State of Iowa

1960

THIRTY-THIRD BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

FOR THE

BIENNIAL PERIOD ENDING DECEMBER 31, 1960

NORMAN A. ERBE
Attorney General

Published by the
STATE OF IOWA
Des Moines

ATTORNEYS GENERAL OF IOWA

1853-1960

NAME	HOME COUNTY	SERVED YEARS
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	1947-1953
Leo A. Hoegh	Lucas	1953-1954
Dayton Countryman	Story	1954-1956
Norman A. Erbe	Boone	1956-1960

PERSONNEL OF THE DEPARTMENT OF JUSTICE*

NORMAN A. ERBE.....Attorney General
B. Oct. 25, 1919, Boone, Iowa; B.A., J.D., S.U.I.; married; 3 children; W.W. II pilot, 8th Air Force; Co. Atty., Boone Co.; Spec. Asst. Atty. Gen. 1954-1956; Elected Atty. Gen. 1956, 1958.

OSCAR STRAUSS.....First Assistant Attorney General
B. Sept. 23, 1876, Des Moines, Iowa; Ph.B., U. of Mich., L.L.B., S.U.I.; married; App. Asst. Atty. Gen. 1944, 1945, 1947, 1949, 1951, 1953; App. 2d Asst., 1953, 1955, 1957; App. 1st Asst., 1958, 1959.

FRANK D. BIANCO .....Second Assistant Attorney General
B. May 11, 1896, Des Moines, Iowa; L.L.B., LaSalle Ext. U.; married, 3 children; Army, W.W. I, W.W. II; App. Asst. Gen. 1957, 1959.

C. J. LYMAN.....Special Assistant Attorney General
(State Highway Commission)
B. May 24, 1919, Alexandria, S. Dak.; Grad. S.U.I. Coll. of Commerce and Law; married, 1 child; App. Spec. Asst. Atty. Gen. 1957, 1959.

JAMES H. GRITTON.....Assistant Attorney General
B. Feb. 7, 1929, Des Moines, Iowa; B.C.S., J.D., Drake U.; Army 1953-1955; App. Asst. Atty. Gen. 1957, 1959.

CARL H. PESCH.....Assistant Attorney General
B. July 25, 1929, Mt. Pleasant, Iowa; B.A., I.S.T.C., J.D., S.U.I.; married, 1 child; Korean War, 1951-1953; App. Asst. Atty. Gen. 1958, 1959.

MARION R. NEELY.....Assistant Attorney General
B. Dec. 7, 1923, Billings, Mont.; B.S.C., J.D., S.U.I.; married, 2 children; W.W. II, 94th Inf. Div.; App. Asst. Atty. Gen. 1959.

THEODOR W. REHMANN, JR.....Assistant Attorney General
B. Mar. 20, 1929, Des Moines, Iowa; B.S., L.L.B., Drake U.; U.S.M.C. 1951-1953; married, 4 children; App. Asst. Atty. Gen. 1959.

JAMES R. MAGGERT.....Assistant Attorney General
B. June 12, 1932, Kendallville, Indiana; B.S.C., J.D., S.U.I.; Army 1955-1957; married, 2 children; App. Asst. Atty. Gen. 1959.

GARY S. GILL.....Special Assistant Attorney General
(State Tax Commission)
B. April 1, 1931, Kensett, Iowa; B.A., J.D., S.U.I.; married, 4 children; Korean War 1952-1954; App. Asst. Atty. Gen. 1959.

FRANK CRAIG.....Assistant Attorney General
B. July 21, 1934, Aurora, Iowa; B.A., J.D., S.U.I.; married; Army, 1957-1959; App. Asst. Atty. Gen. 1959.

WILLIAM EARL ADAMS.....Assistant Attorney General
B. April 12, 1932, Manly, Iowa; L.L.B., S.U.I.; single; App. 1960.

GEORGE E. WRIGHT.....Special Assistant Attorney General
(Claims)
B. May 8, 1934, Davenport, Iowa; B.A., J.D., S.U.I.; married, 1 child; Army, 1956; App. Asst. Atty. Gen. 1960.

SECRETARIAL STAFF

LEILA BERTHOLF .....Secretary
DUANE DUBOIS .....Clerk
MABEL M. HOEYE .....Secretary
GAYE HOTH .....Secretary
BARBARA LEHMAN .....Secretary
DOROTHY RICHARDS .....Receptionist

*As of December 31, 1960.

REPORT OF THE ATTORNEY GENERAL

December 31, 1960

HONORABLE HERSCHEL LOVELESS
Governor of Iowa

Dear Governor Loveless:

In compliance with section 17.6 of the 1958 Code of Iowa, I hereby submit the biennial report of the Attorney General covering the period beginning January 1, 1959 and ending December 31, 1960.

During the biennium, as part of the duties of this office, this Department has participated in and disposed of 102 criminal cases, which were appeals from the various district and municipal courts of the State to the Supreme Court of Iowa. In one of the criminal cases, *State v. McNamara,* 104 N.W. 2d 569, the State of Iowa became the second jurisdiction in the United States to lay a foundation for the use of the results of lie detector tests. In addition to criminal cases in the Supreme Court, there have been filed 44 habeas corpus actions, instituted in the various courts by inmates of the several state penal institutions, and in each instance in which this Department participated, none was successful. In five of the habeas corpus cases, the petitioners were unsuccessful in the United States Court of Appeals, and in 14 cases they were unsuccessful in United States Supreme Court. The Attorney General obtained an injunction in the Iowa Supreme Court against an individual engaged in the unauthorized practice of law.

This Department endeavored to enlighten the general public as to the increasing menace of obscene and pornographic magazines. Litigation was commenced in Federal District Court against the Attorney General in the case of *Four Star Publications et al. v. Erbe,* 181 F. Supp. 483, which sought to enjoin this office from taking action against the distribution of obscene and pornographic magazines. This action was successfully defended in the Federal District Court, and an appeal has been taken to the Circuit Court by the plaintiffs. More than 2,000 letters were received from persons expressing their support of the action against the distribution of obscene magazines.

The new Charitable Trust Registration Act went into effect July 4, 1959. A Charitable Trust Register of all charitable trusts in Iowa within the purview of the Act has been established. A total of 316 charitable trusts, with a total value of $39,626,404.42, have registered. Under the Charitable Trust Act, this office filed one action against the trustees of a charitable trust for failure to faithfully discharge their duties, and investigated the activities of trustees in several others. The

one action filed resulted in an Order which made operative an educational trust that had been dormant for 94 years. College scholarships were awarded to 32 students for the 1960-61 academic year from the income of this one trust. In the case of *In re Hawks Estate,* this Department successfully defended a will contest involving a $230,000 devise to the Iowa School Fund. In addition, four estates were escheated to the state, applications for escheats were filed in four other estates, as well as this Department appearing in three cases involving refund claims in escheated estates.

The most prominent case involving the Department of Public Safety was *Spurbeck v. Statton,* No. 50136, wherein the Supreme Court upheld "charge suspensions" under section 321.210(1) in OMVI cases. This decision affirmed the right and duty of the Department of Public Safety to suspend the operator's or chauffeur's license of certain individuals charged with OMVI and also resolved several other questions in the general area of license suspension. During the biennium, this Department represented the Department of Public Safety in two other appeals before the Supreme Court and filed a brief Amicus Curiae in another case. In addition, the Department of Public Safety was represented in 57 district court cases.

This Department represented the State Department of Public Instruction with respect to school reorganization appeals in the case of *Bd. of Dir. v. Bd. of Ed.,* 251 Iowa 589, 102 N.W. 2d 159, in which the Supreme Court determined that, in an appeal under Chapter 275 of the Code, the State Department of Public Instruction was not a necessary party to the appeal. As a result of this case, the number of reorganzation suits against the State Department of Public Instruction dropped from 29 cases to 2 cases, which are before the Supreme Court at this time. This Department has represented the State Department of Public Instruction in 9 cases other than school reorganization.

The special assistant Attorney General assigned to the State Board of Social Welfare participated in the following cases during the biennium: 12 foreclosure actions, 24 partition actions, 5 quiet title actions, 8 objections to final report, 4 applications to require administrator to file final report, 1 petition for declaratory judgment, 1 application to reopen estate, 1 application to determine priority of liens, 1 appeal to district court from decision of the State Board, 1 hearing to allow claim, 1 excess assistance action, 3 condemnation proceedings, and 1 petition to set aside order, making a total of 64. There is also one out-of-state case, complaint for partition. One case is being taken to the Supreme Court by the Department, notice of appeal having been filed, and the record now being prepared. In addition, answers have been filed in cases involving applications to sell real estate; 442 for the year 1959 and 386

for the year 1960. During the biennium 1,296 estates were opened, 1,349 estates were closed and, with 1,029 estates pending on January 1, 1959, this leaves 976 estates pending as of December 31, 1960.

The Attorney General's office processed 270 general legislative claims and presented them through the State Appeal Board to the 58th General Assembly. Fifty-seven highway claims were similarly handled. The figures for the 59th General Assembly showed 361 general claims and 67 highway claims for an increase of 101 over the previous session. These claims were investigated by the Attorney General's office and forwarded with recommendations to the State Appeal Board. Said Board reviewed the claims and sent them on to the legislature for approval or disapproval.

The Attorney General's office worked closely with the Executive Council in attempting to collect damages incurred by State vehicles involved in accidents. Approximately twenty such cases were processed to conclusion since the last biennial report, with the current file now containing about five of these claims. This office was involved in some twenty Workmen's Compensation hearings in the past two years. In actions against the State of Iowa as employer, which were contested, this office represented the State. In addition, the Attorney General recovered large amounts of Workmen's Compensation payments which were made to injured parties from third parties responsible for those injuries.

During the biennium, 320 land condemnation appeals were processed under the supervision of the special assistant attorney general assigned to the Highway Commission. Of these, 157 were tried, 27 settled and 34 otherwise disposed of, leaving 102 condemnation appeal cases pending as of December 31, 1960. In addition, 123 other litigation matters were handled. During this same period, 37 cases were on appeal to the Supreme Court of Iowa with dispositions made of 26, in 14 of which opinions were given and 12 subsequently dismissed. As of December 31, 1960, 11 cases were still pending in the Supreme Court of Iowa. Of the Supreme Court cases, two were of primary importance, namely the Lehman and Redfield cases. *Lehman v. Highway Commission,* 99 N.W. 2d 404 (1959), involved the establishment of a controlled access highway through new territory. The lower court had allowed, over objections, consideration of loss of access to the relocated highway as an element of damage. On appeal to the Supreme Court, the rule was set down that establishment of a controlled access highway through new territory does not deprive the owner of a right of access to his property, and he is not entitled to compensation for the claimed taking of a right that never existed.

Redfield v. Highway Commission, 99 N.W. 2d 413 (1959),

changed a long-standing rule of evidence in Iowa land condemnation appeal cases. The prior rule allowed prices paid for other properties in the vicinity to be offered in evidence to test the knowledge and competency of the witnesses as valuation experts and could be considered only for that purpose and not as substantive proof of the value of the property in litigation. The rule as established in the Redfield case allows evidence of prices paid for other property in the vicinity to be offered as substantive proof of the value of the property in litigation. During the last three years, under the supervision of the special assistant assigned to the Highway Commission, the law of eminent domain in Iowa has been reappraised and reviewed. The work product entitled *Eminent Domain in Iowa* was completed and appeared in published form as of March 1, 1960. It covers elementary materials and common problems in eminent domain proceedings and was prepared as an aid to the attorney as well as the engineer and appraiser.

This Department, in cooperation with county attorneys, has prosecuted several violations of the Department of Agriculture. The Attorney General's office represented the Department of Health in four district court cases and one appeal to the Supreme Court.

This report contains a composite of the staff opinions which are of sufficient general interest to be published. In addition, a few of the advisory opinions which were issued have been summarized and annotated following the staff opinions in each chapter.

Respectfully submitted,

NORMAN A. ERBE

Attorney General of Iowa.

State of Iowa

1960

THIRTY-THIRD BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

FOR THE

BIENNIAL PERIOD ENDING DECEMBER 31, 1960

NORMAN A. ERBE
Attorney General

Published by the
STATE OF IOWA
Des Moines

ATTORNEYS GENERAL OF IOWA

1853-1960

NAME	HOME COUNTY	SERVED YEARS
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	1947-1953
Leo A. Hoegh	Lucas	1953-1954
Dayton Countryman	Story	1954-1956
Norman A. Erbe	Boone	1956-1960

PERSONNEL OF THE DEPARTMENT OF JUSTICE*

NORMAN A. ERBE.....Attorney General
B. Oct. 25, 1919, Boone, Iowa; B.A., J.D., S.U.I.; married; 3 children; W.W. II pilot, 8th Air Force; Co. Atty., Boone Co.; Spec. Asst. Atty. Gen. 1954-1956; Elected Atty. Gen. 1956, 1958.

OSCAR STRAUSS.....First Assistant Attorney General
B. Sept. 23, 1876, Des Moines, Iowa; Ph.B., U. of Mich., L.L.B., S.U.I.; married; App. Asst. Atty. Gen. 1944, 1945, 1947, 1949, 1951, 1953; App. 2d Asst., 1953, 1955, 1957; App. 1st Asst., 1958, 1959.

FRANK D. BIANCO .....Second Assistant Attorney General
B. May 11, 1896, Des Moines, Iowa; L.L.B., LaSalle Ext. U.; married, 3 children; Army, W.W. I, W.W. II; App. Asst. Gen. 1957, 1959.

C. J. LYMAN.....Special Assistant Attorney General
(State Highway Commission)
B. May 24, 1919, Alexandria, S. Dak.; Grad. S.U.I. Coll. of Commerce and Law; married, 1 child; App. Spec. Asst. Atty. Gen. 1957, 1959.

JAMES H. GRITTON.....Assistant Attorney General
B. Feb. 7, 1929, Des Moines, Iowa; B.C.S., J.D., Drake U.; Army 1953-1955; App. Asst. Atty. Gen. 1957, 1959.

CARL H. PESCH.....Assistant Attorney General
B. July 25, 1929, Mt. Pleasant, Iowa; B.A., I.S.T.C., J.D., S.U.I.; married, 1 child; Korean War, 1951-1953; App. Asst. Atty. Gen. 1958, 1959.

MARION R. NEELY.....Assistant Attorney General
B. Dec. 7, 1923, Billings, Mont.; B.S.C., J.D., S.U.I.; married, 2 children; W.W. II, 94th Inf. Div.; App. Asst. Atty. Gen. 1959.

THEODOR W. REHMANN, JR.....Assistant Attorney General
B. Mar. 20, 1929, Des Moines, Iowa; B.S., L.L.B., Drake U.; U.S.M.C. 1951-1953; married, 4 children; App. Asst. Atty. Gen. 1959.

JAMES R. MAGGERT.....Assistant Attorney General
B. June 12, 1932, Kendallville, Indiana; B.S.C., J.D., S.U.I.; Army 1955-1957; married, 2 children; App. Asst. Atty. Gen. 1959.

GARY S. GILL.....Special Assistant Attorney General
(State Tax Commission)
B. April 1, 1931, Kensett, Iowa; B.A., J.D., S.U.I.; married, 4 children; Korean War 1952-1954; App. Asst. Atty. Gen. 1959.

FRANK CRAIG.....Assistant Attorney General
B. July 21, 1934, Aurora, Iowa; B.A., J.D., S.U.I.; married; Army, 1957-1959; App. Asst. Atty. Gen. 1959.

WILLIAM EARL ADAMS.....Assistant Attorney General
B. April 12, 1932, Manly, Iowa; L.L.B., S.U.I.; single; App. 1960.

GEORGE E. WRIGHT.....Special Assistant Attorney General
(Claims)
B. May 8, 1934, Davenport, Iowa; B.A., J.D., S.U.I.; married, 1 child; Army, 1956; App. Asst. Atty. Gen. 1960.

SECRETARIAL STAFF

LEILA BERTHOLF .....Secretary
DUANE DUBOIS .....Clerk
MABEL M. HOEYE .....Secretary
GAYE HOTH .....Secretary
BARBARA LEHMAN .....Secretary
DOROTHY RICHARDS .....Receptionist

*As of December 31, 1960.

THE

OFFICIAL OPINIONS

OF THE

ATTORNEY GENERAL

FOR

BIENNIAL PERIOD

1959-1960

CONTENTS

CHAPTER 1

AGRICULTURE

STAFF OPINIONS

LETTER OPINIONS

1.1 April 5, 1960

CONDEMNATION — INDEMNIFICATION — ERADICATION — Secs. 163.10 and 163.15 provide for condemnation of an indemnification for animals only when the same are *infected.* An eradication program under sec. 163.15 shall be established by the secretary of agriculture dependent upon the approval of the executive council.

Mr. Clyde Spry, Secretary of Agriculture: The following was requested by you on February 5, 1960:

"I would appreciate an opinion being rendered to me on the following questions:

1. Can animals under quarantine, known to have been exposed to animals infected with contagious and infectious disease, be ordered to slaughter and indemnity paid in accordance with section 163.15?

2. In the control of infectious and contagious diseases, other than tuberculosis and Bang's disease, as listed in section 163.3, what method should the department of agriculture follow to qualify for indemnity funds as outlined in section 163.15?"

In reply thereto, the first question involves two parts. First, may the department order animals under quarantine, known to be exposed to animals infected with contagious and infectious disease, to be slaughtered, and secondly, may indemnity be paid if such exposed animals may be ordered to be slaughtered.

Section 163.10, Iowa Code 1958, states:

"The department may quarantine or *condemn* any animal which is *infected* with any contagious or infectious disease." (Emphasis ours.)

At this point it is feasible that we distinguish between infected and exposed. Webster's New International Dictionary, Second Edition, defines "exposed" as "to render accessible to something that may prove detrimental." The word "infect" means "to communicate or affect as if by some subtle contact."

In *Summers v. Houston,* 62 Okla. 280, the court stated:

"The word infection as used in an instruction in an action for damages arising from the sale of hogs alleged to have been infected with cholera, held to mean that the hogs must have been affected with the cholera, or that the germs of such disease were in or on them."

Following the above quotation it can be seen that there is a difference

between exposed and infected, as infected infers that the animals already have the disease.

Therefore, the department may only condemn animals which are *infected* and not when merely known to be *exposed* to an infectious and contagious disease.

Section 163.15, Iowa Code 1958, provides for indemnification to an owner whose animal has been condemned. Such section states:

"Whenever any animal if found to be *infected*. . . ." (Emphasis ours.)

The wording providing for indemnification is identical to that of condemning, to wit: *"infected."* As a result the department may not condemn or indemnify an owner of an animal which is known to have been *exposed* but only if such animal is *infected.*

The second question which you ask involves indemnifying owners of animals which have been condemned, but no other provisions have been made to indemnify.

Section 163.15, Iowa Code, 1958, states:

"Whenever any animal is found to be infected with one of the contagious diseases enumerated in section 163.2 or one which has been designated by the department thereunder, if there be *no other provisions for indemnifying* the owner in case the same may be condemned and ordered by the department to be killed, and the secretary of agricultrue determines that the existence of said communicable disease constitutes a threat to the general welfare of the public health of the inhabitants of the state, he shall formulate a program of eradication including therein the condemnation and killing of the infected animal; provided, however, that said program shall not be put into effect as hereinafter provided until the same has been approved by the executive council.

"Any animal killed under such a program shall be appraised by three competent and disinterested persons, one to be appointed by the state department of agriculture, one by the owner, and the third by the other two, and it shall be their duty to appraise and report their appraisal under oath to the department of agriculture, and they shall receive such compensation and expenses as shall be provided for in the program. Any claim for indemnity filed by the owner of such animal or animals so appraised shall not exceed the amount agreed upon by the majority of the appraisers based on current market prices except in the case of registered purebred stock, then the amount payable for indemnity may exceed market prices by not more than fifty per cent less any indemnity which he might be allowed from the United States department of agriculture. No indemnity shall be allowed for infected animals if it is determined by the department of agriculture that such animals have been fed raw garbage. Claims for indemnity and those filed by the appraisers for compensation and expenses shall be filed with the secretary of agriculture and submitted by him to the executive council for its approval or disapproval. There is appropriated from any funds in the state treasury not otherwise appropriated sufficient funds to carry out the provisions of this section." (Emphasis ours.)

The first paragraph of the above-quoted section states that the secretary of agriculture shall formulate an eradication program for indemnification if he determines that the disease, which is the reason why an animal was condemned, is a threat to the general welfare or health of the people of Iowa. The plan then must meet the approval of the executive council.

The secretary, then, must *first* determine if the disease will be detrimental to the health or welfare of the people of Iowa.

If the determination is in the affirmative then the secretary *shall* formulate an eradication plan. "When a statute uses the word 'shall' in directing a public body to do certain acts the word is to be construed as mandatory, not permissive, and excludes the idea of discretion." *Hansen v. Henderson*, 244 Iowa 650, 56 N. W. 2d 59.

The final approval of the proposed eradication plan then is with the executive council.

The second paragraph of section 163.15, Iowa Code, 1958, sets out certain procedures which should be incorporated in the eradication plan. However it should be noted that final approval for payment of claims is also vested with the executive council.

Therefore, when no other provision is made for indemnifying an owner whose animal has been found to be infected with a disease enumerated in section 163.2, Iowa Code, 1958, the method the *department of agriculture* should follow in order to qualify for providing for indemnification is as stated above. (Emphasis ours.)

1.2

Bang's disease—A violation of Code sec. 164.11 is a misdemeanor. A transferee in a transaction made without accompaniment of a negative brucellosis test as provided by Code sec. 164.11 is not in violation of that section. (Craig to Scholz, Mahaska Co. Atty., 10/13/59) #59-10-19

1.3

(1) *Biological products; permits*—One must have a permit to sell biological products, whether serum or virus only or both.

(2) *Sales to permittees*—Chapter 143, Acts of the 58th G.A., governs only virulent virus sales to permittees. (Maggert to Spry, Secy. Agr. 11/12/59) #59-11-16

1.4

Brucellosis testing—An *approved* veterinarian for testing brucellosis on an area plan may test his own cattle located in that area. (Erbe to Spry, Secy. Agr., 9/24/59) #59-9-32

1.5

County extension districts—County agricultural Extension Districts may not invest overage extension educational funds in time certificates. (Forrest to Willett, Tama Co. Atty., 8/10/59) #59-8-11

1.6

County fair boards—County fair societies organized under ch. 174, Iowa Code 1958, have the power to provide forms of entertainment to its patrons, e.g., horse, car, dog races, etc., and may require entry fees and awarding of premiums to winners. (Maggert to Blackburn, Hamilton Co. Atty., 4/26/60) #60-7-1

1.7

Dairy and food, frozen products—An edible frozen product resembling

ice cream made exclusively from vegetable oils is not an adulteration within the contemplation of Code sec. 190.5, and if not sold under the name of one of the defined articles of food in ch. 190 is salable in Iowa if not adulterated within the meaning of Code sec. 190.3 but is labeled within the provisions of sec. 189.9, Code 1958. (Forrest to Liddy, Agr. Dept., 1/19/59) #59-1-25

1.8

Dairy and frozen food products—Sale in Iowa of an edible frozen product resembling ice cream made exclusively from vegetable oils is not precluded by secs. 190.9 or 190.5, 1958 Code. (Forrest to Liddy, Agr. Dept., 3/30/59) #59-4-3

1.9

Domestic animal fund—The ten days for filing a claim against the domestic animal fund for the killing or injury of an animal is governed by Code sec. 4.1(23) as amended by par. 1, ch. 64, Acts of the 58th G.A., and claim filed for an animal killed on December 2 is within the ten days if filed on or before December 12. (Strauss to Roggensack, Clayton Co. Atty., 1/25/60) #60-1-12

1.10

Eligibility of fees—The Iowa State University Veterinary (Ambulatory) Clinic is not such an agency of the department of agriculture as to bear the burden of expenses under brucellosis testing plans and therefore may file claims for services rendered from such sources as are available. (Maggert to Spry, Secy. Agr., 11/4/59) #59-11-10

1.11

Feed grinders and portable mills—Registration—Whether or not the presence of auxiliary equipment on a truck upon which is mounted a portable mill takes the vehicle out of Code sec. 321.118 depends upon the factual relationship of the auxiliary equipment to the process of manufacturing commercial feed. Opinions of 5/22/56 and #'s 57-11-28 and 57-9-12 quoted and reconciled. (Abels to Prentis, St. Sen., 2/26/60) #60-3-6

1.12

Indemnity, brucellosis area testing—Cattle condemned under brucellosis area testing are eligible for the State's proportionate share of indemnity, as lack of funds is not a basis of eligibility for indemnity by the U. S. Department of Agriculture. (Maggert to Roggensack, Clayton Co. Atty., 4/26/60) #60-5-2

1.13

Marketing division—Expenditures under marketing division—Final authority—Chapter 139, Acts of the 58th G.A., provides that expenditures are approved by the secretary of agriculture. (Maggert to Spry, Secy. Agr., undated) #59-11-25

1.14

State entomologist—The state entomologist, under ch. 267, Code 1958, known as the Iowa Crop Pest Act, does not have the authority to promulgate rules and regulations regarding misrepresentation, grade standards,

varieties, etc., such as vigor and vitality. (Maggert to Spry, Secy. of Agr., 4/7/60) #60-5-1

1.15

Swine importation—State department is creature of statute and may regulate only for reasons specified in statute. (Erbe to Spry, Secy. Agr., 9/24/59) #59-9-33

CHAPTER 2

BANKS AND BANKING

LETTER OPINIONS

2.1

Branch banks—Power of superintendent to deny or grant applications. (Strauss to Nolan, St. Sen., 2/24/59) #59-2-1

2.2

"Contiguous"—The word "contiguous" as used in sec. 528.51, Code 1958, means "actual contact, meeting at the surface." Touching at the corners is not "contiguous." (Strauss to Gronstal, Bkg. Supt. 4/3/59) #59-4-8

2.3

Dividends—Dividends of building and loan associations shall be declared and apportioned annually, semiannually, or quarterly. Dividends declared on May 31 and November 30 are neither annual, semiannual, nor quarterly. (Strauss to Akers, St. Aud., 12/1/59) #59-12-7

2.4

Interest on public deposits—May not be paid on demand deposits. (Abels to Gronstal, Supt. of Bkg., 10/20/59) #59-10-23

2.5

Liability of share accounts—Share account or shares in a building and loan association operating under chapter 338, Laws of the 58th G.A., means part of the savings liability of the association credited to the account of the holder of such shares. (Strauss to Akers, St. Aud., 10/19/60) #60-10-10

2.6

Real estate licenses—The bank acting as trustee of property under a trust agreement or will is exempt from the provision of ch. 117, Code 1958, and broker's license is not required insofar as sale or lease thereof is concerned. (Strauss to Hart, Real Est. Com., 9/3/59) #59-9-16

2.7

Savings and loan associations—The authority granted to building and loan associations by ch. 528A, Code 1958, to destroy records of such associations applies only to dead files and records. (Strauss to Akers, St. Aud., 5/14/59) #59-5-13

2.8

Savings and loan joint accounts—A legal joint account with right of survivorship is not a pay-on-death account within the terms of ch. 338, sec. 11, subsec. 8, Acts of the 58th G.A. (Strauss to Akers, St. Aud., 1/3/60) #60-2-12

2.9

Small loan companies—

1. Under Code sec. 536.12 the superintendent of banking has discretion, upon making the factual determination therein described, to permit a small loan business to occupy joint quarters with a loan business operated on the Morris plan.

2. As an aid to making the said factual determination, the superintendent may require the would-be joint occupants to enter into an agreement to the end that the provisions of the small loan act may be kept inviolate. (Abels to Gronstal, St. Bkg. Supt., 8/10/59) #59-8-13

CHAPTER 3

BEER AND CIGARETTES

STAFF OPINIONS

LETTER OPINIONS

3.1 November 5, 1959

BEER: Brewers, etc.—prohibited interest—Advertising promotion schemes by class "A" permittees is mainly a factual question whether such scheme violates sec. 124.22, Iowa Code. Under facts considered, no violations appeared.

Mr. Melvin D. Synhorst, Secretary of State: The following request for an opinion, dated July 20, 1959, is hereby acknowledged:

"Your formal opinion is respectfully requested as to the legality of the practice outlined in the attached statement of facts, and if illegal, which parties engaging in such a practice have violated the law?

"If the same facts were to be amended only to the extent that the premiums would be mailed or delivered directly by the brewery to the consumer, would the practice be legal, and if illegal, which parties engaging in such a practice have violated the law?"

The facts relating to paragraph one (1) are substantially set out below: (Also attached).

Breweries, as part of their advertising promotion schemes are offering premiums to the consumer through retailers. The premiums are redeemable by sending the coupons directly to the brewery and then receiving the merchandise through the retailer. Retailers are in no way benefited, except by possible increase in sales.

The statute in question is section 124.22, Iowa Code 1958, which states:

"Brewers, etc.—prohibited interest. 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 promotion scheme used by the brewery in question is a scheme to promote the sale of *their* beer. If the scheme is successful, it will undoubtedly affect the business of another permittee as to sales, etc.

The wording, ". . . nor directly or indirectly be *interested* in the *ownership, conduct or operation* of the business or another permittee . . ."

(emphasis supplied) then raises the question whether the scheme used by the brewery in question violates the statute as being indirectly interested in another permittee's business at the retail level.

Section 124.22, Iowa Code 1958, is a form of legislation which many states have adopted in one form or another. Its purpose is to prevent the evil known as the "tied-house" evil. This evil, as it existed, enabled breweries to have such an interest in the sale of beer by retailers (class "B" and "C" permittees) that the breweries may then have monopolies in certain areas of the land. This was accomplished by coercing the retailer to sell only the brand of beer produced by the brewery.

The section as enacted by the 45th General Assembly (extra session) states that one of the purposes of the act is ". . . providing for the regulation of the manufacture, sale and distribution of beer . . .". Therefore, the statute raises the factual question of certain practices by breweries, i. e., whether certain methods will enable the brewery to control the retailer and thereby exercise the tied-house evil which section 124.22, Iowa Code 1958, is designed to correct.

Section 124.37, Iowa Code 1958, provides the penalty for any violations under chapter 124:

"Violations. Any person except a minor, who violates any of the provisions of this chapter, or who manufactures for sale or sells beer without a permit as provided herein, or who makes a false statement concerning any material fact in submitting any application for a permit, or for a renewal of a permit, or in any hearing concerning the revocation thereof, shall be punished by a fine of not less than three hundred dollars, nor more than one thousand dollars, or by imprisonment in the county jail for not less than three months, nor more than one year, or by both such fine and imprisonment. Any minor who violates any of the provisions of this chapter or commits any other offense listed in this section shall be fined not to exceed one hundred (100) dollars or imprisoned in the county jail, not to exceed thirty (30) days. It is hereby made unlawful for any person to use or consume beer upon the public streets or highways, or in automobiles or other vehicles on said streets or highways, and any person violating this provision of this chapter shall be fined not to exceed one hundred dollars or imprisonment in the county jail not to exceed thirty days."

By virtue of section 124.37, section 124.22 (Iowa Code 1958) becomes penal in nature. Therefore, "a statute imposing a penalty should be given a *strict* construction in order to avoid the penalty imposed." (Emphasis supplied.) *Elwood v. Board of Supervisors of Sac County*, 156 Iowa 407.

"Interested" in 33 C.J. 261 is defined " . . . as meaning advantage; claim to advantage or benefit from a thing; concern, part; . . . participation; . . .". In *Andrews & Smith v. Burdick & Goble et al.*, 62 Iowa 714, it was stated, " . . . the word interest . . . means share, portion, part." This case involved a mechanic's lien upon realty and it was argued that such a lien was an interest in realty. The court, referring to Webster's dictionary, applied the technical and legal definition of interest, as stated above, and concluded that such a lien, whether general or special, was not such an interest. 33 C.J. 261 also states that ". . . in its (interest) legal and purely technical sense it applies to some ascertained and tangible right."

