain proceeds were not received by or subject to any recorded order of the club; that the owner of the building was also vice-president and steward, and apparently received rent, salary and money for electric service. The Supreme Court of Rhode Island held that petitioner was not a bona fide club.

The word Club is defined in Webster's New International Dictionary (Second Ed., 1948) p. 509, as follows:

"6. An association of persons for the promotion of some object, as literature, science, politics, good fellowship, etc., esp. one jointly supported and meeting periodically. Membership is usually conferred by ballot, and carries the privilege of exclusive use of club quarters."

It is clear that the word "club" within normal connotation and within legal contemplation refers to an organization of a private nature and whose quarters are in truth and in fact a private place. It is, of course, this very truth which encourages attempts to clothe illegal transactions with apparent legality by the adoption of the word "club" or the erection of a mere form without substance as a club. It follows, therefore, that the premises of a "club" which does not have the true essence of a private association in fact is under the statutes a public place.

In construing the statutory definition of a "public place" under the provisions of Chapter 123 of the Code it is pertinent to observe decisions on the question whether the public has or is permitted to have access even though the place has certain characteristics borrowed from bona fide "clubs".

In Tooke v. State, 61 S. E. 917, it was said by the Court of Appeals of Georgia:

"The rooms of bona fide private clubs of select and discriminate membership, to which only members and specially invited guests are permitted access, are prima facie not public. If the membership of the club is organized upon an indiscriminate basis, or admits guests to its rooms otherwise than upon special invitation, or if it is not a bona fide organization, or if it be organized or maintained chiefly for the purpose of encouraging or facilitating the drinking of liquors, it is a public place while persons are congregated there."

In Suburban Club, Inc. v. State, 222 S. W. 2d. 321, an injunction was sought against the Suburban Club to enjoin the club from operating an open saloon. This issue necessarily involved the sale of intoxicating liquors. Notwithstanding the fact that the question submitted by you does not assume a sale of alcoholic beverages by a "club" the facts of the case and the conclusions of the court directly bear upon the question you have presented in that to find the establishment an "open saloon" it was also necessary to find that the club was of a public nature.

The club was chartered under Texas statutes as a non-profit corporation. In two months of operation the club earned for the "proprietors" a substantial sum which included sums derived from the sale of "memberships." The "members" did not attend meetings, did not serve on membership committees, had no voting rights, acquired no interest of any kind in the "club" property.

The Court of Civil Appeals of Texas stated:

"The evidence sustained the conclusion that the 'club' was operated for the sole profit of the 'proprietors' and that the 'members' were individuals acceptable to 'proprietors' who were willing to pay * * * for the privilege, as 'members', of having liquor served to them with their meals and enjoying the music of the orchestra or dancing at the 'proprietors' 'club'. * * *

"The so-called 'club' * * * was limited in its patronage to those to whom the 'proprietors' chose to sell 'memberships,' together with their guests (sometimes numbering as many as 25 in one party). 'Members' were sold their meals and liquors on credit and were liable for the charge slips they signed, as well as for those signed by their authorized guests; but the profits belonged to the 'proprietors' who, alone, chose the members; and, as owners of the corporate appellate, ran the 'club'.

We are of the opinion that although the patronage was restricted by the 'proprietors', the use of the club and its charter was a subterfuge; and the sale of liquor in the dining-room of the so-called 'club', under the circumstances and evidence in this case, justified the trial court in finding that 'the place was operated under circumstances and conditions contrary to the purposes of the Liquor Control Act.' "

In conclusion you are advised:

1. The provisions of sections 125.13 of the Code are superseded by the provisions of Chapter 123, and therefore it is not unlawful to keep alcoholic beverages which are in containers bearing Iowa Liquor Control Commission seals, upon the premises of a club.

2. Whether the premises of a club is a private or public place, is a fact question to be determined through the guidance of the cases herein cited, and other pertinent cases on the question, it being clear, however, that the quarters of bona fide associations of select discriminate membership owned and operated by and for the benefit of the members, under the exclusive control of the membership are deemed private places in the eyes of the law, whereas, establishments which have merely assumed the club form but are lacking in the substantive attributes of a true club and are in fact business ventures, are within contemplation of law "public places".

3. The possession of alcoholic beverages in containers bearing Iowa Liquor Control Commission seals, in a public place is not per se a violation of the Liquor Control Act. However, possession may be illegal, as for example, if the liquor is kept for the purpose of sale, or illegal use (circumstantial evidence may establish this point).

4. The consumption of liquor in a public place is in violation of the Liquor Control Act, and the keeping of liquor to be consumed in a public place is a violation as the establishment in possession may be charged as a principal (aider and abettor).

5. No club may engage in the sale of alcoholic beverages.

April 4, 1952

SOLDIERS BONUS: Status of stepchild adopted by new stepfather. Where a stepchild of a deceased World War II veteran was adopted prior to November 2, 1948, by a new stepfather the affinity ceased to exist and such child would not be entitled to the bonus and the next in line under the statute would take.

Mr. Edward J. Kallemyn, Executive Secretary, World War II Service Compensation Board:

We have had under consideration for some time now your request for an additional opinion as to stepchildren and adopted children and adoptive parents.

You will recall that we rendered an opinion on July 27, 1950, advising you that:

1. "In the case, then of a veteran killed in action, who at that time was married and had a stepchild, that relationship continued to exist thereafter.

2. "The stepchild may obtain another stepparent but the affinity remains with the veteran stepfather and since the legislature did not see fit to take the child out of the line in the event of a new stepparent relationship as it did in the case of a remarried widow, we believe they intended the stepchild to receive this benefit."

In your recent request, you go a step further and ask:

"As to whether or not the adoption of a veteran's stepchild by its new step or new parent or by any other person or persons changes its status to the extent that it is no longer eligible for World War II service compensation as beneficiary of its deceased veteran stepfather, and, if so, whether the beneficiary next in line, as provided in Chapter 35A, Code of Iowa, 1950, thereby becomes eligible."

In our opinion of July 27, 1950, we said:

"We would hold differently in case the veteran returned and the relationship terminated by a divorce and loss of custody to the veteran of the child by court action prior to the death of the veteran. In such case, the relationship of stepchild and stepfather would not be existant at the time of the veteran's death and the ex-wife and child would not be in the list designated in the statute."

In our opinion to you dated March 15, 1949, we advised you that:

"It follows that it is our opinion that the effective date of Chapter 59, Acts of the 52nd General Assembly, was November 2, 1948, and that the status of those eligible to receive said bonus was fixed and determined as of that date."

Taking into consideration our opinions of March 15, 1949, and July 27, 1950, it follows that it is our opinion now that if the relationship of stepfather and stepchild existed on November 2, 1948, and the widow was remarried on or before that date, then the stepchild's status is fixed and determined as of that date and such stepchild is entitled to the bonus. The affinity continues notwithstanding the death of the veteran stepfather.

What, then, if the said stepchild had been adopted by a new stepfather on or before November 2, 1948?

Section 600.5 provides that a decree of adoption *shall* be entered.

"Ordering that from the date thereof, the child shall be the child of the petitioners."

Section 600.6 provides

"upon the entering of such degree, the rights, duties and realtionships between the child and parent by adoption shall be the same that exist

between parents and child by lawful birth and the right of inheritance from each other shall be the same as between parent and children born in lawful wedlock."

Our adoption laws contain nothing concerning the relationship between a former stepparent and an adoptive parent.

In the case of In Re Smith's Estate, 223 Iowa 817, 273 N W 891 and 277 N W 743 states the law in Iowa to the effect that where an adopted child dies intestate, leaving no widow or heirs, the adopting parents are the legal heirs of deceased and entitled to his estate to the exclusion of the natural parents and no part of the estate descends to the natural parents or their heirs. (Citing In Re Fitzgerald's Estate, 223 Iowa 141; 272 N W 117.)

The cases of Moore vs. Weaver, 53 Iowa 11, 2 N W 741, In Re Estate of Parker, 97 Iowa 593, 66 N W 908 and Lawley vs. Keyes, 172 Iowa 575, 154 N W 940 state the law of Iowa to the effect that where a person dies intestate, leaving no widow or heirs, and his natural mother predeceases his natural father and such natural father had remarried, the deceased's stepmother would be entitled to share in his estate. In other words, though no heir of her husband, the stepmother was an heir of her stepson, though no blood relation to him.

Bearing in mind the two foregoing lines of cases, it seems logical to say that if the stepchild of the deceased veteran was adopted on or before November 2, 1948, the affinity ceased to exist upon the filing of the decree of adoption and, as stated in the Smith case, the adopting parents are the legal heirs to the exclusion of the natural parents and if the adopting mother had predeceased the adopting father and he had remarried, the stepmother would be considered as a legal heir.

We are, therefore, of the opinion that if such stepchild of a deceased veteran had been adopted by a new stepfather on or before November 2, 1948, the affinity ceased to exist and such person would not be entitled to the bonus and the next in line, mother, father or person standing in loco parentis, in that order, would be entitled thereto.

April 17, 1952

(See Opinion of February 21, 1952)

CITIES AND TOWNS: Parking meter revenue—use of excess funds. The excess of parking meter revenue may be used for general traffic control including off-street parking lots and parking garages, however its use for garages for storage, repair and servicing of city vehicles is not within the authority of the statute.

Mr. Glenn D. Sarsfield, State Comptroller: We have yours of recent date in which you have submitted the following:

"In your opinion of February 21, 1952, to me regarding the Parking Lot Fund and the Parking Meter Fund you state in part the following:

'2. (b) The foregoing statute, therefore, being a regulatory measure under the police power, its use must be restricted to the uses designated by the foregoing section 390.8. Its diversion to any other use, such

as use in the Street Fund, than that prescribed in the foregoing section 390.8, would place the foregoing statute in constitutional jeopardy. This jeopardy would arise if and when the Parking Meter Fund, limited in its use to the installation and maintenance of meters and traffic control devices, is diverted into the Street Fund where it might be used for the several purposes therein defined. According to Hickey v. Riley, 162 Pac. 2d 371, following other cited cases, states this:

'The right to apply the revenue not only to the narrow and restricted purposes of the mere installation, operation and maintenance of the meters, but also to the broad purposes of general traffic control where authorized by the enabling ordinances, has been upheld in a number of well-reasoned decisions.'

(c) Because of the very terms of the statute, 390.8, parking meter funds can be used only for the purposes set forth in the statute and none other. The statute so reads:

'Funds derived from the operation of parking meters shall be used for the following purposes and none other.'

Section 390.12, Code of Iowa, makes certain exceptions and provisions for the use of the funds received from the operation of parking meters in cities under 10,000 population.

A municipal corporation (under 10,000 population) has raised the question with this office if the council may direct a portion of the cost of construction of a contemplated garage for the storage, repair, and servicing of city motor vehicles and other equipment may be paid direct out of the Parking Meter Fund without transferring it.

In view of your opinion referred to above and section 390.12, Code of Iowa, I respectfully request an opinion as to whether expenditures such as those referred to above, or for any other lawful purpose may be made from the Parking Meter Fund in cities under 10,000 population."

In reply thereto we would advise you as follows:

The foregoing Code section 390.12, Code of 1950, involved herein, provides as follows:

"Cities under 10,000 population. Sections 390.8 and 390.11 shall not be applicable to cities and towns having a population of less than ten thousand, however, such cities shall have power and authority to use the funds received from the operation of parking meters to pay the cost of acquiring, operating, maintaining and repairing the same, and also to pay the cost of acquiring and operating other parking and traffic control devices. Any of such funds remaining thereafter may be used either to purchase, lease or otherwise acquire parking lots or other off-street parking areas for the parking of vehicles, or said remaining funds may also be used for the retirement of revenue bonds issued for the purpose of acquiring parking lots, in the event the revenue from said parking lots is insufficient to pay the cost of retiring said bonds, or for any other lawful purpose."

The question at issue concerns the authorization provided in the foregoing statute for the use of meter funds remaining after the payment of the cost of acquiring, operating, maintaining and repairing, and paying the cost of acquiring and operating other traffic control devices, and specifically their use for the purpose of paying a portion of the cost of construction of a garage for the storage, repair and servicing of city motor vehicles and other equipment needed either directly or by transfer. Such excess may be used under the authority of the

statute for either the purchase, lease or otherwise acquisition of parking lots or other off-street parking areas for the parking of vehicles or for the retirement of revenue bonds issued for the acquisition of parking lots in the event the revenue from the parking lots is insufficient to pay the cost of retiring the bonds or for any other lawful purpose. The purpose for which the use of this fund is now sought clearly is within the foregoing terms only if it can be used under the power to use the excess for any other lawful purpose. In other words, if such excess is usable for the purpose stated, it must arise out of the power to use the excess "for any other lawful purpose." This being a regulatory measure promulgated under the police power, there are limitations upon its exercise. Such limitation is fixed in State v. Osborne, 171 Iowa 678, 687, in the following words:

"When, therefore, it is clearly evident that an act sought to be justified as an exercise of the police power is not in fact intended as a regulation, and that its real purpose—no matter what verbiage is employed to conceal it—is to raise revenue or to accomplish some ulterior effect not within the legitimate province of legislation, the courts will hold it to be unauthorized and void. Iowa City v. Glassman, 155 Iowa 671."

The situation, therefore, presents the question as to whether the accumulation of revenue from parking meters, in excess of its needs, in itself converts this statute into a revenue measure. The rule appears to be that collection of an amount of a license tax imposed under the police power in excess of the amount required to accomplish its purpose is sufficient by itself to destroy this use. That its use for the purchase, leasing or otherwise acquiring off-street parking lots and areas authorized by the statute is consistent with its purpose, will not be denied. But its use for any other lawful purpose places this statute in jeopardy unless it be within the legitimate province of the legislation.

McQuillin Municipal Corporation, Second Edition, Vol. 3, Page 693, provides as follows:

"Ordinances imposing license taxes under the power to regulate are prima facie valid, and the unreasonableness of the exactions must be made clearly to appear, and they must be obviously and largely beyond what is needed for the purpose intended, before such legislation will be declared void. The fact that the exaction may result in producing a revenue in excess of that required for regulation does not in itself destroy the regulatory character of a police measure."

In the cases cited in support of the foregoing rule:

"Erwin v. Omaha, 118 Neb. 331, 224 N. W. 692; Tharp v. Clovis, 34 N. M. 161, 279 Pac. 69, 71, citing the text; State ex rel. Remick v. Clousing, 205 Minn. 296, 285 N. W. 711. See State v. Cox ..... N. H. ....., 16 A. (2d) 508."

In the case of Colorado Postal Tel. Co. v. Colorado Springs, Colo, 560, 158 Pac. 816, it was held:

Where it did not plainly appear that the license fees imposed upon corporations using poles and wires for the conduct of electricity would

produce an income in excess of what would be required to pay the expense of the city's supervision, the ordinance imposing such fees was upheld as a valid and reasonable police measure.

In Glodt v. City of Missoula, 190 Pac. 2nd, 545, 549, where there was a claim made that the installation of parking meters and charging of a fee therefor, is revenue collecting purpose and not a traffic control purpose, the Supreme Court of Montana stated:

" 'Ordinances imposing license taxes under the power to regulate are prima facie valid, and the unreasonableness of the exactions must be made clearly to appear, and they must be obviously and largely beyond what is needed for the purpose intended, before such legislation will be declared void. The fact that the exaction may result in producing a revenue in excess of that required for regulation, does not in itself destroy the regulatory character of a police measure.' McQuillin on Municipal Corporations, 2nd Ed., Vol. 3 P. 693, Par. 1102.

The Supreme Court of Oregon in Hickey v. Riley, 177 Or. 321, 162 P. 2d 371, 377, said: 'We think that it is beyond question that the ordinances were enacted primarily for traffic regulation and not for revenue. The fact that, in the operation of the meters, a revenue has resulted, does not, in itself, classify the ordinances as revenue measures. (Citing cases) The right to apply the revenue not only to the narrow and restricted purposes of the mere installation, operation and maintenance of the meters, but also to the broad purposes of general traffic control where authorized by the enabling ordinances, has been upheld in a number of well-reasoned decisions'.

The state of Montana has clothed the cities and towns of the state with broad and comprehensive power over the streets and public ways within their limits. Several of the subdivisions of section 5039, Revised Codes 1935, set forth specifically the power and authority that the state, from its reserve of police power, has granted to the cities to enable them to acquire, construct, control and regulate the streets and the use thereof and the traffic thereon."

It would follow therefore that if excess revenue, arising out of the exercise of the police power in the enactment of a licensing measure, in itself may be a badge of unlawfulness, statutory provision for the use of such excess must be within the purpose of the licensing act. This is the view of Blashfield Cyclopedia of Automobile Law and Practice, Vol. 1, Part 1, Permanent Edition, Section 78.10, which states the rule as follows:

"Revenue derived from parking meters in excess of the expenses of installation and maintenance may properly be used to maintain the streets, including streets on which no meters are located; and, under proper legislative authority, may be used to acquire, construct, and maintain municipal parking lots or public parking areas."