Therefore, as the statute in question is penal, the technical application

of the word "interest" seems appropriate as such statutes are strictly construed.

The facts state that (1) the class "B" and "C" permittees receive the same offer to sell the brand in question, (2) the promotion scheme *excludes* such permittees, employees thereof, or anyone else who is prohibited by the control laws of any government body and (3) no benefits are received by the permittees from the brewery in question. These facts do not indicate to be within the definition of "interest" as defined supra.

In *Bohemian Breweries v. Koehler*, 332 P. 2nd 875, the brewery used a promotional scheme in which the caps from the bottles were redeemable by the consumer *directly to the brewery.* The scheme also had a similar provision as the scheme in question as to who may redeem. The court stated:

"The purpose of the statute is to prevent a brewer from owning or controlling the retail outlet and gaining advantage or control of the industry. Such result would not follow the advertising plan here under attack."

The case may be distinguished on the facts from the situation presented, as in our case the retailer delivers the article redeemed to the consumer, *but* only after the consumer sends his coupons to the brewery, stating what articles he desires, and then the brewery sends the article to the retailer to deliver to the consumer. This is merely a means to have the consumer frequent his favorite retailer in the hope that such consumer will buy more of the brand of beer in question.

Since it is the intent of the legislature to regulate the manufacture, sale and distribution of beer, i. e., prevent the evil known as "tied-house", then the mere benefit of possible increased sales bestowed upon retailers due to the brewery's promotional scheme is not such an interest, i. e., an ascertained and tangible right, as to be in contravention of section 124.22, Iowa Code 1958. The extent or degree of control exercised by the brewery upon the retailer would be the basic factual question to solve.

Therefore, *within the facts stated,* it is the opinion of this office that the promotional scheme by the brewery in question is not in violation of section 124.22, Iowa Code 1958.

In view of the above result, it is unnecessary to consider the other formal questions presented.

3.2 February 16, 1960

BEER: Class "B" Club permits—illegal sale—The use of coupons bought and paid for on a weekday for the delivery and consumption of beer on the premises of the club on Sunday is illegal and a violation of sec. 124.20, Code of Iowa 1958.

Mr. Edward R. Samore, Woodbury County Attorney: We have your favor of February 11, 1960 reading as follows:

"There is a practice maintained in a local club whereby a member pays the sum of $2.00 to the club and in return gets a book of six coupons entitling him to six bottles of any available beer. The purchase of the coupon book is made on a weekday and the coupons are delivered in exchange for a bottle of beer of any available brand of beer on a Sunday, and said beer is consumed on the premises of the club on Sunday.

"The form of the coupon is as follows:

" 'The .....CLUB

....., IOWA

" 'This coupon good for one (1) bottle of any available brand of beer (value 35c) covered by Master Pre-Paid Card.

(Not good if Detached)

" 'NO.....(not transferable)' "

"Your opinion is respectfully requested as to whether or not the purchase, use, and consumption of beer by means of this coupon is legal under the laws of the State of Iowa."

In answering your inquiry, we are assuming that the local club you speak of holds a class "B" permit.

The pertinent section of the law applicable is the second paragraph of section 124.20, Code of Iowa 1958, reading as follows:

"*Nor shall* any such *beer be sold* or *delivered* to *or consumed* by any *person, on the premises* of any *class "B" permit holder*, between the hours of twelve o'clock midnight *on Saturday* and *seven o'clock* of the *following Monday morning.*" (Emphasis ours.)

As we view the facts as stated in your letter, the use of coupons is simply another method of effecting delivery of the beer on Sunday. This method of delivery and consumption on Sunday is intended as an evasion of the law. In the transaction you describe, by the local club, the completed transaction is made on Sunday in clear violation of the statute.

This office so ruled in an opinion issued April 22, 1948, and found in Report of the Attorney General of 1948 at pages 184, 185, wherein it was held in a similar situation that: "it would be a plain violation of the law for a person to purchase and pay for it, and then take delivery of said beer on Sunday."

For similar rulings, see O.A.G. 1934 at pages 202, 263 and 279.

Therefore, it is our opinion that the purchase, use and consumption of beer by means of the coupon, as described, is illegal under the provisions of section 124.20 of the Code of Iowa.

3.3

Advertising promotion—Under factual situation stated, manufacturers, for a coupon, gave a free gift of a six-pack of beer; held, not a violation of ch. 124, Code 1958. (Bianco to Kuehl, Dir., State Permit Bd., 6/21/60) #60-6-29

3.4

Bonds—The state tax commission may require bonds of longer than annual duration to be filed with the cigarette-permit-issuing bodies. (Brinkman to Miller, St. Tax Comm., 4/20/59) #59-4-24

3.5

Cities and towns—Ordinances in conflict with state law—Municipalities cannot pass an ordinance changing the minimum requirement of 500 square feet of flood space under section 124.39, Code 1958. (Bianco to Buchheit, Fayette Co. Atty., 12/1/60) #60-12-6

3.6

Interests between permittees prohibited—Loan of a clock by Class "A" permittee to Class "B" permittee for use in place of business is not violative of sec. 124.22, Code 1958. (Forrest to McCleary, Tax Com., 6/18/59) #59-6-13

3.7

Interests between permittees prohibited—The placing of premium stamps by a Class "A" permittee in six packs of beer is violative of the provisions of sec. 124.22, Code 1958. (Forrest to Carpenter, Bd. Secy., 6/18/59) #59-6-14

3.8

Issuance of retail cigarette permits—County board of supervisors has no authority to issue temporary retail cigarette permits. (Brinkman to Miller, St. Tax. Comm., 3/18/59) #59-3-13

3.9

Permits—Retail seller of cigarettes selling them in two different businesses which he owns, within single building, needs only one permit. (Adams to Brown, Mitchell Co. Atty., 7/19/60) #60-7-18

3.10

Permits—Under stated facts, county board of supervisors has no authority to issue a Class "C" permit to owner of restaurant located outside of a platted village. (Bianco to Cady, Franklin Co. Atty., 8/30/60) #60-8-20

3.11

Permits—Violation of State liquor law by corporate president does not make mandatory the revocation of corporation's beer permit under the provisions of Code sec. 124.30, whether defendant is convicted in his personal, noncorporate capacity. (Forrest to Ford, Des Moines Co. Atty., 6/24/59) #59-6-22

3.12

Sunday closing—Under Code secs. 124.20 and 124.34, cities have no discretion to permit Sunday sale of beer. (Abels to Bianco, Ida Co. Atty., 7/19/60) #60-7-20

3.13

Vending machines—A machine vending cigarettes which is capable of transacting the sale itself, without the element of human intervention and control, falls within the purview of the words "vending machine" and the prohibition of Code sec. 98.36(6). (Forrest to Dietz, St. Rep., 3/24/59) #59-3-25

CHAPTER 4

CITIES AND TOWNS

STAFF OPINIONS

LETTER OPINIONS

4.1 March 25, 1959

CITIES AND TOWNS: "Fiscal Agent"—Cannot enter into contract for purchase of bonds.

Sen. David O. Shaff, Senate Chamber: Receipt is acknowledged of your request for an opinion of this office as to whether a person, firm, or corporation engaged in the business of buying and selling municipal bonds may lawfully enter into a contract as "fiscal agent" for a city or town or other political subdivision of the state and subsequently bid on or purchase all or part of a bond issue, such bond issue being the end-product with respect to which the services as "fiscal agent" were rendered.

As our supreme court has said on numerous occasions, "Cities and towns are creatures of statute with only those powers conferred by statute." *Gritton v. City of Des Moines,* 247 Iowa 326, 73 N. W. 2d 813, and cases cited therein. It therefore becomes necessary to examine the statutes relating to the power of cities and towns to enter into contracts of employment. Such power is conferred in section 368A.1, Code 1958, which provides in pertinent part:

"In all municipal corporations, except when otherwise provided by laws relating to a specific form of municipal government, the council shall:
" * * *

"7. Have power to appoint an attorney . . . and such other officers, assistants and employees as are provided by ordinance and are necessary for the proper and efficient conduct of the affairs of the municipal corporation . . . "

And, in section 363C.7, Code 1958, relating to the "specific form of municipal government" called "council-manager form by election" appears the following:

"The duties of the manager shall be as follows:
" * * *

"7. He shall have power to employ, reclassify or discharge all employees of the city, as the occasion requires . . . "

Whether an "officer, assistant or employee" to be called the "fiscal agent" is "necessary for the proper and efficient conduct of the affairs" of a given municipal corporation under section 368A.1 or whether in a council-manager city the "occasion requires" hiring such employee, is in each case a question of fact to be determined from the surrounding circumstances. In *Keenan et al., v. Carleton Beh Co. et al.*, Equity No. 54406-99, a case decided in the District Court of the State of Iowa in and for Polk County, the court in its amended and supplemental decree, Conclusion of Law No. 13, indulged in the presumption that facts justifying such employment *may* exist, by the following language:

"That, assuming without deciding that the defendants have the legal right to enter into contracts with municipal corporations to render services other than legal services prior to the proceedings had preliminary to the issuance of muncipal bonds and on the sole issue of unauthorized or illegal practice of law, the defendants are entitled to include in their offers to perform such services to the various municipalities of Iowa, and in their contracts therewith, contractual provisions which could read in substance as follows: . . . "

Indulging in the same presumption as did the court, and assuming but not deciding that facts may exist which might justify the appointment of a "fiscal agent" to perform among various duties, nonlegal services in connection with a proposed bond issue, brings us to the crux of the problem, i. e., whether such a "fiscal agent" may lawfully bid on or purchase all or part of the bond issue. It should, of course, be noted that even if facts exist warranting the appointment of a "fiscal agent" under the quoted statutes, such appointment must be for indefinite tenure rather than with reference to a particular bond issue, by virtue of the express statutory command in section 75.6, Code 1958, " . . . No expense shall be contracted or paid in connection with such sale other than the expenses incurred in advertising such bonds for sale." In this connection see 1940 *Report of the Attorney General* at page 346. Bearing in mind that such appointment, if lawful, makes the fiscal agent an "officer, assistant, or employee" of the city or town, section 368A.22, Code 1958, immediately becomes pertinent. It provides:

> "No officer, including members of the city council, shall be interested, directly or indirectly, in any contract or job of work or materials or the profits thereof or services to be furnished or performed for the city or town."

The rule announced by the statute is simply declaratory of the common law. In *James v. City of Hamburg*, 174 Iowa 301, 156 N. W. 394, the supreme court of Iowa said, at page 396 of 156 N. W.:

> "It is an old saying that a man cannot serve two masters . . . It is this sort of condition that the law is intended to avoid. It is not necessary there be evidence of dereliction of duty on the part of a public officer, to bring these contracts within the inhibition of the law. The inhibition applies when the contract is of such a character that, in the very contract and in the making of it, a temptation to dereliction of duty is created. The law intends these public officers should, like Caesar's wife, be above suspicion and temptation."

And, at page 397 of 156 N. W., quoting from *Dillon on Municipal Corporations:*

" 'It is impossible to lay down any general rule defining the nature of the interest of a municipal officer which comes within the operation of these principles. Any direct or indirect interest in the subject matter is enough to taint the contract with illegality, if the interest be such as to affect the judgment and conduct of the officer either in the making of the contract, or its performance.' "

And, at page 398 of 156 N. W.:

"It is the universal holding of the courts that, in determining the validity of contracts such as we are dealing with, it is not necessary, to avoid the contract, that it be adjudicated and determined that the parties stipulated for corrupt action. It is enough for the court to know that the contract tends to those results, and furnishes a temptation to the plaintiff to resort to corrupt means or improper influences to accomplish the result . . . and where it appears, from the contract sought to be enforced, that the tendencies of such contract, if allowed, will be to place the public officer in such a position that his personal interests conflict with his public duty, in all such cases, the contract will be held illegal . . . "

In *Bay v. Davidson*, 133 Iowa 688, 111 N. W. 25, at page 27, our supreme court said:

" . . . Both contracts for services and contracts of sale are prohibited at common law. The Legislature has done nothing more than to emphasize the prohibition as to service contracts. And, in our opinion it would be absurd to give effect to the statute as evidencing at once a change in view respecting the matter of public policy, and as a declaration for the legality of all contracts theretofore within the class prohibited at common law save those in such statute prohibited in terms."

And in *Weitz v. Ind. Dist. of Des Moines*, 78 Iowa 37, 42 N. W. 577:

"In this case the agreement may have been fair, and for the benefit of the district, but we are of the opinion that agreements of the class to which it belongs must be held invalid."

In *Liggett v. Shriver*, 181 Iowa 260, 164 N. W. 611, "against public policy" is defined at pages 612, 613 of 164 N. W. as "any contract which conflicts with the morals of the times or contravenes any established interest of society . . . and that which is not prohibited by statute, condemned by judicial decision, nor contrary to the public morals contravenes no principle of public policy."

It follows that when a city or town, in circumstances necessary for the proper and efficient conduct of the affairs of the municipal corporation, if any such there be, creates the post of "fiscal agent" with various duties including the compilation of facts, figures and data, such fiscal agent may have no financial interest, direct or indirect, in the purchase or sale of any municipal bonds, preparatory to the issuance of which he draws up such statistical analysis, for the reason that he would be exposed to temptation to present his analysis in such manner and in such light as to discourage competition in bidding. In this connection see opinions appearing at 1940 *Report of the Attorney General*, page 660; 1934 *Report of the Attorney General*, page 344; 1932 *Report of the Attorney General*, pages 110 and 189; 1930 *Report of the Attorney General*, page 335; 1928 *Report of the Attorney General*, pages 75 and 399; 1912 *Report of the Attorney General*, page 521.

Since the rule that a public official may have no direct or indirect

interest in any contract entered into by the public board or body for which he serves has been said to preclude contracts between a board and the partner of a member, the board and a co-operative association in which a member holds shares, the board and a corporation in which the member is a stockholder, the board and a bank of which the member is an official, it seems only a logical application of the same public policy to say that a city council cannot enter into a contract of sale of bonds with its own "fiscal agent" who prepared the prospectus. Whether or not such preparation was honest, the transaction would be tainted with suspicion and, therefore, the contract of sale illegal as contrary to public policy.

This result has direct support in case decisions of other states. In *State ex rel. Stock v. Kubiak*, 262 Wis. 613, 55 N. W. 2d 613, it was held that where a town authorized a certain person to act as "financial agent" in connection with the issuance of bonds, and such person did so act, he placed himself within the prohibition against acquiring pecuniary interest in the transaction under a statute similar to section 368A.22, supra, *even if his employment as agent was illegal.* To like effect are the decisions in *Miami v. Benson* (Fla.), 63 So. 2d 916, and *Mayor and Board v. Engle*, 211 Miss. 380, 51 So. 2d 564.

You are accordingly advised that irrespective of whether a city or town can appoint a "fiscal agent" for the purposes aforesaid, if it does appoint such "fiscal agent" it cannot lawfully entertain his bid or contract sale of bonds to such "fiscal agent."

As to other political subdivisions of the state, the answer is even more clearly in the negative. This office has for a number of years been of the opinion that such a contract with a county is illegal. 1940 *Report of the Attorney General*, page 346. School districts have no general statutory power to create and fill positions of employment corresponding to the power conferred on cities and towns by section 368A.1, supra, for which reason appointment of a "fiscal agent" would be illegal irrespective of whether such agent bid on or purchased bonds.

4.2 May 25, 1959

CIVIL SERVICE COMISSION—Under ch. 365, Code 1958, has no power to delegate to a city manager by election its functions in respect to the preparation of examinations, administration of examinations and determination of qualifications of applicants for employment.

Hon. Herschel C. Loveless, Governor of Iowa: This will acknowledge receipt of yours of the 19th inst. in which you submitted the following:

"Under the provisions of Chapter Three Hundred Sixty-five (365), Code 1958, responsibility for the administration of Civil Service programs for paid fire and police departments in cities of over eight thousand population is vested in an appointive Civil Service Commission.

"More specifically, the duties of the Commission are set forth in Section Three Hundred Sixty-five point Eight (365.8), Code of Iowa, 1958, with respect to the announcement, and holding of examinations, and the determination of the qualifications of applicants.

"Your opinion is requested on the following question:

"May a Civil Service Commission appointed and operating under Chapter Three Hundred Sixty-five (365), Code of Iowa, 1958, delegate its functions to a city manager in matters pertaining to the preparation of examination, administration of the examinations, and the determination of the qualifications of applicants?

"Your prompt attention to this request will be appreciated."

In reply thereto I advise as follows:

1. Civil service public office was initiated to free aspiration to public office from any aspect of political partisanship and to establish a merit system of fitness and efficiency as a basis of appointment to the civil service. In keeping with this philosophy to make examinations for positions and promotions in the organization of government open and competitive the statutes are in conformity with this theory. Sections 365.8 and 365.9 impose upon the civil service commission the duty of determining the qualifications of applicants for positions in the civil service and for competitive promotional examinations for the purpose of determining qualifications of applicants for promotions to higher grade in the civil service. These statutes specifically provide as follows:

"365.8 *Original entrance examination—appointments.* The commission shall, during the month of April of each year, and at such other times as shall be found necessary under such rules, including minimum and maximum age limits, as shall be prescribed and published in advance by the commission and posted in the city hall, hold examinations for the purpose of determining the qualifications of applicants for positions under civil service, other than promotions, which examinations shall be practical in character and shall relate to such matters as will fairly test the mental and physical ability of the applicant to discharge the duties of the position to which he seeks appointment. Provided, however, that such physical examination of applicants for appointment to the positions of policeman, policewoman, police matron or fireman shall be held under the direction of and as specified by the boards of trustees of the fire or police retirement systems established by section 411.5.

"All appointments to such positions shall be conditional upon a probation period of not to exceed six months, during which time the appointee may be removed or discharged from such position by the appointing person or body without the right of appeal to the commissin. Continuance in the position after the expiration of such probationary period shall constitute a permanent appointment."

"365.9 *Promotional examinations—promotions.* The commission shall, during the month of April of each second year, and at such other times as shall be found necessary, under such rules as shall be prescribed and published in advance by the commission, and posted in the city hall, hold competitive promotional examinations for the purpose of determining the qualifications of applicants for promotion to a higher grade under civil service, which examinations shall be practical in character, and shall relate to such matters as will fairly test the ability of the applicant to discharge the duties of the position to which he seeks promotion.

"Hereafter, all vacancies in the civil service grades above the lowest in each department shall be filled by promotion of subordinates when such subordinates qualify as eligible, and when so promoted, they shall hold such position with full civil service rights therein."

By the use of the word "shall" in imposing this duty provided in the foregoing statutes together with the purpose herein described in initiating the civil service, I am of the opinion that the duty imposed upon the

commission is mandatory. In *Wisdom v. Board*, 236 Iowa 669, 679, with reference to the meaning of the word "shall" as used in the statutes, it is stated:

" * * * True, the statute states that the 'claims * * * *shall* state.' etc., and the word 'shall' appearing in statutes is generally construed as mandatory, but when the word is not addressed to public officials and no right is destroyed by giving it a directory meaning, it will be so construed."

and this may not be delegated, or, in Latin, *"Delegatus non potest delegare"*.

2. The power of the city manager with respect to the employment of city personnel is contained in section 363C.7(7), Code 1958, which provides as follows:

"363C.7 *Duties of manager.* The duties of the manager shall be as follows:

" * * * .

"7. He shall have power to employ, reclassify, or discharge all employees of the city, as the occasion requires, and to fix the compensation to be paid to such employees, except as otherwise herein provided, subject, however, to the provisions of chapters 70 and 365."

Under the foregoing, in conferring upon the manager this power, it is made subject to chapter 365, being the civil service chapter. The words "subject to" as used therein mean "subordinate to," "subservient to." See Words and Phrases, Volume 40, Permanent Edition, page 389, and the Annual Supplement, page 83. As so used, delgating the power described in your letter upon the city manager constitutes a contradiction of the power existing and imposed upon the civil service commission to determine the holding of city positions and offices by persons qualified by examination. In other words, (1) the duty of the commission in respect stated in your letter is mandatory and may not be delegated, and (2) the power of the manager in the employment of city personnel is subordinate to the powers of the commission.

4.3 July 30, 1959

CITIES AND TOWNS: Traffic Signals—Subsections 2 and 3 of section 321.257, 1958 Code of Iowa, do not authorize a right turn. A right turn is authorized only under subsections 1 and 4 of section 321.257, supra.

Mr. Carl Schach, Safety & Traffic Department, Highway Commission: In your letter of June 30, 1959, the following question was submitted:

"This is to request that you prepare an official Attorney General's opinion in regard to the interpretation of Section 321.257 with specific regard to Items 3 and 4.

"We are receiving numerous requests from cities and towns for permission to erect signs reading, 'Right Turn on Red After Stop'. We have been informing the cities requesting this permission for installation of such signs that it was permissible where a green arrow was included with the red stop signal (Item 4). Our interpretation

was that a city or town could qualify to some extent the word 'Cautiously' by requiring a stop before making the right turn. However, we are now receiving so many requests that I feel it best that we have an official opinion in this regard."

Section 321.257, 1958 Code of Iowa, provides:

"Traffic-control signal legend. Whenever traffic is controlled by traffic-control signals exhibiting the words 'Go', 'Caution' or 'Stop' or exhibiting different colored lights successively one at a time *the following colors only shall be used and said terms and lights shall indicate as follows:*

1. . . .

2. *Yellow alone or 'Caution'* when shown following the green or 'Go' signal.

Vehicular traffic facing the signal shall stop before entering the nearest crosswalk at the intersection, but if such stop cannot be made in safety a vehicle may be driven cautiously through the intersection.

Pedestrians facing such signal are thereby advised that there is insufficient time to cross the roadway, and any pedestrian then starting to cross shall yield the right of way to all vehicles.

3. *Red alone or 'Stop'.*

Vehicular traffic facing the signal shall stop before entering the nearest crosswalk at an intersection or at such other points as may be indicated by a clearly visible line and shall remain standing until green or 'Go' is shown alone.

No pedestrian facing such signal shall enter the roadway unless he can do so safely and without interfering with any vehicular traffic.

4. *Red with green arrow.*

Vehicular traffic facing such signal may cautiously enter the intersection only to make the movement indicated by such arrow but shall not interfere with other traffic or endanger pedestrians lawfully within a crosswalk.

No pedestrian facing such signal shall enter the roadway unless he can do so safely and without interfering with any vehicular traffic.

The motorman of any streetcar shall obey all the above signals as applicable to vehicles."

Subsection 2 of the above Code provision indicates what vehicular traffic may do when the traffic control signal is "yellow alone or caution." There is no authorization for a right turn on such signal, and under subsection 3 of section 321.257, supra, it is clear that a right turn may not be effected on "red alone or stop" inasmuch as it is stated "shall remain standing until green or 'Go' is shown alone." Only subsection 4 provides for a right turn on red and then only "red with green arrow."

From reading section 321.257, supra, there can be but one meaning. Accordingly, the statute seems clear on its face and free of ambiguity. Under well-defined rules of statutory construction a Code provision which is clear on its face and admits of only one meaning is not subject to interpretation. *Hindman vs. Reaser*, 246 Iowa 1375, 72 N.W. 2d 559. *Michel vs. State Board of Social Welfare*, 245 Iowa 961, 65 N. W. 2d 89. *Yarn vs. City of Des Moines*, 243 Iowa 991, 54 N.W. 2d 439.

Another facet of this matter pertains to section 321.252, 1958 Code of Iowa, wherein the state highway commission is given authority to adopt a manual and specifications for a uniform system of traffic control devices consistent with the provisions of chapter 321. Upon examination of the manual adopted in July, 1950, and amendments thereto, there is no *sign* authorizing a right turn on "red" or "caution" signals.

It is, therefore, the conclusion of this office that a right turn is not authorized under subsections 2 or 3 of section 321.257, supra. It is the further opinion of this office that a right turn is authorized only as specified in subsections 1 and 4 of section 321.257, supra.

4.4 November 9, 1959

CITIES AND TOWNS: Elections—A write-in candidate for municipal office may be duly elected to office notwithstanding the fact that he has not made and signed the official candidate's affidavit.

Mr. J. R. Hoyman, Warren County Attorney: Reference is herein made to your letter of the 5th inst. as follows:

"I wish an opinion on the following question:

"At a municipal election, a write-in candidate defeated the candidate named on the official ballot for the office of Mayor. The election was held in a town of less than ten thousand which had not passed an ordinance relative to elections under Chapters 44 or 45. The write-in candidate did not make the affidavit required by Section 363.14 of the Iowa Code. Would you please advise whether a write-in candidate may be the duly elected officer when opposed by a candidate who has taken the candidate's affidavit above referred to?

"Your prompt attention will be appreciated."

In reply to the aforegoing, I am of the opinion that the problem in question is controlled by the case of *Barr v. Cardell*, 173 Iowa 18, 155 N.W. 312, where the headnote states:

"ELECTIONS: Right of suffrage—Regulation confining elector to official ballot—Writing in name of candidate. A qualified elector has the constitutional right to freely vote for whom he pleases. This right cannot be taken away or abridged by a statutory provision that, in voting, he shall choose between the candidates whose names are printed on the official ballot. It follows that the voter has the right to write or paste upon his ballot the name of any person for whom he desires to vote." The Court stated the following:

"The foregoing copious extracts from the decisions in various jurisdictions leave little to be said on the question of the right of electors to vote for a candidate whose name is not printed on the official ballot. On principle, nothing can be clearer than this right, and nothing can be more subversive of a free ballot than its denial. We have not discovered a single authority, save the principal case and perhaps Commonwealth v. Reeder, 171 Pa. St. 505 (33 Atl. 67), that intimates the competency of the legislature to deny this right. And, as before pointed out, the court in the latter case misconceived the law. We should admire the courage of the South Dakota court in announcing its conclusion in the face of the decisions of other states, if it were defensible on principle. But regarding it, as we do, to be

destructive of one of the greatest institutions yet realized in the evolution of society, we have no hesitancy in denouncing it as a dangerous precedent."

By reason of the foregoing, I am of the opinion that a write-in candidate for office may be duly elected to municipal office notwithstanding the fact that he has not made the candidate's official affidavit.

4.5 December 21, 1959

CITIES AND TOWNS: Council—Time of taking office—For the purpose of qualifying for office, January 1, 1960 is a secular day.

Auditor of State, Attention Mr. C. W. Ward: This will acknowledge receipt of yours requesting an opinion as to what is the second secular day of January, 1960, for the purpose of qualifying for municipal office. I would advise as follows:

According to the opinion issued by this department, appearing in the Report of 1938, at page 896, it is said:

". . . that when a so-called holiday falls on Sunday, it is customary to observe such a day on the following Monday. This custom, in our opinion, however, makes Monday, January 2, 1939, no less a secular day within the meaning of Section 511 supra. Monday, January 2, 1939, is in no sense a legal holiday—a legal holiday ordinarily being regarded as the opposite of a 'secular' or 'business' day. See *State v. Duncan*, 118 Louisiana 702, 43 Southern 283, 10 L.R.A. (NS) 791. In this very connection, this department recently ruled, in an opinion dated December 5, 1938, to State Auditor Charles W. Storms, that January 2, 1939, is not a legal holiday for any other purpose than that mentioned in Section 9545, Code of Iowa, 1935, being a section contained in the negotiable instruments law. In the course of that opinion we took occasion to point out that a legal holiday, other than Sunday, has effect as a holiday only as to those acts and transactions which are designated in the statute establishing the day, citing 29 *Corpus Juris*, page 762, paragraph 3. Hence our conclusion that Section 9545, supra, must be strictly confined to the inhibited acts therein specified. Therefore, if January 2, 1939, be not a legal holiday except as where provided by law, it must necessarily be a 'secular' or 'business' day."

In accordance with the rule of that opinion that a legal holiday is only a holiday as to those acts and transactions which are designated in the statute establishing the day, I would advise:

By section 541.85, Code 1958, the first day of January, among other days, is named a legal holiday for the purpose of presentation for payment or acceptance, and for the protesting and giving notice of the dishonor of bills of exchange, drafts, etc.

By Rule 366 of the Rules of Civil Procedure, it is provided that where, in computing time under the Rules of Civil Procedure, the last day fell on Sunday or a holiday, the time shall be extended to the next day not a Sunday or holiday, and January first, among others, was designated in that section as a holiday.

By chapter 64, Acts of the 58th General Assembly, the first day of January, among other days, was designated a holiday, and wherever by statute or rule, such day is the last day for the commencement of any

action or proceedings, or the filing of any pleading or motion, or the perfecting or filing of any appeal (and any day appointed as a day of thanksgiving shall be a holiday for that purpose), "the time therefor shall be extended to include the next day which is not a Saturday, Sunday, or such day hereinbefore enumerated."

It appearing that the foregoing acts and transactions are the only ones which may not be performed on a holiday, and there being no designation of a holiday or a day forbidding qualification on a certain day, it would follow that January first, insofar as qualification for office is concerned, is a secular day, and that the time for qualifying for a municipal office would therefore be before noon of the following day, Saturday, the second day of January, such being the second secular day of January, 1960. Confirmation of this conclusion is found in the case of *Michel v. Creamery Co.*, 128 Iowa 706, 708, where it is said:

" 'When the statute declares them to be legal holidays, it does not permit a reference to the legal status of Sunday to discover its meaning, for it proceeds to interpret the phrase, so far as it is prohibitory, by express enactment declaring what shall not be done thereon. What it thus expresses is prohibited. What it fails to prohibit remains lawful to be done.' "

4.6 April 22, 1960

CITIES AND TOWNS: Speed limits—If, as a fact question, a city ordinance involves a "suburban district" as defined in ch. 321, a speed limit of 35 miles per hour established by ordinance on an extension of primary highway within the corporate limits would render such an ordinance invalid in its entirety under secs. 321.258, 321.290, 321.293 and 321.236, 1958 Code of Iowa.

Mr. L. M. Clauson, Chief Engineer, Iowa State Highway Commission, Ames, Iowa: I have your request for an opinion with respect to the validity of an ordinance, copy attached, establishing a speed limit of 35 miles per hour on the extension of a primary highway within the corporate limits of ————————, Iowa.

To determine the validity of this ordinance, it is necessary to examine the power or authority of a municipal corporation to enact such a speed regulation. Under section 321.285, 1958 Code of Iowa, the speed limit is 20 miles per hour within a "business district," 25 miles per hour within a "residence district," and 45 miles per hour in a "suburban district." These various districts are defined in section 321.1, 1958 Code of Iowa, as follows:

"57. 'Business district' means the territory contiguous to and including a highway when fifty percent or more of the frontage thereon for a distance of three hundred feet or more is occupied by buildings in use for business.

"58. 'Residence district' means the territory within a city or town contiguous to and including a highway, not comprising a business, suburban or school district, where forty percent or more of the frontage on such highway for a distance of three hundred feet or more is occupied by dwellings or by dwellings and buildings in use for business.

"60. 'Suburban district' means all other parts of a city or town not included in the business, school or residence districts."

Whether the area within the corporate limits on this extension of a primary highway constitutes a "business district," "residence district," or "suburban district" is a fact question.

Section 321.205, *supra*, states that the speed limits therein specified may be modified. One such modification is authorized by section 321.280, 1958 Code of Iowa, which provides:

"Whenever the state highway commission shall determine upon the basis of an engineering and traffic investigation that any speed limit *hereinbefore* set forth is greater than is reasonable or safe under the conditions found to exist at any intersection or other place or upon any part of a highway, said commission shall determine and declare a reasonable and safe speed limit thereat which shall be effective when appropriate signs giving notice thereof are erected at such intersection or other place or part of the highway." (Emphasis added)

The above statutory provision has been interpreted in a 1940 attorney general opinion at page 305. This interpretation is that the highway commission has the conclusive authority to reduce speed limits on all extensions of a primary highway below those fixed in section 316 of chapter 134, Acts of the 47th General Assembly, which corresponds to section 321.285, *supra*. The use of the words "speed limit hereinbefore set forth" in section 321.290, *supra*, further substantiates this opinion in that the said wording refers to the speed limits established in section 321.285, *supra*, section 321.293, 1958 Code of Iowa as amended by section 3, chapter 231, Acts of the 58th General Assembly, is as follows:

"Local authorities in their respective jurisdiction may in their discretion authorize by ordinance *higher* speeds than those stated in section 321.285 upon through highways or upon highways or portions thereof where stop or yield signs have been erected at the entrances thereto provided signs are erected giving notice of the authorized speed, but local authorities shall not have authority to authorize by ordinance a speed in excess of fifty-five miles per hour." (Emphasis added)

This provision specifically authorizes local authorities to establish by ordinance a higher speed than those specified in section 321.285, *supra*, upon through highways or portions thereof where stop signs have been erected at entrances thereto. Thus, the ordinance establishing the speed at 35 miles per hour is valid if, as a fact question, the area involved is a "business district" or "residence district." However, if the area is a "suburban district," the speed limit established by section 321.285, *supra*, is 45 miles per hour, in which case the highway commission under section 321.290, *supra* has exclusive authority to reduce the speed limit.

It is conceivable that a portion of the area within the corporate limits may, as a fact, be a "suburban district." If so, the city under the authority discussed herein has exceeded its authority. The question then is whether partial invalidity renders the entire ordinance invalid. There is no savings clause in the ordinance as published. The general rule is stated in 62 C.J.S., Municipal Corporations, section 439, as follows:

"Where the invalid portion of an ordinance is separable from the remainder and the remainder in itself contains the essentials of

a complete enactment, the invalid portion may be rejected and the remainder will stand as valid and operative; but, where each part of a municipal ordinance is essential to, and connected with, the balance, the invalidity of one part renders the whole invalid."

According to this rule, the ordinance in question appears to be an entire ordinance as opposed to one which is separable. In 37 American Jurisprudence, Municipal Corporations, section 167, it is stated:

"The whole of an ordinance will be declared void and of no effect where such ordinance is entire, each part having a general influence over the rest, and a particular provision thereof is void. An ordinance in excess of the powers of a municipality has frequently been held to be void as a whole and not merely to the excess . . . "

In addition section 321.236, 1958 Code of Iowa, states:

"Local authorities shall have no power to enact, enforce, or maintain any ordinance, rule or regulation in *any way* in conflict with, contrary to or inconsistent with the provisions of this chapter, and *no such ordinance, rule or regulation of said local authorities heretofore or hereafter enacted shall have any force or effect. . . .*" (Emphasis added)

Under the above provision, if any part of an ordinance is in conflict with, contrary to or inconsistent with any provisions in chapter 321, such ordinance will have no force or effect.

It is, therefore, our opinion that if any part of the area within the corporate limits of _____, Iowa, on the extension of a primary highway is a "suburban district," the ordinance in question is invalid.

ORDINANCE NO._____

An Ordinance Regulating The Speed of Motor Vehicles Upon U. S. Highway _____ Within The Corporate Limits Of The City Of _____, Iowa, Providing A Penalty For Violation Thereof And Repealing All Conflicting Ordinances Or Parts Thereof.

BE IT ORDAINED by the City Council of the City of _____, Iowa.

SECTION 1.

The speed limit for all east bound and west bound vehicles on U. S. Highway _____ within the Corporation Limits of the City of _____, Iowa, shall be and the same is hereby fixed and established at thirty-five (35) miles per hour.

SECTION 2.

Anyone violating any of the provisions of this Ordinance shall upon conviction be subject to imprisonment not exceeding thirty (30) days or to a fine not exceeding $100.00. Whenever the fine and costs imposed for the violation of this Ordinance are not paid the person convicted may be committed to jail until the fine and costs are paid, not exceeding thirty (30) days.

SECTION 3.

That all Ordinances or parts of Ordinances in conflict with this Ordinance are hereby repealed.

SECTION 4.

That this Ordinance shall be in full force and effect from and after its passage and publication as provided by law.

Passed and approved this 18th day of February, 1960.

/s/_____Mayor

ATTEST:

/s/_____City Clerk

4.7 May 16, 1960

CITIES AND TOWNS: City council—park commission—City council may purchase from the commission lands owned by said commission for an adequate consideration. The city council cannot exercise power of eminent domain over the park commission.

Sen. David O. Shaff, 408 South Second St., Clinton, Iowa: This is to acknowledge receipt of your letter of May 4 as follows:

"May the City Council of the City of Clinton, Iowa, expend money from 'Parking Meter Fund' created by receipts from parking meters and under the provisions of Subsection 4 of Section 390.8 of the 1958 Code of Iowa for the acquisition of land for off-street parking and owned by Clinton Board of Park Commissioners?

"Also, may the City Council take property for off-street parking from the Clinton Board of Park Commissioners by eminent domain, as provided by Section 390.3 of the 1958 Code of Iowa?

"The Clinton Board of Park Commissioners was created and operates under Chapter 370 of the 1958 Code of Iowa. It is an independent agency and may and does own land as provided by Sections 370.11 and 370.12 of the 1958 Code of Iowa. The City Council desires to expand present off-street parking facilities, and in order to do so desires to acquire land from the Board of Park Commissioners for that purpose. The Board of Park Commissioners believes that the park funds should be compensated for said land so that other land may be acquired for park purposes in order to replace land taken out of the park system for other public purposes."

In reply thereto, we advise as follows:

Section 370.12, Code 1958, provides in pertinent part:

"*General powers.* It may sell, subject to the approval of the city council, exchange, or lease any real estate acquired by it which shall in the discretion of the park commission be unfit, not desirable, unnecessary, or not required, for park purposes; * * * "

Section 390.2, Code 1958, provides:

"*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."

As the two above sections indicate, both the park commission and the city council have the power to purchase land for a particular purpose as set out above. The park board does have the authority to sell the property if, in its own opinion, it would not be suitable for park purposes for which it was condemned. By the same token, the city council has the authority to expend from the parking lot fund such monies as might be

needed for additional off-street parking. The legislature thus conferred a distinct and individual method for the disposal of public property held in trust by the park board. When public property is to be disposed of by sale, unless otherwise provided, an adequate consideration should be given for the property. See *Ind. Sch. Dist. v. DeWilde*, 243 Iowa 685, 53 N. W. 2d 256.

The city council has no authority to exercise its power of eminent domain over the park commission. Both the city council and the park commission are public bodies exercising exclusive rights within their respective jurisdictions. It is a well-settled rule in the State of Iowa that, "Property devoted to public use cannot ordinarily be taken for another inconsistent public use, and this rule applies to a property to be lawfully appropriated although the appropriation is not complete." See *Connolly v. D. M. & Cen. Rlwy. Co.*, 246 Iowa 874 at 884, 68 N. W. 2d 320.

Therefore, the answer to your question is as follows: the city council does have the authority to purchase the property from the park commission if the park commissioners feel that the property is unfit and not desirable for park purposes. If an agreement is entered into between the park commission and the city council, adequate consideration should be given to the park commission for the land to be acquired. *Gritton v. City of D. M.*, 247 Iowa 326, 73 N. W. 2d 813. The city council cannot exercise its power of eminent domain over the park commission, as the power extends only to condemning private property.

4.8 **May 16, 1960**

CITIES AND TOWNS: **Swimming pools**—Acquisition by city of former lake bed of Storm Lake by gift, lease or purchase discussed.

Mr. Glen G. Powers, Director, State Conservation Commission:

It is my understanding from reading the newspaper reports of the recent commission meeting, and from letters to this office from various individuals in the Storm Lake area, the commission wishes this office to investigate the following question:

> Can the city of Storm Lake acquire by lease, gift, or purchase, a certain 3.44-acre tract in the former bed of Storm Lake for the purpose of construction of municipal swimming pool thereon?

Although I still feel that efficient operations of this office require the submission of questions in writing, due to the pressing need for this opinion at an early date as pointed out by citizens in the Storm Lake area, I wish now to express my opinion prior to any formal request by the commission in this matter.

The power of gratuitous conveyance of state-owned land lies in the general assembly of the state of Iowa, and can be exercised by agencies or creatures of the state only upon expressed statutory authorization. See *Gritten v. City of Des Moines*, 247 Iowa 526. I know of no existing statutory authority for any agency of the state to give the land in question to the city of Storm Lake. To pursue this method of acquisition it would be necessary for the city of Storm Lake to secure authorization of

such a conveyance by the general assembly. The next regular session of this body will be in January, 1961.

Section 111.10, Code of 1958, is in part as follows:

"111.10 *Jurisdiction.* Jurisdiction over all meandered streams and lakes of this state and of state lands bordering thereon, not now used by some other state body for state purposes, is conferred upon the commission."

The facts presented to this office indicate that the land in question is within the purview of section 111.10, Code of 1958, and it is now so assumed for the purpose of this opinion.

Section 111.29, Code of 1958, is as follows:

"111.29 *Leases.* The commission may, with the approval of the executive council, lease for periods not exceeding five years such parts of the property under its jurisdiction as to it may seem advisable. All leases shall reserve to the public of the state the right to enter upon the property leased for any lawful purpose."

The limitations contained within this section would appear to render this method of acquisition impractical under the facts.

In connection with the purchase of this land by the city of Storm Lake, it is necessary to consider the authority of the commission to sell property under its jurisdiction in historic perspective.

In 1917 by chapter 236, Acts of the 37th G. A., the state fish and game warden, by and with the written consent of the executive council, was authorized to establish public parks and to improve and beautify the same. Section three of the chapter provided for the sale of such lands and concluded by providing "that no such lands shall be sold except in compliance with the legislative enactment designating specifically the lands to be sold." Section 9 of said Act set up an investigative board of conservation to be appointed by the executive council.

In 1919 by chapter 360, Acts of the 38th G. A., the authority previously granted to the state fish and game warden was transferred to the board of conservation.

A major change in the state park program occurred in 1923 with the enactment of chapter 35, Acts of the 40th G. A. This Act provided for the appointment of the board of conservation by the governor and greatly expanded and changed the authority, jurisdiction, duties and procedure of the board.

Section 9 of said chapter 33 provided in part as follows:

"Section 9. *Meandered waters and state lands.* Jurisdiction over all meandered streams and lakes of this state and of state lands bordering thereon, not used by some other state body for state purposes, is conferred upon the board. The board, with the approval of the executive council may establish parts of such property into state parks and when so established all of the provisions of this Act relative to public parks shall apply thereto."

The section, as editorially subdivided, now appears as section 111.18, Code of 1958. (Previous to this section in 1921 the board of conservation had been authorized to take control and management of all meandered

streams and lakes belonging to the state. See section 3, chapter 135, Acts of 39th G. A.)

Section 16 of said chapter 33, Acts of the 40th G. A., further provided as follows:

"Section 16. *Sale of park lands.* The executive council may upon the recommendation of the board of conservation, sell such parts of public parks as in their judgment may be undesirable for park purposes. (A method of appraisal and reappraisal was provided.) Conveyances shall be in the name of the state, signed by the governor and secretary of state, with the great seal of the state attached."

In 1924 the conflict in the method of sale between chapter 236, Acts of the 37th G. A., as amended, and section 16, chapter 33, Acts of the 40th G. A., was resolved by chapter 40, Acts (unpublished) Extra Session 40th G.A., by the dilution of the former method contained in chapter 236, Acts of the 37th G. A.

Section 16, chapter 33, Acts of the 40th G. A., were codified as sections 1824 and 1825, Codes of 1924, 1927 and 1931.

In 1933, by the enactment of chapter 34, Laws of the 45th General Assembly, section 1824, Code of 1931, was repealed, and substituted therefor was the following:

"The executive council may, upon a majority recommendation of the board, sell or exchange such parts of public lands under the jurisdiction of the board as in its judgment may be undesirable for conservation purposes, excepting state-owned meandered lands already surveyed and platted at state expense as a conservation plan and project tentatively adopted and now in the process of rehabilitation and development authorized by a special legislative act. Such sale or exchange shall be made upon such terms, conditions or consideration as the board may recommend and that may be approved by the executive council, thereupon the secretary of state shall issue a patent therefor in the manner provided by law in other cases. The proceeds of any such sale or exchange shall become a part of the funds to be expended under the provisions of this chapter."

This chapter (as amended in 1935 by chapter 13, Acts of 46th G. A., which abolished the board of conservation and substituted in lieu thereof the state conservation commission) now appears as section 111.32, Code of 1958.

The title to Chapter 34, Acts of the 45th General Assembly, is as follows:

"An Act to repeal section eighteen hundred twenty-four (1824), Code, 1931, and enacting a substitute therefor, permitting the executive council, upon recommendation of the board of conservation, to sell, trade or exchange state-owned lands under the jurisdiction of said board, and providing for the use of the proceeds of such sale or transfer and for the issuance of patents therefor."

By reading this chapter in its proper historical content, it is readily apparent that the authority of the executive council to sell land previous to the enactment of chapter 34, Laws of the 45th General Assembly, related to "public parks," whereas subsequent to this enactment, the authority was broadened to include "sell or exchange such parts of public lands under the jurisdiction of the board." Jurisdiction over "all meandered streams and lakes and of state lands bordering thereon, not

used by some other state body for state purposes" had at that time been in the board of conservation 10 years. Furthermore the requirement for legislative enactment designating specifically the lands to be sold had been deleted nine years previously.

An investigation has been made for special legislative Acts affecting the land in question so as to bring it within the exception to this Act. (For an example of such an Act see chapter 275, Acts of the 45th G. A.) No applicable Act has been found.

In the reported Opinions of the Attorney General of 1958, page 897, this office had occasion to consider the provisions of the present section 211.32, Code of 1958:

> "The exception set out in the above statute apparently would not include the land under consideration. It will be observed that the statute provides that the state conservation commission, by a majority of its members, recommend to the executive council such sale, including the terms, conditions and considerations thereof. The authority to consummate such transaction then is vested in the executive council, which should be expressed by a resolution of the council approving all the recommendation of the state conservation commission.
>
> "If the lands, therefore, are of such character that the state, in virtue of its sovereign ownership, of the bed of the Missouri River, owns and controls the same, it is our opinion that upon recommendation of the conservation commission, and upon approval by the executive council, that such lands can be transferred to the city of Sioux City as contemplated in sections 1824 and 1825.
>
> "We assume that the conservation commission has determined that the real estate in question is subject to their jurisdiction, and if this is the situation, then if the council sees fit it may proceed to approve the conveyance and consummate the same."

Following the precedent of this former attorney general's opinion, and within the limitation contained in section 111.32, Code of 1958, the executive council may sell the land in question to the city of Storm Lake.

For further particulars in regard to the proper procedure to follow in connection with a sale pursuant to the provisions of section 111.32, Code of 1958, see Opinion of Attorney General, 1934, page 254.

In conclusion, the land in question could be acquired by the city of Storm Lake by

(a) gift of the state legislature

(b) lease pursuant to section 111.25, Code of 1958

(c) purchase from the executive council pursuant to section 111.52, Code of 1958.

This opinion is limited to a discussion of land within the provisions of section 111.13, Code of 1958.

4.9 July 13, 1960

CITIES AND TOWNS: Fire protection and inspection—Under sections

100.10 and 368.11, a municipality cannot directly or indirectly prohibit the fire department from answering a fire call or making an inspection of school buildings within the corporate limits of the municipality.

Mr. D. M. Statton, Commissioner, Department of Public Safety:

This will acknowledge receipt of your letter of June 20, in which you state:

"Attached is a recent Judgment and Decree rendered by District Judge Sandee Jordan, 18th Judicial District, wherein the court declares that the Cedar Rapids Community School District, Linn County, Iowa, is not subject to the building codes of the city of Cedar Rapids, as embraced in any of its relevant city ordinances.

"With reference to this court ruling and applicable state law, your opinion is respectfully requested on the following, pertaining to buildings of a school district located within the corporate limits of a city:

"(a) Does the municipality have a duty to provide fire protection services for these buildings?

"(b) Do the fire department inspectors of a municipality have a duty to inspect every such school building to determine whether each school meets state fire safety standards and regulations, and is free from other fire hazards?"

In reply thereto, we advise as follows:

Section 368.11, Code 1958, provides:

"*Fire protection.* They shall have power to provide for the protection of life and property against fire and to establish, house, equip, staff, uniform and maintain a fire department. They may establish fire limits. They may consistent with code standards promulgated by nationally recognized fire prevention agencies regulate the storage, handling, use, and transportation of all inflammables, combustibles, and explosives, within the corporate limits, and inspect for and abate fire hazards. They may provide conditions upon which the fire department will answer calls outside the corporate limits and the corporation shall have the same governmental immunity as when operating within the corporate limits. Firemen operating equipment on calls outside the corporate limits shall be entitled to the benefits of chapter 410 or 411 when otherwise qualified."

The general assembly has vested a city or town with a general power to provide fire protection. Once a fire department is established by a municipality, the primary purpose of the department is the governmental function of protection of life and property of those persons within the corporate limits of the municipality.

The cases in Iowa clearly indicate that fire protection is a governmental function. Therefore, the municipality is immune from any liability arising out of negligent performance or inadequate equipment. *Bradley v. City of Oskaloosa,* 193 Iowa 1072, 188 N. W. 896; *Saunders v. City of Fort Madison,* 111 Iowa 102, 82 N. W. 428.

The powers conferred upon municipalities are to be strictly construed and the governmental functions of fire protection cannot be derogated by orders from the governing body of a municipality in the absence of spe-

cific statutory authority to the contrary. *Gritton v. City of Des Moines*, 247 Iowa 326, 73 N. W. 2d 813.

In view of the foregoing authority, the answer to your first question would be that, if a municipality establishes a fire department, then the municipality has the duty to provide fire protection to buildings of a school district located within the corporate limits, in the performance of the governmental function for which the department was created.

Section 100.1, Code 1958, provides in pertinent part:

"Fire marshal. The chief officer of the division of fire protection in the department of public safety shall be known as the state fire marshal.

"His duties shall be as follows:

" * * *

"4. To enforce all laws, and the rules and regulations of the Iowa department of public safety, concerned with:

"a. The prevention of fires;

" * * *

"d. The electric wiring and heating, and adequate means of exit in case of fire, from * * *, schools, * * *, whether publicly or privately owned; * * * "

Section 100.10, Code 1958, provides:

"Authority to enter and inspect. The state fire marshal, and his designated subordinates, in the performance of their duties, shall have authority to enter any building or premises and to examine the same and the contents thereof."

Express statutory authority vests the state fire marshal with authority to designate subordinates to inspect school buildings to determine whether the buildings meet state standards. If the inspection of the buildings is done faithfully and impartially, without favor, fraud or oppression, then such inspection is clearly a governmental function. *Brown v. Cochran*, 222 Iowa 34, 268 N.W. 585.

Thus, in answer to your second question, if the state fire marshal duly appoints the fire department inspectors of a municipality to inspect school buildings in conformity with state safety standards and regulations, then such inspection, if properly performed, is a governmental function over which the municipality has no control.

4.10

Airports—Cities and towns may accept a gift of the donor's entire interest in property for airport purposes, subject to the condition that the city pay for certain improvements necessary to fulfillment of such purposes. (Ables to Strack, Grundy Co. Atty., 6/14/60) #60-6-20

4.11

Airports—An airport is not exempt under section 427.1(21) of the Code 1958, unless there has been a conveyance to a city or town. (Rehmann to Berlin, Dir. Ia. Aero. Com., 9/30/60) #60-10-1

4.12

Cemeteries—Cemetery board has no express authority to assess a "burial fee" as such. (Abels to Samore, Woodbury Co. Atty., 6/29/60) #60-6-37

4.13

Census—Increases or deductions in salaries of city officials based on population changes are effective on the date the secretary of state certifies and publishes the official census figures. (Strauss to Hultmann, Black Hawk Co. Atty., 7/13/60) #60-7-11A

4.14

Civil service commission—Authority to abolish civil service commission is limited to cities having a population of less than 8000. (Strauss to Naughton, St. Rep., 11/20/59) #59-11-21

4.15

Civil service—The civil service commission appointed under ch. 365, Code 1958, may not delegate any of its duties. The commission has no statutory authority to employ others to perform any of its duties, even ministerial, or to aid it in the final performance of its discretionary powers. (Strauss to Reppert, St. Rep., 4/4/60) #60-4-4

4.16

Compatibility of office—Office of justice of the peace and member of city council are incompatible, and member of city council may act as election judge and such action does not violate Code sec. 368A.21. (Strauss to Barlow, Palo Alto Co. Atty., 10/13/59) #59-10-18

4.17

Compatibility of office—Offices of members of the city council and member of the park board cannot be occupied by the same person. (Strauss to Burdette, Decatur Co. Atty., 10/1/59) #59-10-8

4.18

Councilman appointed to other municipal office during term—The prohibition against such appointment contained in sec. 368A.21 refers to increase in the compensation for the appointive office rather than to the compensation received as councilman. (Abels to Akers, St. Aud., 7/14/60) #60-7-13

4.19

Eminent domain—City or town can not condemn state property, if to do so would materially impair the previous use by the state of the property without a statute clearly conferring such authority. (Gritton to Smith, O'Brien Co. Atty., 1/12/60) #60-1-7

4.20

Flood control—1. Under the provisions of ch. 395, Code 1958, a city engaged in flood control work and river improvement which is to cross a railroad right of way, by proper notice in writing, may require said railroad company to construct or pay for a bridge. The obligation of the railroad company exists with or without the obligation to pay its

share of the special assessment. 2. If each segment, section, or district of the whole flood control program is a separate improvement district, the cost thereof is restricted to said segment, section, or district, and can be paid by special assessment. (Strauss to Erhardt, Wapello Co. Atty., 3/29/60) #60-3-26

4.21

Health officer—A veterinarian specially trained in public hygiene and sanitation may be appointed health officer under Code secs. 137.4 and 368A.1(7). (Abels to Ford, Des Moines Co. Atty., 2/5/59) #59-2-9

4.22

Legal opinions—City questions not properly subject of opinion by attorney general or county attorney unless of direct concern to and submitted by a state department (Code secs. 13.2 and 336.2) (Abels to Ford, Des Moines Co. Atty., 8/27/59) #59-9-10

4.23

Mayor—Vacancy—The death, prior to qualifying, of a person elected in November 1959, to the office of mayor to fill a term beginning January 2, 1960, creates a vacancy at the time of his death, and the vacancy is properly filled by the new council taking office January 2, 1960. (Strauss to Larson, Atty., 11/24/59) #59-11-26

4.24

Mayor's court—Under the provisions of Code sec. 367.5 the mayor has, in certain instances, the powers of a justice of the peace, but has no authority to assume any title other than mayor. (Abels to Carlsen, Clinton Co. Atty., 5/27/59) #59-5-23

4.25

Memorial hall commissioners—Under sec. 37.15, 1958 Code of Iowa, the mayor has no authority to appoint himself as an ex officio member of the commission, said authority being vested solely in the town council under sec. 37.9, 1958 Code of Iowa. (Rehmann to Johnson, Poweshiek Co. Atty., 9/21/60) #60-9-18

4.26

Motels, regulation—"Motels" fall within the definition of "multiple dwellings" referred to in Code sec. 413.3, subsec. 3. "Motels" must be built where sewer and water are accessible. (Rehmann to Houser, Health Dept., 2/19/59) 59-2-17

4.27

Motor vehicles, speed limits—Cities and towns (municipal corporations) have the power to pass ordinances establishing speed limits on or in public alleys; but an ordinance which conflicts with, is contrary to, or inconsistent with, the provisions of ch. 321, Code 1958, is of no force and effect. (Pesch to Dodds, St. Rep., undated) #59-1-1

4.28

Naming streets—Under Code sec. 409.17, the city or town has final determination in the name of a platted street. (Rehmann to Baumhover, St. Rep., 7/22/59) #59-7-25

4.29

Pay increase—Any time prior to the expiration of their respective terms of office, the compensation of the mayor and councilmen in cities of over 15,000 population, operating under the commission form of government, by ordinance may now be increased under the provisions of ch. 272, Acts of the 58th G.A., anything in sec. 368A.21, Code 1958, or any other statute to the contrary, notwithstanding. (Strauss to Akers, St. Aud., 4/5/60) #60-4-5

4.30

Police and fire retirement—Sec. 411.6(5), as amended by ch. 293, Acts of the 58th G.A., allows police and fire members disablement retirement upon a mere showing of heart disease. (Craig to Murray, Webster Co. Atty., 7/15/60) #60-7-16

4.31

Police judge—Can't serve two cities at same time. (Abels to Hultman, Black Hawk Co. Atty., 5/5/59) #59-5-6

4.32

Police retirement—Policemen in cities with established Policemen's Pension Fund are not within the coverage afforded by ch. 85, Code of 1958, and specifically sec. 85.62 (Gritton to Jones, Ind. Comr., 7/2/59) #59-7-6

4.33

Sewage disposal—Chapters 392 and 393, Code 1958, are separate and distinct operational provisions for sewerage, and sewage disposal, and are not alternative. Sewer rentals are restricted by chapter 393, and may not be used for operation under chapter 392. (Strauss to Akers, St. Aud., 12/13/60) #60-12-13

4.34

Sinking funds—Under Code sec. 453.9: (1) Such portions of revenue from sewer rentals as are set aside to retire existing indebtedness constitute a sinking fund. (2) Money accumulated to retire revenue bonds is a sinking fund. (3) Money allocated for *repairs* to a light plant is not a sinking fund. (Abels to Rigler, St. Sen., 4/7/60) #60-4-9

4.35

Special assessment of state property—State-owned property is subject to assessment under secs. 391.45 and 391.46, 1958 Code, and assessments, when levied, should be paid by the highway commission from the primary road fund as provided in secs. 2 and 4, ch. 207, 58th G. A. (Lyman to O'Connor, Highway Com., 8/17/59) #59-8-18

4.36

Special charter cities—Under Code secs. 420.160, 420.163 and 420.155, no power is conferred to erect buildings for the purpose of rental. (Abels to Leir, Scott Co. Atty., 9/30/59) #59-10-7

4.37

Tax levy—Park board may levy up to five mills under Code sec. 404.11 in

lieu of tax as provided in Code sec. 370.6; however limited to the provisions of Code ch. 370 and the specific purposes named therein. (Rehmann to Shaff, St. Sen., 10/22/59) #59-10-24

4.38

Transfers—Public-square transfer by city for public school purposes under Code sec. 409.46 is a rededication of public lands and no consideration is necessary. (Rehmann to Morrow, Allamakee Co. Atty., 1/12/60) #60-1-10

4.39

Water extensions—Payment for water extensions in undeveloped areas of cities is made by assessments and not by use of accumulated revenue funds, and the municipal utility fund may not be used for that purpose. (Strauss to Mensing, St. Rep., 2/18/59) #59-2-21

4.40

Waterworks—Not a "profit-making organization." (Erbe to Loveless, Gov., 3/24/59) #59-3-23

4.41

Utility boards—Boards of trustees of municipal electric light, water, and gas companies may not be eliminated without statutory authorization. (Strauss to Akers, St. Aud., 1/27/60) #60-1-16

CHAPTER 5

CONSERVATION

LETTER OPINIONS

5.1

Appropriation—Storm Lake—Entire $170,000 to be be used for the sole and only purpose of lake dredging. (Gritton to Stiles, St. Cons. Dir., 5/19/59) #59-5-16

5.2

Boating—Concurrent jurisdiction, Code sec. 106.13, applies to the Mississippi River. (Gritton to Carlsen, Clinton Co. Atty., 10/7/59) #59-10-12

5.3

City tax levy—A city may continue to raise funds from the tax levy (sec. 404.11, Code 1958)and spend these funds in conjunction with the county conservation board (111A.7, Code 1958), even after an agreement has been entered into between the agencies whereby a city has divested itself of all jurisdiction and control of the property. (Gritton to Johnson, Poweshiek Co. Atty., 9/9/60) #60-9-13

5.4

Commercial fishing—1. No refund can be made of amount paid for gear tags purchased prior to July 4, 1959. 2. Owner's certificate required after July 4, 1959. (Gritton to Brinck, St. Rep., 7/16/59) #59-7-17

5.5

Condemnation—Code sec. 111A.4(2) does not give the county conservation board authority to condemn land for public use. Nor may the county condemn land for the use of the county conservation board. (Gritton to Blackburn, Hamilton Co. Atty., 7/12/60) #60-7-9

5.6

County board—Board of supervisors has no authority to charge county board of conservation for use of county-owned equipment and operators and any other county-owned material, pursuant to sec. 111A.7, Code 1958. (Gritton to Cady, Franklin Co. Atty., 4/25/60) #60-4-18

5.7

County board—Member of county conservation board unauthorized to also be a member of the state conservation commission. Section

111A.4(3), 1958 Code, makes these positions incompatible. (Strauss to Leir, Scott Co. Atty., 1/13/59) #59-1-23

5.8

County board—prohibited interests—A member of the county conservation board may not be appointed to be an executive officer of the board nor may a member of the county conservation board, as an individual, enter into construction contracts for the improvement of county parks with the board. (Strauss to Blackburn, Hamilton Co. Atty., 7/15/59) #59-7-14

5.9

County conservation boards—Discussion relative to the control and jurisdiction of the board of supervisors over the county conservation board. (Gritton to Leir, Scott Co. Atty., 11/3/60) #60-11-5

5.10

Fishing—Wholesale Fish License and Bait Dealers License—Both licenses are required for one operation under applicable factual situations. (Gritton to Bedell, Dickinson Co. Atty., 2/24/59) #59-2-27

5.11

Hunting and fishing grounds—1. Commission is authorized and empowered to acquire by lease or agreement, lands or waters and rights of ways, thereto, and maintain the same for public hunting and fishing grounds. 2. Commission may expend moneys in the fish and game protection fund to carry out the above purposes. (Gritton to Powers, St. Cons. Com., 1/11/60) #60-1-6

5.12

Hunting license—"Children" as used in sec. 110.17, Code 1958, refers to the first-degree descendants and therefore it is not necessary for any son or daughter of an owner to obtain a license in order to hunt on their father's land. (Gritton to Brown, Mitchell Co. Atty., 12/29/58) #59-1-18

5.13

Hunting, pistol or revolver permit—No person may carry a pistol or revolver in any vehicle operated by him, except on lands possessed by him, without a license therefor. (Gritton to Powers, St. Cons. Com., 10/7/59) #59-10-10

5.14

Leases—(1) *Conservation Commission*—Authority to Lease—the commission has the authority to lease concessions in state park areas. (2) *County Conservation Board*—Authority to Lease—The Board does not have the authority to enter into contracts for commercial operations. (Gritton to Rush, Cons. Com., 4/21/59) #59-4-26

5.15

Mink license—License required by Code sec. 109.60, not repealed by ch. 138, Acts of the 58th G.A. (Gritton to Strand, Winneshiek Co. Atty., 8/13/59) #59-8-17

5.16

Plans and programs—Plans and programs which require approval of the state conservation commission pursuant to Code sec. 111A.4(3) are those plans and programs prepared and adopted under the authority and power vested in the county conservation board by Code secs. 111A.4(1) and 111A.4(4). (Gritton to Leir, Scott Co. Atty., 7/22/60) #60-7-24

5.17

Professional assistants—County conservation boards may employ professional assistants for the excavation and recovery of archaeological relics. (Gritton to Tierney, Asst. Webster Co. Atty., 7/12/60) #60-7-10

5.18

Radio facilities—A county conservation board organized under chapter 111A of the 1958 Code of Iowa, cannot properly expend funds allocated to it by the county board of supervisors to equip a state conservation officer with a two-way radio to facilitate the performance of his duties as a state conservation officer. (Gritton to Fisher, St. Rep., 10/12/60) #60-10-6

5.19

Soil conservation—Legal Sponsors for Federal Aid.—County drainage districts, cities and towns may qualify as legal sponsor under Public Law 566 within the purview of the chapters applicable, Iowa Code 1958. County conservation boards have no power to qualify as legal sponsor under Public Law 566, as per ch. 111A, Iowa Code 1958. (Maggert to Greiner, 2/3/60) #60-2-13

5.20

State commission—Transfer funds—Monies of the fish and game protection fund can not be transferred and used for the operation of the division of lands and waters. (Gritton to Frudden, Comr., 1/13/59) #59-1-22

5.21

State commission—Disposal of equipment to be made pursuant to Code sec 19.23 with the method and means of sale within the discretion of the executive council. (Gritton to Stiles, St. Cons. Dir., 1/13/59) #59-1-20

5.22

State commission—Expenditures of the conservation commission in connection with the state-wide clinic held September 8, 1959, are not reimbursable. (Strauss to Powers, St. Cons. Com., 9/30/59) #59-9-36

5.23

State commission appropriation—Allocation of appropriation made to conservation commission by H.F. 548, 58th G.A., may be made in accordance with the provisions thereof, notwithstanding some contradictions therein. (Strauss to Sarsfield, St. Comp., 6/1/59) 59-6-3

5.24

State commission, appropriation—Appropriation of $17,000 found at

line 183, ch. 28, Acts of the 58th G.A., may be used to acquire by purchase an existing residence. (Gritton to Powers, St. Cons. Com., 8/20/59) #59-8-19

5.25

State commission organization—Law-enforcing officers and matters may be transferred to the division of administration pursuant to sec. 107.21, Code 1958. (Gritton to Powers, St. Cons. Com., 7/28/59) #59-7-36

5.26

State commission salaries—1. Officers are entitled to additional compensation only after obtaining maximum basic salaries of $4,680. 2. Years of continuous employment with the state applies only to the additional compensation. (Gritton to Powers, St. Cons. Com., 8/13/59) #59-8-16

5.27

State conservation commission cannot designate a city police officer to enforce the state law on the river within the city limits. (Gritton to Powers, St. Cons. Com., 7/29/59) #59-8-3

CHAPTER 6

CONSTITUTIONAL LAW

STAFF OPINIONS

LETTER OPINIONS

6.1 June 29, 1959

CONSTITUTIONAL LAW: **Signing bills**—A bill passed by both houses of the legislature must be signed by the presiding officers of such houses in the presence of such houses, and lacking that procedure it is not an enrolled bill and does not become a law even if deposited with the secretary of state.