If the accumulation of this excess money is deemed to be, in any aspect, an exercise of the taxing power of the state, its use for any other lawful purpose is limited to the general purposes of the statute. To that point Birmingham v. Hood-McPherson Realty Co., 172 So. 114, 108 A.L.R. 1140, 1150, stated the following:

"In the leading case of Van Hook v. City of Selma, 70 Ala. 361, 364, 365, 45 Am. Rep. 85, it is declared as to the power to tax as an incident to the exercise of police power, that 'in the case of useful

trades and employments, and a fortiori in other cases, that, as an exercise of police power merely, the amount exacted for a license, though designed for regulation and not for revenue, is not to be confined to the expense of issuing it; but that a reasonable compensation may be charged for the additional expense of municipal supervision over the particular business or vocation, at the place where it is licensed. For this purpose, the services of officers may be required, and incidental expenses may be otherwise incurred in the faithful enforcement of such police inspection or superintendence.' This is the rule that obtains in this jurisdiction. Standard Chemical & Oil Co. v. City of Troy, supra."

and our Supreme Court has stated to the same point in State v. Gish, 168 Iowa 70, 81, the following:

"The statute in question involves not only the taxing power, but the police power of regulation as well. If we were to strike down Sec. 9, which section alone involves the exercise of the taxing power, it would still leave the remainder of the act quite intact and independent and involving only an exercise of the police power. That a reasonable fee may be imposed as an incident to the exercise of the police power of regulation is too well settled to require citation of authorities. Standard Stock Food Company v. Wright, 225 U. S. 540; Engel v. O'Malley, 219 U. S. 128; St. Louis v. Williams, 235 Mo. 503; 139 S. W. 340."

In view of the foregoing we are of the opinion that the Legislature in authorizing use of the excess parking meter revenue "for any other lawful purpose" intended and did limit its use for general traffic control. We regard its use, therefore, for reconstruction of a garage for the storage, repair and servicing of motor vehicles and other equipment, not a use within the authority granted by section 390.12, Code 1950.

June 5, 1952

COUNTIES: Loaning or renting county equipment to drainage district. Except as provided in section 455.135 of the Code, the board of supervisors may not permit the use of county equipment in drainage ditch work within the district under control of a drainage board, with or without allowing compensation to the county from said drainage district.

Mr. Dayton Countryman, County Attorney, Nevada, Iowa: We have yours of the 24th ult. in which you have submitted the following:

"Kindly advise me on the following proposition:

'Can the Board of Supervisors use county equipment in drainage ditch work within the district under their control as the drainage board, with or without allowing compensation to the county from said drainage district?'

The nearest Attorney General's opinion I can find on this is found at page 294—1940. The facts, however, are sufficiently different in my opinion to warrant the above request."

In reply thereto we would advise you that subject only to certain provisions of Chapter 202, paragraph 21, Acts of the 53rd General Assembly, now appearing in section 455.135, Code of Iowa, 1950, there is no express authority in the Board of Supervisors to permit the use

of county equipment for any other than county purposes either with or without compensation to the county for such use. Such provision of the 53rd General Assembly is in terms as follows:

"In the case of minor repairs not in excess of five hundred dollars ($500.00) where the board finds that the same will result in a saving to the district it may cause the same to be done by secondary road equipment and labor of the county and then reimburse the secondary road maintenance fund from the drainage district fund thus benefited."

In the opinion to which you refer where the question of permitting farmers to use county spraying machines for the purpose of destroying weeds and for which use a reasonable rental is charged by the county it was the conclusion:

"That such use of the machine by farmers would be unauthorized. Municipal corporations have only such powers as are expressly granted them by statute or such as may be reasonably implied from the expressed grant. There is no statute authorizing a county to rent county property for private purposes."

The limited express power to use secondary road equipment provided by the foregoing statute enacted by the 53rd General Assembly, is, in our judgment, confirmation of the lack of any previous general power, express or implied, in the board of supervisors to permit the use of county equipment for other than county purposes with or without compensation.

Subject to the provisions of the portion of section 455.135, heretofore quoted, we are of the opinion that county equipment cannot be used for other than county purposes with or without compensation to the county for such use.

June 5, 1952

MOTOR VEHICLES: Records of operators for public inspection—exceptions. Records of the department of public safety relating to motor vehicle operators, except as provided in section 321.271 of the Code, may be inspected by the public and certified copies obtained upon payment of fee.

Mr. Pearl W. McMurry, Commissioner of Public Safety:

By letter dated April 15, 1952, you request an opinion relating to the authority and duties of the Department of Public Safety with relation to supplying to the public records of the department or information therefrom pertaining to motor vehicle operators.

Your attention is respectfully invited to the following pertinent sections of the Code of Iowa, 1950:

321.10 CERTIFIED COPIES OF RECORDS. The commissioner and such officers of the department as he may designate are hereby authorized to prepare under the seal of the department and deliver upon request a certified copy of any record of the department, charging a fee of fifty cents for each document so authenticated, and every such certified copy shall be admissible in any proceeding in any court in like manner as the original thereof.

321.11 RECORDS OF DEPARTMENT. All records of the department, other than those declared by law to be confidential for the use of the department, shall be open to public inspection during office hours.

321.199 RECORDS. The department shall file every application for a license received by it and shall maintain suitable indexes containing, in alphabetical order:

1. All applications denied and on each thereof note the reasons for such denial.

2. All applications granted.

3. The name of every licensee whose license has been suspended or revoked by the department and after each such name note the reasons for such action.

321.200 CONVICTION AND ACCIDENT FILE. The department shall also file all accident reports and abstracts of court records of convictions received by it under the laws of this state and in connection therewith maintain convenient records or make suitable notations in order that an individual record of such licensee showing the convictions of such licensee and the traffic accidents in which he has been involved shall be readily ascertainable and available for the consideration of the department upon any application for renewal of license and at other suitable times.

321.271 REPORTS CONFIDENTIAL—WITHOUT PREJUDICE. All accident reports shall be in writing and the written report shall be without prejudice to the individual so reporting and shall be for the confidential use of the department, except that upon the request of any person involved in an accident, or the attorney for such person, the department shall disclose the identity of the person involved in the accident and his address. A written report filed with the department shall not be admissible in or used in evidence in any civil case arising out of the facts on which the report is based.

321A.3 COMMISSIONER TO FURNISH OPERATING RECORD—FEES TO BE CHARGED AND DISPOSITION OF FEES. The commissioner shall upon request furnish any person a certified abstract of the operating record of any person subject to the provisions of this chapter, which abstract shall also fully designate the motor vehicles, if any, registered in the name of such person, and, if there shall be no record of any conviction of such person having violated any law relating to the operation of a motor vehicle or of any injury or damage caused by such person, the commissioner shall so certify. A fee of one dollar shall be paid for each such abstract except by state, county, city, town or court officials. Such fees shall be used by the department for administering this chapter. Such abstracts shall not be admissible as evidence in any action for damages or criminal proceedings arising out of a motor vehicle accident.

Obviously the provisions of section 321.10 are qualified by specific statutory provisions in derogation thereof. Section 321.271 is such a qualifying section. Likewise the provisions of section 321.271 qualify the provisions of section 321.11.

Under the provisions of section 321.271 the written reports relating to motor vehicle accidents which are made by parties involved in an accident, are privileged and are not to be made available for examination by any persons whomsoever other than personnel of the department of public safety in the performance of their duties in the

department. The Department of Public Safety will, under the provisions of the section, supply to *any person involved in an accident or their attorney* the identity and address of other persons involved in the accident.

It is to be noted that the provisions of section 321A.3 which make it the duty of the commissioner to furnish a certified abstract of operating records, are not in conflict with any pertinent statutes hereinbefore set forth. Briefly stated: Section 321.11 permits inspection of certain records; section 321.10 provides for certified copies of records; section 321A.3 provides for a certified abstract of records. For example: Under section 321.10, the operating history of an individual may involve a number of records. A copy of each record would be supplied for a fee of fifty cents. These records are available for public inspection without charge. Under section 321A.3 a person interested only in a summary of certain records and not actual copies of the records, may obtain an abstract of the information contained in such various records upon payment of a fee of one dollar.

You are advised that it is the opinion of this office that records of the department, other than those declared by law to be confidential, as in section 321.271, may be inspected by the public, and that certified copies of such records shall be provided upon the payment of a fee of fifty cents. You are further advised that members of the public may obtain an abstract of the conviction and accident record of any person upon payment of a fee of one dollar. You are also advised that under the provisions of section 321.271 accident reports and information set forth in such reports are not to be divulged or made available in any manner to the public, with the exception that the identity and address of persons involved in an accident may be furnished to other persons involved in the accident or the attorneys for such persons, and with the further exception that the fact that an individual was involved in an accident on a certain date, may be shown in the abstract under section 321A.3.

In making records available to the public, you are advised that the duty of the department under the law is to provide reasonable service to the public taking into consideration the normal limitations imposed by personnel and the regular administrative functioning of that office.

July 3, 1952

COUNTIES: Use of county hospital tax funds for tuberculous patients. The state institution fund, section 444.12 of the Code as amended by chapter 91, Acts 54 G. A., is the proper fund from which the cost of tuberculous patients in the county hospital should be paid. The county hospital tax levied under section 347.7 is not available for that purpose.

Mr. Clyde E. Herring, County Attorney, Des Moines, Iowa, Attention Mr. Shepherd: This will acknowledge receipt of yours of the 6th ult. in which you have submitted the following:

"Broadlawns Polk County Hospital has notified the Board of Supervisors of Polk County, Iowa that it proposes to ask Polk County to budget approximately $200,000.00 in the State Institutions fund of Polk County, and to levy a tax sufficient to raise said amount, and to appropriate the amount so raised, and to pay the said amount to Broadlawns to pay the full cost of tuberculosis patients at its tuberculosis department. Their request is based upon a letter opinion from your office dated November 19, 1948, and addressed to the County Attorney of Scott County, Iowa.

Heretofore, the cost of operating the tuberculosis department of Broadlawns has been paid from the Polk County Public Hospital fund created pursuant to section 347.7 of the Iowa Code of 1950. The Board of Supervisors has not used the State Institutions fund for such purpose. In this connection, attention is invited to the language of section 254.4 of the 1950 Code, as amended by Chapter 91, section 1 of the Acts of the 54th General Assembly, which indicates that allowance by the supervisors from the State Institutions fund is permissive only, and not mandatory.

Your attention is further invited to section 347.7 of the Iowa Code of 1950 and to Chapter 138, section 1 of the Acts of the 54th General Assembly, which amended said section as it applied to Polk County by increasing the maximum from 2 mills to 3½ mills for the County Public Hospital fund. This increase was pursuant to H. F. 88, the explanation of which bill reads as follows:

'An Act to amend section 347.7, Code 1950, to raise the limitation on the power to levy annually special taxes for the improvement and maintenance fund of county public hospitals in counties having a population of 135,000 inhabitants or over.'

We have discussed this Act with Mr. Sloane, Representative from Polk County, who introduced the Act and have been advised that prior to the introduction thereof, he and others were taken on a tour of inspection of Broadlawns Hospital by the Superintendent and Trustees of that institution; that they were conducted through the tuberculosis department as well as the general department and were advised as to the costs of operation of both the general and tuberculosis departments. Mr. Sloane states that it was his intention when this Act was introduced to provide sufficient funds to operate the entire establishment, including both the general hospital and the tuberculosis hospital from the proceeds of the tax levy provided by section 347.7 and that for that reason the word 'hospitals' in the plural was used in the preamble to the Act. He further advised us that the same representations and cost figures were submitted to the Committee of the House of Representatives to which this H. F. 88 had been referred, and in the opinion of Mr. Sloane it was the legislative intent of the 54th General Assembly that all of these costs, including the cost of the operation of the tuberculosis hospital, should and could be met from the increased tax levy provided.

We have also discussed this matter with State Senator George O'Malley, who has been kind enough to turn over to us his entire legislative file concerning the enactment of the amendment to section 347.7, and he likewise indicated that he understood the increased tax levy for the County Public Hospital fund was designed to cover both the general and tuberculosis departments.

Will you, therefore, kindly review your letter opinion of November 19, 1948, above referred to, and advise us in the light of the amendments to the law therein construed as to whether or not the cost of operating the tuberculosis hospital, which is a part of the Broadlawns

Polk County Hospital, may be met from the County Public Hospital fund authorized by section 347.7 of the Code, over which fund, under the authority of *Phinney vs. Montgomery*, 218 Iowa 1240, the Board of Supervisors has ministerial authority only, or, must be met from the State Institution fund, authorized by Section 444.12 of the Code of Iowa."

In reply thereto we would advise you as follows:

In the letter opinion, dated November 19, 1948, wherein it was submitted that a tuberculosis sanatorium, through its board of trustees, was making a claim against the county for the cost of furnishing free treatment during the first and second quarters of 1948 and the query was made as to whether the claim can be paid out of the State Institution Fund directly to the sanatorium, reply was made as follows:

"(1) The state institution fund, being section 444.12, Code 1946, is the proper fund from which the foregoing claim should be paid. The tax levied under section 347.7 is not available for that purpose.

(2) The maximum limitation of $20.00 per week, provided by section 254.4, is the limit of the liability of the county for the support of each patient."

The foregoing opinion was based upon the provisions of section 444.12, Code 1946, which provided as follows:

"State institution fund. The board of supervisors for each county shall establish a state institution fund and shall at the time of levying other taxes, estimate the amount necessary to meet the expense in the coming year of maintaining county patients, including cost of commitment and transportation of patients at the Mount Pleasant state hospital for the insane, Independence state hospital for the insane, Cherokee state hospital for the insane, Clarinda state hospital for the insane, the state sanatorium for the treatment of tuberculosis at Oakdale or any similar tuberculosis institution established and maintained by any county under the provisions of chapter 254, the Glenwood state school for the feeble-minded, the hospital for epileptics and school for feeble-minded at Woodward, the Iowa juvenile home at Toledo, the Iowa Soldiers' orphans home at Davenport, the school for the blind at Vinton, the school for the deaf at Council Bluffs, and the state psychopathic hospital at Iowa City, and shall levy a tax therefor. Said fund shall not be diverted to any other purpose. Should any county fail to levy a tax sufficient to meet this expense the deficiency shall be paid from the county general fund, same to be transferred to the state institution fund."

The foregoing section was enacted by section 1, Chapter 220, Acts of the 50th General Assembly, and was legislative recognition and direction with respect to the cost of care determined by this department in the Report of Attorney General for 1942 at page 115, in which it was the holding that the cost of care of patients at the Oakdale Sanatorium may be paid either from the County General Fund or the County Poor Fund.

Prior to the enactment of the foregoing statute, there existed the statute 3828.128, Code 1939, which, at the time of the issuance of the 1942 opinion of Attorney General, appeared in terms as follows:

"Allowance for support. The board of supervisors may allow, from the poor fund of the county, for the care and support of each tuberculous patient cared for in any such institution, a sum not exceeding twenty dollars per week."

At the same time that the 50th General Assembly established the State Institution Fund for the care of the tubercular, it, by section 9 of Chapter 220, 50th General Assembly, substituted for the word "poor" in section 3828.128, exhibited above, the words "state institution", and thereby further recognized that the care and support of tuberculous patients in county institutions should be paid from the State Institution Fund as created by the 50th General Assembly. The foregoing section 3828.128 now appears as section 254.4, Code 1950, and as amended by the 54th General Assembly, Chapter 91, section 1, provides as follows:

"Allowance for support. The board of supervisors may allow, from the state institution fund of the county, for the care and support of each tuberculous patient cared for in any such institution, a sum not exceeding the average per patient per day cost of treatment in any such institution."

Upon cursory examination, it would appear that while the Legislature has imposed a mandatory duty to levy a tax, among others, for the purpose of paying the claims of indigent tuberculous patients in county institutions, it has, by the use of the word "may" in section 254.4, allowed therefor the sum therein prescribed for the care and support of each tuberculous patient and left the use of the fund as a matter of discretion for the Board of Supervisors. However, the history of this legislation dispels that appearance. The original of section 254.4 was enacted by the 36th General Assembly, section 3, Chapter 142, in terms as follows:

"Sec. 3. Allowance—appropriations—elections. The board of supervisors shall allow for the care and support of each patient when in such designated institution, a sum not exceeding fifteen dollars ($15.00) per week from the poor fund, provided that in counties of 67,000 or over, population, a sum not to exceed $15,000, in counties of 15,000 or over population, and less than 67,000, a sum not to exceed five thousand dollars ($5,000.00), and in counties of less than 15,000 population, a sum not to exceed two thousand dollars ($2,000.00) may be appropriated out of county funds for constructing, acquiring and equipping buildings without submitting the same to a vote of the qualified electors. The board of supervisors may submit the question of expending a greater amount than above specified by a vote of the qualified electors of the county at any general election and may for such purposes expend the amount authorized by said vote."

and appeared as section 409-t4 of the Supplemental Supplement of 1915. Chapter 150, Section 1, Acts of the 43rd General Assembly struck the word "shall" in the foregoing statute and inserted in lieu thereof the word "may". However, whatever view may be taken of the legislative intent in substituting the word "may" for "shall" at that time, it is quite clear to us that where the Legislature in 1943 established the State Institution Fund, and substituted its use instead of the poor fund, for the care and support of tuberculous patients, it did not intend thereby to invest a vain power in the Board of Supervisors. If there rest a discretion in the board in the use of the State Institution Fund

for tuberculous patients, the mandatory direction to levy for that purpose would deprive the taxpayers of money for which no use is provided. It is our view, therefore, that the retention of the word "may" in section 254.4 is not a true expression of the legislative intent in view of the foregoing statutory situation. Converting "may" in a statute to the mandatory "shall", under appropriate circumstances, has long had judicial support, both in Iowa and elsewhere. School Township 76 vs. Nicholson, 227 Iowa 290, 288 N.W. 123, stated the following:

"The word 'may' is construed to mean 'shall' whenever the rights of the public or third persons depend upon the exercise of the power or performance of the duty to which it refers. And so, on the other hand, the word 'shall' may be held to be merely directory, when no advantage is lost, when no right is destroyed, when no benefit is sacrificed, either to the public or to the individual, by giving it that construction. But, if any right to anyone depends upon giving the word an imperative construction, the presumption is that the word was used in reference to such right or benefit. But, where no right or benefit to anyone depends upon the imperative use of the word, it may be held to be directory merely."

That this conclusion does not conflict with the legislative intent with respect to the maintenance levy, provided by Chapter 347, Code 1950, for a county hospital, is quite clear from the fact that providing for maintenance in the operation of the county hospital as a tubercular sanatorium, or providing for the care of tuberculous patients, is merely an optional power vested in the hospital trustees. Section 347.14, subsections 6 and 7, Code 1950, provide as follows:

"Optional powers and duties. The board of hospital trustees may:

6. Operate said hospital as a tuberculosis sanatorium or provide as a department of such hospital suitable accommodation and means for the care of persons afflicted with tuberculosis.

7. Formulate rules and regulations for the government of tuberculosis patients and for the protection of other patients, nurses, and attendants from infection."

It would seem, therefore, anomalous to infer that the Legislature, charged with the knowledge of its creation of the State Institution Fund and the use to which it is to be put and the failure to empower hospital trustees to expend hospital funds for tubercular purposes, in providing a mandatory maintenance levy under section 347.7 to county hospitals, intended to include therein money for the maintenance of a tuberculosis sanatorium, which the county hospital trustees may never establish. Or, in other words, to make two separate funds, established by separate levying bodies, available for the payment of tuberculosis costs. In so far as the powers of administrative agencies are concerned, "the language of legislation granting the power to expend public funds has been narrowly restricted." (Sutherland Statutory Construction, 3rd Edition, section 6603.) In this connection it is to be said that, while the statements of legislators, respecting the purpose of legislation, is entitled to the fullest credence, such statements, as an aid to statutory intention, are not favored by the courts. Section 5013 Sutherland Statutory Construction, 3rd Edition, Vol. 2, states the following:

"As a corollary to the general rule against the use of statements of individual legislators made during debate on the bill, in construing a statute the courts refuse to consider testimony as to the intent of the legislature embodied therein by members of the legislature which enacted it. In addition to the reasons against the use of statements of individual legislators, the courts probably wish to avoid having to pass upon the credibility of legislators and ex-legislators."

You are therefore advised that the State Institution Fund, being section 444.12, Code 1950, as amended by the 54th General Assembly, is the proper fund from which the cost of tuberculous patients at the tubercular department of the county hospital should be paid. The county hospital tax levied under section 347.7 is not available for that purpose.

July 17, 1952

MINORS: Persons under 14 years of age—certain employments prohibited. Section 92.1 of the Code prohibits the employment of persons under 14 years of age in ball parks, race tracks and places of entertainment or sport or in the distribution and sale of popcorn, peanuts or like merchandise in any place of amusement or elsewhere.

Mr. M. L. Gilbert, Labor Commissioner, Bureau of Labor: This is in reply to your letter of July 2nd in which you requested an opinion and submitted the following:

Would a minor under fourteen years of age who sells peanuts, popcorn, etc., in a ball park, race track or the like, be subject to the provision of section 92.1 which covers "place of amusement"?

Regardless of the foregoing, would such employment be considered as "distribution of merchandise" as that term is used in said section?

The Code section involved follows:

"92.1 Child labor—age limit—exception. No person under fourteen years of age shall be employed with or without compensation in any mine, manufacturing establishment, factory, mill, shop, laundry, slaughter house, or packing house, or in any store or mercantile estalishment where more than eight persons are employed, or in any livery stable, garage, place of amusement, or in the distribution or transmission of merchandise or messages; * * *."

The Supreme Court of Iowa in State v. Erle, 210 Iowa 974, 232 NW 279, 72 A.L.R. 137 held that the state, under its police power, may prohibit the employment of children, such as those children under fourteen years of age, in occupations dangerous to life, or injurious to morals or the welfare of children. Secklich v. Harris-Emery Co. 184 Iowa 1025, 169 NW 325, is also authority.

Whether a ball park, race track or like place is a "place of amusement" is determinative of this question. The Supreme Court of Wisconsin in Jones v. Broadway Roller Rink, 118 NW 170 (Wis.) states the following:

"A roller skating rink to which the public are invited on the sole condition of paying a fixed charge is a public place of amusement." Likewise the Washington Court in Pearson v. City of Seattle, 44 P. 844 (Wash.) defined "public amusement":

" 'Amusement' is synonymous with diversion entertainment, recreation, pastime and sport, so that a public dance is a public amusement."

A ball park, race track, or other like place of entertainment, would be within the judicial definition of "place of amusement". It would be unlawful to employ a minor under fourteen years of age in such a place unless the ball park, race track or other like place of amusement is operated and under the control of the child's parents. See opinion of the Attorney General in the Report for 1930 at page 169.

"Merchandise" is defined by the Texas Court in Mara v. Brauch, 135 SW 661 (Tex.), as follows:

" 'Merchandise' has a very extended meaning and usually means personalty used by merchants in the course of trade, but may include every article of traffic."

Adopting that judicial definition, there is no question but that peanuts, popcorn, and like goods, are merchandise when kept for sale.

We find no pertinent definition of the word "distribution", either in the dictionary or among words judicially defined. However, the word "distribution" in connection with the sale of merchandise, is so generally used and accepted as meaning the sale of merchandise, or the ordinary transactions of a merchant, that the sale of peanuts, popcorn and like goods, would be "distribution of merchandise" within the meaning of section 92.1.

It is therefore our opinion that a ball park, race track, or place of entertainment or sport, is a "place of amusement" within the meaning of section 92.1, and that the sale of popcorn, peanuts and like merchandise is "distribution of merchandise" within the meaning of that phrase as used in section 92.1, whether the sale be made in a place of amusement or elsewhere.

July 17, 1952

MOTOR VEHICLES: **Truck overloads—computation of tolerances.** The penalty made mandatory by statute for overloaded trucks can be legally imposed only on the amount by which the weight exceeds that authorized plus the tolerance provided and said tolerance is not cumulative.

Mr. Ralph W. Bastian, County Attorney, Fort Dodge, Iowa; and Mr. Leonard L. Graham, County Attorney, Ida Grove, Iowa:

Re: Fines for overloads under sec. 321.463, Code of Iowa, 1950, as amended by Ch. 128, Acts of the 54th General Assembly.

Each of you has submitted an inquiry with reference to the construction of the foregoing statute as amended. Your questions are so closely related that it is more convenient to dispose of them in a single opinion, rather than to consider them separately. The statute in question, as amended, will so appear in subsequent official Code compilations. It is of such length that it is not believed proper to set it forth in full for publication in the annual opinions of the Attorney General.

Even after the basis has been established the computation of the fine involves considerable mathematical calculation. As a matter of convenience to the courts and prosecutors the Safety and Traffic Department of the Highway Commission prepared and published a mimeographed Table, containing detailed information under the several situations contemplated by the statute. This mimeographed Table has no legal significance and one series, dated June 2, 1951, contained some mathematical errors which were corrected in the table dated June 22, 1951, and the latter added to the information supplied a column giving the number of pounds in each bracket. The basis of the computation is in each instance the same and that basis is the subject of your inquiries and this opinion.

It is appreciated that the problems involved in the enforcement of this law are continually before the courts of the state. Under such circumstances the Attorney General's office has been and is reluctant to issue an opinion lest such an expression be construed as an effort to influence the court on a matter which is the subject of litigation. For that reason we have heretofore refrained from issuing this opinion, although mindful of the existence of the problem. We are only constrained to do so now by the fact that it has become the subject of two specific inquiries by county attorneys and the statute in question has been variously construed by several courts in which the question has arisen.

Question No. I

When a vehicle's weight exceeds the allowed weight plus tolerance, should the fine be imposed on the entire excess over the legally authorized weight, or should it be imposed only on the amount by which the weight exceeds the authorized weight plus tolerance?

Question No. II

On what basis should the tolerance be computed?

I.

That portion of the statute relating to tolerance reads as follows:

* * * * *

"A tolerance above the maximum legal weight of any axle or vehicle or combination of vehicles *may* be allowed as follows:

"Three per cent on any axle, including tandem axles.
"Eight per cent of the gross weight of any particular group of axles.
"Eight per cent on the total gross weight of a vehicle or combination of vehicles." * * * *

This is a penal statute and is subject to strict construction, State vs. Balsley, 242 Ia. 845, 48 N.W. 2nd 287.

It is axiomatic that a penal statute must be positive in character and not dependent for its enforcement on whims or opinions, but only upon the language employed in the act, in the light of legislative purpose. The use of the italicized word "may" above, if considered permissive in character, will have the effect of introducing precisely the uncertainty frowned upon by the courts. Under such circumstances our courts have held that "may" will be given the meaning of "shall". If the word "shall" be substituted, all uncertainty disappears. The tolerance contemplated is there at all times, and is not allowed at the discretion of the arresting officer or the court.

This does not fully decide the question of whether a fine could be imposed for the amount of the tolerance if the legal maximum plus the tolerance were actually exceeded. It would be possible to draft a

statute which would provide that in the event that the legal maximum plus the tolerance were exceeded the penalty should relate to everything above the legal maximum, but this legislation does not so provide. It starts out in the portion of the section dealing with axle and tandem axle weight violations with an overload percentage of 3% and the first penalty, a $1.00 penalty per hundred pounds is applied to the overload between 3% and 8%, which ought to make it completely obvious that this 3% is the same 3% that is referred to in the portion of the statute which deals with tolerance. The same thing is true in the portion of the statute which sets up the percentage of overload as to gross or group of axles violations, for this starts with a percentage of overload of 8% and provides a penalty of $1.00 per hundred pounds for that portion of the percentage of overload between 8% and 10%. It is equally obvious that the 8% which is the starting point is the same 8% that is referred to in the portion of the statute which deals with tolerance. When the language employed is analyzed in this fashion there can be no justification for the contention that the $1.00 fine should apply to the percentage from 1 to 3 or 1 to 8, as the case may be, in the same fashion as to the percentage from 8 to 10. The language of the statute is explicit and the fine only relates to the poundage between the percentages to 3 to 8 or 8 to 10, as the case may be.

It would likewise have been possible to have drafted the statute so as to provide that when the percentage of overload fell in a given bracket the amount of fine per hundred pounds applied to all of the overload in excess of the maximum legal load specified in sec. 321.463, but the language adopted by the legislature did not so provide. It very carefully blocked off the percentage to which the amount of fine per hundred pounds should apply, and in each instance used the phrase "to and including". Under the rule of strict construction, which has been referred to above, ordinary force and effect must be given this language. The amount of the fine is graduated in steps and the amount per hundred pounds for each step is specifically prescribed.

It is the opinion of this office that the fine made mandatory by the legislature in this enactment can be legally imposed only on the amount by which the weight exceeds that authorized by the statute plus the tolerance provided.

II.

Some counsel for accused violators have been insisting that a double tolerance should be allowed before the amount of the fine is computed.

If the fines set up in the amendment to the statute are to be applied only after the tolerance has already been allowed for, then it becomes apparent from an inspection of the statutory language that with reference to a single axle or a tandem axle the tolerance would be increased to 3% plus 3%, or 6% before any penalty was incurred. With reference to a group of axles, or the gross weight of a vehicle, there would be a tolerance of 8% plus 8%, or 16% before any penalty was imposed. This seems, on its face, to be a violent distortion of the plain language of the statute.

That impression is strengthened by the table of percentages set forth in the amendment. The lowest tolerance provided for is 3% and in applying the rate to the percentage the legislature starts out with 3%. This must be the same 3% that is referred to elsewhere in the legislative enactment as the tolerance and the first bracket runs from 3% to 8%. Neither patent or latent ambiguity is apparent from this language but if such were found the fact that the table starts with the same 3% which is mentioned as the minimum tolerance would seem to tie the two together and clarify the situation, if clarification be required.

Following this same line of thought and turning to the percentages and fines applicable to a group of axles or to the gross weight of the vehicle we find that this table starts with 8% and again 8% is the tolerance allowed for this type of violation. Why go to the trouble of adding 8% to 8% so as to compute a tolerance of 16% when the use of the same figures would indicate to a reasonable mind that it is the same 8% that is under discussion?

It is the conclusion of this office that a tolerance should be allowed before the mandatory table of fines is applied, but that such tolerances, whether 3% or 8%, should be allowed a single time, not permitted to cumulate.

July 17, 1952

INTOXICATING LIQUORS: Transportation of opened bottle of liquor. It is not sufficient, to establish a violation of the liquor transportation laws, to show that a bottle had been opened and part of the contents gone if the liquor seized had been legally purchased and legally possessed.

INTOXICATING LIQUORS: Intoxication on a public highway—nature of offense. A person arrested in an intoxicated condition in an automobile on a public highway, and not driving the vehicle is properly charged with intoxication in a public place.

Mr. David B. Evans, County Attorney, North English, Iowa: This is to acknowledge receipt of your communication of June 30, 1952, wherein you request an opinion on the following propositions:

1. A permit holder purchased liquor legally. He is apprehended with the partially consumed liquor in his possession while driving from his home to a hotel room. Is this transportation contrary to section 123.26 of the 1950 Code? Further, suppose the man apprehended is not a permit holder but has in his possession a bottle of opened Iowa liquor and is transporting the same to his home after an evening out. Would this be contrary to section 123.26?

2. A man, "A", is in an intoxicated condition and riding in an automobile owned by "B". He is arrested out in the country, far from any town, and charged with 'intoxication upon the public highway'. Is "A" properly chargeable under section 123.42 with being intoxicated upon the public highway or intoxicated in a public place?

Section 123.26, Code 1950, provides as follows:

"Transportation permitted. It shall be lawful to transport, carry, or convey liquors as defined by this chapter from the place of purchase by the commission to any state warehouse, store, special distributor or depot established by the commission for the purpose of this chapter or from one such place to another and when so permitted by this chapter the regulations made thereunder and in accordance therewith, it shall be lawful for any common carrier, or other person to transport, carry, or convey liquor sold by a vendor or a special distributor from a state warehouse, store or depot to any place to which the same may be lawfully delivered under this chapter and the regulations established by the commission; provided, however, that no common carrier or other person shall break, open, allow to be broken or opened any container or package containing alcoholic liquor or to use or drink or allow to be used or drunk any liquor therefrom while in the process of being transported or conveyed; provided, however, that nothing in this chapter shall affect the right of any permit holder to purchase, possess,

or transport alcoholic liquors as defined by this chapter and subject to the provisions of this chapter and the regulations made thereunder."

It is our view that this section applies to the transportation of intoxicating liquors, both by private persons and by common carriers and their agents. An analysis of section 123.26 shows that the statute makes it legal for the State Liquor Control Commission to transport liquor, through its own employee or through common carrier, from the place of purchase by the commission to its state warehouse and stores, and by the person who purchases liquor at a commission store to transport it from the place of purchase to the places where it is legal to possess it and consume it under the other provisions of Chapter 123.

The provisions in section 123.26 which provide that " * * no common carrier or other person shall break, open, allow to be broken or opened any container or package containing alcoholic liquor or to use or drink or allow to be used or drunk any liquor therefrom while in the process of being transported or conveyed;"

are intended to cover the act of opening a bottle or the act of consuming the contents thereof while the bottle is being transported. These provisions of section 123.26 do not make it illegal to transport an open bottle or a bottle, the contents of which have been partially consumed. To establish a violation of section 123.26 it would not be sufficient simply to show that the bottle of liquor was open or that a part of its contents was gone when the bottle was seized, if the seized liquor had been legally purchased from a state liquor store, and was legally possessed under the provisions of Chapter 123.

In regard to your second proposition, we believe that under the provisions of section 123.42 the proper wording of the charge against "A" would be that he was "intoxicated in a public place." In enacting section 123.42 the legislature first made it "unlawful for any person to use or consume any alcoholic liquors upon the public streets or highways, or in any public place", and then provided that "no person shall be intoxicated nor simulate intoxication in a public place." The phrase "public streets or highways", was not carried over and does not appear in the legislative prohibition against intoxication, but subsection 19 of section 123.5, defines a "public place" as including "any place, building or conveyance to which the public has or is permitted to have access and any place of public resort."

The term "public place" has been variously defined as meaning any place to which the public is invited or is permitted to go or congregate; a place where the public has a right to go and be; a place which is in point of fact public, as distinguished from private, and usually accessible to the neighboring public (See 70 C. J. S. 1096, Place).