Hon. Melvin D. Synhorst, Secretary of State:

This will acknowledge receipt of yours of the 24th inst. in which you submitted the following:

"Attached hereto is a photostatic copy of a Bill which originated in the Senate and is known as Senate File 425, Fifty-eighth General Assembly. You will note that the signature of Edward J. McManus, President of the Senate, does not appear on this Bill. This Bill was approved by the Governor on April 22, 1959, and was transmitted to the Secretary of State on April 22, 1959.

"If the President of the Senate were to sign this Bill prior to July 4, 1959, would Senate File 425 became effective on July 4, 1959?

"If it is permissible for the President of the Senate to sign Senate File 425 now, should a notation be placed on this Bill showing the date of signing and other relevant facts?

"Your formal opinion is respectfully requested on the preceding questions."

and the photostatic copy of the bill referred to is herewith exhibited as follows:

"SENATE FILE 425

AN ACT

TO AMEND CHAPTER FIFTY-TWO (52), CODE 1958, RELATING TO VOTING MACHINES.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

Section 1. Section fifty-two point three (52.3), Code 1958, is hereby amended by striking the period (.) in line eight (8) and inserting in lieu thereof the following:

'. or levy not to exceed one-half (½) mill annually; and any amounts so levied and collected in excess of actual costs of voting machines shall revert to the general fund of the county, city, or town concerned. In the case of a city or town, such levy shall be made for the municipal enterprises fund.'

EDWARD J. McMANUS
President of the Senate

VERN LISLE
Speaker of the House
/s/ Vern Lisle

I hereby certify that this bill originated in the Senate and is known as Senate File 425, Fifty-eighth General Assembly

/s/ Richard W. Berglund
RICHARD W. BERGLUND
Secretary of the Senate

Approved April 22, 1959
/s/ Herschel C. Loveless
HERSCHEL C. LOVELESS

Governor"

In reference to the foregoing, I advise as follows: In the view that the department takes of this situation, I find it unnecessary to answer your questions seriatim. The situation presents the question whether an enrolled bill may become a law by signature of one of the presiding officers of the houses of the legislature previously omitted but imposed subsequent to the adjournment thereof. The answer is in the negative because of the following:

Processing of a bill passed by the legislature to its enrollment is described in the case, *Carlton v. Grimes*, 23 N.W. 2d 883, 237 Iowa 912, 925, as follows:

"Enrollment is the preparation of a copy of the act passed for the signatures of the authenticating officers and the approval of the Governor. Enrollment in the Iowa Legislature is always done by the enrolling clerk of the originating house. All of the amendments which have been made in the course of the proceedings through both houses are incorporated in the enrolled bill. The caption 'A Bill For' is left off, so that the title reads 'An Act'. After the enrollment of the bill it is signed by the recording officer of the originating house, as a certification of its true origin. The bill is then examined by the committee on enrolled bills of the originating house and later is re-examined by a standing joint committee on enrolled bills composed of members from the House and the Senate, to see that the enrolling clerk has copied the bill correctly and properly inserted all amendments and corrections. The committees on enrolled bills are required to compare the enrolled bills with the engrossed bills—those prepared for the last reading—and with the amendments that have been made, and report their findings to the Legislature. The committee on enrolled bills of the originating house reports only to that house, while the joint committee reports to both houses. The chairman of each branch of the joint committee signs a certificate on behalf of the committee that the bill was found correctly enrolled, which certificates are attached to the bill. If the reports are approved they are adopted by each house. After their adoption the bill is signed by the President of the Senate and the Speaker of the House as required by section 15 of the Constitution. This is done in the presence of the Senate and the House respectively. These signatures are prescribed by the Constitution for the legal authentication of the legislative action expressed in the bill. After signing a bill the presiding officer announces that he has signed the particular

bill in the presence of the house. It is this bill so signed that is ordinarily designated as the enrolled bill. See Iowa Manual of Legislative Procedure compiled and published by the State Historical Society of Iowa in 1917, under the direction of its superintendent, Benjamin F. Shambaugh, in accordance with a concurrent resolution of the 37th G. A., and re-edited and published in 1939 through an appropriation of the 40th G.A., pages 92-94, 123, 124 of the later edition, from which we have drawn freely. After its authentication by the legislative officers the enrolled bill is sent to the Governor for his approval. If he approves it he evidences the date of his approval by his official signature and notifies the originating house of his action, and files the bill with the secretary of state. The enrolled bill involved in this appeal, ch. 136, 51st G.A., secs. 309.11, 324.2 and 324.63, Code 1946, on file in the office of secretary of state, bears the following official signatures and certificate:

" 'Kenneth A. Evans, President of the Senate.

Harold Felton, Speaker of the House.

I hereby certify that this Bill originated in the Senate and is known as Senate File 229, Fifty-first General Assembly.

W. J. Scarborough

Secretary of the Senate.

Approved March 27, 1945

Robert D. Blue, Governor."

"The common law rule is that the enrolled bill, nothing to the contrary appearing on its face, is an absolute verity, is conclusive of its textual content and of its lawful enactment, and cannot be impeached by the legislative journals or evidence extrinsic of the journals. This is the rule of the English courts, the Federal courts, and of many of the state courts. Crawford, The Construction of Statutes, supra, sec. 139; 1 Sutherland, supra, footnote, pages 227-229.

"Other courts apply the rule that the enrolled bill imports absolute verity, in a modified form. They hold that the enrolled bill is a verity and conclusively proves that the General Assembly complied with all constitutional provisions, excepting those provisions of the Constitution compliance with which is expressly required to be shown on the journals."

You will note that according to the foregoing the process of enrollment of a bill requires the signature of presiding officers of the House and Senate be attached during sessions of the legislature and in the presence of the Senate and House respectively. The constitutional effect of the lack of such signatures imposed on the bill in the presence of one house or the other is described in the case of *State of Iowa ex rel. Hammond v. Lynch*, 169 Iowa 148, 151 N.W. 81, where it appears the petition praying the enjoining of a nuisance was held defective on demurrer because the Act, being ch. 214, Acts of the 33rd General Assembly, appears among the enrolled bills in the office of the secretary of state though duly signed by the president of the senate and approved by the governor, was never signed by the speaker of the house of representatives. Addressing itself to the question as to whether the signature of the speaker of the house, as well as the president of the senate, was essential in the authentication of the bill in order to have the bill become a law of the state, the court, after citing the following provisions of the constitution:

" * * * Article 3. Sec. 9 thereof declares that: 'Each house shall . . . keep a journal of its proceedings, and publish the same.' Sec. 10: 'The yeas and nays of the members of either house, on any question, shall, at the desire of any two members present, be entered on the journals.' Sec. 15: 'Every bill having passed both houses, shall be signed by the speaker and president of their respective houses.'

"Sec. 16. 'Every bill which shall have passed the general assembly shall, before it becomes a law, be presented to the governor. If he approve, he shall sign it; but if not, he shall return it, with his objections, to the house in which it originated, which shall enter the same upon their journal, and proceed to reconsider it; if, after such reconsideration, it again pass both houses, by yeas and nays, by a majority of two-thirds of the members of each house, it shall become a law, notwithstanding the governor's objections. If any bill shall not be returned within three days after it shall have been presented to him (Sunday excepted) the same shall be a law in like manner as if he had signed it, unless the general assembly, by adjournment, prevent such return. Any bill submitted to the governor for his approval during the last three days of a session of the general assembly, shall be deposited by him in the office of the secretary of state within thirty days after the adjournment, with his approval, if approved by him, and with his objections, if he disapproves thereof.'

"Sec.17. 'No bill shall be passed unless by the assent of a majority of all the members elected to each branch of the general assembly, and the question upon the final passage shall be taken immediately upon its last reading, and the yeas and nays entered on the journal.' "

and reviewing a number of authorities stated the following:

"The Supreme Court of the United States held an enrolled act duly authenticated and on file with the secretary of state conclusive proof of the law as passed by Congress in *Field v. Clark*, 143 U.S. 649, 36 L. Ed. 294, where, speaking through Harlan, J., it said: 'The signing by the Speaker of the House of Representatives and by the President of the Senate, in open session, of an enrolled bill, is an official attestation by the two houses of such bill as one that has passed Congress. It is a declaration of the two houses, through their presiding officers, to the President, that a bill, thus attested, has received, in due form, the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass Congress shall be presented to him. And when a bill, thus attested, received his approval, and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable. As the President has no authority to approve a bill not passed by Congress, an enrolled act in the custody of the Secretary of State, and having the official attestations of the Speaker of the House of Representatives, of the President of the Senate and of the President of the United States, carries, on its face, a solemn assurance by the legislative and executive departments of the government, charged, respectively, with the duty of enacting and executing the laws, that it was passed by Congress. The respect due to coequal and independent departments requires the judicial department to act upon that assurance and to accept, as having passed Congress, all bills authenticated in the manner stated; leaving the courts to determine, when the question properly arises, whether the act, so authenticated, is in conformity with the Constitution.

" 'It is admitted that an enrolled Act, thus authenticated, is suffi-

cient evidence of itself—nothing to the contrary appearing upon its face—that it passed Congress. But the contention is, that it cannot be regarded as a law of the United States if the journal of either House fails to show that it passed in the precise form in which it was signed by the presiding officers of the two houses, and approved by the President. It is said that, under any other view, it becomes possible for the Speaker of the House of Representatives and the President of the Senate to impose upon the people as a law a bill that was never passed by Congress. But this possibility is too remote to be seriously considered in the present inquiry. It suggests a deliberate conspiracy to which the presiding officers, the committees on enrolled bills, and the clerks of the two houses must necessarily be parties, all acting with a common purpose to defeat an expression of the popular will in the mode prescribed by the Constitution. Judicial action based upon such a suggestion is forbidden by the respect due to a coordinate branch of the government. The evils that may result from the recognition of the principle that an enrolled Act, in the custody of the Secretary of State, attested by the signature of the presiding officers of the two houses of Congress, according to the forms of the Constitution, would be far less than those that would certainly result from a rule making the validity of Congressional enactments depend upon the manner in which the journals of the respective houses are kept by the subordinate officers charged with the duty of keeping them.'

"There the court held it not competent to show from the journals of the house and other evidence that the enrolled bill as passed contained a section not found in the enrolled act in the office of the secretary of state.

"Enough has been said and quoted to clearly indicate the grounds of our conclusion that the enrolled bill on file with the secretary of state is the ultimate proof of its passage in the form there appearing and that beyond this, the courts cannot go in ascertaining whether the legislature complied with the requirements of the Constitution. The authorities seem about evenly divided as to whether resort may be had to the journals of the house, but there is a decided tendency in recent decisions to hold that the enrolled bill is conclusive evidence of its passage as it appears. In the last edition of Sutherland on Statutory Construction at page 72 the author observes that 'It is no longer true that "in a large majority of the states" the courts have held that the enrolled act may be impeached by a resort to the journals. A comparison will show that the courts are now about equally divided on the question. The current of judicial decision in the last ten years has been strongly against the right of the courts to go back of the enrolled act. Undoubtedly, the decision of the Supreme Court of the United States in *Marshall Field & Co. v. Clark*, 143 U. S. 649, 36 L. Ed. 294, 12 Sup. Ct. Rep. 495, has had much to do in creating and augmenting this current, but it may also be due to the greater simplicity, certainty, and reasonableness of the doctrine which held the enrolled act to be conclusive. Many courts and judges, while feeling compelled to follow former decisions holding that the enrolled act may be impeached by the journals have done so reluctantly, and have expressed doubts as to the validity of the doctrine, and in many cases, as will appear in the following sections, have qualified and restricted it in important particulars.'

" * * *

"What has been said, perhaps, indicates with sufficient definiteness our conclusion that the signature of the speaker was essential to the validity of the enrolled bill. Courts holding that resort may not be had to other than the enrolled bills to ascertain their enactment

by the General Assembly are unanimous in deciding that the signature of the presiding officer of each house is essential as proof of their passage and that the omission of either is fatal to the bill.

" * * *

"This is expressive of the view entertained by the great weight of authority and there appears no sound reason for not holding, in accordance therewith, that, in order that a bill may become a valid law of this state, compliance with the section of the Constitution under consideration (Sec. 15 of Article 3), exacting the signature of the speaker of the house as well as that of the president of the senate, is essential to the authentication of the bill in form and substance as well as essential to certifying its passage. All are presumed to know the law and it is of highest importance to each citizen as well as to the public officer that there be an authentic record to which he may resort to ascertain certainly and definitely what laws are enacted by the legislature which control him and which he is bound to observe at his peril. Whatever conduces to certainty in this respect is of great moment to every person in the state and no rule of construction would be wise which would leave so important a matter to doubt or uncertainty. Our conclusion that the enrolled bill must be signed by both the speaker of the house and the president of the senate, and that when so signed and approved by the governor, or approval omitted under circumstances defined in Sec. 16 of Article 3 of the Constitution, it is conclusive that it has been properly enacted and has become a valid statute of the state, accomplishes this, and we need only add that, in consequence thereof, chapter 214 of the 33rd general assembly, not having been signed by the speaker, is not and never was a part of the laws of this state.—Affirmed."

The foregoing authorities determine that the signature of the speaker of the house and lieutenant governor, the presiding officer of the senate, must be attached to a bill passed by the legislature in the presence of the house or senate in session in order to become a law. A bill as passed by the legislature but lacking either signature is not an enrolled bill and is not a law even if deposited with the secretary of state.

6.2

Appropriations, private acts—The appropriation of $250,000 to the Iowa Great Lakes Sanitary District is not a local or private purpose and does not violate Art. III, sec. 31, of the Constitution of Iowa. (Strauss and Forrest to Getting, St. Rep., 4/16/59) #59-4-20

6.3

Aviation gasoline tax refund—Chapter 247, Acts of the 58th G. A. providing refund of moneys collected on account of aviation gasoline, its refund and transfer of unrefunded portion to the state aviation fund does not violate sec. 8 of Article VII, Constitution of Iowa. (Strauss to Abrahamson, St. Treas., 11/10/59) #59-11-14

6.4

Civil defense—In existing emergency arising out of enemy attack, the General Assembly under its police power may act appropriately, and insofar as legislating concerning a future emergency, the written constitution contains no such powers and such power to be exercised with caution. (Erbe and Strauss to Ringgenberg, Res. Bur., 2/9/59) #59-2-19

6.5

Civil defense interim government—Appointment by a member of the

legislature of an interim successor as provided by ch. 89, Acts of the 58th G. A., does not constitute an unconstitutional act and is not a violation of his constitutional oath. (Strauss to Hoschek, St. Sen., 8/3/59) #59-8-5

6.6

Convention—Whether and how the convention is called and the scope of its inquiry depends upon legislative action after an affirmative vote of the people. (Strauss to Halling, St. Rep., 2/26/60) #60-2-28

6.7

Determination of constitutionality of an act of the legislature is a judicial function. (Strauss to Miller, St. Sen., 4/22/59) #59-4-29

6.8

Legislation—Under Art. 111, sec. 29, subject matter of sec. 1, H.F. 684, appears within scope of title to S.F. 532 for purposes of offering an amendment. (Abels to Burtch, St. Rep., 4/16/59) #59-4-19

6.9

Mobile food establishments—A proposed bill (58th G. A., House File 142) adding "vehicles used for delivering and selling foods directly to the consumer" as an additional definition of "food establishment" in Code sec. 170.1(6), does not place such a burden upon interstate commerce as to render the same unconstitutional. (Forrest to Doyle, St. Rep., 2/24/59) #59-2-2

6.10

Religious tests—Barring from qualifying for office by reason of religious training and belief being opposed to war is religious test and barred by Art. I, sec. 4, of the Constitution of the State of Iowa. (Strauss to Gilmour, St. Sen., 3/19/59) #59-3-15

6.11

Shoplifters, unwarranted search—S.F. 3, 58th G. A., will probably withstand attack under sec. 8, Art. I, Iowa Constitution, and sec. 6, Art. I, Iowa Constitution does not appear to be violated. (Strauss to Loveless, Gov., 5/6/59) #59-5-7

CHAPTER 7

CORPORATIONS

STAFF OPINIONS

LETTER OPINIONS

7.1 August 24, 1959

CORPORATIONS: Foreign reports—A foreign profit corporation electing to adopt chapter 321, Acts of the 58th G. A., establishing an alternative method of incorporating in Iowa, is not required to file its annual report due between July 1, and August 1, 1959.

Mr. Melvin D. Synhorst, Secretary of State, Attention Mr. Berry O. Burt:

Dear Sir:

This will acknowledge receipt of yours of the 30th ult. in which you submitted the following:

"Enclosed herewith please find Thermo-fax copy of a letter signed by Robert Valentine wherein Iowa Southern Utilities Company, a foreign corporation, has filed an Election to come under the Iowa Business Corporation Act, said filing being effective July 30, 1959, and the Corporation prior to the filing of the Election to come under the new Corporation Act filed the annual report required by Chapter 496 of the 1958 Code, and said annual report was filed under protest on the contention that under Chapter 496 the annual report is not due until July 31, 1959.

"Your opinion is respectfully requested as to the date the annual report is due under section 496 of the 1958 Iowa Code and as to whether such annual report must be filed prior to a foreign corporation making an election to come under the Iowa Business Corporation Act providing said Election is made before July 31, 1959."

In reply thereto I would advise as follows: The statute that gives rise to the question is chapter 321, section 142(3)(c) setting forth the method by which corporations organized under chapter 491 previously or thereafter may voluntarily elect to adopt the provisions of chapter 321, Acts of the 58th General Assembly, including therein a resolution adopted by the corporation which election insofar as foreign corporations are concerned under subsection (3)(d) of section 142 is accomplished as follows:

"d. As to foreign corporations, such instrument shall be delivered to the secretary of state for filing in his office and the corporation shall at the same time deliver also to the secretary of state for filing in his office any annual report which is then due."

Section 496.1, Code 1958, provides the following:

"*Time of report—requirements.* Any corporation, organized under the laws of this state or under the laws of any other state, territory, or any foreign country, which has complied with the laws of this state relating to the organization of corporations and secured a

certificate of incorporation or permit to transact business in this state, and any corporation that may hereafter organize and become incorporated under the laws of this state, and shall secure a certificate of incorporation or permit to transact business in this state, and any foreign corporation that may hereafter comply with the laws of this state relating to foreign corporations and secure a permit to transact business within this state, shall, between the first day of July and the first day of August of each year, make an annual report to the secretary of state, said report to be in such form as he may prescribe, upon a blank to be prepared by him for that purpose, and such report shall contain the following information.

"1. Name and post-office address of the corporation.

"2. The amount of capital stock authorized.

"3. The amount of capital stock actually issued and outstanding.

"4. Par value of such stock, designating whether preferred or common stock, and the amount of each kind.

"5. The names and post-office addresses of its officers and directors and whether any change of place of business has been made during the year previous to making said report."

The annual report there provided for is claimed on one hand to be an annual report due at the time the foregoing resolution is filed, which claim is on the other hand denied. In my view what is meant by the word "due" as used in the one statute as well as what is meant by the word "between" used in the other statute will determine the question.

It was held in the case of *The Barber Asphalt Paving Company v. Woodbury County, et al.*, 137 Iowa 287, 114 N. W. 1044, that:

" * * * The word 'due' in its primary sense means 'owing.' *Sather Banking Co. v. Briggs Co.*, 138 Cal. 724 (72 Pac. 352); *U. S. v. Bank*, 31 U. S. 29, (8 L. Ed. 308). And, as applied to the statute now before us, the words 'due the city' mean 'owing to.' "

And in the case of *Hawkeye Securities Fire Ins. Co. v. United Investment Company, et al.*, 217 Iowa 644, 255 N. W. 874, it was said:

"The claim of the appellant is that the use of the word 'due' in the portion of the decree above set out is ambiguous, and therefore subject to oral explanation. Defendant argues that, under the statutes of this state, these taxes were not 'due' at the time of the expiration of the year of redemption, which was February 21, 1932. The first question for determination is whether or not the decree is ambiguous because of the use of the word 'due.'

"In 19 C.J. 818, it is said:

" 'According to the consensus of judicial opinion, the word has a double meaning: (1) That the debt or obligation to which it applies has by contract or operation of law become immediately payable; (2) a simple indebtedness, without reference to the time of payment, in which it is synonymous with "owing" and includes all debts whether payable *in praesenti* or *in futuro*.'

"Turning now to the statutes of the state, section 7210, Code 1931, provides:

" 'No demand of taxes shall be necessary, but it shall be the duty of every person subject to taxation to attend at the office of the treasur-

er, at some time between the first Monday in January and the first day of March following, and pay his taxes in full, or one-half thereof before the first day of March succeeding the levy, and the remaining half before the first day of September following.'

"According to section 7147, it is the duty of the county auditor to make up the tax list and deliver the same to the county treasurer on or before the 31st day of December, and such list is sufficient authority for the treasurer to collect the taxes therein levied.

"It is evident, therefore, under these two sections of the Code, that, from the 1st day of January to the 1st day of March following, such taxes are 'owing' by the property owner and may be paid at any time during said period. Under one definition, therefore, as above set out, it may be properly said that these taxes are 'due.' The words 'due' and 'duty' are derived from the same root, according to Webster's International Dictionary, and 'duty' is equivalent to 'payment due.' So far, therefore, this question is easy to answer."

And the word is generally used in connection with indebtedness as owing or payable. "Due" in its larger and general sense signifies that which is owed; that which one contracts to pay, do, or perform to another, including liabilities matured and unmatured, and it may import indebtedness or an existing obligation without reference to day of payment, depending upon the context and evident purpose. *Succession of Brower v. State*, La. App., 80 So. 2d 212, 220. Such is not the situation under examination. A money debt is not involved. A report is involved. It is not payable and in its primary sense it is owed. It is owing according to section 496.1 "between" July 1st and August 1st of any year. Such period of time as adjudicated excludes both of the dates mentioned in the statute. As early as *Robinson v. Foster*, 12 Iowa 186, it was ruled in construing section 1720, Code 1851:

" * * * 'If not served ten days before the then next term, the cause shall stand continued, unless a trial be had by consent of parties.' Under this, by excluding the first and including the last day as directed by §2513, a service on the Friday week before the first day of the term, this service would be in time. The section under consideration, however, has changed the phraseology of the old statute, and indeed is different from that used in the statutes of most of the States on the subject, and the question now is, what construction it shall receive? And upon its face it presents to us but little difficulty. The clear language is, that there must be ten days *between* the day of service and the first day of the term to which the notice is returnable, and that in counting that time, we are not to include the first day of the term. Time *between* two days is that which is intermediate, without computing any part of either of those days to make the same. And it would do great violence to the language used, to say that ten days are left between the service and the term, and yet count one of those days to make the intermediate time. Not only so, but we are justified in saying that in the Revision of 1860, the language of the Code of 1951, has been uniformly followed, except when it was thought advisable to introduce a new rule. In this instance the language has been changed, and as we are bound to suppose, for a purpose."

And see *Winans v. Thorp*, 87 111, App. 297, where it is stated:

" * * * When the word 'between' is used with reference to a period of time bounded by two other specified periods of time, such as between the days named, the days or other periods of time named as boundaries are excluded. (Richardson v. Ford, 14 Ill. 332; Cole-

man v. Keenan, 76 Ill. App. 315; Cook v. Gray, 6 Ind. 335; Atkins v. Insurance Co., 5 Metc. 439; Robinson v. Foster, 12 Iowa 86; Bunce v. Reed, 16 Barb. 347; Fowler v. Rigney, 5 Abb. Pr., N S. 182; 4 Am. & Eng. Ency. of Law (2d Ed.), 9; Anderson's Law Dictionary, title, 'Between.') 'Between' has a like meaning when used with reference to two boundaries in space. (Philadelphia v. C. P. Ry. Co., 151 Pa. St. 128.)"

In the case of *Nash v. Vaughn,* 182 So. 827. It is stated:

" * * * Petitioner contends that at least one week did not elapse between the first and second reading of the ordinance and in support of this contention he cites Hodges v. Filstrup, 94 Fla. 943, 114 So. 521, 523: 'When the word "between" is used with reference to a period of time, bounded by two other specified periods of time, such as between two days named, the days or other periods of time named as boundaries are excluded. Winans v. Thorp, 87 Ill. App. 297, 298; Fowler v. Rigney, 5 Abb. Prac. (N. S.) (N. Y.) 182, 184; Cook v. Gray, 6 Ind. 335, 337; Bunce v. Reed, 16 Barb. N. Y. 347, 352; Robinson v. Foster, 12 Iowa 186, 188. "The word 'between,' when used in speaking of the period of time 'between' two certain days generally excludes the days designated as the commencement and termination of such period."' (Citing cases.)"

In this state of the law I am of the opinion that the report required by section 496.1, Code 1958, was due at any time between July 1st and July 31st, both dates inclusive, and therefore the report was not due under the terms of chapter 321, section 142(3)(d), 58th G. A., at the time when the election of the Iowa Southern Utilities Company was filed in the office of the secretary of state on the 30th day of July, 1959.

7.2

CORPORATIONS: Foreign, reports—A foreign profit corporation authorized to do business in Iowa on July 21, 1958, is not under the exemption provided by section 496.3, Code 1958, required to file its annual report until July 1, 1960, and such corporation, if it elects to adopt chapter 321, Acts of the 58th G. A., is not required to file such report until a time between January 1, 1960 and March 1, 1960.

Mr. Melvin D. Synhorst, Secretary of State, Attention Mr. Berry O. Burt:

Dear Sir:

This will acknowledge receipt of yours of the 30th ult. in which you submitted the following:

"Enclosed herewith please find a Thermo-fax copy of a four page letter from the firm of Gibson, Stewart and Garrett, Attorneys, requesting an opinion concerning the Voluntary Election of a foreign corporation to come under the law effective July 4, 1959, entitled Chapter 321 of the Acts of the 58th General Assembly. The problem is set forth in the letter attached.

"To further clarify the questions asked the problem is two-fold and as follows:

"1. A foreign corporation having a permit to do business in Iowa under Chapter 494 of the 1958 Code during the period from July 4 to, but not including, September 1 of 1959 has filed a Voluntary Election to come under the Iowa Business Corporation Act effective July 4, 1959, by complying with Section 142 of the new Act.

"Section 142, subsection 3, subparagraph 'D' provides that the foreign corporation upon filing the Voluntary Election to come under the new law shall at the same time file any annual report which is then due.

"Section 496.1 of the 1958 Code states that a foreign corporation shall file an annual report with the Secretary of State between the first day of July and the first day of August. The question therefore is whether this report provided by Section 496.1 is an annual report which is due and must be submitted before a foreign corporation is allowed to make the Voluntary Changeover to come under the new Corporation Act by following the procedures set forth in Section 142 of the Act.

"2. In the instant case an additional problem arises and your opinion is respectfully requested as to whether annual report as provided in Chapter 496 is required of a corporation which secured a permit to do business in Iowa on July 21, 1958 as Chapter 496.3 provides that a foreign corporation filed after the first day of April of any year is exempt from filing the annual report for a period of one year from the first day of July following. In other words, the instant corporation contends that since it secured its permit on July 21, 1958 that it should not be required to file an annual report until July 1, 1960.

"Your opinion is respectfully requested and if we may be of further assistance please call upon us."

In reply thereto I would advise as follows:

1. Insofar as the question propounded by section 1 of your letter, the first paragraph of which states the following:

"1. A foreign corporation having a permit to do business in Iowa under Chapter 494 of the 1958 Code during the period from July 4 to, but not including, September 1 of 1959 has filed a Voluntary Election to come under the Iowa Business Corporation Act effective July 4, 1959, by complying with Section 142 of the new Act."

my view of the foregoing situation is set forth in a letter of even date addressed to you, copy of which is attached hereto, and by this reference made a part hereof. Application of the views there expressed to the situation presented, results in the conclusion that this election having been filed on or before July 30, 1959, the annual report provided by section 496.1, Code 1958, was not due at the time of such election.

2. In answer to your question #2 I would advise that section 496.3, Code 1958, provides the following modification or exemption insofar as the filing of a report from a foreign corporation is concerned that secured its permit after April 1st of any year:

"*Exemption.* Any corporation organized under the laws of this state, and any foreign corporation filing a certified copy of its articles of incorporation after the first day of April of any year, shall be exempt from the provisions of this chapter, for the period ending one year from the first day of July following, after which it shall be subject to all the provisions of this chapter."

it appears that this unnamed corporation secured its permit on July 28, 1959. It is obvious that chapter 496, Code 1958, controls this filing: that the first report due thereafter would be July 1, 1960. If it had not made an election to adopt the corporation act of 1959. However, having

adopted the corporation act of 1957, being chapter 321, Acts of the 58th General Assembly, on July of 1959, it is required to make its report between January 1st and March 1st, 1960.