In the case of In Re Walnut Street Bridge in the City of Des Moines, 220 Iowa 55, 261 N. W. 781, in holding that a bridge was a "public place" under the terminology of a particular statute, the court commented that

"The term 'public place' is relative, and depends for its meaning largely on the contex in which it is used. Generally stated, it is the converse of a private place".

It is the actual use by the public and not the legal right of the public to continue in the use, that makes a place public.

If the offense of intoxication is charged under the provisions of section 123.42, the allegation of the place where it was committed is material and should be contained in the information which should describe it with reasonable certainty. (28 C. J. S. 546, Drunkards, Sec. 15 (c) aa.) In a contested case it would be necessary to establish by competent proof that the street or highway where the offense was alleged to have been committed was a "public place", in addition to the proof required to show intoxication.

We are of the opinion therefore and hold in the ordinary case that a public street or highway is a "public place" within the meaning of section 123.42 and subsection 19 of section 123.5.

July 31, 1952

SCHOOLS AND SCHOOL DISTRICTS: Kindergarten pupils—tests for children under five to attend. Attendance at a public school of a child under six years is not a matter of individual right and as to children under said age, where the statute permits attendance the board may impose uniform conditions precedent to the privilege of school attendance. As such conditions the board, while permitting any form of appropriate proof of adequate maturity, may commit itself to acceptance of specified appropriate proof.

Mr. Norman Beach McFarlin, County Attorney, Montezuma, Iowa: An opinion is requested of this office substantially as follows:

The board of education of a public school district has adopted and put into effect courses of study for the school year immediately preceding the first grade, under the provisions of section 282.3, Code of Iowa, 1950. The board has established certain conditions and provisions for entrance of certain students to take such courses of study:

1. No child shall be enrolled for such courses of study who has not attained the age of five years prior to the opening day of the school year, with the exception that a child who has not attained the age of five years prior to the opening date of the school year, but will attain such age prior to November 15, may be admitted if it is established to the satisfaction of the school board that such child is capable of doing satisfactory work in pursuing such courses of study.

2. The board will accept the findings of the psychology department of a certain college made upon examination of children as to their capability to satisfactorily perform the courses of study in the cases of children who have not attained the age of five years prior to the opening day of the school year or prior to the 15th day of November.

3. Examination by the psychology department of the particular college is not mandatory and the board will admit children who have not taken such examinations upon a showing satisfactory to the board that such children are capable of satisfactorily performing the courses of study.

The college hereinbefore referred to will give such examinations as are requested and will make a charge therefor of five dollars. The school district will not pay the expense of such examinations.

Is the action of the board legally justified?

Attention is invited to the provisions of subsection 1 of section 282.3 which provides in pertinent part:

"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 benefited by attendance * * * ."

The foregoing provision does not relate alone to children desiring to enter the first grade. It applies to all children under six years of age. It follows that attendance at school by a child who has not attained the age of six years is not a statutory right, but rather a conditional privilege.

There is no provision of law which makes it mandatory to establish a course of study for children who are not qualified to enter the first grade in school. Subsection 2 of the aforesaid Code section 282.3 provides:

"On and after July 1, 1952 the conditions of admission to public schools for work in the school year immediately preceding the first grade and in the first grade shall be as follows:

No child under the age of six years on the fifteenth day of November of the current school year shall be admitted to any public school unless the board of directors of the school (or the county board of education) shall have adopted and put into effect courses of study for the school year immediately preceding the first grade, approved by the department of public instruction and shall have employed a teacher for this work with standards of training approved by the department of public instruction."

Under the foregoing subsection 2 there is a grant of permission within specified limitations to school districts to establish courses of study for the school year immediately preceding the first grade and to admit pupils under six years of age. The restrictions set forth upon the rights granted to establish such courses of study cannot be construed to imply that if the right of the district is exercised, it then becomes a vested right of all children within the age of pre-first-year students permitted by statute to enter upon such courses of study.

Paragraph 3 of the said section 282.3 provides:

"No child shall be admitted to school work for the year immediately preceding the first grade unless he is five years of age on or before the fifteenth of November of the current school year."

This provision is prohibitory in nature. No rule of satisfactory construction leads to the conclusion that as a corollary all children who will attain the age of five years on or before the 15th of November have the right to enroll as pre-first-year students when such courses of study are established. In fact such construction, if possible, would be in direct conflict with the provisions of subsection 1 of section 282.3, hereinbefore set forth.

Of course it is basic that arbitrary discrimination against any child desiring to enter upon such courses of study, cannot be exercised. Conditions imposed must be of uniform application.

It is to be noted that the provisions of subsection 4 of section 282.3 in no way relate to pre-first-year students. This paragraph provides:

"No child shall be admitted to the first grade unless he is six years of age on or before the fifteenth of November of the current school year, except that a child under six years of age who has been admitted to school work for the year immediately preceding the first grade under conditions approved by the department of public instruction, and who has demonstrated the possession of sufficient ability to profit by first grade work on the basis of tests or other means of evaluation recommended or approved by the department of public instruction, may be admitted to first grade at any time before December 31."

As the subsection of the Code section last above quoted applies only to children entering the first grade, the provisions therein relating to ability tests approved by the department of public instruction, are not applicable to the class under consideration in this opinion. The question is one of the standards of maturity adopted by the board. These standards of maturity among others include mental, emotional, physical and personal habit maturity. For example, it is a matter of common knowledge that childen of given age do not possess equal responsibility with relation to their personal habits. In instances of children who have been slow in acquiring such personal responsibilities, the burdens imposed could seriously impair the conduct and progress of school work and result in little benefit to the child. Likewise, emotional immaturity could impose a serious burden. These matters are matters for the school board to determine. So long as their action is reasonable and not arbitrary, their power is properly exercised.

The question of mental maturity involves scientific fact. The board has not adopted a single arbitrary means of determining those facts. No child is compelled to submit to examination by the psychology department of the particular college, as a condition of gaining admission as a pupil. The provision with relation to tests given by the said psychology department is *only one* means provided of determining degree of maturity. No illegality is found in the commitment of the board to accept the results of tests given by that department. Standard intelligence quotient tests are frequently used by educators. The adoption of such tests by educators and educational institutions does not constitute a delegation of the power to determine mental qualities to the author of such tests. It is to be presumed that the board has determined that such tests as are given by the said psychology department have authority as scientific determinations. The board may very properly rely upon the facts found by experts in this field of science.

You are advised that it is the opinion of this office that the matter of attendance at public school is not a matter of individual right of children under the age of six years, and that as to children under the age of six years, the board of a school district may impose uniform condi-

tions precedent to the privilege of school attendance. You are further advised that it is the opinion of this office that a board of a school district may, as such a condition precedent, require proof of adequate maturity to pursue school work, and may while permitting *any form* of appropriate proof, commit the board to acceptance of specified appropriate proof.

August 21, 1952

NEWSPAPERS: **Publication of official notices and proceedings.** Where any statute requires publication of a notice or report of proceedings to be published in a newspaper it means a newspaper as defined in section 618.3 of the Code. Where other matter is required to be published in a newspaper, any newspaper which qualifies under the terms of the particular statute making the requirement will suffice.

Mr. S. W. Needham, Superintendent of State Printing: This will acknowledge receipt of yours of the 8th inst. in which you have submitted to us the following:

"The Iowa Press Association has raised the question regarding Code section 618.3, in that it apparently defines what a newspaper is, stating that a newspaper to be eligible, for legal notices, must have been mailed regularly through the post office for two years and have a bona fide subscription list.

This, therefore, brings up the question which is plainly seen in the Act by the 54th G. A. I refer to page 183 of the Session Laws, section 3, paragraph 3 under the title of 'The clerk.' In there it says:

'and cause the same to be published in a newspaper of general circulation in a city or town.'

Does this mean a newspaper as specified in section 618.3, or does it mean any newspaper in the city or town? I note in going through the Session Laws that they have in a number of places, and I refer you specifically to page 190, line three in which the clerk is directed to publish notices and in line six 'as provided in section 618.14'.

In section 279.32 and 279.34 a financial statement shall be published 'during the first week of July of each year, published by one insertion in at least one newspaper, if there is a newspaper published in said district,' etc. In the second reference it states about the same thing. Does that mean that that newspaper which is being circulated in the town or community and it is published there but not having been established for two years, will not be allowed to publish these matters in reference to the schools, or must it be done in some newspaper outside the town, but circulating in that town or territory?

The specific section of the Acts of the 54th General Assembly, being chapter 147 thereof, section 3, subsection 3, in terms provides as follows:

"The clerk. In all municipal corporations the clerk shall perform the following duties: * * *

3. Immediately following a regular or special meeting of the city or town council, the clerk shall prepare a condensed statement of the proceedings of said council, including the total expenditure from each municipal fund, and cause the same to be published in a newspaper of general circulation in the city or town. Said statement shall include a list of all claims allowed and a summary of all receipts, providing how-

ever that in cities having more than one hundred fifty thousand (150,000) population the council shall each month print in pamphlet form a detailed itemized statement of all receipts and disbursements of the city, and a summary of its proceedings during the preceding month, and furnish copies thereof to the state library, the city library, the daily newspapers of the city and to persons who shall apply therefor at the office of the city clerk, and such pamphlet shall constitute publication as required herein. Failure by the clerk to make such publication shall constitute a misdemeanor."

Section 618.3, Code 1950, defines a newspaper as follows:

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

That such is the "newspaper", meant by the 54th General Assembly in the enactment of the foregoing section, is evidenced by the fact that an obligation is imposed upon the clerk to prepare condensed statements of the proceedings of a city or town council following a regular or special meeting thereof, including therein the total expenditure from each municipal fund and to cause such condensed statement to be published in a newspaper of general circulation in a city or town. Clearly, this condensed statement of these proceedings is a "report of proceedings required by statute to be published". Being required to be published in a newspaper of general circulation, therefore, means a newspaper as defined by section 618.3, and not any newspaper. This conclusion accords with opinion of this Department appearing in the Report of Attorney General for 1940 at page 290, where distinction is made between publication of notice of articles of incorporation of banks and publication of the statement of the condition of banks. There it was said:

"Examination of these provisions of the statutes leads us to the opinion that notices of articles of incorporation and amendments are such notices as must be published in a newspaper, as defined by House File 613, but that the publication of statements of the condition of banks need not be published in a newspaper, as defined by House File 613, but may be published in any newspaper which meets the requirements of section 9232. The provision for publication of statements of the condition of banks is that they shall be published in a newspaper in the city or town where the bank is located, if there be such, and in addition, the statement of condition of banks is neither a notice or a report of a proceeding as provided for in the new enactment."

Notices and reports of proceedings, required to be published, distinguishing a newspaper defined in section 618.3, and any other newspaper, likewise determines the kind of newspapers required for publication of matters contained in sections 279.32 and 279.34. Section 279.32 requires of the school boards in consolidated and independent city and town districts to publish a summarized statement of the board, showing the receipts and disbursements of all funds for the preceding year. Section 279.34 requires of the school board in the foregoing designated

districts the quarterly publication in at least one newspaper published in the district, a statement verified by affidavit of the secretary showing a summary of the proceedings of the board pertaining to financial matters or expenses to the district for the previous quarter, including a list of warrants issued by the board, etc. By its terms, therefore, section 279.32 is neither a notice nor a report of proceedings. On the other hand, section 279.34 clearly is a report of proceedings. One is required to be published in the newspaper as defined by section 618.3—the other is not so required.

We are of the opinion, therefore, that where, by statute, notices or reports of proceedings are required to be published in a newspaper, such publication shall be made in a newspaper as defined by section 618.3, Code 1950.

August 21, 1952

CREDIT UNIONS: Power of members to set aside election of officers. At a meeting of the membership of a credit union the majority has no power to set aside the election of any or all officers elected in accorddance with the approved standard by-laws and section 533.9 of the Code.

Mr. Newton P. Black, Superintendent, Department of Banking: This is in reply to yours of July 24th in which you state that the question has arisen as to the power granted members of a credit union by Code section 533.7 to set aside the election of any or all officers of such union. Code section 533.7 is as follows:

"Fiscal year—meetings. The fiscal year of all credit unions shall end December 31. Annual meetings shall be held, and special meetings may be held, in the manner indicated in the by-laws.

At all meetings no member shall have more than one vote regardless of the shares held by him. There shall be no voting by proxy. A member other than a natural person may cast a single vote through a delegated agent which agent shall be a member of the organiztion for which he acts. The majority of members present at any meeting may modify, amend or reverse any act of the board of directors or instruct it to take action not inconsistent with the by-laws or of this chapter."

The statute with reference to the election of officers by the board of directors of a credit union reads:

"533.9—Directors and officers. Within five days following the organization meeting and each annual meeting the directors shall elect from their own number a president, vice-president, treasurer and secretary, of whom the last two may be the same individual, and also a credit committee of not less than three members and an auditing committee of three members. It shall be the duty of the directors to have general management of the affairs of the credit union, particularly to:

1. Act on applications for membership.
2. Determine interest rates on loans and deposits.
3. Fix the amount of the surety bond which shall be required of all officers and employees handling money.

4. Declare dividends, and to transmit to the members recommended amendments to the bylaws.

5. Fill vacancies which occur in the board between meetings of the members until the next annual meeting and until successors are elected and qualify.

6. Determine the maximum individual share holdings and the maximum individual loan which can be made with and without security.

7. Have charge of investments other than loans to members.

The duties of the officers shall be determined in the by-laws, except that the treasurer shall be the general manager. No member of the board or of either committee shall, as such, be compensated."

While section 533.7 provides that the members of a credit union may, at any meeting, modify, amend or reverse any act of the board of directors, Code section 533.9 provides for the time and manner of electing union officers. Moreover, subsection 7 of section 533.1 authorizes the superintendent of banking to prepare an approved form of by-laws. Such by-laws have been prepared and furnished credit unions. Section 4 of Article VII of said by-laws follows:

"The board of directors shall meet within five (5) days following the organization meeting and each annual meeting. At each such meeting the directors shall elect from their own number the following officers: a president, a vice-president, a treasurer and a secretary. The offices of treasurer and secretary may be held by one person. At each such meeting the directors shall elect from their own number a credit committee of ..... (.....) members and an auditing committee of three (3) members. No officer or member of the credit committee may be elected to the auditing committee."

It will be noted that both the statute and the bylaws name the time when officers shall be elected. It is a fair and reasonable inference from the import of both the statute and the by-laws that the officers elected at the prescribed time shall serve until the next election designated by law.

The last sentence of Code section 533.7, as follows:

"The majority of members present at any meeting may modify, amend or reverse any act of the board of directors or instruct it to take action not inconsistent with the by-laws or of this chapter."

was added in to the substance of that section by chapter 269, Laws of the Fifty-second General Assembly. Section 533.7 as it appeared in the Code of 1946, was repealed and the present section 533.7 was enacted in lieu thereof. The only addition to the substance of section 533.7 by the repeal and enacting of the present section was the addition of the last sentence quoted above. The same chapter 269 also amended parts of section 533.9 by adding a paragraph now appearing as subsection 5 of section 533.9, evidencing the fact that the legislature considered both sections 533.7 and 533.9 at the same time.

The Iowa Supreme Court in the case of Eckerson v. City of Des Moines, 137 Iowa 452; 115 N.W. 177, held that it is a general rule of statutory construction that a special statute is not repealed by a general statute unless the intent to repeal is manifest. As early as 1861, in the case of

Cole v. Jackson County Board of Supervisors, 11 Iowa 552, the Supreme Court of Iowa held that the repeal of a special law for a specific purpose must be express, or by language and scope of a subsequent act equivalent to an express repeal. In Diver v. Keokuk Savings Bank, 126 Iowa 691; 102 N.W. 542, 3 Ann. Cas. 669, the Iowa court said:

"When two statutes cover, in whole or in part, the same subject matter, and are not absolutely irreconcilable, no purpose of repeal being clearly shown, the court, if possible, will give effect to both, and will not presume that the legislature intended a repeal of a prior statute by a later one on the same subject unless the later statute is so broad and explicit as to show that it was intended to cover the whole subject and displace the prior statute."

Section 533.9 provides for the election of credit union officers *five days after the organization meeting* and each *annual meeting* thereafter. That is a specific directive from the legislature as to the time when officers shall be elected, and under the rulings above mentioned the special law enacted for the specific purpose will govern where there is a conflict. The courts construe statutes to avoid undesirable or mischievous consequences. (50 Am. Jur. 272, Article 368.) The general rule as stated in American Jurisprudence was followed by the Iowa court in Newgirg v. Black, 174 Iowa 636; 156 N. W. 708. In determining the legislative intent, the subject matter, effect, consequence, and reason of the statute, as well as the language used, must be considered. In Sexton v. Sexton, 129 Iowa 487; 105 N. W. 314, 2 L. R. A. (NS) 708, the court said:

"Every statute ought to be expounded, not according to its letter, but according to legislative intent, as manifested from all parts of the act; and literal import should not be followed if the result would be absurd, provided a more reasonable view can be taken."

Again, in District Township of Dubuque v. City of Dubuque, 7 Iowa 262, the court said:

"Sections of statutes relating to the same subject-matter should be construed together in determining their meaning and all the language should be considered."

See also Elks v. Conn, 186 Iowa 48; 172 N. W. 173. The Supreme Court of Iowa also held in Noble v. State, 1 G. Greene 325:

"Where the language of a part of a section of an act is in conflict with the language and leading design as expressed in several other sections, the leading and prevailing portions will be followed."

See also In re Sale of Liquors in Valley Junction, 169 Iowa 692, 150 N. W. 86.

Both sections of the statutes can be given effect when construed together. Section 533.9 spells out the powers and duties of the board of directors; in all but two of the granted powers the board has much discretion. The time for election of officers is set by law and is restated in the bylaws which have been approved by the superintendent of banking. Subsection 5 of said section provides the manner of filling va-

cancies on the board. Both Code section 533.9 and the bylaws limit eligible officers to members of board of directors, so it would be futile to set aside the election of any or all officers only to instruct the board to elect others of their own number to take the place of those deposed. Then, too, the members of the union can only instruct the directors to take action not inconsistent with the bylaws or chapter 533. The setting aside the election of any or all officers would be inconsistent with both the bylaws and chapter 533. It would lead to unending mischief if the officers of the union were subject to recall at any meeting of the membership and undesirable consequences would surely follow such a practice. The two statutes should be so construed as to prevent such results. The power granted the membership of a union by section 533.7 is limited to modifying, amending or reversing those acts of the board which are discretionary and to leave unchanged the tenure of officers who were elected by the board at the time fixed by law. It therefore follows that the specific provision as to the election of credit union officers provided in section 533.9 is controlling over the general provision in section 533.7.

What we have said here has nothing to do with removing credit union officers for cause. Such removal is fully provided for in section 5 of Article X of the standard approved bylaws. We quote:

"Section 5. By unanimous vote the auditing committee may, if it deems such action necessary to the proper conduct of the credit union, suspend any officer, director or member of the credit committee. In the event of any such suspension, the auditing committee shall call a special meeting of the members within ten (10) days to act on such suspension. Notice of such meeting shall be given as provided in Article VI, section 4 of these bylaws. The members at said meeting may sustain such suspension and remove such officer, director or member of the credit committee permanently or may reinstate such officer, director or committee member.

It is our opinion that at a properly called meeting of the membership of a credit union the majority cannot set aside the election of any or all officers elected in accordance with the approved standard bylaws and section 533.9, Code 1950.

August 28, 1952

CREDIT UNIONS: Amendments to bylaws—approval by banking superintendent. The superintendent of banking in exercising his statutory duty to approve proposed amendments to bylaws of a credit union is not limited to the bare legal question of whether or not the bylaws are consistent with the statute. He must also examine the facts to ascertain whether the proposed would be of benefit to the membership.

CREDIT UNIONS: "Maximum individual loans" defined. The term "maximum individual loans" in subsection 6 of the Code section 533.9 means and includes the total maximum amount which any individual may borrow with security and also the total maximum amount which an individual may borrow without security.

Mr. Newton P. Black, Superintendent, Department of Banking:

This in reply to yours of July 24th in which you request an opinion and state: that certain proposed amendments to the standard credit union bylaws have been submitted to you with the request that you approve said amendments substituting them in lieu of certain sections presently in said bylaws. As a result of the proposed amendments, two questions have arisen: (1) Is the purpose of having the bylaws and all amendments thereto approved by the superintendent of banking to be certain that no credit union will have a provision in its bylaws which will not be consistent with Code chapter 533, and is the authority of the superintendent limited to determining the bare legal question of whether or not the proposed bylaws or amendments thereto are within the letter of the law? (2) What effect does subsection 6 of section 533.9 have on the power of the board to limit loans?

Section 533.1, Code 1950, places administration of the credit union law in the superintendent of banking and defines its purposes. Said section is in part as follows:

"Definition and purpose. A credit union is hereby defined as a co-operative, nonprofit association, incorporated in accordance with the provisions of this chapter for the purpose of creating a source of credit at a fair and reasonable rate of interest, of encouraging habits of thrift among its members and of providing the opportunity for people to use and control their savings for their mutual benefit.

"Administration. The superintendent of banking shall be charged with the execution of the laws of this state relating to credit unions."

The following statutes or parts of statutes are pertinent to this opinion:

"533.1. . . . 4. The superintendent shall, within thirty days of the receipt of said articles and bylaws, determine whether they conform with the provisions of this chapter, and whether or not the organization of the credit union in question *would benefit the members of it and be consistent with the purposes of this chapter.*" (Emphasis supplied)

"533.2 Amendments . . . And any and all such amendments must be approved by the superintendent of banking before they become effective."

"533.9 . . . 6. Determine the maximum individual share holdings and the maximum individual loan which can be made with and without security."

In order to properly answer your question, not only must the sections of the Code quoted above be considered, but also all other sections of chapter 533, as well as the purposes of the organization of a credit union.

Code section 533.1 charges the superintendent of banking with the duty to execute the laws of the state relating to credit unions and in subsection 4 of said section, the superintendent has the duty of determining whether or not the organization of the credit union in question would benefit the members and be consistent with the purposes of said chapter.

For that reason, the superintendent is required not only to approve the bylaws, but also by virtue of section 533.2, to approve any and all amendments thereto. It is manifest that the purpose of the approving of any and all amendments is the same as that which prompted the legislature to require the approval of the original bylaws. That is, the amendments must not only conform to the law, but must also be consistent with the purposes of chapter 533. Whether or not the original bylaws or any amendment subsequently made are consistent with the purposes of the above mentioned chapter is a question of fact which is to be determined by the superintendent of banking. This of necessity must be true, for if credit unions were authorized to amend their bylaws at will with the approval of the superintendent of banking being limited to the bare question of the legality of the proposed amendment, and without a finding of fact by him that a proposed amendment is consistent with and effectuates the purposes of the law, then his power to require that the original bylaws must benefit the members and be consistent with the laudable objectives of the law would be an empty gesture and without force and effect.

It must be remembered that the officers and boards of directors of the several credit unions are not bankers. A credit union is an adventure in minor banking operations by persons unfamiliar with banking and untrained in the practice and theory of banking while the superintendent of banking is an experienced banker. A credit union is a co-operative organization, the membership of which is limited to certain classes of persons usually connected with one firm or organization. Their banking operations are part-time, over-hour activities; it is not a vocation as is the business of banking. For that reason, more control and supervision is required to safe-guard the funds of the members and depositors of the union.

It is our opinion the contention that the power of the superintendent is limited to determining the bare legal question of whether or not the bylaws are consistent with chapter 533, is without merit. The superintendent must examine the facts and from those facts ascertain whether or not the organization of a credit union would benefit the members of it as well as being consistent with the law and the purposes of chapter 533. The same reasoning applies to amendments subsequently made.

With reference to the question as to the construction of subsection 6 of Code section 533.9, it will be noted that the board of directors is delegated the power to set the "maximum individual loan which can be made with and without security". In other words, the authority granted the directors is the same as if it were worded "determine the maximum individual loan which can be made with security and also determine the maximum individual loan which can be made without security". The purpose and design of the above mentioned subsection is clear. It does not limit the credit committee in making less than maximum loans with security, nor does it limit the power of the credit committee to make loans without security less than the maximum. It is our opinion, based

on all of chapter 533 and the statutory statement of the purposes thereof, that maximum individual loan means and includes the total maximum amount which any individual person may borrow with security and also the total maximum amount which an individual member may borrow without security.

The standard approved bylaws which you submitted with your request for opinion have been examined and kept in mind in the preparation of this opinion. It is not necessary for us to comment on the suggested amendments as the question of approving the proposed changes are questions of the policy which are within the sole province of the superintendent of banking.

August 28, 1952

BEER: Wholesaler giving financial aid to retailer—prohibition. The practice of a wholesale beer distributor in advancing money to a beer retailer to cash payroll checks for customers is in violation of section 124.22 of the Code.

Mr. Martin Lauterbach, Chairman, Iowa State Tax Commission: We acknowledge your inquiry, namely:

"Each week a Class "A" permit holder furnishes a Class "B" permit holder or holders large sums of money for the purpose of cashing payroll checks for customers. The "B" permit holder gives the "A" permit holder his check which is held until the "B" permit holder returns the funds and picks up the check. Is such practice a violation of Code section 124.22, Code of Iowa 1950?".

Code section 124.22 provides:

"No person engaged in the business of manufacturing, bottling or wholesaling beer nor any jobber nor any agent of such person shall directly or indirectly supply, furnish, give or pay for any furnishings, fixtures or equipment used in the storage, handling, serving or dispensing of beer or food within the place of business of another permittee authorized under the provisions of this chapter to sell beer at retail; nor shall he directly or indirectly pay for any such permit, nor directly or indirectly be interested in the ownership, conduct or operation of the business of another permittee authorized under the provisions of this chapter to sell beer at retail. Any permittee who shall permit or assent or be a party in any way to any such violation or infringement of the provisions of this chapter shall be deemed guilty of a violation of the provisions of this chapter."

The pertinent part of the foregoing section is "nor directly or indirectly be interested in the ownership, conduct or operation of the business of another permittee authorized under the provisions of this chapter to sell beer at retail".

One of the primary rules of construction is to seek the legislative intent and give it effect where possible. A careful examination of the statute discloses that it was designed to keep "A" permittees from promoting and assisting the "B" permittee; first, in obtaining furnishings, fixtures and equipment, secondly in paying for the permit and, lastly, in conducting or operating the business. The Legislature designed the

statute to effect a complete prohibition by use in each of the foregoing instances of the words, "nor directly or indirectly".

The Attorney General in 1942 Attorney General's Opinions at Page 78 did opine that the loaning of money by a wholesaler ("A" permit holder) to any other permit holder to enable him to enter the retail beer business would be "indirectly furnishing or paying for the supplies and equipment, and it would seem that he would be directly interested in the ownership of the business".

The cashing of payroll checks is practiced to foster goodwill of the customer and invite him into the place of business. The business psychology, of course, is the conversion of the check into cash by a thirsty patron who buys a beer or two before departing. It is a practice used by vendors in conducting or operating a business regardless of its nature.

No one would argue with any hope of persuasion that the cashing of payroll checks was not indirectly connected with the operation of a business.

The Class "B" permittee is not running a financial institution and only cashes checks with the hope of some ultimate gain because of this business convenience. The Class "A" permittee furnishes the weekly bankroll to assist the "B" permittee to conduct or operate his business.

It is our opinion that the Legislature designed to prevent this indirectly conducting or operating the business of a Class "B" permittee by means of the financial aid of the Class "A" permittee and such practice is a violation of section 124.22, Code of Iowa 1950.

September 11, 1952

SCHOOLS AND SCHOOL DISTRICTS: **Teacher training at expense of district not allowable.** Sections 262.30 to 262.32, inclusive, of the Code do not permit the payment by a school district under any circumstances of expense for board, room, tuition and supplies of graduates of the high school of the district attending any teachers college.

Jessie M. Parker, Superintendent of Public Instruction: By recent letter you have requested an opinion of this office which presents the following question:

Under the provisions of sections 262.30 to 262.32, incclusive, Code of Iowa, 1950, may the board of directors of a school district enter into a contract with the State Board of Education providing for payment by the school district of tuition, board, room, books and school supplies, of of high school graduates of the school district pursuing a course of study in Teachers College at the Iowa State Teachers College, The State University of Iowa or the College of Agriculture and Mechanic Arts.

Restated briefly your question is whether a school district may pay the expenses of its high school graduates in obtaining a college education, pursuing a course of study to qualify as teachers under Iowa law.

The above mentioned code sections provide:

"262.30 Contracts for training teachers. The Board of Directors of any school district in the state of Iowa may enter into contract with the State Board of Education for furnishing instruction to pupils of such school district, and for training teachers for the schools of the state in such particular lines of demonstration and instruction as are deemed necessary for the efficiency of the Iowa State Teachers College, State University of Iowa, and College of Agriculture and Mechanic Arts as training schools for teachers."

"262.31 Payment. The contract for such instruction shall authorize the payment for such service furnished the school district or for such service furnished the state, the amount to be agreed upon by the State Board of Education and the board of the school district, thus co-operating."

"262.32 Contract—Time Limit. Such contracts shall be in writing and shall extend over a period of not to exceed two years, and a copy thereof shall be filed in the office of the superintendent of schools of the county."

The foregoing code sections must be read with other pertinent code provisions and effect given to all if possible. Sections 268.3 and 286.2 of the Code are pertinent. These sections provide:

"268.3 Contract with School Districts. The State Board of Education may contract in writing with the Board of Directors of the school district in which the college is situated and those contiguous thereto, for a period not exceeding two years at a time to receive the pupils thereof into the State Teachers College and furnish them with instruction; and payment thereof shall be made out of the general funds of such districts, but shall not exceed fifty cents per week for each pupil. A copy of such contract shall be filed with the county superintendent, and all reports required by law to be made to the Board of Directors of such townships or schools and the county superintendent by the teachers thereof shall be made by the president of the college. All sums received for tuition shall be placed to the credit of the general fund of the college."

"286.2 Definitions. For the purposes of this chapter an elementary pupil is a pupil of school age attending public school who has not entered the ninth grade, and a high school pupil is a pupil of school age attending public school in any of the grades ninth to twelfth inclusive."

The principal purpose of sections 262.30 to 262.32 inclusive, supra, is to supplement theory taught students of the teachers colleges in the classroom with practical application. In other words provision is made for a type of instruction for students attending the said state schools which has come to be known as "on the job training." Provision is also made for attendance of elementary and high school pupils at these teachers colleges to pursue their instruction as elementary and high school pupils. Section 262.30 of the Code is divisible into two parts: (1) furnishing instruction to pupils of the school district, (2) training teachers in methods of instruction and demonstration to promote the efficiency of the three state schools mentioned. In some instances high school graduates pursuing a course of study at a teachers college hold provisional certificates and under such certificates may be employed as teachers. At the same time such college students receive college credits for the work they are employed to do. Under such circumstances the Board of Directors of a school district may enter into contracts with the State Board of Education providing for furnishing instruction

for pupils of the school district by the employment of teachers holding provisional certificates and for compensating the practice teachers involved.

In Clay v. Independent School District, 187 Iowa 89, the independent school district of Cedar Falls had entered into an agreement with the Iowa State Teachers College whereby all pupils of school age residing in a certain section of the district were required to attend the Normal Training School of the college. The remainder of the school population of the district attended the public schools of the district. The agreement further provided that certain of the more advanced students of the college would come into the public schools and teach and instruct a certain designated grade or class of pupils during a part of the day, such teaching being done and instruction given under the supervision, advice, and criticism of the public school teacher in regular charge of the room. At the time the action was brought the student teachers held provisional certificates. Under the arrangement the public school teacher in regular charge of the room was paid by the school district less than full time wages, and was paid by the college for so much of her time as was given to her work as critic teacher. The action brought by residents and tax payers of the district challenged the regularity and legality of the arrangement, and sought an injunction against its continuance. The injunction was denied. In its opinion the Supreme Court of Iowa said in part:

" * * * remembering that the statute requires the board to select only such teachers as have been properly certified by the state superintendent, it may be conceded that the employment of uncertified teachers would be an unauthorized act, and that, if the board in this case were, in fact, violating the law in this respect, injunction would lie to correct such practice. That the student teachers, so called, did not hold certificates prior to the issuance of the provisional certificates is admitted, and if the service they performed was such as to bring them within the scope of the statute, then the board exceeded its authority in permitting it. It is very doubtful, however, whether the statute prohibiting the employment of uncertified teachers has any application to a case where the person in question does no more than to render gratuitous temporary or incidental assistance to a competent and duly certified teacher, who has the room and pupils in her immediate charge and control."

It is significant to observe that the court in indicating the use of "practice teachers" under such circumstances would probably be legal, stressed the fact that their opinion was influenced by the fact that the "practice teacher" who held no certificate was an uncompensated assistant, and in this regard drew an analogy to the use of pupils of the school by a teacher to assist her:

"It is certainly neither unknown nor a reprehensible practice for a responsible teacher in charge of a school or department to call upon bright and promising students or pupils to assist her in some phase of the work of instruction, nor is she open to just condemnation if, in so doing, she is actuated more by a desire to encourage and develop the capacity of such young persons than by any pressing need of assistance in her work."

The court observed that the arrangement provided for the attendance of at least a part of the pupils of the school district at the normal training school. Bearing this fact in mind, the court said:

"It is very evident that this arrangement contemplates an advantage to the district in the instruction of such pupils, as well as an advantage to the teachers college in affording its students the benefit of an object lesson in teaching, and at the same time an opportunity for * * * 'practice teaching', under the direction and leadership of the responsible members of the teaching force having such school in charge."

The court stated that its views hereinbefore quoted were academic in the case, as all of the student teachers had procured provisional certificates. However, we believe these academic considerations by the court to be of particular import to the questions here examined as the pronouncements are significant in that they exemplify the operation of the statute under consideration. There is no hint that the purpose of these statutes is to increase the number of qualified teachers in the state by permitting a school district to send its graduates through teachers college. If insuring a continuing adequate supply of teacher personnel was the primary intent of the said statutes, it would seem that attendance would not be limited to the three specified state schools, but rather would include education at any accredited college or university in the state.

The provision in section 262.30, supra, "for furnishing instruction to pupils of such school district" contemplates such provisions as were included in the cited case, that is, provision for the employment of student teachers who hold certificates and provision for attendance of pupils of a school district at a normal school, rather than the regular school or schools of the district. Attention is invited to the definition contained in section 286.2, supra.