7.3

Articles amended—Those existent at the effective date of ch. 338, Acts of the 58th G. A., in order to take advantage of the revision of building and loan law (Ch. 338, Acts of the 58th G.A.) are required to accept such revision by amendment. (Strauss to Akers, St. Aud., 9/28/59) #59-10-5

7.4

Dissolution of co-operative associations—Under sec. 499.47(3) county recorder is required to record dissolution of co-operative association at the usual fee charged for such recording. (Rehmann to Gray, Calhoun Co. Atty., 6/22/59) #59-6-16

7.5

Foreign—bidders—Qualification of a foreign corporation is not a prerequisite to bidding upon public work, but contract results from acceptance of the bid and thereafter sec. 120 of ch. 321, Acts of the 58th G. A., is applicable. (Strauss to Maggert, Capitol Supt., 11/5/59) #59-11-27

7.6

Practice of architecture—Articles of incorporation authorizing the engagement of the corporation in the practice of architecture without a certificate of registration therefor, do not conform to law. (Strauss to Synhorst, Secy. of St., 1/13/60) #60-1-8

7.7

Rebates to stockholders—In profit corporations organized under ch. 491, Code 1958, a money rebate to stockholders in proportion to the volume of business that the individual stockholder does with the corporation is unauthorized. (Strauss to Synhorst, Secy. of St., 6/15/59) #59-6-10

CHAPTER 8

COUNTIES AND COUNTY OFFICERS

STAFF OPINIONS

LETTER OPINIONS

8.1 June 24, 1959

COUNTIES AND COUNTY OFFICERS: *Recorders*—Have no authority to pass upon legality of instruments, or the acknowledgment when the instrument is being offered for recording.

1. Under House Files 19, 81, and 443, 58th G.A., the recorder would have no authority to accept for recording, instruments not bearing typed or legibly-printed names of the signers thereon to be accompanied by affidavit correctly spelling the legibly-typed signatures, which affidavit may not be recorded at a later date. The filing of a chattel mortgage is not within the terms of the statute and the filing fee for filing the instrument will not exceed $1.50 for the first page or fraction thereof and for each additional page not in excess of $1.00.

2. The county treasurer is authorized to file lien for taxes with the county recorder against any owner of taxable personal property about to remove from the county or dispose of his property without payment of filing fees.

3. The county recorder, being a ministerial officer having no knowledge of the foreign law, has no authority to question the legality of an acknowledgment taken in conformity with the laws of a foreign state.

Mr. Chet B. Akers, Auditor of State: This will acknowledge receipt of yours of the 22nd inst. in which you submitted the following:

"We have received the following inquiries regarding the new laws for county recorders:

"1. Does the recorder have to accept instruments that do not have typed or legibly-printed names of all signers thereon? Can the affidavit be filed later for recordation? Does this include the filing of chattel mortgages?

"The fee for part of a first page should be $1.50 and $1.00 for each additional page when photostatic, photographic or similar processes are in use. Is this the proper charge the recorder should make?

"2. What should be charged, if any, for notice of tax lien filed by the treasurer as provided by H.F. 81?

"3. H. F. 443. If an instrument affecting real estate in this state has been acknowledged in a foreign country, should the recorder question the acknowledgment since he would have no knowledge of foreign laws?"

In reply thereto I advise as follows:

1. The statute under which your question #1 arises is House File 19, 58th General Assembly, providing as follows:

"Section 1. Section three hundred thirty-five point two (335.2), Code 1958, is hereby amended by adding thereto the following:

"'All instruments filed for recordation with the recorder shall have typed or legibly printed the names of all signers thereon, excluding those of the acknowledging officers and witnesses, beneath the original signatures; provided, however, that in the event that such instrument does not contain such typed or printed names, the recorder shall accept such instrument for recordation if accompanied by an affidavit, for record with the instrument, correctly spelling in legible print or type the signatures appearing on said instrument. This requirement shall not apply to military discharges or military instruments, nor to wills or court records, or to any other instrument dated prior to the effective date of this Act. Failure to print or type signatures as herein designated shall not invalidate the instrument.'

"Sec. 2. Section three hundred thirty-five point fourteen (335.14), subsection two (2), Code 1958, is hereby amended by striking the period (.) at the end thereof and inserting a semicolon (;) in lieu thereof and adding thereto the following: 'provided in those counties where photostatic, photographic or other similar processes are in use, the fees shall not exceed one dollar fifty cents ($1.50) for the first page or fraction thereof of any instrument and one dollar ($1.00) for each additional page.'"

In answer to your question, I am of the opinion that the recorder would have no authority to accept instruments for recording that do not have typed or legibly printed the names of all signers thereon or, as a substitute therefor, the instrument to be accompanied by an affidavit correctly spelling in legible print or type the signatures appearing upon said instrument. Such affidavit must accompany the instrument offered for

recording. Unless such affidavit is filed at the time of the recording of the instrument the affidavit is not entitled to be recorded later. The filing of a chattel mortgage is not within the terms of the foregoing statute. Filing of a chattel mortgage is not a recording thereof. There are different methods of giving notice. See section 556.3, et seq., Code 1958. The filing fees for the instrument as stated by the statute insofar as the first page or fraction of the instrument is concerned shall not exceed $1.50 and for each additional page not in excess of $1.00.

2. With reference to your question #2, I would advise that the question arises out of the provisions of House File 81, 58th General Assembly, providing as follows:

"Section 1. Chapter four hundred forty-five (445), Code 1958, is hereby amended by adding the following section:

" 'Whenever the county treasurer shall have reason to believe that any owner of taxable personal property, who is a resident of the state of Iowa and against whom personal property taxes have been assessed, is about to remove from the county or is about to dispose of his personal property, he shall immediately regard and declare the taxes due and payable, shall file a notice of such lien with the county recorder, and shall proceed immediately to collect such taxes, together with costs and any interest and penalty that may be due, by distress and sale of the personal property so assessed which is not exempt from taxation. In the event the county treasurer proceeds to collect such taxes prior to date of levy, the amount of such taxes shall be presumed to be the taxable value of such property multiplied by the tax rate established at the date of levy next preceding.'

"Sec. 2. Section four hundred forty-five point twenty-nine (445.29), Code 1958, is amended by striking from lines twenty-three (23) and twenty-four (24) thereof the words, 'whose personal property tax is delinquent.' and inserting in lieu thereof the following: ', such lien to relate back to and exist from the first day of January of the year in which such personal property is assessed. Such a lien shall not be effective or applicable, however, as against the rights of purchasers or mortgagees who acquired an interest in or a lien against real estate owned by the resident against whom such tax is assessed before the date that the treasurer files notice of such lien.' "

The Act itself provides for no fee to be paid for the filing of the notice and according to opinion of this department appearing in the report for 1928 at page 75, where no specific statute fixing a charge is applicable it is a universal custom not to charge recording fees for public records and all public business should be recorded free of charge.

3. The question involved in your question #3 arises out of the contents of House File 443, providing as follows:

"Section 1. Section five hundred fifty-eight point nine (558.9), Code 1958, is hereby amended by adding the following paragraph:

" 'Any instrument affecting real estate situated in this state which has been or may be acknowledged or proved in a foreign state or country and in conformity with the laws of that foreign state or country, shall be deemed as good and valid in law as though acknowledged or proved in conformity with the existing laws of this state.' "

In answer thereto I am of the opinion that the recorder has no authority to question the legality of such an acknowledgment because, first, he is a ministerial officer and not charged with the duty and power of

passing upon the legality of instruments or acknowledgments offered for recording, and, secondly, having no knowledge of the foreign law under which the foreign acknowledgment was made, he would be unable to pass on either the legality or illegality of such an acknowledgment made to an instrument offered for recording.

8.2 September 24, 1959

COUNTIES: Jails—Under Code section 337.11 (11), confinement in jail from before midnight until the following morning is not two nights lodging.

Mr. Robert D. Parkin, Jefferson County Attorney: Receipt is acknowledged of your letter of September 21 as follows:

"Query has been made unto me as County Attorney by the County Board of Supervisors relative to an interpretation of Section 337.11 (11) relative to lodging of prisoners in the Jefferson County Jail. It has been the practice and habit of the sheriffs of Jefferson County, Iowa to bill the County for two nights' lodging wherein an individual is confined to Jail prior to 12:00 o'clock P.M. midnight and released therefrom the next day during daylight hours.

"The Board of Supervisors of Jefferson County, Iowa asked for my interpretation of this statute, and it is my opinion that this particular statute stating, 'and fifteen cents for each night's lodging', means that as each night contained within a twenty-four hour period. If you will note the sentence preceding the one herein in quotation marks, the statute states that meals are determined during a twenty-four consecutive hour period.

"At page 241, Volume 17 of the Iowa Code Annotated, there appears a reference to an Attorney General's Opinion of 1934 at Page 747 by your office stating that there was to be allowed fifteen cents for each prisoner for each night's lodging.

"I am wondering if a perusal of that Opinion by your office and an interpretation of the Section above cited does not mean as follows:

"1. Each night is to be considered as night-time, or darkness, wherein the prisoner is lodged from those hours prior to midnight until the early morning hours of the following day and is interpreted as one night, rather than that one night should end at 12:01 A. M."

Essentially your question is, "how long is a night for purposes of defining a 'night's lodging'?" The 1934 opinion to which you refer does not answer that question and it therefore becomes necessary to look elsewhere. Statutes will, if fairly possible, be construed so as to avoid unreasonable or absurd consequences—*State ex rel Pieper v. Patterson*, 246 Iowa 1129, 70 N.W. 2d 838. "Words and phrases shall be construed according to the context and approved usage of the language . . . ."—(Section 4.1, Code of Iowa.)

There is nothing uncommon about the phrase, "night's lodging." I believe Duncan Hines has written a book having substantially that title, *Lodging for a Night.* One who stops for a night's lodging at a hotel or motel needs no expert guidance to understand and know the meaning of the term and we may be assured that the weary motorist who arrives at a motel seeking a night's lodging would react promptly and anti-

socially if presented with a bill for *two* nights' lodging upon preparing to depart the following morning.

Although it appears no court has been called upon to judicially define the phrase "night's lodging," the words "night" and "nighttime" have been variously defined as meaning, "after sundown," "between darkness and dawn," "between sunset and sunrise."

You are therefore advised that for purposes of Code section 337.11 (11), where an individual has been lodged in jail prior to 12:00 midnight and is released the following morning, he has not been given two nights' lodging. I am in substantial agreement with the definition arrived at by you in your above-quoted letter.

8.3 November 19, 1959

COUNTIES: Domestic animal fund—The domestic animal fund created by chapter 352, Code 1958, is not available to an owner of sheep injured by dogs where his claim has been paid by an insurance carrier, nor is the carrier entitled to any right of subrogation.

Mr. Richard H. Wright, Davis County Attorney: This will acknowledge receipt of yours of the 10th inst. in which you submitted the following:

"Would like to submit herewith formal request for attorney general's opinion with regard to the interpretation of Chapter 352 CODE OF IOWA (1958), which in general deals with and covers the domestic animal fund. My question is a rather narrow one and arises from a situation where a farmer has insurance covering loss or destruction of animals, specifically sheep by dogs. The farmer recovered for his loss from the insurance company and the Board of Supervisors in processing the claims denied payment of the claim on the ground that the farmer had already been reimbursed.

"The question is as follows:

" 'When the owner of domestic animals, injured or killed by dogs, not owned by said owner, recovers his damages from a private insurance carrier, on insurance purchased by the owner, is the insurance company subrogated to the rights of the owner and is the owner or the insurance company entitled to recover reimbursement for the injuries or loss of said domestic animals under Chapter 352?'

"In general the fact situation is that a farm owner of sheep sustained damages and loss of sheep by dogs not owned by the owner. At the time of the loss the owner had insurance and reported the loss to the insurance company; received reimbursement for his damages; filed claim with the County Auditor for reimbursement of the loss under Chapter 352 and the claim under Chapter 352 was then denied by the County Board of Supervisors because the owner had already been reimbursed for his damages.

"In the past our County Auditor has talked over this very matter with an Auditor from the State Office who was then in the process of auditing the books for Davis County. This Auditor advised our County Auditor that the claims should not be allowed where the person had been reimbursed by insurance for loss or damage to his animals.

"It has been a problem which has been recurring more recently due to

the purchase of more insurance throughout the county and I would very much appreciate a formal ruling or opinion on this matter, and would then relay that information to the Board of Supervisors and Auditor and they could then process their claims accordingly."

In reply thereto I would advise you in my opinion neither the owner of the sheep is entitled to recover damages out of the domestic animal fund, nor is the insurance carrier that underwrote the owner's risk entitled to assert any subrogation right against this fund. Support is found for this conclusion in the intention of the legislature in the enactmet of the law in the establishment of the fund as described in the following case statements:

In the case of *Hodges v. Tama County*, 91 Iowa 578, 580, 60 N. W. 185, it is said:

"The evident purpose of said chapter 70 is to provide a fund by collecting a tax on dogs, out of which to indemnify those whose domestic animals are killed or injured by the dog or dogs of another, when the owner is unknown, or, if known, has no property subject to execution, out of which the claim can be made. If the owner of the dog is known, and has property subject to execution, out of which the claim can be made, the parties are left to their rights, under the common law. It is only when the owner is unknown, or unable to respond in damages, that the injured party is entitled to indemnity out of this special fund, and then, not because of any common law liability upon the part of the county, but solely because of the provisions of said chapter 70. Such claims are not, strictly speaking, claims against the county, but against the domestic animal fund. The injured party is not entitled to share in that fund until he has established his claim by proofs satisfactory to the board and then only to share pro rata, if the fund is insufficient to pay all such claims.

"It is certainly clear that the rights given and the liability created by said chapter 70 are exclusively statutory. Said statute expressly provides that the board of supervisors shall hear and determine said claims, and impose, upon the claimant the burden of establishing certain facts to the satisfaction of said board 'by proof before the board.' Said chapter not only gives a right and creates a liability which did not exist at common law, but provides a special tribunal, namely, the board of supervisors, before which the right must be asserted and the liability ascertained. In *Cole v. City of Muscatine*, 14 Iowa 296, this court held as follows: 'Where a statute gives a right and creates a liability which did not exist at common law, the statute at the same time provides a specific mode, and that alone must be pursued.' See *Lease v. Vance*, 28 Iowa 509. Claims under said chapter 70 are unlike ordinary claims against the county, in that they are not for any wrong done by the county, or for a debt against it, but rest solely upon the right to be indemnified out of a special fund. The power of the board with respect to such claims is also different, in that it is authorized to hear evidence, and to determine the rights of the claimant."

And from the case of *Ellis v. Oliphant*, 159 Iowa 514, 141 N.W. 415, I quote: (pp. 519, 520)

"The domestic animal fund is created by a general dog tax, made to meet claims for damages to domestic animals, etc. This law is not cumulative in character, but creates a special fund to meet particular claims for damages, and although but 90 per cent of the damages are to be paid, it is said that if one elects to rely upon these special provisions, he must be held to have waived any other remedy. Defendant, however, insists that he had the right to resort to this fund and also to recover the balance

of his damages from the person, or persons, owning the dog. Acting upon this assumption, he gave plaintiff credit for the sum of $36, being the amount received from the county. His claim against the county was for $60, and his prayer for damages in his counterclaim was for $144.50. In this connection plaintiff says that whatever claim defendant may have had now belongs to the county, because, having paid the debt, it is entitled to be subrogated to any remedy defendant may have had against the plaintiff. No attention need be paid to this issue, for if defendant's claim has been paid, or if he is concluded by his election, the case, so far as the counterclaim is concerned, is at an end. There is not subrogation in favor of the county, except, perhaps, to an extent necessary to protect it, nor in any event, unless it has paid defendant's claim in full; and, if it has done that, defendant has no further remedy. Nothing more need be said of the claim of subrogation.

"In filing his claim with the county board, defendant included all his then demands for damages, and there is nothing to show that they have since been augmented. He knew that he could not have the full amount of his claim, and he also knew that if he elected to sue the owner of the dog and had judgment against him, he could not recover from the county. The domestic animal fund was contributed by the owners of all dogs, and could be resorted to whether the injured party knew the owners of the dogs, or not. If in doubt about the ownership of the dogs, or of his ability to prove that ownership, or to recover full compensation for his injuries, he had before him the simple remedy of filing his claims for damages. The board took up his claim and, as we understand it, allowed defendant $36, in effect finding the actual damages suffered by him to be $40. Defendant now says that his damages were $144.50, and that the finding of the board of supervisors was erroneous, and that all required of him now is that he give plaintiff credit for the amount he received. This proposition does not seem to be sound in principle or supported by authority."

8.4 December 10, 1959

COUNTIES: Recording fees—Section 335.14 as amended must be construed as though the amendment were part of the original act.

Mr. William Pappas, Cerro Gordo County Attorney: Receipt is acknowledged of your letter of December 3 as follows:

"Apparently there has been some misunderstanding as to the effect of Chapter 255 of the Acts of the Fifty-eighth General Assembly in so far as it amends 335.14 of the Code.

"The Cerro Gordo County Recorder uses a photographic process and has been charging, ever since the amendment went into effect, the sum of $1.50 for the first page and $1.00 for each additional page of any instrument. It is my understanding that Chapter 255 merely places a ceiling on the amount that a recorder may charge but the provision as to a charge on the basis of words is still effective.

"In other words, it is my thought that an instrument containing less than 400 words still may be recorded for a fee of $1.00 and that the basic charge still cannot exceed $1.00 for every 400 words plus 20c for each additional 100 words.

"To clear up this discrepancy, and to satisfy our recorder, as well as any other recorders that may be in doubt, could I have your opinion as to the effect of Chapter 255 of the Acts of the Fifty-eighth General Assembly in so far as it amends Section 335.14."

Similar inquiry has been received from the committee on legal forms of the Iowa State Bar Association. This will serve as answer to both inquiries.

Section 335.14, Code 1958, provides as follows:

"Fees. The recorder shall charge and collect the following fees:

1. For recording each instrument containing four hundred words or less, one dollar.

2. For every additional hundred words or fraction thereof, twenty cents.

3. For the marginal assignment or release of any instrument (except those made by the clerk of the district court), fifty cents."

Chapter 255, section 2, Acts of the 58th G.A., provides as follows:

"Section three hundred thirty-five point fourteen (335.14), subsection two (2), Code 1958, is hereby amended by striking the period (.) at the end thereof and inserting a semicolon (;) in lieu thereof and adding thereto the following: 'provided in those counties where photostatic, photographic or other similar processes are in use, the fees shall not exceed one dollar fifty cents ($1.50) for the first page or fraction thereof of any instrument and one dollar ($1.00) for each additional page.'"

Various questions arising under the 1959 amendment have been considered in letter opinions of this office. In an opinion directed to the auditor of state under date of June 24, 1959, it was said, "The filing fees for the instrument as stated by the statute insofar as the first page or fraction of the instrument is concerned shall not exceed $1.50 and for each additional page not in excess of $1.00. In a letter directed to Mr. Edward N. Wehr, Assistant Scott County Attorney, under date of July 28, 1959, it was said:

"In view of the fact that the word 'page' is used only with reference to matter to be copied by 'photostatic, photographic, or other similar process,' it is my impression the legislature intended by use of the word 'page' to refer to each separate piece of paper to be copied by such process. In other words, the work and cost of making a picture of a piece of paper is not affected by the number of typed or written lines on such piece of paper. The work and cost of making a written or typed copy would be affected by the number of lines to be copied by typewriter or other manual process. The fee, presumably, bears some relation to the work and cost involved in making the record. Therefore, the reference in the amendment is to pages (pieces of paper) rather than words or lines, where means of reproduction other than manual are used."

Thus, in prior opinions, this office has pointed out that for purposes of the 1959 amendment a "page" is a piece of paper to be copied and that the fee for such copying *shall not exceed* $1.50 for the first page and $1.00 for the second page. You now ask the further question as to the effect of the amendment upon the original rates which remain unrepealed and are stated in general language capable of encompassing all methods of copying, photostatic as well as manual.

The answer to this question is furnished by answering two preliminary questions:

1. Is the amendment to be construed as an independent act or as part of the original act?

2. What is the effect of the phrase, "not to exceed" as used in the amendment?

The answer to the preliminary questions is furnished in part by the decision of the supreme court of Iowa in the case of *State ex rel Board of Pharmacy Examiners v. McEwen*, 96 N.W. 2d 189, 191:

"Plaintiff contends due to the use of the words 'For the purpose of this Act' in subsection 7, of section 1, the legislature intended to restrict the definitions therein to only the provisions being enacted by Chapter 96, Acts of the 57th General Assembly. Defendant contends that when these words appear in the section amended (Section 155.3), it is equivalent to re-enacting the whole section which starts out 'For the purpose of this Chapter,' and that the words 'For the purposes of this Act' refer to the original Act . . .

"In construing any particular clause or words in a statute, it is especially necessary to examine and consider the whole statute, including the title, and gather, if possible, from the whole the expressed intention of the legislature. It cannot be resolved from isolated words taken out of context. *Dingman v. City of Council Bluffs, Iowa*, 90 N.W. 2d 742 and citations; *Spencer Publishing Company v. Spencer, Iowa*, 92 N.W. 2d 633 and citations; *City of Nevada v. Slemmons*, 244 Iowa 1068, 59 N.W. 2d 793, 43 ALR 2d 693; *In re Guardianship of Wiley*, 239 Iowa 1225, 34 N.W. 2d 593; *Board of Directors of Menlo v. Blakesley*, 240 Iowa 910, 36 N.W. 2d 751; *Sinclair Refining Co. v. Burch*, 235 Iowa 594, 16 N.W. 2d 359 . . ."

And at page 193:

"In addition, in this jurisdiction we have adopted the rule that an amendment to a statute will be construed as though such amendment was a part of the statute when it was originally enacted. *Spencer Publishing Company v. Spencer*, supra. On page 636 of 92 N.W. 2d we said: 'The rule is well settled that an amended act is ordinarily to be construed as if the original statute has been repealed, and a new and independent act in the amended form had been adopted in its stead. *Benschoter v. Hakes*, 232 Iowa 1354, 1359, 8 N.W. 2d 481, 485.' "

Thus, section 335.14 is to be read as though the 1959 amendment had been part of the original enactment. It follows, the phrase "not exceed" must be read in the light of the entire section as amended and not merely within the framework of the amendment itself. "Not to exceed" implies a legislative intent that the fee in question will not *always* be $1.50 for the first page and $1.00 for each additional page. How, then, is a lesser fee arrived at? Certainly the recorder cannot compute a lesser fee as nowhere in the entire statute is authority or formula for such reduction by the recorder or any other public officer set forth. The recorder (and other county officers) are "creatures of statute with only those powers conferred by statute."

Therefore, assuming that the words "not to exceed" mean something, which assumption is warranted in view of the holdings in *State ex rel Peiper v. Patterson*, 246 Iowa 1129, 70 N.W. 2d 838; *Davis v. Davis*, 246 Iowa 262, 67 N.W. 2d 566; *Holzhauser v. Iowa State Tax Commission*, 245 Iowa 525, 62 N.W. 2d 299; *Wolf's v. Iowa Employment Security Commission*, 244 Iowa 999, 59 N.W. 2d 216; *Chappell v. Board*, 241 Iowa 230, 39 N.W. 2d 628; *Coggeshall v. City of Des Moines*, 138 Iowa 730, 117 N.W. 309; *In re Van Vechten's Estate*, 218 Iowa 229, 251 N.W. 729, it is necessary to consider all of section 335.14 as amended in order to determine that meaning.

Considering the amended statute from its four corners, it appears the only way meaning can be given to the phrase, "not to exceed" is by considering the original and unrepealed provisions of subsections 1 and 2 as of continuing applicability to all instruments including those copied by photostatic means. In other words, under subsection 1 of section 335.14 the fee for recording an instrument of four hundred words or less will always be $1.00 irrespective of the number of pages or pieces of paper the four hundred words are spread upon and irrespective of whether the copy for record be made by goose-quill, typewriter or photostat. By the same token, under subsection 2 where the instrument exceeds four hundred words but is entirely on one page (piece of paper) each additional two hundred words upon that page will increase the fee by twenty cents until the maximum of $1.50 is reached. Thus, the first page of an instrument photostated for record may cost anywhere from $1.00 to $1.50 but will never cost more than $1.50 even though it contains in excess of seven hundred words.

The same would be true of an instrument in excess of four hundred words occupying more than one page. Suppose for example an instrument contained five hundred words on the first page, five hundred words on the second page, six hundred words on the third page and one hundred words on the fourth page. The fee for recording by photostatic means would be $1.20 for the first page ($1.00 for the first four hundred words plus twenty cents for the extra one hundred words). For the second page, the fee would be $1.00 (five times one hundred words at twenty cents per hundred). The fee for the third page would also be $1.00 for the reason that the cost for an additional page may not exceed $1.00. The fee for the fourth page would be twenty cents.

We trust the foregoing illustrations clarify the answer to your question.

8.5 January 6, 1960

COUNTIES: Mentally-ill—care of—disclosing names—Under chapter 230, Code of Iowa, the names of mentally-ill persons being cared for at public expense must be disclosed to county boards of supervisors.

Mr. Donald L. Nelson, Story County Attorney, Nevada, Iowa:

We have your favor of recent date in which you request an opinion of this office upon the following matter:

"Story County Mental Health Center opened in Ames in July. In October it extended its services to Boone and Hamilton County. As you know, it receives a large percentage of its support from the County Boards of Supervisors. The Deputy Auditor ruled, with approval from your office, that lump sums should not be paid but should be on a per patient basis. It was also agreed that it would not be necessary to give names but use a case number. Story, Boone and Hamilton supervisors feel they should get the names of patients treated at the Center. * * *

"We would like a ruling from your office about the legality of releasing these names to the Boards of Supervisors."

In reply thereto we advise as follows:

Chapter 230, Code of Iowa 1958, sets forth the law as to the support

of the insane, now designated as "mentally ill" as amended by chapter 152, Laws of the 58th General Assembly.

County boards of supervisors are authorized to expend public funds for the psychiatric examination and treatment of mentally-ill persons in community mental health centers. (See section 230.24 of the Code.)

In addition thereto a county has a lien on any real estate of such person or the spouse. (Section 230.25) Also a claim against the estate of such person upon death. (Sections 230.28 and 230.30) And a claim also against any other person legally liable for their support as defined in section 230.15.

In order to avail themselves of these remedies, county boards of supervisors must be apprised of the names of persons being aided under said law and the names of any other persons legally liable.

Therefore it is our opinion that such mental health centers should and must reveal the names of patients being treated in such centers at public expense (to the board of supervisors).

8.6 January 11, 1960

COUNTIES: Assistance to recorder and clerk of court—Code section 341.8 applies only to the auditor; under 341.1, approving resolution of supervisors may not be supplied by ratification.

Hon. Harold O. Fischer, State Representative, Wellsburg, Iowa: Receipt is acknoweldged of your letter of November 25, as follows:

> "A person who holds a county office was recently criticized by the Board of Supervisors for hiring an extra assistant in his office while he was gone on vacation without first procuring approval by the Board. Chapter 341 covers temporary assistance for county attorneys and auditors but makes no mention of the other county offices. Would you say that 341.8 would apply also for temporary assistance to the recorder or clerk of court or just what would your opinion be in a case of this kind?"

Section 341.8 provides as follows:

> "Temporary assistance for county auditor. In case no deputy shall be appointed, but on account of the pressure of business in his office the auditor is compelled temporarily to employ assistants, he shall file the bill for such services with the board of supervisors at their next regular meeting and it shall make a reasonable allowance therefor."

Under the rule of construction *expressio unius est exclusio alteruis,* the quoted section can be applied only to the auditor.

Section 341.8 governs the appointment of assistants in the office named in your letter and requires approval of each appointment by resolution of the board of supervisors.

In some instances the doctrine of ratification would permit approval by the board after the act. However the doctrine of ratification does not apply where, as here, there is a want of power in the public officer to

perform the original act—43 Am. Jur. 74, § 257; 58 Ill. 44, 87 Am. Dec. 282; 306 S.W. 2d 699 (Ark.) 222 Minn. 41, 23 N.W. 2d 22.

8.7 **January 11, 1960**

COUNTIES: Zoning—

1. Under Code section 358A.6, the proposed ordinance, change, or amendment must be published, either in full or in sufficient detail to apprise objectors they have something about which to object.

2. Publications need not be made in all of the official newspapers of the county as required in Code section 349.16.

Mr. Donald L. Larson, Story County Attorney, Nevada, Iowa, Attention George R. Larson, Assistant County Attorney: Receipt is acknowledged of your letter of December 11 as follows:

"A question has been asked of our office by the Story County Board of Supervisors as to whether a county, in adopting a zoning ordinance pursuant to the above mentioned statute, would have to publish the ordinance.

"We have read the case of *Gannett v. Cook,* 245 Iowa 750, in which case the Court stated that although a county is distinguishable from a municipal corporation, it is treated the same in such legislation as is here involved, i.e., Chapter 358A of the 1954 Code of Iowa.

"The County Zoning Enabling Act is silent as respects publication and the local Board of Supervisors hesitates to incur the cost of publication unless the rule of law would require it.

"In the event publication must be had before a county zoning ordinance becomes effective, the question arises as to whether publication must be had in all three of the county's official papers, or whether publication in one of such official papers would be sufficient?"

The pertinent statute appears to be Code section 358A.6 which provides as follows:

"Public hearings. The board of supervisors shall provide for the manner in which such regulations and restrictions and the boundaries of such districts shall be determined, established, and enforced, and from time to time amended, supplemented or changed. However, no such regulation, restriction, or boundary shall become effective until after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. At least fifteen days notice of the time and place of such hearing shall be published in a paper of general circulation in such county."

"Notice" means "fair notice." Whatever is "notice" enough to excite attention and put a reasonably-prudent person upon his guard and calls for inquiry is notice of everything to which such inquiry might have led.—*Winstead v. Shank,* 173 P. 1041; *Wapa Oil Co. v. McBride,* 201 P. 984 and other cases cited at 28A W & P 506.

The notice required to be published under the provisions of section 358A.6 must, therefore, contain enough information to inform one who

may object to the proposed regulations, restrictions, or boundary changes that he has something to object about. Publication of the entire ordinance, change, or amendment would, no doubt, so inform him. Whether something less than the full text would so inform him would depend on the facts of each case. No other publication requirement than that set forth in section 358A.6 appears in chapter 358A.

However, in the exercise of powers conferred by chapter 358A, the board of supervisors acts as an ex officio commission. It is a zoning board or commission with identical membership as the board of supervisors. This being the case, it is not necessary to comply with the general statutes governing proceedings by the board of supervisors, in addition to the provisions of chapter 358A. Code sections 349.16 and 349.18 requiring publication in all official newspapers of all proceedings of the board of supervisors are not applicable.

In answer to your questions, you are accordingly advised:

1. Under section 358A.6, the proposed ordinance, change, or amendment must be published, either in full or in sufficient detail to apprise objectors that they have something to object about.

2. The above publication need not be made in all of the official newspapers of the county.

8.8 February 16, 1960

COUNTIES: Liens—Under Code section 230.25, no lien attaches to the property of a voluntary patient or spouse of a patient receiving treatment at a community mental health center under Code section 230.24, where such patient has not been committed to the mental health center.

Paul E. Huston, M.D., Director Iowa Mental Health Authority, Local: Receipt is acknowledged of your letter of February 15 as follows:

> "There are twelve Community Mental Health Centers in Iowa receiving about half of their support from the Mental Health Fund of twenty-six counties served.
>
> "According to Code of Iowa 1958, Section 230.24, a levy of not to exceed three-eighths mill from the County Mental Health Fund may be made for psychiatric treatment and care in a Community Mental Health Center. These patients, half of whom are children, are living in their homes and come into the center usually for an appointment of one hour weekly, and return to their homes, school, or employment. All come voluntarily and there is no commitment procedure whatever.
>
> "Code of Iowa Section 230.25, Lien of Assistance, provides 'Any assistance furnished under this chapter shall be and constitute a lien on any real estate owned by the person committed to such institution or owned by either the husband or the wife of such person.'
>
> "We would like a ruling from your office on whether the above section makes it mandatory for a lien on any real estate owned by the patient or others liable."