In Kruse v. Independent School District of Pleasant Hill, 209 Iowa 64, it was said by the Supreme Court of Iowa:

"A child who attends a public, private, or parochial school outside a school district is a pupil of the school he attends, not of the schoool in his district which he does not attend."

Upon graduation from high school a student is no longer entitled to free education by the school district. His status is that of a "former pupil". Upon entering college the individual becomes a student of the college. Section 268.3 of the Code, supra, provides for attendance of elementary and high school pupils of neighboring school districts at the State Teachers College. Payment by the district for such attendance is limited to the sum of fifty cents per week for each pupil.

Section 282.6 of the Code provides:

"282.6 Tuition. Every school shall be free of tuition to all actual residents between the ages of five and twenty-one years, and to resident honorably discharged soldiers, sailors, and marines, as many months after becoming twenty-one years of age as they have spent in the military or naval service of the United States before they became twenty-one. Every person, however, who shall attend any school after graduation

from a four-year course in an approved high school or its equivalent shall be charged a sufficient tuition fee to cover the costs of the instruction received by such person."

This provision clearly denies any right of "free education" to persons who have graduated from a four-year course in an approved high school or its equivalent and makes it mandatory to charge such persons a tuition covering the cost of their instruction.

We believe that it would be a strained construction indeed that would lead to the conclusion that all resident graduates of a school district were under the statute pupils of the district school even though its work had been completed and that the district in furnishing instruction to "its pupils" could send them to college after graduation from high school.

It is the opinion of this office that sections 262.30 to 262.32, inclusive, Code of Iowa, 1950, do not permit the payment by a school district under any circumstances of expense of board, room, tuition and supplies of graduates of the high school of the district attending any teachers college.

September 25, 1952

ELECTIONS: Employee's opportunity to vote. The statutory guarantee of two hours to each employed person to vote means a two-hour period of the working day if such period is reasonably necessary to afford such person opportunity of voting.

Honorable Melvin D. Synhorst, Secretary of State: This will acknowledge receipt of yours requesting a review of opinion issued October 31, 1950 and appearing in the Report of Attorney General for 1950 at page 190, interpreting section 49.109, Code 1950, in view of the recent pronouncement by the Supreme Court of the United States respecting a similar statute of the State of Missouri in the case of Day-Brite Lighting, Inc. v. State of Missouri, 96 Law Edition 343. The same case was considered by the Supreme Court of Missouri, there entitled "State v. Day-Brite Lighting, Inc.," appearing in 240 S. W. 2d, 886. The case before the Supreme Court of the United States is a determination that a statute comparable to our Iowa statute with respect to the right of persons to be allowed time off to vote is a proper exercise of the police power of the state and is not violative of the provisions of the federal Constitution. The case before the Supreme Court of Missouri likewise was a determination that the Missouri statute was a proper exercise of the police power of the state and not violative of the provisions of either the federal Constitution or the Missouri Constitution. There is no substantial difference between the Missouri statute, considered by the Supreme Court of the United States in Day-Brite Lighting, Inc. case, upon which the decision is based, and the Iowa statute, designated as section 49.109. These two statutes are herein exhibited as follows:

The Missouri statute:

"Any person entitled to vote at any election in this state shall, on the day of such election, be entitled to absent himself from any services or employment in which he is then engaged or employed, for a period of four hours between the times of opening and closing the polls; and such voter shall not, because of so absenting himself, be liable to any penalty; provided however, that his employer may specify the hours during which such employee may absent himself as aforesaid. Any person or corporation who shall refuse to any employee the privilege hereby conferred, or shall discharge or threaten to discharge any employee for absenting himself from his work for the purpose of said election, or shall cause any employee to suffer any penalty or deduction of wages because of the exercise of such privilege, or who shall, directly or indirectly, violate the provisions of this section, shall be deemed guilty of a misdemeanor, and on conviction thereof be fined in any sum not exceeding five hundred dollars."

The Iowa statute:

"Sec. 49.109. *Employees entitled to time to vote.* Any person entitled to vote at a general election shall, on the day of such election, be entitled to absent himself from any services in which he is then employed for a period of two hours, between the time of opening and closing the polls, which period may be designated by the employer, and such voter shall not be liable to any penalty, nor shall any deduction be made from his usual salary or wages, on account of such absence, but application for such absence shall be made prior to the day of election."

It will be noted that the Iowa statute limits the pertinency of the statute to general elections only and restricts the period allowable from his services to two hours between the time of opening and closing the polls, and that application for absence from the services for voting purposes shall be made prior to the day of election. It is clear that the statute requires the employer to allow the employee two hours of time between the opening and closing of the polls.

The St. Louis Court of Appeals in 220 S. W. 2d, 782, stated that the Missouri statute, "means that if the employee's regular working day leaves him at least four consecutive hours on election day during which he would not be engaged in actual service to his employer, the object and purpose of the statute has been met, and such employee is not entitled to be absent from his regular working hours at all; or, if such time when the employee is not actually engaged in service to his employer is less than four hours (in this case two and one-half hours), the employer shall permit the absence of the employee from his services for a sufficient time (in this case one and one-half hours) to make up four full hours. Obviously the two opposing views bring about different results. For instance, if the views of the state prevail, as to this employee, he would quit his work at the noon hour, thereby having seven hours' time in which to vote, and the employer would have to pay him $6.40 for four hours of services which were not rendered, whereas if our view of the statute is correct, this employee would quit work at 3:00 o'clock p. m. instead of 4:30 p. m., thus depriving the employer of only one and one-half hours of service instead of four hours, and the employee would have four full hours to vote. Suppose the employee is working on a shift from 4:00 a. m. to 12:00 noon. If the state is correct in its view of the statute the employer would be compelled to grant absence on pay to the employee for four hours before 12:00 noon, regardless of the fact that such employee could be on his

job until 12:00 noon and then have seven hours' time in which to vote. On this theory the employee would have eleven hours out of the election day of thirteen hours.

If the views of the state are correct there would indeed be a constitutional question involved, not only under the 'due process' clause of Section 1, Amendment XIV to the Constitution of the United States, and Section 10, Article I, Constitution of Missouri, 1945, but also under the 'equal protection of the laws' clause of Section 1, Amendment XIV to the Constitution of the United States, and Section 14, Article I, Constitution of Missouri, 1945, because of an unnecessary, arbitrary and unreasonable burden being visited upon the employer, whether it be an individual or corporation, in order to accomplish the simple purpose of the employee having four hours on election day in which to vote. Then why give the statutory words a strained construction which would invalidate it, if the words are just as susceptible to a meaning that makes it a reasonable and valid law? The Legislature most assuredly had in mind the Constitution, and its various provisions, when it enacted the law, and it is the legislative intent we are seeking in construing the law.

The primary rule of the construction of statutes, is to ascertain and give effect to the lawmakers' intent. It is of significance that this statute was enacted over fifty years ago, when working hours ranged from ten to sixteen hours a day. It was at that time that the words were used that the employee 'be entitled to absent himself from any services or employment in which he is then engagd or employed, for a period of four hours *between the time of opening and closing the polls*'. The italicized words would be useless and have no place in the sentence where used if the four-hour period is to be restricted to the employee's regular working hours, as the state would contend. But even in that day there were many employees whose service ended at noon, or by 3:00 o'clock in the afternoon, and we can see no reason why the lawmakers intended to require the employer to give such employee more time to vote, if his regular working schedule gave him a full four hours of free time. Then there was added the proviso, 'that his employer may specify the hours during which such employee may absent himself as aforesaid.' 'As aforesaid' could only mean four hours between the times of opening and closing the polls. The lawmakers intended to secure to every citizen both the right and the opportunity to vote. If the voter's regular working hours already gave him the four-hour opportunity to vote, there was no useful purpose in the section at all as to such employee. If the voter already had two and one-half hours' free time, as did Grotemeyer, then if the employer gave him an additional one and one-half hours, the purpose of the law would be met by Grotemeyer's having four full hours in which to vote, and with no more inconvenience and expense to the employer than were necessary and reasonable to effect the purpose of the law. Thus viewing Section 11785 the defendant was improperly convicted under the first count of the information."

Whether the allowance of voting time be fixed at four hours or two hours is a matter within the legislative power and discretion. The Iowa Legislature having fixed the period of voting time allowance of two hours, such allowance is not the subject of constitutional attack. The area of constitutionality is fixed by the Supreme Court of the United States in the Day-Brite case, as follows:

"But the state legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare; they may within extremely broad limits control

practices in the business-labor field, so long as specific constitutional prohibitions are not violated and so long as conflicts with valid and controlling federal laws are avoided."

The constitutionality of the Iowa statute tested by the foregoing and the Day-Brite case being established, the interpretation of the Missouri statute as herein set forth with the substitution of two hours time for four hours time, is applicable to the Iowa statute.

Under the Missouri case, if the foregoing two-hour allowance for voting, or any part thereof, is taken from the working day, the employee is entitled to such time without deduction of pay. Deduction of wages for such time would make the employer liable to the penalty provided by section 49.110, Code of Iowa, 1950. This decision is consistent with opinion of this department issued October 31, 1950, and appearing in the Report of Attorney General for 1950 at page 190.

September 25, 1952

MINES AND MINING: **State and federal plan of co-operation.** The state mine inspector of Iowa does not have the authority to enter into any agreement to carry out a plan of state and federal co-operation until first such authority be granted by the state legislature.

His Excellency, The Governor: This is in reply to your request for an opinion dated September 3, 1952, in which you state:

"There has been enacted, by the Congress of the United States, Public Law 552 of the 82nd Congress; (66 Stat. 692), which became effective July 16, 1952.

"Said enactment contains provisions with respect to state and federal co-operation in the inspections of mines in the State of Iowa. Said provision for co-operation is found in Section 202 (b) (2) of the federal Coal Mine Safety Act, referred to above as Public Law 552.

"Subparagraph (A) of said Section provides, in event co-operative inspections are made, that the state designate the state mine inspection or safety agency as the sole agency responsible for the administration of the co-operative inspections.

"An opinion is requested as to whether or not, with respect to subparagraph (A), the mine inspectors of the State of Iowa will have authority, under the Iowa law, to co-operate and carry out the plan.

"Section 203 (e) provides that the state agency shall assign inspectors employed by it to participate in inspections to be made under the provisions of the above mentioned title.

"An opinion is requested as to whether or not the state inspectors of Iowa have authority to participate in a co-operative plan and to concur in orders of the federal mine inspectors."

The statutes involved in this opinion are as follows: Public Law 552 of the 82nd Congress (66 Stat. 692).

Section 202 (b) (1):

"(b) (1) In order to promote sound and effective co-ordination in federal and state activities within the field covered by this title, the director shall co-operate with the official mine inspection or safety agencies of the several states.

"(2) Any state desiring to co-operate in making the inspections required under this title may submit, through its official mine inspection or safety agency, a state plan for carrying out the purposes of this subsection. Such state plan shall—

"(A) Designate such state mine inspection or safety agency as the sole agency responsible for administering the plan throughout the state and contain satisfactory evidence that such agency will have the authority to carry out the plan,

"(B) give assurance that such agency has or will employ an adequate and competent staff of inspectors qualified under the laws of such state to make mine inspections within such state,

"(C) give assurances, that upon request of the director or upon request of an operator under section 203 (e) (1), the agency will assign inspectors employed by it to participate in inspections to be made in such state under this title, and

"(D) provide that the agency will make such reports to the director, in such form and containing such information, as the director may from time to time require.

Section 203 (e) (1):

"(e) (1) If an order is made pursuant to subsection (a) of this section with respect to a mine in a state in which a state plan approved under section 202 (b) is in effect, and a state inspector did not participate in the inspection on which such order is based, the operator of the mine may request the agency designated in the state plan to assign a state inspector to inspect the mine. The state inspector assigned in accordance with such request shall inspect such mine promptly after the request is made."

Code of Iowa, section 82.12:

"82.12. *General office—report to governor.* The three inspectors shall maintain a general office at the seat of government and keep therein all records, correspondence, documents, apparatus, or other property pertaining to their office; they shall at the time provided by law, make a biennial report to the governor of their official doings, including therein all matters which by this chapter are specially committed to their charge, adding such suggestions as to needed future legislation as in their opinion may be important."

Code of Iowa, section 82.14:

"82.14. *Duties of inspector—record.* He shall examine, test, and adjust, as often as he deems necessary, all scales, beams, and other apparatus used in weighing coal at the mines. He shall examine all the mines in his district as often as the time will permit, which examination shall be made at least once every six months, keep a record of the inspections made, showing date, the condition in which the mine is found, the extent and manner in which the laws relating to the government of mines and their operation are observed and obeyed, the progress made in improvements for better security to health and life, number of accidents happening and their character, the number employed, and such other matter as may be of public interest and connected with the mining industries of the state."

The office of mine inspector is a creature of law: such office is unknown to the common law. Hence it follows, the powers and duties of the inspectors are those specifically named in the Code and such other powers as may be necessarily implied from the powers granted.

Code section 82.12 provides for the report to the governor. There is no duty therein to report to any other person. Section 82.14 spells out the duties of the inspectors. There is no mention in that section of any power or duty of the state inspectors to obey any order or directions of any federal authority as to the time or place of making inspections. However, he may participate in any inspection and aid any federal inspector in the performance of his duty, and may by his order concur in an order made by the federal inspector. It is a well recognized rule of statutory construction that where duties are enumerated in the statute, the enumeration of such duties excludes the exercise of others, except such as are necessarily implied from the authority granted. 50 American Jurisprudence 238, Article 244, and cases cited in the notes thereto.

It is therefore our opinion, the mine inspector of the State of Iowa does not have authority to enter into agreement to carry out the plan of state and federal co-operation provided for in Public Law 552 of the 82nd Congress, unless that authority shall be first granted by the legislature.

September 25, 1952

BANKS AND BANKING: **Loan limit to individual borrowers.** In computing the statutory limit of loans to persons and corporations, the loans to the person and the corporation must be considered separately, even though the person may be a majority stockholder in the corporation.

Mr. N. P. Black, Superintendent, Department of Banking: This is in reply to your letter of September 11th in which you state that the examination of a certain state chartered bank, having a legal loan limit of $20,000, revealed that on a certain date said bank held direct obligations of a borrower in the principal sum of $10,000, and also certain obligations of two borrower corporations, the majority outstanding stock of each being owned by the borrower and his wife; that one corporation of which the individual borrower owned 51 shares of 100 shares of outstanding capital stock owed the bank $17,000, and the other corporation of which the borrower and his wife owned 385 shares of the 450 shares of the capital stock outstanding owed the bank $5,000, making a total indebtedness of the individual borrower plus the two corporations in the aggregate of $32,000; the banking department contends the total sum of $32,000 is a direct liability of the individual borrower inasmuch as he owns his own business and the controlling interest in the two corporations above mentioned, which the department claims is a family concentration.

You state further that the bank strenuously objects to the ruling of the banking department and insists the two corporations are separate and each should be considered by itself.

You request an opinion as to whether or not the above mentioned three loans considered together amount to a violation of section 528.14.

That part of Code section 528.14 applicable to this opinion follows:

"528.14. *Limit of liabilities.* The total liabilities to any savings or state bank of any *person, corporation, company,* or *firm* for money borrowed, including in the liabilities of a *company* or *firm* the liabilities of the several members thereof, shall at no time exceed twenty per cent of the actually paid-up capital and surplus of such bank; provided that they may loan not to exceed one-half of their capital stock to any *person, corporation, company,* or *firm* on notes or bonds secured by mortgage or deed of trust upon unencumbered farm land in this state, worth at least twice the amount loaned thereon;" (Emphasis supplied)

It is a primary rule of statutory construction that the legislative intent be given effect. Words are evidence of intention, not only the words actually used, but also the manner in which a statute is written is indicative of legislative intent. That is the case here.

Webster's New International Dictionary defines "company" as follows:

"An association of persons for a joint purpose or performance, esp. for carrying on a commercial or industrial enterprise or business. The term "company" in its general sense includes corporation, guild, joint-stock company, and partnership, but is mostly used of the larger partnerships (specially called "joint-stock companies") and trade, industrial, or commercial corporations. In British usage the term is the ordinary one for designating the historic chartered companies (as of the merchant adventurers), the trade guilds (those of London being often called "city companies"), and the modern industrial and commercial organizations more often called *corporations* in the United States, the term *corporation* in British usage being chiefly used of corporations other than those for trade, industrial, or commercial purposes. The ordinary small business copartnership companies are more frequently designated, esp. in England, by the name *firm* or *partnership.*

The federal Court of Appeals in re Midwest Athletic Club, 161 Federal 2nd, 1005, 1008, defined "company":

"A company is a number of persons united for performing or carrying on anything jointly."

The same was also defined in Atlantic Coast Line Railroad Co. v. State, 69 South Eastern 725, 729, as follows:

"The word 'company' does not necessarily mean a corporation, but may mean a firm, partnership, or individual."

Again the word required definition by the court in Owen v. Shepard, (Ind. T.) 59 Federal, 749:

"By common usage the use of 'company' is as applicable to partnerships and unincorporated associations as to corporations."

Also by the Oklahoma Court in Leader Printing Co. v. Lowry, 50 Pacific, 242:

"The word 'company' no longer applies exclusively to corporations. It may now be part of the name of a partnership or of any unincorporated company, so that, as used in pleadings, it does not impart that the person or thing was not designated as a corporation."

The word "firm" is defined by Webster's New International Dictionary as follows:

"The name, title, or style under which a company transacts business; the firm name; hence a partnership of two or more persons; a commercial house; as, the *firm* of Hope & Co. Under English and American law a *firm* is not recognized as a legal person distinct from the members composing it; but in Scots law and French law the firm is a legal person distinct from its members, though the individual partners may be charged on a decree or diligence directed against the firm."

The dictionary definition is concured in by the courts in cases cited in 17 Words and Phrases 56.

It will be noted that the limitation of liabilities apply to a person, corporation, company or firm, those words are connected by the disjunctive "or", and should be considered separately. In that part of the statute which provides that the personal liabilities of the debtor shall include the debts of a company or firm of which he is a member, the words "person" and "corporation" are not used. Further, in the statute, there is a proviso, in which the legislature again used the words "person, corporation, company, or firm", indicating that the word "company" was used as meaning an unincorporated association or partnership, as distinguished from a corporation. Moreover, a corporation is an intangible entity which is distinct from its stockholders who are not liable for its debts. It must follow, then, that the owner of the majority of the outstanding stock of a corporation is not liable for the corporate debts. The statute provides that the debts of the company or firm shall be considered the liabilities of its several *members* and be included in the calculation of their personal borrowing limit. A corporation does not have members—it has stockholders. The stockholders are separate and apart from the corporate entity. In making a loan to a corporation, the bank can look only to the assets of the corporation for the repayment thereof, on the other hand the members of an unincorporated company or firm are personally liable for the company's debts, which is a cogent reason why the word "company" as used in the statute is limited in its meaning to an unincorporated company and does not mean and include a corporation.

It is our opinion that in computing the statutory limit of loans to persons and corporations the bank loans of the person and the corporation must be considered separately, that loans to a corporation are separate and distinct from personal loans to its stockholders. There fore the loans in question do not violate section 528.14, Code, 1950.

November 13, 1952

HIGHWAYS: **Primary road fund—anticipation of revenue.** The state comptroller may anticipate the receipts of the primary road fund up to and including June 30 of a fiscal year and issue warrants in the amount not exceeding such anticipated receipts.

Mr. Glenn D. Sarsfield, State Comptroller: We have yours of the 4th inst. in which you have submitted the following:

"This office is faced with the problem that contract obligations made by the Iowa Highway Commission against the Primary Road Fund of this State temporarily exceed the amount of cash available, however, we anticipate that there will be sufficient revenues available to the Primary Road Fund during this fiscal year to meet its obligations.

Section 8.19, Code of Iowa, 1950, provides as follows:

'8.19 Claims exceeding appropriation. No claim shall be allowed when the same will exceed the amount specifically appropriated therefor.'

The Road Use Tax Fund is provided for in Chapter 308A, Code of Iowa, 1950, and Section 308A.2 provides for the allocation of this fund by the Treasurer of State, of which the Primary Road Fund receives 42%.

Section 313.3, Code of Iowa, 1950, provides as follows:

'313.3 Primary road fund. There is hereby created a primary road fund which shall include and embrace:

1. All road use tax funds which are by law credited to the primary road fund.
2. All federal aid primary and urban road funds received by the state.
3. All other funds which may by law be credited to the primary road fund.
4. All revenue accrued or accruing to the state of Iowa on or after January 26, 1949, from the sale of public lands within the state, under Acts of Congress approved March 3, 1845 supplemental to the Act for the admission of the states of Iowa and Florida into the Union, chapters 75 and 76 (Fifth Statutes, pages 788 and 790), shall be placed in the primary road fund.'

Section 313.4, as amended by Chapter 107, Section 1, Acts of the 54th General Assembly, will then read as follows:

'313.4 Disbursement of fund. Said primary road fund is hereby appropriated for and shall be used in the establishment, construction and maintenance of the primary road system, including the drainage, grading, surfacing, construction of bridges and culverts, the elimination or improvement of railroad crossings, the acquiring of additional right of way, all other expense incurred in the construction and maintenance of said primary road system, and the maintenance and housing of the state highway commission.'

Section 313.5 places a further limitation on expenditures from the Primary Road Fund for the support of the Highway Commission, engineering and administration of highway work and maintenance of the primary road system.

Section 313.8 was amended and revised by Chapter 107, Sec. 3, Acts of the 54th General Assembly, and now states in part as follows:

'The state highway commission shall proceed to the improvement of the primary road system as rapidly as funds become available therefor until the entire mileage of the primary road system is built to established grade, bridged, and surfaced with pavement or other surface suited to the traffic on such road. Improvements shall be made and carried out in such manner as to equalize the condition of the primary roads, as nearly as possible, in all sections of the state.'

In view of these provisions, it appears that all receipts accruing to the Primary Road Fund are appropriated, and that no specific limita-

tion exists other than the estimated receipts for a given fiscal year, and, therefore, the restriction of disbursement imposed by Section 8.19, Code of Iowa, 1950, would not apply.

I respectfully request an official opinion as to whether or not the State Comptroller may anticipate the receipts of the Primary Road Fund up to and including June 30th of a fiscal year (current year ends June 30, 1953), and issue warrants in the amount not exeeding such anticipated receipts.

If this can be done, then it will be necessary for the Treasurer of State to stamp warrants 'Not paid for want of funds' after which they will draw interest until such time as called for payment, in accordance with the provisions of Chapter 74, Code of Iowa, 1950."

In reply thereto we advise as follows:

Your power and duty in issuing warrants is prescribed by Section 8.6, Subsection 2, Code of Iowa, 1950, as follows:

"Specific powers and duties. The specific duties of the state comptroller shall be: * * * 2. Collection and payment of funds. To control the payment of all moneys into the treasury, and all payments from the treasury by the preparation of appropriate warrants, or warrant checks, directing such collections and payment."

The act of the Legislature in appropriating the Primary Road Fund and prescribing the uses to be made thereof pursuant to the provisions of section 313.4, Code of Iowa, 1950, as amended by Chapter 107, section 1, Acts of the 54th General Assembly, set forth by you in your letter, in view of your power and duty in issuing warrants, presents the question whether warrants can be issued against the Primary Road Fund with the knowledge that funds therein are not available for the payment of the warrants so issued. This question has been before the Supreme Court in the case of State vs. Sherman, 46 Iowa 415, where mandamus was sought against the Auditor of State to issue warrants upon the State Treasurer. The Auditor of State defended on the grounds that there was no money in the state's treasury with which the warrants could be paid at the time of their execution. The Court observed:

"He understands the law to provide that the appropriation is to be paid quarterly if there be money in the State Treasury, if not, as soon after as funds may be found on hand. In other words, he holds that the appropriation is not due at the quarterly periods unless there be money in the treasury out of which it may be paid, and will not become due until money be afterward found from which the warrants may be paid.

The officers of the university insist that the appropriation is payable under the act in quarterly installments, and therefore it is the duty of the auditor to issue warrants therefor without regard to the fact of the want of money in the State Treasury to meet them.

It becomes our duty to determine the true construction of the act above quoted, and thereby to decide the point of difference presented for adjudication in this case. Reference must here be made to other statutory provisions which afford light for the solution of the question submitted to us.

It is the duty of the Auditor of State 'to draw warrants on the treasurer for money directed by law to be paid out of the treasury, as the same may become payable. Code, Sec. 66, P. 8. 'When the amounts due from the State to any person exceeds twenty dollars, the auditor shall, if requested, divide the amount in parcels of not less than ten dollars, and issue warrants therefor.' Sec. 66, P. 12. Upon the presentation of an auditor's warrant to the Treasurer of State, if there be no money in the treasury, he is required to indorse upon it the day of its presentation, and therefrom it draws interest at six per centum per annum. Code, Sections 76, 78. When sufficient money comes into the treasury the outstanding warrants are paid in the order of their presentation. Section 79.

It will thus be seen that the auditor is required to issue a warrant for money appropriated by the General Assembly when payable, without regard to the fact that there may be no money in the treasury to pay it. The warrant then draws interest. As a matter of fact this is not infrequently done, for, unfortunately, the income of the state does not always equal its expenditures, as appropriated by the General Assembly. It is a fact, also, of which we will take judicial notice, that auditor's warrants, when they cannot be paid by the treasurer for want of funds, have such value that money may readily be raised thereon at rates which many who receive them in payment of claims against the state are willing to accept. They are often negotiated at par, the interest they draw giving to them such value. These statutory provisions and facts will be remembered when referred to hereafter in the course of our inquiry."

Nor is this power to issue warrants against an exhausted fund effected or limited by the provisions of section 8.19, Code of Iowa, 1950, providing as follows:

"Claims exceeding appropriation. No claim shall be allowed when the same will exceed the amount specifically appropriated therefor."

The appropriation of the Primary Road Fund provided by section 313.4, as amended by Chapter 107, Section 1, Acts of the 54th General Assembly, set forth by you in your letter, clearly is not a specific appropriation for the payment of an allowed claim. The uses to be made of the Primary Road Fund appropriation are specified in the foregoing section, including its use for "all other expense incurred in the construction and maintenance of said primary road system". This appropriation is general in its terms for the payment of such expense, irrespective of the amount of any claim that may arise out of the performance of the duty of construction and maintenance of the system. This interpretation accords with the intent of the Legislature as disclosed by Chapter 63, Acts of the 49th General Assembly, in which section 8.19 of the Code of Iowa, 1950, appears as sec. 6 of the foregoing chapter. The title to that chapter is this:

"AN ACT relating to the presentation, investigation, allowance, and payment of claims against the State of Iowa, being amendatory of chapter seven and one-tenth (7.1), Code, 1939, known as the Budget and Financial Control Act."

We are of the opinion therefore that the State Comptroller may anticipate the receipts of the Primary Road Fund, created by section 313.3, Code of Iowa, 1950, up to and including June 30, 1953, and may issue warrants in an amount not exceeding such anticipated receipts.

The duty of the Treasurer of State to pay the warrants so issued by the State Comptroller, and so certified to him by the State Comptroller, (See section 12.3, Code of Iowa, 1950) is performed subject to the provisions of Chapter 74, Code of Iowa, 1950, providing for the duty of the treasurer where warrants issued by the comptroller are presented for payment out of an exhausted fund. This duty imposed upon the State Treasurer is set forth in sections 74.2, 74.3, 74.4 and 74.5, each in terms as follows:

"74.2. Indorsement and interest. 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."

"74.3 Record of warrants. 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."

"74.4 Assignment of warrant. When any warrant shall be assigned or transferred after being so indorsed, the assignee or transferee shall be under duty, for his own protection, to notify the treasurer in writing of such assignment or transfer and of his post-office address. Upon receiving such notification, the treasurer shall correct the aforesaid record accordingly."

"74.5 Call for payment. When the treasurer has funds on hand in the fund on which such warrants are drawn, sufficient to pay a warrant, he shall, by notice posted at his office and in a place readily accessible to the public, call said warrant or warrants for payment, giving the number thereof. Said warrants shall be paid in the order of presentation."

November 14, 1952

ELECTIONS: Canvass of vote—correcting obvious error of judges in precinct. Where it appears to the canvassing board that the election officials have made an obvious error in transposing figures to the return book, the election board should be reconvened and return made in accordance with the statute.

Mr. Clyde E. Herring, County Attorney, Des Moines, Iowa; Attention; A. R. Shepherd: We have yours of even date in which you have submitted the following situation for opinion of this department, together with copy of your own opinion of date November 13, 1952. Your letter states the following:

"The Polk County Board of Supervisors now sitting as a canvassing board has asked me to submit some other questions to you regarding the board's powers and I am dictating this inquiry to you in the presence of the attorneys for the interested parties.

In Precinct No. 10 in the city of Des Moines, the pollbook which is a part of the returns certified, sealed and delivered to the canvassers shows that a total of 1435 votes were cast in the precinct. The total

of the votes shown for the office of County Recorder is 604 votes and we understand that none of the totals shown by the returns for any office exceeded 700 votes.

Five judges and clerks were duly appointed for Precinct No. 10. All of these five people served and all of them certified to the returns. One other person was sent to help the judges and clerks. She served during part of the time the polls were open and did not stay until the counting was completed but her name was signed to the certificate by one of the other judges purportedly by her authority.

Two of the judges and one of the clerks who were duly appointed who served throughout election day and who signed the certificate have appeared before the canvassing board during the course of the canvass, have shown certain sheets which they describe as the work sheets from which the returns were computed, have stated after reference to these sheets that the returns as submitted are correct except for the fact that they failed to include approximately 700 straight party votes and have asked permission to change the poll books to add the straight party vote in the numbers which they state are correct to the total vote for each candidate.

Mr. Throckmorton, the attorney for Mrs. Barker, one of the candidates for County Recorder, proposes that the canvassing board grant this permission and that it then canvass the returns for precinct No. 10 as changed in conformity with the request of the two judges and clerk who have appeared before the canvassing board. As authority for his position Mr. Throckmorton cites the following cases: 112 Iowa 503; 22 Iowa 343; 7 Iowa 390.

Mr. McNutt, the attorney for Mrs. Gibson, the other candidate for County Recorder, objects to Mr. Throckmorton's proposal. Mr. McNutt contends that the canvassing board cannot go beyond the face of the returns but that any change in the returns can be considered only by a contest board. He contends further that in any event the three members of the election board, as distinguished from the whole board, should not be permitted to change the returns. Mr. McNutt contends that the case cited by Mr. Throckmorton—112 Iowa 503 can be distinguished and cites in further support of his position the case of Davies vs. Wilson 229 Iowa 100. Mr. Throckmorton thinks this latter case can also be distinguished.

Herewith I am enclosing an opinion which I have previously handed the Board of Supervisors and you may give this opinion whatever consideration you think it merits. Since the canvassing board has recessed pending receipt of your opinion we shall all be very grateful if you can give this matter prompt attention."

In reply thereto we advise you as follows:

Section 50.16, Code of Iowa, 1950, provides the following:

"Return of board. A return shall be made in each pollbook, giving, in words written at length, the whole number of ballots cast for each officer, except those rejected, the name of each person voted for, and the number of votes given to each person for each different office; which return shall be signed by the judges, and be substantially as follows:

At an election at ..... in .....township, or in ..... precinct of ..... township, in ..... county, state of Iowa, on the ..... day of ..... A. D. ....., there were ..... ballots cast for the office of ..... of which

A ..... B ..... had ..... votes.
C ..... D ..... had ..... votes.

(and in the same manner for any other officer).

A true return: L ..... M .....)
N ..... O .....)
P ..... Q .....)
Judges of Election

Attest: R ..... S .....)
T ..... U .....)
Clerks of Election."

In the performance of the foregoing duty, it appears that in Precinct No. 10 in the city of Des Moines the pollbook, as certified, sealed and delivered, shows a total of 1435 votes were cast in the precinct. It also show that for the office of County Recorder, 604 votes were cast, and the understanding that none of the totals shown by the returns for any office exceeded 700 votes. In that situation there is a fair and reasonable inference to be drawn that the discrepancy between the total of 1435 votes shown to have been cast and the number of 604 votes and not exceeding 700 votes cast for any particular office, that the return is not a return "of the whole number of ballots cast for each officer." Such return was a duty imposed upon the judges of election by the foregoing quoted Section 50.16. The discrepancy here described appears to be confirmed by the fact that two of the judges and one of the clerks in the foregoing Precinct No. 10 appeared before the Canvassing Board during the course of the canvass and exhibited certain work sheets from which the returns were computed, and have stated, after reference to these sheets, that the return, as submitted, is correct except for the fact that they failed to include approximately 700 straight party votes. It does not appear that the remaining election officials, 1 judge and 1 clerk, while not appearing, have objected to a request made to the Canvassing Board for permission to change the poll books, by adding the straight votes to conform with the correct return of the whole vote of each candidate. We are of the opinion in the foregoing situation that such permission should be granted.

Authority for such procedure is found in the case of Rummel v. Dealy, 112 Iowa 503, where it appeared that at the General Election of 1898 the judges of election in certain townships failed and neglected to properly certify and authenticate the election returns of said townships and that in consequence thereof the board of supervisors, when canvassing said returns in said county, refused to canvass the returns from said townships. It also appeared that while the board of supervisors were in session, the judges of election appeared and asked the said board that they be permitted to correct any errors submitted by

them in authentication of returns, which request the board refused and refused to consider the vote shown by the return. Mandamus was sought to compel the board of supervisors to permit the authentication of the returns by the judges of election, and recanvass the votes cast and make return accordingly. Mandamus issued requiring the Board to reconvene and canvass the election returns. In so ordering, the Court observed:

"It is made to appear that the judges of election failed to properly and fully certify to the returns of said election, and that, immediately upon discovering the mistake so made by them, they offered to certify in due form said returns, and the board of supervisors refused them the right so to do. We are not referred to any like case, but we think, under the facts as found by the court, the correction should have been permitted. Technicalities in such proceedings should not be permitted to defeat the expressed will of the voters.