In an opinion which appears at page 135 of the 1950 *Report of the Attorney General,* the following statement is made with respect to the lien provided in Code section 230.25:

"It is apparent, therefore, that the statutory lien in question is one which creates a right where no such right existed at common law. Such statutes are required to be strictly construed and a lien created thereby is limited in operation and extent by the terms of the statute. It can arise and be enforced only in the event and under the facts provided for in the statute. See 33 Am. Jur. p. 432, Sec. 26, *Forst v. Atwood*, 73 Mich. 67, 41 N.W. 96 and *Howard v. Burke*, 176 Iowa 123, 157 N.W. 744."

Since it is stated as a matter of fact in your letter that "*there is no commitment procedure whatsoever*," it follows that no lien could attach to real estate owned by such patient or the spouse of such patient under Code section 230.25, for the reason that said statute must be strictly construed and by its own express terms it is limited to *committed* patients.

8.9 April 19, 1960

COUNTIES: Supervisor—candidates, residence—

1. Chapter 252, Laws of the 58th G.A. and Code section 39.19(2) cannot be construed together.

2. No relevancy or pertinency between the repeal by implication of Code section 39.19(2) and the situation covered by Code section 39.19(1), repeal of which is neither express nor implied.

3. Disqualification of a candidate occurs at the time of election and becomes effective at the time of taking office.

4. The March 14, 1960 opinion of the attorney general has no effect upon present members of the boards of supervisors elected prior thereto, and each may complete the term to which he was elected.

Mr. Martin D. Leir, Scott County Attorney, Davenport, Iowa:

This will acknowledge receipt of yours of the 8th inst. in which you submitted the following:

"We respectfully request the opinion of your staff on the following circumstances relating to the election of Boards of Supervisors.

I

"The Scott County Board of Supervisors consists of five members elected at large. In accordance with Section 39.19(2), Code of Iowa, 1958, there have for years been *two* members resident of the City of Davenport Township, the City of Davenport being located therein and having a population in excess of 35,000.

"In the 1960 elections, one member of the Board, William Goettsch, a resident of the City of Davenport, is a holdover, his term expiring January 1, 1963. Election will, therefore, be held for two offices for the term beginning January 1, 1961, and two offices for the term beginning January 1, 1962. On the Republican Primary Ticket there are six candidates for the terms beginning January 1, 1962, as follows:

(1) Warren G. Maxwell, present Board member, whose term expires January 1, 1962, resident of Pleasant Valley Township.

(2) Phillip T. Hedin, present board member, whose term expires January 1, 1962, resident of the City of Davenport.

(3) In addition to the foregoing incumbents, there are 4 other candidates for this term beginning January 1, 1962, all of whom are residents of the City of Davenport.

(4) The Democratic Party presently has one candidate for this term, also a resident of the City of Davenport.

II

"In an opinion dated March 14, 1960, directed to the County Attorney of Black Hawk County, Mr. Oscar Strauss of your office makes a legal ruling based upon Chapter 252, Acts of the 58th General Assembly, which act was amendatory to Section 331.7, Code of Iowa, 1958, and concludes that the foregoing amendment repealed by implication, Section 39.19(2) Code of Iowa, 1958, (Page 4—Strauss opinion). The conclusion is, therefore, that in counties of over 80,000 population not more than one supervisor may be a resident of any one township, and yet presumably a county of less than 80,000 with a city of over 35,000 may still have 2 supervisors from such township in which the city is located.

III

"The following questions, therefore, arise with respect to Scott County:

(1) Since repeal by implication may be a matter of opinion, we feel if such is the ruling it should be confirmed by the staff.

(2) Could not Chapter 252, Acts of the 1958 G.A., be construed in harmony with Section 39.19(2) in counties of over 80,000 population, which also have a city with a population in excess of 35,000.

(3) If Section 39.19(2) is repealed by implication as Mr. Strauss' opinion holds, what is the effect of such repeal on Section 39.19(1), which reads:

'A member elect may be a resident of the same township as a member he is elected to succeed.'

(4) In the event your staff confirms Mr. Strauss as to the above holding, when is the candidate disqualified; in other words, does his disqualification bar his candidacy, his election, or does it take effect only at the time of taking office.

(5) Since it appears that the foregoing sections apply only to elections, would it be your opinion that the foregoing interpretation would have no effect upon present Board members completing the terms to which they were elected under prior law.

"The date for filing nomination papers for county candidates is April 12th, and we realize that an answer to this cannot be obtained before that time. We would, however, appreciate your maximum cooperation in this matter in order that an opinion may be rendered well in advance of the date for primary elections on June 6, 1960." In reply to your questions propounded, we advise as follows:

1. We observe to you that the opinion in question, while prepared by one of the staff, had the approval, prior to issuance, of a committee of four members of the staff, one of whom is the attorney general. We fur-

ther advise that since the issuance of this opinion, it has been made an official staff opinion.

2. In answer to your question No. 2, we would advise that it was the opinion of the committee that the two statutes mentioned herein could not be construed together, and upon review thereof, the conclusion is confirmed.

3. In answer to your question No. 3, we would advise that we see no relevancy or pertinency between the repeal by implication of section 39.19 (2) and the situation covered by section 39.19 (1), repeal of which is neither express nor implied.

4. In answer to your question No. 4, we would advise that the disqualification arising out of the situation in question occurs at the time of election, and becomes effective at the time of taking office.

5. In answer to your question No. 5, it is our opinion that the opinion that is now in question, issued March 14, 1960, to Mr. Evan H. Hultman, Black Hawk County Attorney, would have no effect upon the present members of the board of supervisors completing the terms to which they were elected, prior to the interpretation of the March 14, 1960 opinion.

8.10

Attorney for county conservation commission—Under Code section 111A.7, the county attorney is obligated, as part of the duties of his office, to prepare easements, examine abstracts of title, and perform other legal services for the county conservation commission, to the extent that his specific statutory duties, outlined in Code chapter 336, will permit. (Strauss to Roggensack, Clayton Co. Atty., 12/6/60) #60-12-10

8.11

Assessors—The county assessor, under the provisions of ch. 441, Code 1958, may not contract away statutory duties, and the county assessor may not be relieved of his obligation to pay taxes to the Iowa Public Employees Retirement System, and to the Federal Social Security System. (Strauss to Hanrahan, Polk Co. Atty., 10/7/59) #59-10-11

8.12

Assessor's pay period—Where the term of the county assessor does not expire until January 1, 1960, his salary may not be increased for the year 1959 because such salary is controlled by ch. 441, Code of 1958, and is not subject to change during the term except the salary may be increased in excess of the salary of the county auditor. (Strauss to Akers, St. Aud., 9/8/59) #59-9-20

8.13

Assessor's salary—The salary of the county assessor for the year 1959 is subject to the budget requirements of ch. 441, Code of 1958, and such salary is not subject to change during the assessor's term, except as the salary might be increased to exceed the salary of the county auditor (Strauss to Sarsfield, St. Comp., 9/8/59) #59-9-19

8.14

Assessor's salary—Under the provisions of ch. 291, Acts of the 58th G.A., the county assessor's salary fixed by the conference board, but

reduced in amount at the budget hearing, authorized by section 24.11, Code of 1958, the salary so reduced, after certification of the levy, is the legal salary of the county assessor. (Strauss to Norelius, Crawford Co. Atty., 8/26/59) #59-8-21

8.15

Attorney—Free services to township defined by Code secs. 336.2(7) and 359.18. (Abels to Strand, Winneshiek Co. Atty., 6/18/59) #59-6-12

8.16

Attorney, vacancy—County attorney appointed to fill vacancy will hold office until the next regular election in November, 1960, and until January, 1961, if a successor is not elected at said November election to fill the short term from November to January. The election for such short term could be accomplished under the provisions of ch. 44 or 45, Code 1958, or by write in. (Strauss to Samore, Woodbury Co. Atty., 7/11/60) #60-7-7

8.17

Auditor—Auditors have authority to seal applications for, and affidavits of, absentee or disabled voters, and all affidavits of individual candidates appearing IN his office; at NO time can the county auditor use the auditor's seal outside the office, and as county auditor he cannot take acknowledgments. (Strauss to McDonald, Dallas Co. Atty., 2/29/60) #60-3-7

8.18

Board of supervisors—In counties having a city of 35,000 therein and a board of supervisors of 5 or 7 members and composed of 2 townships, such townships are each entitled to one member and not two members on the board of supervisors. (Strauss to Balch, St. Rep., 3/17/59) #59-3-12

8.19

Board of supervisors—There is no statutory authority for the expenditure of public funds to conduct studies and surveys of county government operations, by private individuals or firms, under the present statutes. (Bianco to Scholz, Mahaska Co. Atty., 5/19/60) #60-5-19

8.20

Business license—Under ch. 254, 58th G.A., a farmer operating a roadside stand where eggs and vegetables are sold to the public is exempt from licensure unless the eggs and vegetables are so prepared or other items or services are offered so that in fact his business establishment is similar in character or resembles a "theatre, moving picture show, pool or billiard room or table, dance hall, skating rink, amusement park, bowling alley, restaurant . . ." (Abels to Hultman, Black Hawk Co. Atty., 7/22/59) 59-7-23

8.21

Cities and towns—Municipal and county law-enforcement officers are not authorized to enter into contracts for joint purchase, maintenance, and operation of radio equipment. (Craig to Statton, Comr. of Pub. Safety, 6/14/60) #60-6-22

8.22

City Solicitors—Since there are no statutory prohibitions, the only reason the position of assistant county attorney and city solicitor can not be occupied by the same person would be incompatibility arising out of the duties to be performed. (Strauss to Tucker, Dep. Lee. Co. Atty., 12/5/60) #60-12-8

8.23

Compensation of deputy sheriff—There is no statutory authorization for compensation to be paid a deputy sheriff other than the salary fixed by statute. (Section 340.8, Code 1958). Any claim of the deputy for compensation for care and feeding of prisoners at and in the jail is unauthorized. (Strauss to Akers, St. Aud., 3/28/60) #60-3-24

8.24

Conservation board—(1) The board is not authorized to enter into a cooperative agreement with a private organization for the establishment of a recreational area. (2) Financial aid. The board may not financially aid a town in the establishment of a recreational area upon property in which the board has no interest. (Gritton to Cady, Franklin Co. Atty., 4/22/59) #59-5-2

8.25

Coroner's fees—Subsection 1, sec. 340.19, and subsection 2, sec. 340.19, Code 1958, are mutually exclusive; also discussion of fee to be charged for death occurring under suspicious circumstances. (Gritton to Hasbrouck, Guthrie Co. Atty., 5/20/59) #59-5-25

8.26

County boards of supervisors—(1) Supervisor and election judge. (2) Supervisor and utilities trustee. (Abels to Hindt, Lyon Co. Atty., 4/19/60) #60-4-14

8.27

County conservation board—Membership on board and the position of executive officer are incompatible. (Gritton to Cady, Franklin Co. Atty., 4/21/59) #59-4-27

8.28

County farm—No authority to sell and place proceeds in a special fund to build a convalescent home. (Abels to Fischer, St. Rep., 8/5/60) #60-8-8

8.29

County hospitals—County treasurer not authorized to carry special fund. (Abels to Harris, Greene Co. Atty., 8/5/60) #60-8-7

8.30

County—nursing homes—Reference made to #58-8-6 and #59-7-12. Lease of part of county hospital to a private nursing home may be authorized by the voters under Code sec. 347.13(12), but could not extend to the kitchen and laundry facilities, as such, of a functioning county hospital. (Abels to Robinson, St. Rep., 2/18/60) #60-2-25

8.31

Court clerk—hospital liens—Under code secs. 582.2 and 582.4 filing may be properly made only in the county where the hospital is located. (Abels to Morr, Lucas Co. Atty., 12/29/59) #59-12-23

8.32

Courthouse—Expenditure for remodeling cannot exceed statutory limit irrespective of whether or not part of payment is deferred until subsequent year. (Abels to Hanrahan, Polk Co. Atty., 7/27/59) #59-7-33

8.33

Courthouse grounds—There is no authority in the board of supervisors to lease or sell to the city part of the courthouse grounds currently used for county purposes. (Strauss to Cady, Franklin Co. Atty., 5/15/59) #59-5-14

8.34

Courthouse improvement—Remodeling of courtroom, by lowering ceiling and installing complete new lighting fixtures, is a public improvement and not repair, and where cost is less than $5,000 is exempt from provisions of sec. 23.2, Code 1958. (Strauss to Hanrahan, Polk Co. Atty., 6/28/60) #60-6-36

8.35

Courthouse parking—

1. The board of supervisors under the provisions of Sec. 332.3(19), Code 1958, has power to establish parking lanes in the courthouse grounds;

2. The board would have no authority to transfer any part of the courthouse grounds to the city as a gift without specific statutory authority;

3. There is no express or implied authority in the city to transfer property to the county by corrective deed;

4. An election to place this matter before the electors would be without statutory authority and would constitute a mere voluntary referendum. (Strauss to Cothern, Clarke Co. Atty., 7/27/59) #59-7-32

8.36

Deputies—bonds—Deputy county medical examiners when appointed must be sworn in pursuant to chapter 63 of the Code, and file bond pursuant to chapter 64 of the Code. (Bianco to Schoeneman, Butler Co. Atty., 12/20/60) #60-12-19

8.37

Deputy sheriff and probation officer, and probation officer and justice of the peace—Incompatible. (Strauss to Akers, St. Aud., 10/23/59) #59-10-27

8.38

Domestic animal fund—Canadian geese and wild turkeys are not domestic fowl, within the contemplation of ch. 352, Code of Iowa 1958. (Craig to Bruner, Carroll Co. Atty., 9/14/60) #60-9-14

8.39

Domestic animal fund—The owner of animals that are killed by HIS dog and another dog, cannot qualify for recovery under section 352.1, Code 1958. (Strauss to Hindt, Lyon Co. Atty., 12/19/60) #60-12-17

8.40

Drive-in theater license—The fee provided for payment under sec. 361.1, Code 1958, for a drive-in theater is a license fee and not a tax and not recoverable from the board of supervisors either as a tax or as a fee, and likewise not recoverable against township trustees as being a voluntary payment. (Strauss to Hultman, Black Hawk Co. Atty., 6/2/59) #59-6-4

8.41

Education board—Bills of the county board of education may be paid by warrant authorized by the county board of education without approval of the board of supervisors. (Strauss to Morrow, Allamakee Co. Atty., 5/13/59) #59-5-11

8.42

Engineer—Not entitled to fee for surveying county maintenance garage site, but qualification as surveyor and probable value of such incidental services should be taken into consideration by supervisors in fixing his salary. (Abels to Johnson, Lee Co. Atty., 6/14/60) #60-6-19

8.43

Fair associations—In spite of general nonprofit corporate powers awarded county fair societies by sec. 174.2, sec. 174.15 restricts authority in such bodies as to erection of a fairground building to erection of buildings on lands acquired under provisions of sec. 174.14, Code 1958. (Forrest to Oeth, Dubuque Co. Atty., 6/24/59) #59-6-21

8.44

Fair districts—Proceeds from the land sold to the highway commission can be expended for permanent improvements under sec. 174.18, Code 1958. (Rehmann to Schroeder, Jackson Co. Atty., 9/6/60) #60-9-6

8.45

Fire districts—Chapter 357A differs from Code secs. 359.42, 368.11 and 368.12. (Abels to Nazette, Linn Co. Atty., 3/3/60) #60-3-9

8.46

Health insurance—Deduction from payroll of premiums to profit hospital service corporations is unauthorized under sec. 514.16, Code 1958. (Strauss to Prichard, Monona Co. Atty., 3/10/59) #59-3-6

8.47

Hospital claims—S.F. 118, 58th G.A., revising ch. 347, Code 1958, interpreted to intend

1. County hospital payrolls are not required to be published in official county newspapers;

2. Official signatures upon warrants may be imposed by stamp or other mechanical device;

3. Employees of the hospital who handle funds are required to be bonded;

4. There appears to be no limitation on the amount of depreciation that can be taken for a depreciation fund;

5. Claims of trustees for personal expenditures and all other unliquidated claims and claims for fees and compensation are required to be duly verified by oath or affidavit of the claimant;

6. There is no statutory requirement for filing duplicate claims in the county courthouse. Claims of trustees are required to be filed with the secretary of the board;

7. S.F. 119, 58th G.A., is not retroactive and property previously accepted by city hospital by gift, etc., is not subject to sale as provided in the foregoing act. (Strauss to Akers, St. Aud., 7/7/59) #59-7-8

8.48

Hospitals—Lucas County having a population of less than 17,000 can avail itself of the one-mill additional tax for servicing bond issued for erection and equipment of the hospital, provided by ch. 263, Acts of the 58th G.A. (Strauss to Morr, Lucas Co. Atty., 11/10/59) #59-11-15

8.49

Hospitals—Sale or lease of sites or buildings requires approval of voters and is restricted to property other than acquired under Code sec. 347.13(11). (Abels to Harris, Greene Co. Atty., 7/31/59) #59-8-4

8.50

Hospital trustees—Section 347.13(1), 1958 Code, does not authorize condemnation by hospital trustees for parking site attached to an established county hospital; township trustees have no power to purchase a site or build a building for a polling place at its own expense or the expense of the county. (Strauss to Main, St. Rep., 2/24/59) #59-2-24

8.51

Hospital—Taxes levied for the maintenance of a county hospital, and taxes levied for construction and equipment of such hospital, may be used only for the purposes for which the levy was made. They may not be transferred one to the other. (Strauss to Morr, Lucas Co. Atty., 10/31/60) #60-11-4

8.52

Incompatibility of office—An inheritance tax appraiser cannot at the same time serve as deputy sheriff. (Strauss to Gray, Calhoun Co. Atty., 12/19/60) #60-12-18

8.53

Injury to county employee—According to Code sec. 85.2, the compensation provided by Code ch. 85 is "exclusive." (Abels to Hasbrouck, Guthrie Co. Atty., 9/9/59) #59-9-22

8.54

Jails—If a prisoner has been bedded down for the night he has been furnished a "night's lodging" even though his release is procured before morning. (Abels to Parkin, Jefferson Co. Atty., 10/9/59) #59-10-15

8.55

Juvenile detention home—Mandatory in counties of 40,000 or more population. (Abels to Sacks, Pottawattamie Co. Atty., 8/10/59) #59-8-10

8.56

Levies—H.F. 125, 58th G.A., authorizing an increase in levy for the county ordinary fund and limiting the extent of the increase, and S.F. 104, 58th G.A., removing the limitation to the court expense fund levy, are not in conflict and both statutes are operative. (Strauss to Hanrahan, Polk Co. Atty., 7/6/59) #59-7-7

8.57

Medical examiner—In absence of statutory authorization, board of supervisors has no authority to substitute an annual salary for the fees of the medical examiner. (Abels to Hanrahan, Polk Co. Atty., 6/28/60) #60-6-35

8.58

Nursing homes—County boards of supervisors have only such powers expressly conferred by statute or necessarily implied therefrom, and such power does not include the authority to operate a nursing home and charge for the care of its patients. (Peterson to O'Malley, St. Sen., 7/10/59) #59-7-12

8.59

Outside employment—Compensation received for a service which was not an official duty, was not done under color of office or public employment, and was not done during working hours, may be personally retained by a public officer or employee. (Abels to Samore, Woodbury Co. Atty., 12/8/59) #59-12-13

8.60

Recorded instruments—The provision of sec. 335.2, Code 1958, that all instruments filed with the recorder shall have typed or legibly printed, the names of all signers thereon is restricted to instruments filed for recordation. (Strauss to Borcherding, Franklin Co. ASC, 3/28/60) #60-3-22

8.61

Recorder—County recorder does not have authority under Code sec. 343.13, to microfilm instruments offered for recording at length under the provisions of Code sec. 335.2. The authority to microfilm extends to records and files in his office. (Strauss to Akers, St. Aud., 8/27/59) #59-9-8

8.62

Recorder—Fees and compensation of the county recorder for performance of his official duties and those performed by him under cover of

his office should be accounted for to the county. (Strauss to Brodie, Woodbury Co. Atty., 1/27/59) #59-1-2

8.63

Recorder—Under 58th G.A., ch. 225, sec. 2, amending Code sec. 335.14, "page" means a piece of paper to be photostated, photographed, or similarly reproduced. (Abels to Leir, Scott Co. Atty., 7/28/59) #59-7-35

8.64

Recorder—Chapter 225, Acts of the 58th G.A., requires all instruments filed for recordation to have typed or legibly printed the names of all signers thereon; such Act does not include copies of articles of incorporation certified to the recorder by the secretary of state nor signatures to affidavit of publication of notice of incorporation. (Strauss to Synhorst, Secy. of St., 3/3/60) #60-3-8

8.65

Recorder and auditor—Under Code ch. 409, no discretion exists on the part of the auditor or recorder to review the propriety of a city council's action in approving a plat as to matters not required by law to be shown on the plat. (Abels to Scholz, Mahaska Co. Atty., 10/12/59) #59-10-17

8.66

Recorder leases—A lease of real estate creates in the lessee an interest therein. Under the provisions of Code sec. 558.53, leases or extensions of leases dealing with lots in cities, towns, or villages, the plats whereof are recorded, shall be recorded in separate books. Leases of lands, or of both lands and lots, in such cities as have recorded plats, shall be recorded in one record, but indexed in both land and town lot indexes, Code sec. 558.54. (Strauss to Sturgeon, Iowa ASC Office, 4/14/60) #60-4-12

8.67

Redistricting—1. Under Code secs. 331.8 and 331.11, county supervisors have discretionary power. 2. A motion with yeas and nays entered of record is equivalent to a resolution. 3. That a candidate has already filed nomination papers does not deprive a board of supervisors from power to redistrict under secs. 331.8 and 331.11. The candidate whose residence is now outside the district may seek the nomination and may also again become qualified to hold the office, if elected, by moving his residence into the district as now constituted. (Abels to Forsyth, Emmet Co. Atty., 1/20/60) #60-2-7

8.68

Road machinery—County road equipment can be used in a county soil conservation project at the county home. (Strauss to Morrow, Allamakee Co. Atty., 5/26/59) #59-5-22. Also see #59-5-9

8.69

Road machinery—County-owned machinery is not available for use by other public bodies without statutory authority bestowed upon the board of supervisors therefor. Use of such machinery on soil conservation projects is not authorized. (Strauss to Morrow, Allamakee Co. Atty., 5/13/59) #59-5-9

8.70

Salaries—A first deputy sheriff from January 6, 1960, to December 1, 1960, was entitled to 85% of his principal's salary, including residence allowance, and the board of supervisors can legally supplement its January 6, 1960 resolution so as to include 85% of the sheriff's residence allowance to said deputy who has not waived his right to said additional compensation because he is no longer said deputy. (Strauss to Cooper, Buena Vista Co. Atty., 12/27/60) #60-12-21

8.71

Sheriff—Chapter 338, Code 1958, respecting certain powers of the sheriff is limited in its applicability to cities having a population in excess of 80,000. The employment by the sheriff of cooks and other assistants, such as jailer, etc., in other cities is not expressly provided for. The performance of such duties is part of the duties of the office, for the performance of some of which fees may be charged. (Strauss to Scholz, Mahaska Co. Atty., 1/7/59) #59-1-11

8.72

Sheriff—Not entitled to fees for or required to make service in civil actions upon parties outside the State of Iowa. (Abels to Johnson, Lee Co. Atty., 7/23/59) #59-7-30

8.73

Sheriff—Repeal of Code sec. 339.1 and 339.2 effective 1/1/61 necessitates legislative provision authorizing someone to perform the sheriff's duties, where he is a party to a proceedings, absent, or otherwise disqualified, but where the office is not vacant, so as to enable the first deputy to act under Code sec. 337.20. (Abels to Carstensen, St. Rep., 6/23/60) #60-6-33

8.74

Supervisors—Boards of supervisors cannot authorize the purchase of real estate costing more than $10,000 without first submitting to voters. (Lyman to Pappas, Cerro Gordo Co. Atty., 5/27/59) #59-6-30

8.75

Supervisors, method of election—Under secs. 331.8 and 331.11, Code 1958, the board of supervisors cannot be compelled to comply with a petition calling election for the purpose of electing members of the board at large nor is any other method provided in ch. 331 by which such action may be compelled. (Strauss to Doyle, St. Rep., 4/2/59) #59-4-6

8.76

Transportation to state institutions—Compensation of county officers (1) to university hospital and (2) to a mental health institute is governed by statute. (Abels to Hasbrouck, Guthrie Co. Atty., 8/26/59) #59-9-6

8.77

Treasurer—Duty under Code sec. 321.46. When application is made to the county treasurer for a new certificate of title and registration card, the legislative directive to forthwith issue same does not mean instanter but as soon as by reasonable exertion, confined to the object, it may be

accomplished. (Pesch to Statton, Comr. Pub. Safety, 8/31/59) #59-9-14

8.78

Treasurer—May deposit funds at interest so long as absolute right of withdrawal is preserved (Code secs. 452.10 and 453.1). (Abels to Ford, Des Moines Co. Atty., 8/27/59) #59-9-10

8.79

Veterans' graves—Chapter 250, Code 1958, makes mandatory the payment for maintenance of graves of service men and women; the amount thereof is fixed by sec. 250.18, but recovery of such costs is not recoverable from relatives of the deceased, nor can they be compelled to provide care; nor may the city be compelled to levy a tax sufficient to pay the costs of maintenance, nor may a lump sum contract be made for such maintenance. (Erbe and Strauss to Wilson, Muscatine Co. Atty., 2/16/59) #59-2-20

8.80

Vacancies—Soldiers preference not applicable to filling vacancy in elective office of county supervisor. (Abels to Draheim, Wright Co. Atty., 9/3/59) #59-9-17

8.81

Voting machines—The county auditor has no mandatory duty to permit the school board to use the county voting machines in a local school board election in the county where such use conflicts with the county's use of the machines at the general election. (Strauss to Salisbury, Jasper Co. Atty., 9/6/60) #60-9-4

8.82

Warrants—Where treasurer gave notice to wrong holder of a warrant under Code secs. 74.4 and 74.6, such notice would not be sufficient to stop interest from running for the balance of the year of issuance, but as to subsequent years, the holder's presumed knowledge of Code sec. 343.10 would make his interest claims for such subsequent years subject to the defense of laches where he sat idly by and made no inquiry as to availability of funds on or before December 31 of the year of issuance. (Abels to Bruner, Carroll Co. Atty., 7/13/60) #60-7-12

8.83

Words and phrases—For purposes of Code ch. 351, "dogs kept in kennels and not allowed to run at large" means dogs kept under such degree of restraint as to make it virtually impossible for such dogs to kill or injure any domestic animal or fowl owned by another than the owner of the dog. (Abels to Hudson, Pocahontas Co. Atty., 6/5/59) #59-6-9

8.84

Zoning—Board of supervisors can amend existing zoning ordinance under Code secs. 358A.6 and 358A.7 so as to take advantage of additional power conferred by 58th G.A. amendment to sec. 358A.3 but, of course, there could be no retroactive enforcement as respects existing nonconforming uses. (Abels to Wilson, Muscatine Co. Atty., 6/9/60) #60-6-15

8.85

Zoning—County zoning commissioners appointed by the board of supervisors are not entitled to compensation or expenses. (Strauss to Hultman, Black Hawk Co. Atty., 12/1/59) #59-12-6

8.86

Zoning—Section 358A.4 does not expand those powers enumerated in section 358A.3, Code 1958, in providing for a county building code. (Rehmann to Nazette, Linn Co. Atty., 10/21/60) #60-10-12

8.87

Zoning—Supervisors have no direct authority to prescribe the width and number of streets in a subdivision under ch. 358A, but may indirectly accomplish the same result by conditioning restrictions on erection, construction, use, etc., of buildings in terms of accessibility to a street or highway of dimensions adequate for purposes of safety and the like. (Abels to Neuzil, Johnson Co. Atty., 7/12/60) #60-7-11

8.88

Zoning—Townships as "areas" under sec. 358A.4; payment of election costs governed by secs. 345.4, 39.7, 49.1, and 49.118. (Abels to Werling, Cedar Co. Atty., 2/11/59) #59-2-13

8.89

Zoning—Under section 358A.10, Code 1958, the board of adjustment can modify the zoning ordinance in individual cases if the ordinance has been amended as provided in section 358A.7. (Rehmann to Wilson, Muscatine Co. Atty., 10/31/60) #60-10-18

CHAPTER 9

COURTS

STAFF OPINIONS

LETTER OPINIONS

9.1 August 26, 1959

COURTS: Municipal—establishment—abolishing inferior courts—vacancies in office of judge.

1. A new municipal court, authorized by a vote of the people is not deemed established, until all the prerequisites required by chapter 602 are complied with.

2. There is no vacancy in the office of judge of a new municipal court until said court has been properly established.

3. Inferior courts are abolished when new court begins its functions.

Mr. Evan L. Hultman, Black Hawk County Attorney: Reference is made to your favor of August 13, 1959, the pertinent parts of which read as follows:

"On August 4th, 1959, there was presented to the electorate of the City of Cedar Falls, Iowa, the following proposition: 'Shall the proposition to establish a Municipal Court in the City of Cedar Falls, Iowa, be adopted?' The majority of the votes cast on this proposition were in favor of said Municipal Court.

"We have been informed through press releases, although not officially, that the Governor of the State of Iowa appointed a Judge for this Municipal Court on the 10th day of August, 1959. These releases indicate said appointment was to become effective August 17, 1959.

"Under the present City budget for the balance of the year 1959, there are no authorized funds for the expenditure of a Municipal Court with which we could pay salaries or perform structural changes in the City Building. The Finance Committee of the Council has been directed to study the financing problems caused by this election to determine what and when funds can be made available to implement the Court.

"The physical plant of the City Hall is not at present adaptable for a Municipal Court. Structural changes will be necessary to provide chambers and library for a judge. Court room facilities will have to be constructed and provisions made for a Jury room. This poses not only a time problem, but also a financial problem and the Building and Grounds committee, as well as the Finance Committee of the Council, have this matter to study and report upon.

"Under the Code of Iowa, Chapter 602, the Mayor and City Council have the obligation of appointing a Clerk and Bailiff whereas the Governor appoints the Judge. Section 602.17 indicates that all of the officers

of a Municipal Court must qualify before the Court is placed in operation. The concern of the City is that in addition to previously mentioned financial and physical problems, they have the problem of determining whether the Municipal Court Clerk and Bailiff will be separate officers or appointed from the City Clerk and the Police Department. Also there is the problem of the necessity of hiring additional personnel to handle the increased work, securing funds therefor, machinery for receiving of all records from the Police Court and the Justice of the Peace Courts. To this end, it is felt that a reasonable time and study will be necessary to implement the Court.

"The City believes that they will require some interim period with which to adequately prepare for this Municipal Court because of all the matters as pointed out above and wish to be advised as to their rights of doing so under the Statute.

"In addition to the facts set out in the above letter, the City Attorney has informed me by telephone that the vote was canvassed on August 5 and the Certificate showing the proposition adopted forwarded to the Governor, Secretary of State and County Auditor on Thursday, August 6, 1959, in accordance with Chapter 602.4.

"In light of the fact that under 602.15 my office as County Attorney will be responsible to said Court for criminal actions within the jurisdiction of said Court and in light of the fact that present courts which are in use and operation will be abolished according to Section 602.17 and in light of the fact that under 602.49 Black Hawk County shall alternately be charged with the monthly payment of salary, in addition to the problems set forth by the City Attorney, I request an opinion in this matter and wish to pose the following additional questions:"

To facilitate proper reply thereto, the various questions posed have been consolidated and rephrased as follows:

1. At what point, or by the fulfillment of what conditions is a municipal court *deemed established,* and in conjunction therewith, at what point are the inferior courts abolished?

2. The Governor's appointment is said to be effective August 17, 1959. Is there a duty upon the city and county to pay the judge's salary, even though the person appointed is unable to perform duties and render no service due to physical, financial and personal conditions making it impossible to hold court at the time of appointment?