These returns were at all times in the custody of proper parties, and there was no question of the identity of the judges of election; and the offer to correct the error was while the board was in session, in the act of canvassing the votes of the county. It is not so easy to see, or even imagine, prejudicial consequences to result from the right so to do. It was not proposed to altar or change the returns as to the votes, but only to do an omitted act, required by law, as to certification, so that the returns might be canvassed by the board of supervisors. In the absence of any positive legal objection to such a proceeding, we think public policy, in the securing of correct results from the voters, requires the more liberal rule by which such results are obtainable. Some reliance is placed on State v. Hardin County Judge, 13 Iowa, 139. We are not holding that it was the duty of the board to canvass the returns without the certification, but only that their cerification should have been permitted under the circumstances of the case, and when certified, they should have been counted. This being a legal duty of the board, it was competent for the court to order it done. That the board may be compelled to recanvass and correct a mistake was held in Price v. Harnel, 1 Iowa, 473, and has been held in other cases."

Application of the rule there laid down, it appearing to the canvassing board that the election officials had failed in their duty to make a return of the whole number of ballots cast for each officer, such election board should be reconvened and return made in accordance with the requirements of section 50.16, Code of Iowa, 1950, and like request of the judges.

Like the officials in the Rummel case, the officials in Precinct No. 10 failed in a duty imposed upon them by law in making a return upon which a canvass by the Board of Supervisors could be made. Even the case of Davies vs. Wilson, 229 Iowa 100, cited in your opinion accompanying your request, did not deny to the Board of Canvassers their right to have all of the returns before them. There it is said:

"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."

It is therefore our opinion that obvious errors made by the judges in transposing their figures to the return book should not be permitted to disfranchise a large group of voters when that error can be corrected before the canvass is completed, and we feel that no injustice can be done by permitting the true return to be considered by the Canvassing Board. In case of contest, the corrected certificate would reflect the will of the voters.

December 1, 1952

VETERANS: **Disability bonus fund of World War I—diversion not permitted.** The disability fund, approved by a vote of the people, as a bonus to veterans of World War I may not be diverted by the legislature or even by a general vote of the people.

Mr. Edwin H. Curtis, Executive Secretary, Bonus Board. This will acknowledge receipt of your letter of November 25th in which you have stated the following:

"The Iowa Bonus Board is desirous of an official opinion as to the status of the funds now in possession of the Iowa Bonus Board and which have been administered by said board to disabled needy Iowa veterans of World War I in the form of disability bonuses. The people of Iowa approved a bonus for World War I veterans of Iowa on March 23, 1921 in the amount of $22,000,000.00. This law contained certain provisions, one of which, I quote:

'Section 8. Disability Fund. After the payment of all approved claims and expenses of administration of the board herein created, all funds remaining in the hands of the bonus board, after December 31, 1924, not in excess of two million dollars, ($2,000,000.00) shall constitute an additional bonus to be administered by the bonus board for amelioration of the condition of residents of this state within the classes as defined in section four (4) of this act, who are suffering from disability.'

What we would like to have legally answered is: Can these funds be diverted for any other purpose than is provided for in Section 8 of the Iowa Bonus Law?"

In answer to your letter we will state that in our opinion it is not possible to revert the two and one-half million dollars, a part of World War I Bonus Act, to the general fund, either by an Act of the General Assembly, or by a general vote of the people. The disabled veterans of World War I have a vested interest in this money and it cannot be diverted or taken from them in any manner short of their consent.

Each veteran listed in Section 8 of the Act has a right to participate in the use of these funds until they are exhausted and to receive them without disturbing his ordinary family life.

December 3, 1952

SCHOOLS AND SCHOOL DISTRICTS: **Minimum age in rural schools.** The county superintendent of schools has no authority to establish a minimum age for admission to the rural schools in the county school system.

SCHOOLS AND SCHOOL DISTRICTS: Kindergarten in rural schools. There is no grant of authority to the county board of education to require rural schools in the county school system to provide a kindergarten.

SCHOOLS AND SCHOOL DISTRICTS: Attending kindergarten in another district. Children of kindergarten age who reside in a district which has no kindergarten are not entitled to attend in another district at the expense of their home district.

SCHOOLS AND SCHOOL DISTRICTS: Admission of pupil to class for which qualified. A child of school age is entitled to be admitted to any class for which he is scholastically qualified, provided he is not otherwise disqualified.

Jessie M. Parker, Superintendent of Public Instruction; Attention Mr. R. A. Griffin: By recent letter an opinion of this office is requested as follows:

"1. Does subsection 11 of section 273.18, code 1950, give the county superintendent authority to establish a uniform beginner's age within the limits prescribed by section 282.3 for rural schools in the county school system?

2. Does the language '(or the county board of education)' which appears in subsection 2 of section 282.3 authorize the county board of education to require all rural schools in the county school system to provide a kindergarten or pre-first grade?

3. Are pupils of kindergarten age who reside in a rural district maintaining no kindergarten entitled to attend kindergarten in another district with tuition and transportation paid by the district of their residence?

4. When a school disrict adopts a rule under subsection 5 of section 282.3 requiring a "greater age than the age requirements set forth in subsections 2, 3, and 4 can the parent evade the operation of such rule by enrolling his child in a district which has no such rule and transferring the child to the school in the district of residence at some subsequent time?

5. When during a school year a family moves into a district which has adopted a greater than statutory beginners age under subsection 5 of section 282.3 and seek to enroll a child in kindergarten or first grade who had enrolled at the beginning of the school year in another district with a lower age requirement, can such child be excluded on the ground that he would not have been eligible for admission if he had resided in the district at the beginning of the school year? Suppose that the family moves in from another state with lower beginners age requirements than those specified in subsections 3 and 4 of section 282.3?"

Section 282.1, code of Iowa 1950, in part provides:

"Persons between 5 and 21 years of age shall be of school age."

Section 282.3 of the code provides:

"1. The board may exclude from school children under the age of 6 years when in its judgment such children are not sufficiently mature to be benefited 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.

2. On or after July 1, 1952, the conditions of admission to public schools for work in the school year immediately preceding the first grade and in the first grade shall be as follows:

No child under the age of six years on the fifteenth of November of the current school year shall be admitted to any public school unless the board of directors of the school (or the county board of education) shall have adopted and put into effect courses of study for the school year immediately preceding the first grade, approved by the department of public instruction and shall have employed a teacher or teachers for this work with standards of training approved by the department of public instruction.

3. No child shall be admitted to school work for the year immediately preceding the first grade unless he is five years of age on or before the fifteenth of November of the current school year.

4. No child shall be admitted to the first grade unless he is six years of age on or before the fifteenth of November of the current school year; except that a child under six years of age who has been admitted to school work for the year immediately preceding the first grade under conditions approved by the department of public instruction, may be admitted to first grade at any time before December 31.

5. Nothing in subsections 2, 3 or 4 shall prohibit a school board from requiring the attainment of a greater age than the age requirements herein set forth."

Under the foregoing code sections, by virtue of the provisions of section 282.1 and subsections 2 and 3 of section 282.3 as a class, children who have attained the age of five years on or before the opening day of the school year are entitled to be admitted to "school work for the year immediately preceding the first grade", (if such school work has been established), but no child may be admitted to such work who will not attain the age of five years "on or before the fifteenth of November of the current school year".

The provisions of subsection 5 above quoted, clearly preserve to the school board the right to deny admission to that class of children who have not attained the age of five years on or before the opening day of school, even though such children will be five years of age on or before November fifteen of the school year. This power of denial is based upon the fact that the children are not of "school age" (five years) when school opens.

Under the provisions of section 282.1, supra, and subsections 2 and 4 of section 282.3 of the code, supra, children as a class who will attain the age of six years on or before the fifteenth of November of the current school year are entitled to be admitted to the first grade. This results from the fact that they are of "school age" and are not within the statutory prohibition set forth in the said subsection 4. Attention is invited to the following provision of subsection 1 of section 282.3:

"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 benefited by attendance * * *."

Under the foregoing provisions of subsection 1, the board may exclude from entering school for work for the year immediately preceding first

grade those individual children who, although they have attained the school age of five years, are not, within the judgment of the board "sufficiently mature to be benefited by attendance". Also under this provision the board may exclude from school such individual children who have not attained the age of six years by the opening day of school who have been found "not sufficiently mature to be benefited by attendance". This results even though such individual children will attain the age of six years on or before the fifteenth of November of the current school year.

It is, therefore, seen that the effect of the subsection 5 hereinbefore quoted is to affirm that the prohibitions set forth in subsections 2, 3 and 4 of section 282.3 are not to be construed as denying the board the power vested in it by virtue of section 282.1 and that part of subsection 1 of section 282.3 of the Code which relates to age. It may then be stated that in the event school work is provided for the year immediately preceding the first grade, children who have attained the age of five years on or before opening day of school, are entitled to be admitted for such work, provided however, that individuals so qualifying because of age, but who are not sufficiently mature to be benefited by attendance, may be denied admission. Children who will attain the age of six years on or before the opening day of school are entitled to be admitted. Children who are not six years of age on the opening day of the school year, but who will attain the age of six years on or before the fifteenth of November of the current school year, are entitled to be admitted to the first grade, provided, however, that as to individuals within such group who are not sufficiently mature to be benefited by attendance, such admittance may be denied.

The foregoing considerations control the admission of children to school insofar as age is concerned. Of course children may be excluded regardless of age, if incorrigible or otherwise disqualified under the provisions of subsection 1 of section 282.3. It is pertinent to note that age qualification is controlled by the aforementioned specific statutory provisions.

Section 273.18 of the code provides in part:

"273.18 Powers and duties of superintendent. The county superintendent shall, under the direction of the board, exercise the following powers and duties:

* * *

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."

In view of the specific provisions relating to admittance as controlled by age, it necessarily follows that the provisions of subsection 11, above quoted, relating to admittance cannot be construed to include discretion with regard to age requirements.

II

Attention is invited to the language "(for the county board of education)" appearing in subsection 2 of section 282.3, supra. It is to be

noted that the essence of the said subsection 2 is that the said subsection is a prohibition against admittance. It is not in the nature of a grant of power. The exception to the specific prohibition in which the quoted language appears, merely makes provision for an exception to the general prohibition in a particular fact situation which may exist, viz., where pre-first school work is provided. Powers granted for establishing school work for the year immediately preceding the first grade, must be found in an express grant and not by mere implication foreign to the essence of a code provision. The language relating to the pre-first-year work occurring in this section must be construed as being only descriptive. Provision for the establishment of such work is found in section 280.16 of the code. This section provides:

"280.16. Kindergarten department. 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."

It is to be noted that section 280.16 is distinguishable from section 280.17, which authorizes the establishment of graded and high schools in that the said section 286.16 does not grant to the board unlimited power to establish a kindergarten department.

III

The fact that the board may act only after being petitioned is a clear indication that a kindergarten department is not to be regarded as a part of the school courses which the district must provide for its children of school age. It follows that children of kindergarten age who reside in a district maintaining no kindergarten are not entitled to attend kindergarten in another district with tuition and transportation paid by the district of their residence.

IV

It has previously been noted that subsection 5 of section 282.3 of the Code is not to be construed as vesting any power in the board which is not elsewhere granted. The effect of the said subsection 5 is to remove any doubt which might exist as to whether subsections 2, 3, and 4 of the said section would nullify or void the powers existing by virtue of the provisions of section 282.1 and subsection 1 of section 282.3 of the Code.

The matter of age as a condition of admission is controlled by statute with one exception—a board, in its discretion may enroll in pre-first-grade work pupils who have not attained school age (five years), provided such children will attain the age of five years on or before November fifteen of the school year. As a result of the discretion

granted to boards in this regard, lack of uniformity may result. Bearing in mind that children of school age must be admitted in the absence of contrary statutory provisions and provided that a child is otherwise qualified, it follows that a child residing in a district not enrolling children who are not five years of age, by enrolling in a school permitting enrollment of children who will attain the age of five years within the time prescribed by statute, may complete the necessary scholastic work to be entitled to admission to the school of the district of residence upon attaining the age of five years. This is no evasion of any statute or regulation. If a child is entitled to admission to school so far as school age is concerned, then for the purpose of this specific inquiry the only remaining consideration is one of scholastic qualification. The case presented in this inquiry shows qualification on both points, viz., (a) age (b) by completing school work necessary to enable the child to carry on the work of the class to which he is admitted.

With one exception which is hereinafter discussed, a child who has attained school age must be admitted to school work on the basis of scholastic attainment. If this were not the rule gross inequity and absurdity would result. For example, it could result that a child scholastically eligible for the eighth grade, because of age, would be set back to the seventh grade, notwithstanding the fact that such child was an outstanding scholar. Beginning "School age" and the admission of a pupil into a particular grade on the basis of scholastic achievement should not be confused.

The only exception to the foregoing statutory result is found in the statutory prohibition forbidding the admission of children to the first grade who are not six years of age on or before the fifteenth of November of the current school year. Under this statute a child who is of school age (five years) but who will not be six years of age on or before the fifteenth of November of the school year cannot be admitted to the first grade. A child who will be six years of age by such date is entitled to enter the first grade.

V

The discussion set forth in IV above applies to question 5. In the event a child who had not attained the age of five years on the date of his enrollment in the school of his residence, which school enrolls children who will become five years of age on or before November fifteen of the current school year, moves with his parents during the school year to a district which does not enroll children who have not reached the age of five years on some date fixed by the board earlier than the fifteenth of November of the current year, such child should be admitted by the latter school providing the child has then attained the age of five years and his completed scholastic work is satisfactory. A child who is of school age is entitled to enter the grade for which he is scholastically qualified.

SUMMARY

From the foregoing considerations you are advised:

1. Subsection 11 of section 283.18 of the Code grants no authority to the County Superintendent of Schools to establish a minimum age for admission to rural schools in the county school system.

2. Subsection 2 of section 282.3 of the Code contains no grant of authority to the County Board of Education to require rural schools in the county school system to provide a kindergarten or pre-first-grade course of study.

3. Children of pre-first-grade school age who reside in a district which has not established a pre-first-grade course of study, are not entitled to attend a school in another district, where such course of study has been established with tuition and transportation paid by the district of the child's residence.

4. A child of school age is entitled to be admitted to any class for which he is scholastically qualified, provided, of course, that the child is not otherwise disqualified.

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6. and commercial trailers in the hands of a registered dealer are exempt from taxation. Special equipment mounted on a motor vehicle and operated by auxiliary power and not specifically exempt, is taxable. House trailers used for dwelling purposes for six months prior to January 1 are taxable as personal property. 34

Truck overloads—computation of tolerances. The penalty made
7. mandatory by statute for overloaded trucks can be legally imposed only on the amount by which the weight exceeds that authorized plus the tolerance provided and said tolerance is not cumulative. 125

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SCHOOLS AND SCHOOL DISTRICTS

County superintendent—continuing contract law not applicable.
6. The County Superintendent of schools is in effect an administrative officer and as such does not come within the provisions of the continuing contract law as found in section 279.13. 24

Election of directors—snow storm preventing opening of polls.
7. Where, due to a severe snow storm, the regular school election could not be held, a vacancy occurs on the board for the term of any directorship due to be filled at that election, which vacancy can only be filled by appointment under section 279.6 —the incumbent director sitting in appointment of his successor—or by specal election under section 279.7. A regular school election may not be postponed. 13

Kindergarten in rural schools. There is no grant of authority to
8. the county board of education to require rural schools in the county school system to provide a kindergarten. 162

Kindergarten pupils—tests for children under five to attend. At-
9. tendance at a public school of a child under six years is not a matter of individual right and as to children under said age, where the statute permits attendance the board may impose uniform conditions precedent to the privilege of school attendance. As such conditions the board, while permitting any form of appropriate proof of adequate maturity, may commit itself to acceptance of specified appropriate proof. 130

Number of pupils to open school—"term" defined. The word
10. "term" as used in section 279.15 of the Code is the period fixed by the board at the beginning of the school year. It may be quarters, semesters, thirty-six weeks or other periods of time and if not so fixed is presumed to be the entire school year. 97

Minimum age in rural schools. The county superintendent of
11. schools has no authority to establish a minimum age for admission to the rural schools in the county school system. 161

Noncontiguous isolated subdistricts—consolidation with another
12. *district.* Where two noncontiguous subdistricts of a township, each containing fewer than four government sections, are isolated as a result of the formation of a consolidated district, each becomes thereby a rural independent corporation and can be consolidated and attach itself with an adjacent area without including the other. 81

Sick leave of employees—maximum. A public school employee
13. may accumulate a maximum of thirty-five days leave of absence for sickness with pay, however he may not use the time granted in any subsequent year to augment such leave so as to exceed said maximum. 83

Sick leave for teachers—when cumulative—absence for maternity.
14. A school district may not pay a teacher accumulated sick leave beyond the statutory maximum of 35 days. Such leave continues to accumulate during the statutory leave of absence for illness or injury, however leave of absence beyond the accumulated sick leave for maternity or other reasons cannot be deemed statutory employment within the period of such leave for the purpose of accumulating sick leave. 91

Teacher training at expense of district not allowable. Sections
15. 262.30 to 262.32, inclusive, of the Code do not permit the payment by a school district under any circumstances of expense for board, room, tuition and supplies of graduates of the high school of the district attending any teachers college. 142

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