3. In the event the appointed judge appears before the Mayor and the City Clerk and desires to be sworn in to qualify, do they have to swear him in until they are ready to put the court in operation?

In answering the various questions, as put, it will be necessary that we advert to the pertinent parts of the statutory law to be construed, relating to your questions, which we set out in part, to wit:

"602.2 Election. Upon the filing with the city clerk of a petition of not less than fifteen percent of the qualified electors, as shown by the poll list in the last municipal or state election of any municipal court district, the mayor shall, by proclamation published once a week for three consecutive weeks in two newspapers of general circulation published in said municipality, or, if two such newspapers be not published, then in one such newspaper, *submit the question of establishing a municipal court* at a general, municipal, or special election to be held at a time specified therein, which time shall be within two months after said petition is filed. If the said proposition is not adopted at such election, said

question shall not be resubmitted to the voters of said district within two year thereafter." (Emphasis added.)

"602.4 Question submitted — election — certifying result. At such election the proposition to be submitted shall be, 'Shall the proposition to establish a municipal court in the city of (name of city) be adopted?' The election shall be conducted, the vote canvassed, and the result declared in the manner provided by law in respect to other municipal elections. If the majority of the votes cast on said proposition be in favor thereof, said municipal court *shall be deemed established.* Immediately after such proposition is adopted, the mayor shall transmit to the governor, the secretary of state, and the county auditor, each, a certificate showing that such proposition was adopted." (Emphasis added.)

"602.6 Appointment of officers. Whenever such court *has been established,* or whenever any city becomes entitled to an additional judge of such court, the governor shall appoint a judge to fill the position until the beginning of the regular term of office succeeding the next election, or until his successor is elected and qualified. Under like conditions, or, if for any other reason a vacancy shall exist, the other elective officers of the court shall be appointed by the mayor with the approval of the city council.

"If the office of clerk or bailiff becomes vacant, the judge or judges shall immediately designate a temporary acting clerk or bailiff, as the case may be, who shall qualify forthwith and serve until the vacancy is filled as herein provided. Such temporary appointment and service shall be without prejudice to any rights to which such appointee may be entitled by virtue of his regular employment." (Emphasis added.)

"602.10 Officers—election and appointment. Whenever a municipal court *has been established,* there shall be elected at the following city election a judge or judges thereof; also a clerk and bailiff, *unless the council shall appoint the city clerk to act as clerk and a policeman to act as bailiff thereof.*" (Emphasis added.)

"602.11 Qualification of officers—term. The elective officers of the court shall qualify, and their term of office shall begin, on the *first day of January after their election.* They shall serve for a term of four years. If the city clerk acts as clerk, or a policeman as bailiff, the council shall determine whether or not they shall have compensation additional to their regular salaries, and fix the same if allowed." (Emphasis added.)

"602.17 Inferior courts abolished. *Upon the qualification of the officers of the municipal court,* the police court, mayor's court, except in incorporated cities or towns other than the city in which said court is established, justice of the peace courts, and the superior court, in and for the municipal court district, and the *offices* of police judge, clerk of police court, justices of the peace, constables, judge and clerk of the superior court, *shall be abolished.*" (Emphasis added.)

In construing a statute the intent of the legislature must be ascertained as nearly as possible, from a study of the law as a whole. Every part of a statute, if it can fairly and reasonably be done, must be given effect. A construction of a statute rendering the whole effective is to be adopted when harmony, unity, and enforcement of all is possible. A construction giving effect to every part of a statute will be adopted, unless irreconcilably repugnant.

With these rules in mind, we must proceed to apply the law as set out above to the questions, as proposed by you, in conjunction with the facts set forth in your letter.

We think the key to the problem stated, lies in the determination, within the intent of the legislature, as to when a *"municipal court shall be deemed established"*, (Section 602.4) without taking said words out of context with the entire law for the establishment of municipal courts.

At this point may we state that the word "deemed" was added to the law by amendment, enacted by the 38th G. A., section 1 of chapter 16, effective by publication, on February 26, 1919. This amendment was the result of the decision in the case of *State ex rel. Cook v. Birdsall*, found in 186 Iowa 129, 169 N.W. 453, and decided on November 22, 1918, wherein the court in discussing a similar problem said on page 134: "Emphasis is put upon that part of the section which provides that, if a majority of the votes shall be in favor thereof, 'said municipal court *shall be established.*' It is claimed, in substance, that this is the equivalent of saying that the court 'shall be *deemed* established;'."

This lends credence to the proposition that it was the intent of the legislature to fix the time when the new court is established. But the problem does not end there. The legislature did not create a municipal court ipso facto, by the mere holding of an election, wherein, the mayor by proclamation did—"submit the question of establishing a municipal court. . ." (Section 602.2) Cities were authorized to create a municipal court by complying with certain prerequisites, the chief one of which was to hold an election to elect a judge or judges thereof, together with a clerk and bailiff, if the council did not choose to appoint the city clerk and a policeman to act as clerk of the court and bailiff of the court. (Section 602.10) Other prerequisites would be necessary: fiscal arrangements such as salaries, (Section 602.49) wherein the city and county on alternate months shall pay the salaries of the judge, clerk and bailiffs; a suitable place for holding said court (Section 602.17); and transfer of causes and records (Section 602.18); creation of a jury commission, jury lists and books (Sections 602.33, 602.34 and 602.35); all of which require time for planning and compliance with other provisions of the Code.

Has a municipal court in all its essential elements been created here? We think not. All the requisite steps must be completed.

In 14 Am. Jur. 253, Sec. 10 it is stated:

"A tribunal for the transaction of judicial business can be created only by the supreme power of the state. In this country the principal courts of the various jurisdictions are quite generally created by the Constitution of the jurisdiction, and power is delegated to the legislature to create others. A court is not a competent jurisdiction unless it is provided for in the Constitution or created by the legislature.

"The establishment of a court and the election of a judge are separate and distinct things, and each must be accomplished in an appropriate and legitimate manner. No person on his own motion has the power to make himself into a court. He may, without any authority, assume the office of judge of a court which has a legal existence and preside as such, and all the acts of a court presided over by him will be valid. *But where there is no law authorizing such court to be held and the judge assumes to create a court and preside over it, the tribunal so created and all its proceedings are absolutely void.*

"It has been held by numerous authorities, among them the Supreme Court of the United States, that there can be no such thing as a *de facto court*, at least where there is a rightful government. Nevertheless, de-

cisions are not wanting to the effect that there may be de facto courts the validity of the acts of which cannot be questioned in collateral proceedings, and that a court organized under color of law is a de facto court and its judge and clerk are de facto officers even though the proceedings for its organization are in some respects irregular. Thus, where a court has been established by a legislative act apparently valid and has gone into operation, it is regarded as a de facto court and its jurisdiction cannot be questioned by third parties, even though it is claimed that the act did not become a law because of failure to receive enough votes in the legislature." (Emphasis added.)

And in Sec. 22 this further statement:

"To perform the functions of a court, the presence of the officers constituting the court is necessary. In addition to the judge, or judges, the essential feature of all courts, and, in the case of courts of record, a recording officer, variously known as a 'clerk,' 'prothonotary,' or 'register,' numerous other officers are usually necessary to the existence of a court and the proper transaction of its business, such as sheriffs, constables, bailiffs, reporters, etc. Attorneys, or counsellors, representing litigants are also usually considered as officers of the court. And a talesman, when accepted as a juror, becomes a part or member of the court."

From the facts stated in your letter, it appears that the only steps taken to create your municipal court, was the submission of the question to the electors; a certificate showing the proposition adopted was forwarded to the governor, secretary of state and county auditor, and an unofficial report that the governor had appointed someone to act as judge. These steps, standing alone, we do not think constitute a *de facto* court.

There must be provided a *place* where the court can function, officers provided and other related matters as above set forth under the provisions of chapter 602 of the Code.

Blackstone defined a court—"a court is a place where justice is judicially administered." (3 Bl. Com. 24.) Our supreme court, in commenting on this statement in the case of *Hobart v. Hobart*, 45 Iowa at page 503 said:

"But this definition obviously wants fullness; it is limited to the *place* of a court in its expression. In addition to the place, there must be the presence of the officers constituting the court, the judge or judges certainly, and probably the clerk authorized to record the action of the court; time must be regarded, too, for the officers of a court must be present at the place and at the time appointed by law in order to constitute a court. To give existence to a court, then, its officers and the time and place of holding it must be such as are prescribed by law. The Circuit Court is to be held by the Circuit Judge (Code, Chap. 5, Title III), and its terms are prescribed by law (Sec. 163). The places of holding it are also prescribed, and it cannot be held elsewhere (Sec. 192). To constitute the Circuit Court, then, the Circuit Judge must be in the discharge of judicial duties at the time and in the place prescribed by law for the sitting of that court."

The supreme court of Iowa, in the case of *State v. Birdsall*, 186 Iowa 129, in construing chapter 602, set out the guiding lights which we believe must be followed to arrive at a solution of the main question presented, being question No. 1.

The supreme court as page 135, said:

"In ascertaining the real intent of the legislature at this point, we must look into the enactment as a whole. Under section 694-c18, the nature of the jurisdiction of the municipal court is set forth. It is indicated there that the purpose of the creation of such a court is to supplant and to be successor to the superior court, the police court, the mayor's court, and the justice court of the creating city. The creation of the new court abolishes the old. The respective jurisdictions of the old and their official records are conferred *en masse* upon the new.

"Section 694-c5 provides (now sections 602.17 to 602.21 incl.)

" 'That after the adoption of the proposition to establish a municipal court under the provisions of this act, and upon the election and qualification of the officers herein provided for, the police court, mayor's court, justice of the peace court and the superior court in and for the territory within the municipal court district, shall be abolished and the offices of police judge, clerk of police court, justices of the peace, constables, superior judge and clerk of superior court shall likewise be abolished; and when said offices shall be abolished the dockets of such courts and all records and papers in their possession pertaining to any proceedings had before them shall be forthwith delivered to the clerk of the municipal court, who shall preserve same in his office and who shall have full power and authority to certify and transcript such proceedings, as appear in the said docket and records and papers of the said courts, and all subsequent proceedings in any cause of action then pending in any of the said courts so abolished, shall be carried out in the said municipal court in the manner herein provided for, the same as if the said cause had originated in said municipal court.'

"The foregoing section sheds light upon the intent of the legislature as to the process of creation of the court. It appears clearly therefrom that the old courts which were to be superseded were to maintain their existence and their functions until after the election of the officers of the new court as provided for in Section 694-c3. *This was a lease of life to the old courts until the 'next regular municipal election.'* There is nothing in the enactment anywhere indicating an intent to confer upon the new court a jurisdiction concurrent with the old courts at any time. The very purpose of the organization of the new court was to supersede the old. If, for instance the statute had required that judges be elected within 30 days after the adoption of the resolution by the voters, it would hardly be claimed that such election of judges did not constitute a part of the process of creation of the court. Nor would it be claimed that a vacancy existed which might be filled by appointment during such 30-day period. The brevity of the time would aid the plausibility of the argument that the election of judges was a prerequisite to the completed creation of the court, in a concrete sense. In the case at bar, the length of time between the time of the vote of adoption of the resolution and the 'next regular municipal election' seems very long, and this gives a plausibility to the contrary argument. But if our position is sound upon the first hypothesis of a brief intervening period, it is no less so because of an intervening period which seems unreasonably long. This long intervening period may be explained by a legislative desire to give the incumbents of the superseded courts a reasonable time of warning of their demise. *We reach the conclusion that the municipal court of Waterloo cannot be deemed to exist in a complete sense until the election of its officers at the 'next regular municipal election;'* and that it was the legislative intent that the election of such officers at such election should be a part of its process of creation, and should complete its creation, in a concrete sense. While the functions of life are saved to the old courts, they are withheld from the new. *When the old courts cease, the new begins its functions. Until such time, there can be no vacancy in the office of municipal judge.* This conclusion is emphasized by Section 694-c16, which provides as follows:

" 'If any vacancy occurs in the office of municipal judge, the governor

of the state of Iowa shall appoint such officer to fill such vacancy who shall hold the office until the next regular city election,' etc.

"This is the only provision of the enactment pertaining to the filling of vacancies. It clearly contemplates a vacancy as a possible contingency; whereas, under the contention of the defendant, a preliminary vacancy would always be a certainty. It follows from these conclusions that the relators are entitled to exercise the functions of their office until after the election of the judges at the next regular municipal election. *It follows, likewise, that the defendant is not entitled to exercise the functions of municipal judge, and that there can be no vacancy in the office of municipal judge until after the completed creation of the municipal court.* The judgment below is, therefore, reversed and the cause remanded." (Emphasis added.)

According to the above authorities, to constitute a court the judge must be in the discharge of judicial duties at the time and in the place prescribed by law for the sitting of the court.

So long as the old courts (being the inferior courts in this instance) are functioning, the new court cannot function and therefore cannot sit in the discharge of judicial duties.

The old courts are not abolished (Section 602.17) until the qualification of the new *officers* of the municipal court. The officers of the new court, when elected cannot qualify until January 1st, when their term begins.

As stated by the court in the *Birdsall* case—"When the old courts cease, the new begins its functions. Until such time, there can be *no vacancy* in the office of municipal judge." (See also *Report of Attorney General* 1917, 1918, p. 342.)

The mandate of the people by voting to establish the court (Section 602.2) is no more than an expression of the will of the people. This in and of itself is not sufficient.

A very important factor mentioned in your letter is that under the present city budget—(and presumably the county budget, since the establishment of a municipal court was not contemplated when these two budgets were adopted for this fiscal year)—is that there are no authorized funds for the payment of salaries and other expenses necessary to establish a functional and operational court.

A court cannot be said to exist until all the provisions of the law, (chapter 602) have been complied with, in order that it can be said that it is organized and ready to function, by the provision of all the prerequisites heretofore outlined. *Hobart v. Hobart,* 45 Iowa at page 503.

1. Therefore in answer to the first question, it is our considered opinion that taking chapter 602, Code of Iowa 1958, as a whole, the municipal court in question cannot be deemed established in the sense that it has been fully created and ready to function, until January 1st, following the election of the officers of the court, at which time it is assumed that all necessary fiscal arrangements have been made, a place to hold the court has been provided and all other prerequisites of the law have been complied with. At that point the inferior courts are abolished.

2. In answer to the second question, there being no vacancy in fact, the purported appointment of a judge is void and of no force or effect;

there is no duty on the part of the city or county to pay said purported appointee's salary.

3. In view of the answers to the first two questions, it is obvious that if the purported appointee presents himself, there is no duty on the part of the mayor or clerk to swear in said purported appointee.

Finally in order to give effect to the entire law and every part of the statute, we must recognize that under the provisions of sections 602.6, 602.10 and 602.11 there may be an alternative method by which a municipal court can be made operative.

Such a municipal court may be established and made operative, provided the city is financially and physically ready to provide a place for a court, and the city council complies with the provisions of section 602.10. Under such circumstances the mayor would have the power to call upon the governor to appoint a judge to act during the interim, until the following city election and until the elective officers have been elected and qualified.

9.2 November 2, 1959

COURTS: Grand jury mileage—Round-trip payment not authorized by Code section 607.5.

Mr. M. Gene Blackburn, Hamilton County Attorney: Receipt is acknowledged of your letter of October 24 as follows:

"I have been requested by the Clerk of Court to obtain an opinion on the following question:

"The prior codes provided in Section 607.5 as follows:

'Grand Jurors shall receive . . . for each mile travelled in the performance of their duties, seven cents (7c).'

"However the 57th General Assembly amended the Section to read:

' . . . Shall receive for each mile traveled *each day from his residence to the place of attendance and* in the performance of their duties . . . '

"The query is then, whether or not a Grand Juror is entitled to mileage from his home to the place of attendance *and return,* or merely one way. Is the act of returning 'in the performance of duty?'

"Your early reply will be appreciated."

One way of determining the meaning of the language emphasized in your letter is by comparison with prior versions of the statute. Your letter sets forth the versions appearing in the 1954 and 1958 Codes. Actually the general provision dates back to the Code of 1851. The various versions are as follows:

Code of Iowa 1850-1: Sec. 2545. Jurors. A juror, for each day's attendance, whether as a grand or petit juror.....$1.00. Before justices of the peace.....$.50. Traveling per mile, going and returning.....$.05.

Code of Iowa (Revision of 1860): Sec. 4154 changed juror's fee to $2.00 and $1.00, mileage same.

Code of Iowa 1873: Sec. 3811. Jurors shall receive the following fees: For each day's service or attendance in courts of record, two dollars, and for each mile traveled *from his residence to the place of trial;* the sum of ten cents; Sec. 3814: Witnesses . . . shall receive . . . Mileage for actual travel per mile *each way,* five cents;

Code of Iowa 1897 (Annotated): Sec. 354 "from his residence to the place of trial . . . " cited *Dwight v. Anson.*

Supplement—Code of Iowa—Annotated—1913: Sec. 354 " . . . from his residence to the place of trial . . . "

Code of Iowa 1924, 27, 31, 35, 39: Sec. 10846 " . . . from his residence to the place of trial . . . "

Code of Iowa 1946, 50, 54: Sec. 607.5 " . . . from his residence to the place of trial . . . "

It thus appears that had the 57th General Assembly intended to pay mileage for a daily round trip it would have used the words "going and returning" as in 1851 and 1860 or "each way" as in the case of *witness* fees in 1873.

The case of *Park v. Polk County,* 220 Iowa 120, is pertinent to the extent that computation of the mileage actually allowed in that case reveals it was for one-way trips only.

Also pertinent is the decision of the Supreme Court in the case of *Anson v. Dwight,* 1865, 18 Iowa 241 in which a dispute arose over whether jurors were to receive "double" or "single" mileage. The supreme court held, "The jurors were entitled to only single mileage . . . "

Reference to House File 159, 57th G. A., reveals that the following explanation was appended by the sponsor:

"The purpose of this bill is to clearly establish that grand and petit jurors receive mileage pay for traveling *to the courthouse* for each day's attendance, but that no juror shall receive mileage if he travels in a vehicle for which another juror is receiving mileage pay."

Ordinarily the purpose of the legislature in amending a statute is to change its meaning but, as is indicated in the explanation, amendment may also be for the purpose of making a statute clearly say that which it was already supposed to say. See *Hanson v. Iowa Employment Security Commission,* 239 Iowa 1139, 1141-1142, 34 N.W. 2d 203, 205. Also see *Des Moines Ind. Com. Dist. v. Armstrong,* 95 N.W. 2d 515, 521.

We must, therefore, conclude that Code section 607.5 as amended by the 57th G.A. does not authorize payment of round-trip mileage.

9.3 June 16, 1960

COURTS: District judge—Newly-created office. Where the legislature failed to fix the tenure of the initial term, a vacancy exists until the next regular election, thus the short-term vacancy may be filled at said election, as well as the long term for the full four-year tenure.

Hon. Melvin D. Synhorst, Secretary of State: We have your favor of June 7, 1960, requesting opinion, and which reads as follows:

"Chapter 354, Acts of the Fifty-eighth General Assembly, provided for an increase in the number of District Court Judges in Polk County from seven to eight. The Governor appointed a Judge to fill his eighth position 'until a successor is elected and qualified, in accordance with the provisions of Section 69.8(2) and 69.11, Code 1958, and Senate File 302, Acts of the 58th General Assembly.'

"What will be the commencement and length of the term of the Judge who is elected by Polk County voters at the November 8, 1960 General Election to fill this newly created Judgeship?

"The other seven District Judges in Polk County will be elected for four year terms starting in January, 1963.

"If there will be a new four year term starting in January, 1961, will it then be necessary to elect a Judge for the short term between the November 1960, General Election and January 1961?"

In reply thereto we advise:

Under the provisions of chapter 354 (S. F. 302) Laws of the 58th General Assembly the number of district judges of the ninth judicial district (Polk County) was increase from seven to eight. A vacancy in office occurs instantly upon the passage and approval of a legislative act which authorizes the governor to appoint an additional district judge in a named district. (See *Schaffner v. Shaw*, 191 Iowa 1047, 180 N.W. 853.)

To fill said vacancy the governor thereupon made an appointment and issued his commission as follows:

"Know Ye, That reposing special confidence in Robert D. Jackson of Des Moines, Iowa, I, Herschel C. Loveless, Governor of the State of Iowa, do hereby appoint and commission him Judge, Ninth Judicial District of Iowa (Polk County), *for a term beginning June 8, 1959, and expiring at the next regular election at which this position can be filled*, and until a successor is elected and qualified, in accordance with the provisions of Sections 69.8(2) and 69.11, Code 1958, and Senate File 302, Acts of 58th General Assembly." (Emphasis ours.)

Referring to your first question as to the commencement and length of the term of the judge to be elected at the general election, November 8, 1960, we note the following provisions of statute and the Constitution, to wit:

Art. V, Sec. 5:

"The District Court shall consist of a single Judge, who shall be elected by the qualified electors of the District in which he resides. The Judge of the District Court shall hold his office for the term of four years, and until his successor shall have been elected and qualified; and shall be ineligible to any other office, except that of Judge of the Supreme Court, during the term for which he was elected."

Art. V, Sec. 11:

"The Judges of the Supreme and District Courts shall be chosen at the general election; and the term of office of each Judge shall commence on the first day of January next, after his election."

Section 39.14, Code 1958:

"Judges of the district court shall be elected at the general election in each judicial district and hold office for four years, except when elected

to fill a vacancy, in which case the election shall be only for the unexpired term."

It is quite clear from the above quotations, that the Constitution of this state fixes the term of judges of the district court at four years and each term begins on January first following the general election. (See *Wilson v. Shaw*, 194 Iowa 28, 188 N. W. 940, for an extended discussion of the Constitution above quoted.)

Therefore, in answer to your first question, the length of the term of the judge to be elected by the electors of Polk County, Iowa, at the general election to be held November 8, 1960, will be for a term of four years, and said term will commence on January 1, 1961.

Having determined the length of the term of office in question to be for a period of four years, we may now consider the second question, with reference to the intervening period, between November 8, 1960, and January 1, 1961, since according to the commission of appointment as made by the governor, the present incumbent of the office was appointed —"for a term beginning June 8, 1959 and expiring at the next regular election at which this position can be filled, * * "; resulting in a vacancy in the newly-created office for the intervening period from November 8, 1960 to January 1, 1961.

The Act, which created the new office in question, chapter 354 (S. F. 302) Acts of the 58th General Assembly, amended section 604.8, Code 1958, by striking the word "seven" and substituting therefor the word "eight."

Previous acts of the legislature creating additional district court judgeships, made provision for filling such vacancies and prescribed the period of the initial term to coincide with the constitutional provisions, until the office was filled at the next general election. (See chapter 263, Laws of the 57th General Assembly.)

Since the legislature failed to do so in the instant case, the vacancy was filled by the governor under existing statutory provisions, i.e., sec. 6 of Art. XI Constitution of Iowa, and sections 69.8(2) and 69.11, Code 1958. The appointment, under the existing commission, supra, expires November 8, 1960. Hence there will exist under the present appointment a vacancy in this office from November 8, 1960 to January 1, 1961. (See *Schaffner v. Shaw*, 191 Iowa 1047, 180 N. W. 853, and chapters 255 and 256 Laws of the 57th General Assembly, which specifically fixed the period of the initial term of two district court judges, which new offices were created by said Acts, and directed the governor to make the appointments in compliance therewith.)

In *Schaffner* case, supra, at page 1051, we note this significant statement:

"Thus an existing office without an incumbent is vacant; and by the great weight of authority there is no difference, insofar as the right to appoint is concerned, whether the vacancy is occasioned by death or resignation of the incumbent, *or the office has been created, and no incumbent has been appointed or elected to the office.*" (Emphasis ours.)

Therefore, in view of the fact that the legislature, which created the office, failed to provide and fix the tenure of the initial term of said office; the appointment, as made by the governor, expiring as of the date

of the next regular election, to wit: November 8, 1960, it is our considered opinion that a vacancy will exist in said office from November 8, 1960 until January 1, 1961, which vacancy may be filled at the next regular election.

9. COURTS:

9.4

Costs—The costs incurred in a preliminary hearing occurring in a justice of the peace court are properly chargeable as part of the district court costs against a defendant in a criminal case. (Neely to Burdette, Decatur Co. Atty., 1/29/60) #60-2-5

9.5

Deposits under Code section 682.39—Auditor should comply with order issued under Code sec. 682.41 unless he knows of some reason claimant was not "entitled thereto" in which event appeal should be taken. (Abels to Goodenberger, Madison Co. Atty., 9/25/59) #59-9-34

9.6

District—Fees collected by clerk—

1. The intent of ch. 358, 58th G.A. was to clarify the authority of the clerk of court to collect a fee for certifying a change in the title of real estate.

2. Practical necessity manifested through administrative practice of long standing justifies collection by the clerk for the auditor of the fee prescribed in Code sec. 333.15. (Abels to Hudson, Pocahontas Co. Atty., 11/23/59) #59-12-2

9.7

Judges retirement plans—A district court judge who holds membership in the judicial retirement system holds the same subject to the right of the legislature to amend the act, and amendment reducing the retirement age from 67 to 65 is not retroactive so as to enable him to receive his annuity upon attaining the age of 65. (Strauss to Sarsfield, St. Comp., 12/30/59) #60-1-4

9.8

Judicial retirement—A former judge who served a term on the municipal court, such term expiring December 31, 1934, cannot qualify for the increased annuity provided by H. F. 151, 58th G.A., by reason of such service because the qualification for the benefits of such act must be made while he is serving as such judge. (Strauss to Sarsfield, St. Compt., 7/10/59) #59-7-11

9.9

Judicial retirement system—Membership of supreme, district, municipal and superior court judges in the judicial retirement system is not mandatory requirement. Membership therein, however, automatically terminates such judge's participation in the Iowa public employees retirement system, and the tax imposed on the wages of such judges ceases on the effective date of such employee's membership in the judicial retirement

system or the effective date of ch. 356, 58th G.A., whichever is earlier. (Strauss to Sarsfield, St. Compt., 7/23/59) #59-7-28

9.10

Justice of the peace—Under sec. 601.131(4), 1958 Code, the allocation of a portion of the civil fees of a justice of the peace and constables to the county treasurer for expenses of their offices applies to the fees of such offices in both townships having a population of 10,000 and over, and 50,000. (Strauss to Akers, St. Aud., 5/13/59) #59-5-10

9.11

Juvenile, probation officers—Under S.F. 115, Acts of the 58th G.A., the judge or judges of the juvenile court may appoint one or more probation officers, and where one such probation officer is appointed, the judges may fix the salary of such officer, but in no case exceeding 70% of the salary of the district court judge. (Strauss to Wilson, Muscatine Co. Atty., 6/24/59) #59-6-20

9.12

Municipal courts—Question of establishment not properly submitted at time and place of regular school election held under Code ch. 277. (Abels to Erhardt, Wapello Co. Atty., 1/6/59) #59-1-10

9.13

Municipal—Executions—Under Code sec. 602.16, the municipal court may issue writs of execution in the same manner as authorized for district courts in Code sec. 626.2, in any case of which the municipal court had jurisdiction. (Abels to Hanrahan, Polk Co. Atty., 6/15/60) #60-6-25

9.14

Municipal, judicial retirement—The contribution under H.F. 151, 58th G.A., from the salary of municipal judge as his contribution to the judicial retirement fund is based upon his basic salary unaffected by any compensation for services on the juvenile court, and likewise the contribution by county or city to such fund shall be made upon the same basic salary from the same source from which the salary is paid. (Strauss to Carlson, Clinton Co. Atty., 7/15/59) #59-7-15

9.15

Municipal, vacancies—Chapter 351, Acts of the 58th G.A., amending sec. 602.6, Code 1958, provides for immediate appointment of a temporary acting clerk until the vacancy is filled by the mayor. (Rehmann to Sacks, Pottawattamie County Atty., 7/31/59) #59-7-39

9.16

Paroles—Board of control has no authority to permit a person to stand trial outside the state. (Rehmann to Lappen, Control Bd., 5/4/59) #59-5-4

9.17

Police judge—His jurisdiction in criminal matters is county-wide. (Abels to Schrader, Jones Co. Atty., 1/28/60) #60-2-3

9.18

Probate notices—Posting fee—Code sec. 618.12 appears the only authority for payment of fees for posting probate notices. (Abels to Samore, Woodbury Co. Atty., 10/28/59) #59-10-30

9.19

Salary—The compensation of a district court judge appointed by the governor June 3, 1959, elected November 8, 1960, for the short term from November 8, 1960 to January 1, 1961, and for the full term beginning January 1, 1961, should be computed at the rate of $10,000 per year until January 1, 1961, at which time, under section 42 of chapter 1, Acts of the 58th General Assembly, it should be increased to $12,500 per year. (Strauss to Sarsfield, St. Comp., 12/14/60) #60-12-14

9.20

Marriage—Code sec. 595.8 is a mandatory statute, and may not be waived; if waived, would subject the clerk of the District Court to the penalty of Code sec. 595.9. (Strauss to Samore, Woodbury Co. Atty., 4/8/60) #60-4-10

CHAPTER 10

CRIMINAL LAW

STAFF OPINIONS

LETTER OPINIONS

10.1 February 9, 1959

CRIMINAL LAW: Fines and imprisonment—

1. When both a fine and jail sentence were imposed prior to amendment of section 247.20, 1958 Code of Iowa, (see chapter 119, Acts of 57th G.A.) and the defendant paroled thereunder, the judgment of fine may be released by act of the governor granting either (1) a remission of the fine, or (2) a pardon, provided such remission or pardon is entered of record by the district court clerk.

2. When there is an alternative judgment of fine or imprisonment, serving the imprisonment satisfies the judgment and record entry thereof and, as in civil cases, releases the fine.

3. Imposition of a fine and imprisonment, with both suspended, and defendant paroled, does not affect entry of judgment for fine.

4. Where an alternative judgment of fine or imprisonment is imposed, and the latter served, the judgment for fine should be entered and is released as stated in 2 above.

Mr. Evan L. Hultman, Black Hawk County Attorney. Attention William C. Ball, Assistant County Attorney: Your letter of October 17, 1958, is set out in full below:

"It has been the policy of Clerk of the District Court of Black Hawk County to enter a money judgment against defendants in all criminal cases where a fine is assessed either in conjunction with a jail sentence or in lieu of a jail sentence.

"Section 247.20 of the Iowa Code deals with bench paroles by the District Court. Prior to amendment by the 57th General Assembly, (Ch. 119 (1) (2)), this section provided for such parole to run for an indefinite term. The amendment of said section provided 'The Trial Court . . . may, by record entry, suspend the sentence and parole said person during good behavior *for such period* as the Court may set. Upon expiration of such period, the Court may grant such paroled person *a final discharge from the sentence.*'

"In regard to judgments so entered prior to the amendment of Section 247.20, we request opinions on the following questions:

"1. How may a money judgment so entered be released when a fine and jail sentence have been suspended by the District Court?

"2. How may a money judgment so entered be released when the sentence imposed was a fine or jail sentence and the defendant has served the jail sentence?

"In regard to judgments after the amendment of Section 247.20, we request opinions on the following questions:

"3. When a defendant is sentenced to pay a fine in lieu of or in conjunction with a jail term, should such a money judgment be entered when the entire sentence imposed in both instances is suspended by the District Court and the defendant is placed on parole for a definite term?

"4. Where a defendant is sentenced to pay a fine in lieu of a jail term and serves the latter, should such a money judgment be entered and if so, how may it be released?"

With respect to the questions about section 247.20, 1958 Code of Iowa, prior to amendment by chapter 119, Acts of the Fifty-seventh General Assembly, you are advised as follows:

1. In the first fact situation both a fine *and* imprisonment were imposed. The sentence has been suspended, and presumably the court also paroled the person during good behavior as authorized by section 247.20, Code of Iowa.

The question then is whether a suspension and parole operate to release the fine imposed by the sentence of fine and imprisonment.

Initially, it is necessary to distinguish between suspension of imposition of sentence and suspension of execution of sentence. From the tenor of your letter, the sentence or judgment appears to have been pronounced. Thus, it is assumed that you are referring to suspension of execution. If that be true, the district court has no power to suspend execution of the sentence after pronouncement of judgment. See *1928 Attorney General Opinion, page 236.* However, according to a *1924 Attorney General Opinion, page 274,* the trial court has authority to suspend execution of sentence at any time prior to issuance of execution.

If the suspension was authorized its effect is that stated in 24 C.J.S., Criminal Law, section 1618(b) (9), which states:

" * * * It does not * * * *affect or change the judgment or sentence that has been rendered.* It merely suspends the execution of the sentence, on accused's compliance with the terms or conditions imposed, and does not deprive the court of its jurisdiction over accused, and of jurisdiction to enforce the sentence or enter such lawful order as justice might require."

The effect of a parole is stated in 67 C.J.S., Pardons, Section 22(b) as follows:

"The status of a paroled prisoner is the same whether he is paroled by the trial court or by the executive . . . a paroled prisoner, although conditionally released from actual custody, remains in legal custody and is constructively a prisoner of the state or nation . . . The parole does not terminate the sentence, . . . and according to some authorities does not affect the sentence at all, . . .

"Some paroles, and the laws under which they are granted, are regarded as not interfering with enforcement of the payment of fines and costs of prosecution; . . . "

Therefore, it appears that suspension of execution and parole have no effect on the judgment of fine. Certainly, there is no release of such judgment.

As to how such judgment may be released, you are referred to section 248.13, Code of Iowa, wherein the power to remit fines is lodged exclusively in the governor. Where such authority is exclusively in the executive, *Banks v. Cain,* 345 Pa. 581, 28 A. 2d 897, 143 A.L.R. 1473, provides that:

" * * * in order to release himself from such obligation without actual payment he must obtain a remission of the fine from the Governor.* * * "

Furthermore, as stated in a *1940 Attorney General Opinion, page 546:*

"We reach the conclusion, therefore, . . . that . . . a suspended sentence continues to have legal vitality unless remitted by death or by your (referring to the Governor) own acts in discharging the same."

Consequently, it is the position of this office that release of the criminal judgment of fine can be accomplished by the governor's remission of such fine. It is to be noted that a pardon, if absolute, may accomplish such remission. Reference is made to 67 C. J. S., Pardons, section 11(b) (4) which reads:

"When defendant in a criminal prosecution is sentenced to pay a fine, a pardon extends to the fine and operates as a remission thereof, . . . "

It must be recognized, of course, that a pardon may be conditional. In that case the conditions must be satisfied before the pardon becomes final.

Section 248.15, 1958 Code of Iowa, (same in 1954), in the case of a pardon, requires the officer having custody of the prisoner to do the following:

" . . . on one copy, said officer shall make such written return as the governor may require, and *forward said copy and return to the clerk of the court wherein the judgment is of record. . . .* " (Emphasis added.)

In addition, section 248.16, 1958 Code of Iowa (same in 1954), as to remissions of fines, provides:

" . . . one copy shall be delivered to said party and one copy to the clerk aforesaid."

Upon receipt of either a pardon or remission, the clerk of court, under section 248.17, 1958 Code of Iowa, (same prior thereto), shall:

". . . . immediately *file* and preserve the same in his office *and make such filing on the judgment docket of the case in question,* except that remissions of fines and forfeitures shall be spread at length on the record books of the court, and *indexed* in the same manner as the original case." (Emphasis added.)

Therefore, as to your first question, release of a judgment of fine may be effected when the clerk of court of the county in which the judgment is a lien makes the proper entry of record showing that the governor has either (1) remitted the fine or (2) granted a pardon which remits the fine.

2. When the judgment imposes a fine, or in lieu thereof, a jail sentence, as warranted by statute, there is an alternative judgment which may be *satisfied in full* by serving the jail sentence. *Wills v. Neilan,* 88 Iowa 548; *State v. Oliver,* 203 Iowa 458.

In the *Oliver* case the issue was whether or not the imprisonment satisfied the fine. Commenting thereon, it is stated:

"The sentence in terms is in the alternative, 'to pay a fine of $300, or in lieu of payment thereof, . . . that he be committed to the Polk County jail for a period of three months.' We need not pass upon the validity

of an alternate sentence. The defendant has served the three months in jail . . . ."

Quoting from the *Wills* case, it is further noted:

" 'The judgment is in the alternative, and would be satisfied by either payment or by imprisonment, . . . ' "

Since there is no Iowa statutory law or any common law specifically stating how a release of the criminal judgment of fine is effected, it is reasoned that section 790.1, Code of Iowa, has some application. It provides:

"Judgments for fines, in all criminal actions rendered, are liens upon the real estate of the defendant, and shall be entered upon the lien index in the same manner and with like effect as judgments in civil actions."

Upon the discharge of a defendant from custody section 791.4, Code of Iowa, is a mandate that:

" . . . the jailer or warden of the penitentiary shall make return of such fact to the proper court, and an entry thereof shall be made by its clerk as is required in the first instance."

If then the discharge from custody is a matter of record, and the imprisonment satisfies the judgment, this, when coupled with the requirement set out in section 624.37, 1958 Code of Iowa, appears to effect a release of the judgment of fine. The above section states:

"When the amount due upon judgment is paid off, *or satisfied in full,* the party entitled to the proceeds thereof, or those acting for him, *must acknowledge satisfaction thereof upon the record of such judgment,* . . . duly acknowledged and filed in the office of the clerk in every county wherein the judgment is a lien . . ." (Emphasis added.)

In view of the fact that judgments for fines in criminal actions are indexed as judgments in civil actions; that a stay of execution may be obtained as in civil actions (Section 790.2, Code of Iowa); that an execution upon a judgment of fine may be issued as in a civil case (Section 791.6, Code of Iowa); it is reasonable to assume that such judgments are released as in civil cases. Therefore, the procedure described above effects such a release as a matter of record.

Now as to your remaining two questions pertaining to section 247.20 as amended and codified in the 1958 Code of Iowa, you are advised:

3. If a fine is imposed in lieu of or in conjunction with imprisonment, with the sentence suspended, and the defendant paroled under authority of section 247.20, 1958 Code of Iowa, the question is whether the judgment for fine should be entered of record.

This, of course, reverts back to the previous discussion of the effect of suspension and parole in the answer to your first question. Since suspension and parole do not affect a judgment of fine it must be concluded that such judgment should be entered of record. As stated in 24 C. J. S., Criminal Law, Section 1593:

"It is required that a judgment in a criminal case be entered of record so that some formal evidence of its rendition shall exist on which to base its execution or an appeal."

The fact that the parole is for a definite term does not affect the entry of judgment.

4. Where an alternative judgment of fine or imprisonment is imposed, and the term of imprisonment served, the judgment of fine should be entered of record as discussed above in answer to question three. And the judgment may be released as pointed out in answer to question two.

10.2

Dogs—A dog is not a "domestic beast" within the meaning of Code sec. 717.1. (Faulkner to Winkel, Kossuth Co. Atty., 3/19/59) #59-3-14

10.3

Federal reservations—(1) Violation of ch. 736A, 1958 Code of Iowa, is a crime. (2) The provisions of ch. 736A, supra, do not apply to the Iowa ordinance plant at Burlington since the federal government has exclusive jurisdiction except for service of civil and criminal process. (3) Where an offense, under 736A, supra, occurred is a fact question dependent upon where the collective bargaining agreement was executed. (Faulkner to Dodds, St. Rep.,) #59-2-8

10.4

Gambling—The fact that new members in the organization pay a membership fee means that some of the participants pay for the chance to win a prize and this constitutes a consideration to support a lottery. (Faulkner to Garretson, Henry Co. Atty., 3/23/59) #59-3-20

10.5

Indictments—An indictment has performed its function upon trial and conviction, the judgment of conviction being sustained by sufficient evidence and in accordance with the law. (Pesch to Bd. of Control, 2/19/59) #59-2-25

10.6

Justice of the peace—In a prosecution for a nonindictable misdemeanor under chapter 762

1. The state may not move for a change of venue except when the justice is related to the defendant or a witness therefor.

2. The state has no right to a jury trial.

3. The state may not take an appeal from a judgment in favor of defendant.

(Neely to Brown, Mitchell Co. Atty., 11/7/60) #60-11-7

10.7

Lotteries—Under Code sec. 726.8, proposed distribution of tickets to the public by county fair boards is in violation of the gambling laws. (Neely to Schroeder, Jackson Co. Atty., 7/20/59) #59-7-18

10.8

O. M. V. I.—Provisions of sec. 789.13, 1958 Code of Iowa, the indeterminate sentence law, are not applicable to third offense O. M. V. I. under sec. 321.281 of the Code, and the court must sentence such person to a specific term of years. (Neely to Bennett, Warden St. Pen., 8/18/60) #60-8-17

10.9

Payment of fine—In a prosecution under Code sec. 693.1, where an indi-

vidual is committed to the penitentiary and a fine is imposed, continued incarceration in the penitentiary for non-payment of the fine under Code sec. 789.17 does not violate any provisions of the Code. (Neely to Bennett, Bd. of Control, 3/30/60) #60-3-28

10.10

Rewards—Reward payable only if conditions of reward offer are met. (Craig to Charlton, Delaware Co. Atty., 9/7/60) #60-9-12

10.11

Rewards to police officers—Police officers on emergency duty are within the scope of their official duties. Police officers cannot receive a reward for making an arrest it is their official duty to make. (Craig to Johnson, Lee Co. Atty., 10/14/59) #59-11-1

10.12

Usury—Whether "carrying charge" is usurious depends on what part was in fact paid for the use of money. (Strauss to Doyle, St. Rep., 10/27/59) #59-10-28

CHAPTER 11

DRAINAGE DISTRICTS

LETTER OPINIONS

11.1

Bonds; statute of limitations—Commences running at date of maturity irrespective of whether special assessment has been levied. (Gill to Parkin, Jefferson Co. Atty., 7/10/59) #59-8-1

11.2

Counties, secondary roads—

(1) The county under Code sec. 465.23, as amended by ch. 233, 57th G. A., is not responsible for the repair of tile lines projected across secondary road right of way prior to the effective date of the enactment by the 57th G. A.

(2) The county under Code sec. 465.23, as amended by ch. 313, 58th G. A., is not responsible for the repair of drainage ditches projected across secondary road right of way prior to the effective date of the enactment by the 58th G. A. (Lyman to Newell, Louisa Co. Atty., 11/5/59) #59-11-11

11.3

Drain—Where private landowners construct an artificial drainage ditch, the county is not required to construct a new drain across the secondary road at this point under Code sec. 465.23, the present drain accommodating a natural waterway being a suitable outlet in the natural course of drainage. (Knudson to Newell, Louisa Co. Atty., 7/25/60) #60-7-25

11.4

Drainage districts—An owner of platted lots which, in the aggregate, total three acres is not a bona fide owner of agricultural land so as to qualify as a trustee under the provisions of sec. 462.7 of the 1958 Code. (Lyman to Erhardt, Wapello Co. Atty., 2/8/60) #60-2-16

11.5

Drainage and levee districts distinguished—A drainage district and a levee district are by statute two different establishments; authorization to purchase drainage district warrants does not include authority to purchase warrants of a levee district. Authorization of a bank to purchase levee district warrants would require legislation. (Strauss to Newell, Louisa Co. Atty., 4/27/60) #60-4-20

11.6

Soil conservation, legal sponsors for federal aid—County drainage districts may be legal sponsors upon approval by the county board of supervisors. Cities and towns are legal sponsors when shown that the electors of such have approved that an agreement with the federal government may be entered into by the city or town. County conservation boards do

not have the authority to become legal sponsors. (Maggert to Greiner, Secy., 10/28/59) #59-11-2

11.7

Tile lines—

1. The township trustees under Code sec. 465.1, determine whether or not a tile line must be projected across the right of way to a suitable outlet as provided in Code sec. 465.23.

2. If it is found that the tile line should be projected across the right of way, then the board of supervisors, as to secondary roads, is responsible for materials and labor as provided in the second paragraph of Code sec. 465.23. (Lyman to Garretson, Henry Co. Atty., 9/4/59) #59-10-1

11.8

Workmen's compensation—Insurance—

1. Drainage district workers engaged in major repairs and improvements are employees of the drainage district and not the county.

2. Drainage district employees are not excluded from the provisions of the workmen's compensation law, but are not county employees and thus not within the liability insurance coverage purchased by the county.

3. Under Chapter 517A, 1958 Code of Iowa, districts of political subdivisions are authorized to purchase liability, personal injury, and property damage insurance. A drainage district may not purchase workmen's compensation insurance. (Faulkner to Oeth, Dubuque Co. Atty., 10/6/60) #60-11-3

CHAPTER 12

ELECTIONS

STAFF OPINIONS

LETTER OPINIONS

12.1 February 11, 1960

ELECTIONS: Pollbooks—The use of pollbooks in all voting precincts is not eliminated by sections 4 and 5, chapter 95, Acts of the 58th General Assembly and are required in the performance of duties as described in Code sections 609.7, 609.8, 609.9 and 609.13.

Mr. Jack W. Frye, Floyd County Attorney: This will acknowledge receipt of yours of the 5th inst. in which you submit the following:

"The County Auditor of Floyd County has requested opinion concerning election procedures as affected by Chapter 95 of the Acts of the 58th General Assembly. Specifically, the Floyd County Auditor has asked the following questions:

"1. Do Sections four and five of House File 678 (Chapter 95 of the Acts of the 58th General Assembly) eliminate the use of pollbooks in all of the voting precincts as provided for in Section 29.28?

"2. Are pollbooks required in township precincts—assuming that the first question above is answered in the affirmative insofar as cities having permanent registration and counties having a jury commission by virtue of Section 608.2?

"3. Are the pollbooks referred to in Sections 49.28, 609.7 and 609.8 and the jury lists referred to in Sections 609.9 and 609.13 required for all precincts in a county not having a jury commission?

"I have rephrased the questions put to me by our County Auditor in an effort to fully explain the purpose of the inquiries made, and am attaching as an exhibit the February 1, 1960 letter of Mr. Harold L. Friedrich, the Floyd County Auditor to more fully explain the purpose of the inquiries."

Accompanying the request is a letter from your County Auditor addressed to you. Copy of which follows:

"I respectfully request an Attorney General's Opinion on the following questions relative to election procedures as affected by the enactment of House File 678, 58th General Assembly of Iowa; also of importance to the

interpretations requested, are the requisite statutes pertaining to cities with permanent registration and those cities without permanent registration and rural areas without any form of registration requirement other than the entry of the voter's name upon a poll list; and the return of jury lists upon the pollbooks in counties not having a jury commission.

"The questions are as follows:

"1. Do Sections 4 & 5 of H.F. 678 eliminate the use of pollbooks provided for in Section 49.28 in all of the voting machine precincts?

"2. Assuming that the pollbooks as referred to in Section 49.28 are not now required in cities having permanent registration and the aforesaid city having such permanent registration is in a county having a jury commission by virtue of Section 608.2, are pollbooks required in the township precincts of the aforesaid county?

"3. Assuming that the pollbooks as referred to in Section 49.28 are not now required in cities having permanent registration under Chapter 48 and the aforesaid city has a population of less than 14,000, the requirement in Section 608.2 before a county may have a jury commission, are the pollbooks as referred to in Section 49.28 and Section 609.7 & 609.8 and the jury lists as referred to in Sections 609.9 & 609.13, required for all precincts in said county not having a jury commission?

"Immediate consideration of the above questions is pertinent to the order of election supplies and the processing of forms, a responsibility of the County Auditor's Office, for use in the forthcoming Primary Elections."

In reply to the foregoing I advise as follows:

The obligation to furnish pollbooks and the form thereof is prescribed by section 49.28, Code of 1958 providing as follows:

"The auditor shall prepare and furnish to each precinct two pollbooks, and all other books, blanks, materials, and supplies necessary to carry out the provisions of this chapter. Each pollbook shall contain a column for the names of the voters, a column for the number, and sufficient printed blank leaves to contain the entries of the oaths, certificates, and returns."

Insofar as the use of such pollbooks is concerned where registration is required, either permanent or temporary, in interpreting statutes still existent such use is described in the case of *Gilman v. Sioux City*, 215 Iowa 442, 245 N.W. 868, as follows:

"From a reading of these various statutes we think it was the intent of the legislature that the certificates of registration showing the qualified electors who participated in the election, where the method of permanent registration is in vogue, should be regarded the same as the pollbooks returned from voting precincts where there is no permanent registration showing the voters who participated in the election. In other words, when the legislature used the term 'poll list' in the statute providing for the petition for the establishment of a municipal court, it was evidently intended to refer to the list of qualified electors who had in fact participated in the last municipal or state election. In the case of a precinct where permanent registration was not required, said 'poll list' would appear in the pollbook as provided by section 800 of the Code. In the case where permanent registration was in effect, the 'poll list' would be the certificates of qualified electors who had participated in said election, which said certificates had been arranged in alphabetical order after the close of the election and returned to the commissioner of registration as provided by section 718-b20. In other words, the 'pollbook' in

one instance, and the 'certificate of registration' in the other, become the 'poll list' of the qualified electors as shown at said election."

In other words where permanent registration is used, the registration certificates required by section 48.21, Code of 1958, are deemed to be statutory pollbooks. Insofar as registration is otherwise concerned, pollbooks as described by section 49.28 are required. Where registration is not required, the name of the person voting is to be entered in the pollbook. (See section 49.83, Code 1958.) After closing of the pollbook, among other duties of the official in charge see sections 50.15 and 50.18 both of the Code of 1958 which provide as follows:

50.15 "Destruction in abeyance pending contest. If a contest is pending, the ballots shall be kept until the contest is finally determined, and then so destroyed."

50.18 "Return of remaining poll and registration books. The other of said pollbooks and the other registration book, if any, shall be forthwith delivered by one of the judges to the township, city, or town clerk, depending on whether the precinct is a township, city, or town precinct."

The foregoing appear to be the statutory directions concerned with pollbooks and contents, delivery, duties as far as casting of ballots are concerned and delivery after the polls are closed.

In this statutory situation, addressing myself to the questions propounded, I would further advise that there is neither express nor implied repeal of any of the foregoing statutes by chapter 95, Acts of the 58th General Assembly. Express repeal is totally absent and implied repeal is not present because there is no irreconcilable conflict between the provisions of the Code sections referred to and the provisions of chapter 95, Acts of the 58th General Assembly.

Sections 4 and 5 of chapter 95, Acts of the 58th General Assembly, deal with returns and insofar as pertinent are exhibited as follows:

"Sec. 4. Section fifty-two point twenty-one (52.21), Code 1958, is hereby amended by adding after the end of line seven (7) thereof the following: 'Said judges shall use a voting machine return and tally sheet in substantially the following form: * * * '"

"Sec. 5. Section fifty-two point twenty-three (52.23), Code 1958, is hereby amended by striking all of said section following the word 'sign' in line four (4) thereof and inserting in lieu thereof the following 'the canvass forms referred to in section fifty-two point twenty-one (52.21) of the Code, which canvass shall serve as a written statement of election. Said canvass statement shall be in lieu of the return required in section fifty point sixteen (50.16), Code 1958, where permanent registration is in effect, except that the registration books shall be preserved and returned with said certificate of election officials and canvass.'"

Election returns dealing with the results of an election are the evidence thereof. See *Words and Phrases 37A*, page 257. Pollbooks, on the other hand, are part of the machinery from which returns are made. Obviously reconcilability between these two cannot exist.

I therefore answer your questions as follows:

1. In answer to question number one, I would advise that sections 4 and 5 of House File 678 (Chapter 95 of the Acts of the 58th General

Assembly) do not eliminate the use of pollbooks in all voting precincts as provided for in Code section 49.28.

2. In view of the conclusion reached in question number one, necessity for answering number two is not required.

3. In answer to question number three, I advise that the pollbooks referred to in Code sections 49.28, 609.7 and 609.8 and the jury lists referred to in Code sections 609.9 and 609.13 are required for all the precincts of the county not having a jury commission.

12.2 March 14, 1960

ELECTIONS: Boards of supervisors—

1. Chapter 252, Acts of the 58th G.A., is an implied repeal of section 39.19(2), Code 1958, and therefore, on a board of supervisors consisting of five members, each township is entitled to one member to be elected at large.

2. Nomination papers of a candidate for primary nomination should designate the term of office which he is seeking to fill.

3. Candidates in each category in the primary receiving the highest number of votes for the office of supervisor, and not less than 35 per cent of the vote for which nominations are respectively sought, are deemed nominated.

4. In the general election, where there are two or more candidates for election to the board of supervisors having the same township residence, the candidate receiving the highest number of votes will be declared elected.

5. If a vacancy results from a failure to elect a member of the board of supervisors, such vacancy is filled pursuant to the provisions of section 69.8(5), Code 1958.

Mr. Evan L. Hultman, Black Hawk County Attorney: This will acknowledge receipt of yours of the 1st inst. in which you submitted the following:

"As per our two previous conferences in your office discussing the election procedure of a five man board of supervisors, my notation which I left the afternoon of Tuesday, February 9, and our brief telephone conversation last week, I wish to specifically submit the problem in more detail. As we have discussed, Chapter 252, of the Acts of the 58th General Assembly amended Section 331.7 of the 1958 Code by inserting in line six after the period the following:

'In counties of over eighty thousand (80,000) population where such proposition reduces the board to five (5) members, there shall be elected at large the number of members required by such proposition provided, however, that not more than one (1) supervisor shall be a resident of any one (1) township of such county.'

"As per our discussion in your office concerning the first problem, which has arisen with reference to the filing of nomination papers by candidates, I have instructed my auditor that a candidate for the board does not have to file any papers at the time he requests nomination papers, as is the case in all instances, but merely requests and takes out the blank forms. By the time of the filing of these papers, there are a

number of problems which must be solved concerning the entire election procedure.

"1. When and how does a candidate declare whether or not he is running for the term of two years, three years, or four years, as is the case in this instance when the supervisors are to be elected after the voters previously voted to reduce the board to five members?

"The last paragraph of Section 331.7 indicates that:

'The length of term for which any person is a candidate and the time when the term begins shall be indicated on the ballot.'

"As you can readily understand, the auditor must certify to the printer in the near future what is to be printed on the ballots for the June primary and what is to appear in the notices, etc., concerning the election. In digesting the above sections, it is evident that there must be an indication by the candidates as to which term he is seeking, i.e., two, three or four year term; that the term must be indicated upon the ballot and not more than one person nominated for the office from any one township. However, Section 39.19(2) indicates:

'In counties having five or seven supervisors two members may be residents of a township which embraces a city of thirty-five thousand population.'

"As you can readily see, it is possible that the candidates for each term of office getting the highest number of votes could conceivably be from the same township in the primary. Which are the party nominees to go on the ballot for the November general election? The situation is even more complex when you consider the nominees from both parties. In other words, we could have a number of legally nominated candidates in the primary who would be in fact eliminated by the questionable township residence requirement before the votes are even cast in the November election.

"It has been suggested that one solution to the problem would be for the Board of Supervisors to set up five supervisor districts under section 331.8 of the 1958 Code and only one candidate nominated from each district. I informed the present board prior to and again at 'its regular meeting in January' that action of this kind would have to be taken at that time. The question has now arisen as to whether or not 'its regular meeting in January' is a continuous meeting which is only recessed each Monday and is still in session.

"As you can readily appreciate, there are many procedural problems concerning both the primary and general election of supervisors created by the passage of Chapter 352 of the Acts of the 58th General Assembly and the passage of the issue of reducing the board to five members by the electorate here in Black Hawk County. Needless to say, it is imperative that the proper election procedure be set out prior to the first step in the election procedure in fairness to all candidates and political parties and to insure a valid election to the general public.

"I will be in Des Moines on Monday, March 7th, and would like to converse with you further concerning this problem in the afternoon. As you can appreciate the time factor of filing, I would appreciate a final opinion concerning this matter as soon as it is reasonably possible."

And receipt is acknowledged of your supplemental letter dated March 8, 1960, in which you submitted the following:

"As per our discussion yesterday, I submit the following additional questions concerning the procedure of electing the Board of Supervisors in Black Hawk County this year:

"Question No. 1: May the present Board of Supervisors district themselves under Section 331.8 of the 1958 Code of Iowa in lieu of Section 331.7 as amended by the 58th General Assembly?

"Question No. 2: In the event candidates filing for a term of 2 years, 3 years, and 4 years are all from the same township residence, do the 2 candidates receiving the highest number of votes for the 2-year terms, the 2 for 2 3-year terms and the 1 for the 3-year term constitute the party nominees for the general election?

"Question No. 3: In the event 2 or more candidates in the general election have the same township residence and are seeking the same term or different term is the candidate with the largest vote the only one elected?

"Question No. 4: In the event there should be a vacancy as a result of the election procedures, in accordance with Section 69.2 of the 1958 Code of Iowa, are said vacancies to be filled in accordance with

Section 69.8 (5) of the 1958 Code of Iowa?

"I kindly request that the aforementioned questions be added to my previous correspondence and a written opinion given to me concerning these additional questions in addition to those originally submitted."

1. In reply thereto I advise you as follows:

Insofar as a conflict exists between chapter 252, Acts of the 58th General Assembly quoted by you, and the provisions of section 39.19(2), (evidenced by the fact that Black Hawk County, having a city of 35,000, and a board consisting of five members, under the provisions of section 39.19, Code 1958, may have two members on the board residents of the same township, while a county having a population of 80,000 or more, which Black Hawk has—see Federal Census of 1950, and the case of *Harp v. Abrahamson*, 248 Iowa 222—is limited to one supervisor for each township, according to chapter 252, Acts of the 58th General Assembly) I am of the opinion that this conflict amounts to an implied repeal of section 39.19(2) by the subsequent enactment of chapter 252, Acts of the 58th General Assembly. This has both textbook and case support.

In *Sutherland Statutory Construction*, 3rd Edition, Volume 1, page 447, after reciting an arbitrary distinction established by the court between amendments and repeal, it is stated:

"This arbitrary distinction has been followed by the courts, and they have developed separate rules of construction for each. However, they have recognized that frequently an act purporting to be an amendment has the same qualitative effect as a repeal—the abrogation of an existing statutory provision—and have therefore applied the term 'implied repeal' and the rules of construction applicable to repeals to such amendments. The courts also have recognized that acts which the legislature has treated as original frequently have the same effect in substance as amendments and repeals and that an independent act in effect adds a provision to a prior act pertaining to the same subject matter or in effect adds a provision to a prior act and abrogates a part of it by being in conflict with it, and have therefore applied the term 'implied amendment' to the first two of these results and the term 'implied repeal' to the last.

"The term 'implied amendment' has been used chiefly by courts in determining whether the constitutional requirement as to the form of an amendatory act has been violated, whereas the term 'implied repeal'

has been used to justify the application to the act of the rules of construction developed for express repeals. Where an independent act in effect adds a provision to a prior act and at the same time repeals a part thereof by being in conflict with it, the terms 'implied amendment' and 'implied repeal' are both used to describe the situation, the former in determining whether the constitutional limitation on the form of amendments has been violated, the latter in construing the act."

And addressing itself to the same proposition, *Sutherland*, on pages 388 and 389, states:

"The constitutional limitation that no act shall be amended by mere reference to its title does not apply to 'implied repeals' or 'repeals by implication.' Repeal by implication occurs when an act not purporting to repeal any prior act is wholly or partially inconsistent with a prior statute or covers the subject of a prior act or section and is a substitute act. On the basis that the latest declaration of the legislature prevails, the inconsistent provisions of the prior statute, or the whole prior statute if the later act is intended as a substitute, are treated as repealed. Where the existence of a prior act is only partially terminated by the inconsistency of provisions in a later act, the repealed provisions of the prior statute are necessarily replaced by the inconsistent provisions of the new act, thus in substance altering or amending the prior act. Repeal by implication when only a part of the prior statute is repealed is identical with amendment by implication."

And on page 458 the author states:

"However, a former act may be just as effectively repealed by implication as by express designation."

Quoting from the case of *People v. Lowell*, 250 Mich. 349, 230 N.W. 202 (1930), he states: (Footnote 3)

"The operation of a repealing act is not dependent upon whether the repeal is express or implied, for, when a repeal is finally determined, inquiry into how it arose is unimportant."

And so far as case authorities are concerned, the case of *New York, N. H. & H. R. Co. v. Bridgeport Traction Co.*, 65 Conn. 410, 32 Atl. 953, 955, 29 L.R.A. 367, 371 (1895) states the following:

"The main contention of the plaintiff is that the Public Act of June 14, which took effect July 30, repealed or modified those parts of the special grants made on June 28 (when the private acts took effect under the provisions of the general statutes), under which the defendant claims an absolute right to construct the crossing in question.

"The doctrine that a later statute repeals by implication all provisions of the former ones which are inconsistent with it rests on the ground that the last expression of the legislative will ought to control. It assumes that there have been successive and different expressions of such will in relation to the same subject; and the latest of these governs, precisely as the last word of the master governs his servants, however much it may vary from his previous directions. Such is presumed to be his intention; and the intent of a statute is determined by the same rule and the same reason."

And while it has not been so pointedly stated, it is hornbook law in Iowa that where two statutes are in irreconcilable conflict, the last one enacted will be construed as repealing the prior one. (Iowa Digest, Vol. 17, p. 380)

IOWA 1857. *Casey v. Harned*, 5 Iowa 1, 5 Clarke 1.

IOWA 1859. *Edgar v. Greer*, 8 Iowa 394, 8 Clarke 394, 74 Am. Dec. 316.

IOWA 1872. *McKinney v. Wood*, 35 Iowa 167.

IOWA 1925. *Owens v. Smith*, 204 N.W. 439, 200 Iowa 261.

IOWA 1933. *Waugh v. Shirer*, 249 N.W. 246, 216 Iowa 468.

The fact that section 3.1, Code 1958:

"3.1 Form of bills. Bills designed to amend, revise, codify, or repeal a law:

"1. Shall refer to the numbers of the sections or chapters of the code to be amended or repealed, but it shall not be necessary to refer to such sections or chapters in the title.

"2. Shall refer to the number of the general assembly and of the sections and chapters of the acts thereof to be amended in case the bill relates to a section or sections of an act not appearing in the code.

"3. All references to statutes shall be expressed in words, followed by the numerals in parentheses, and if omitted the reporter of the supreme court in preparing acts for publication in the session laws shall supply the same.

"4. The title to a bill shall contain a brief statement of the purpose of the bill, however all detail matters properly connected with the subject so expressed may be omitted from the title."

has not been complied with is no bar to the application of this principle. It was so held in the case of *Waugh v. Shirer*, 216 Iowa 468, 472, 249 N.W. 246, in which it was stated:

"(3) 11. It is further argued by the appellant, however, that section 4753-a11 was not repealed because the Legislature did not conform to the requirements made in section 47 of the 1931 Code. This last-named section provides:

'Bills designed to amend, revise, codify, or repeal a law: 1. Shall refer to the number of the section or sections of the code to be amended. 2. Shall refer to the number of the chapter or chapters and title of the code to be amended. 3. Shall refer to the number of the general assembly and of the sections and chapters of the acts thereof to be amended in case the bill relates to a section or sections of an act not appearing in the code. 4. All references shall be expressed in words, followed by the numerals in parentheses, and if omitted the reporter of the supreme court in preparing acts for publication in the session laws shall supply the same.'

"There is no claim by the appellees that the Legislature, in adopting section 1171-a4, complied with section 47 when repealing section 4753-a11. The question here raised by the appellant, nevertheless, has been disposed of by this court in previous cases. In *Solberg v. Davenport*, 211 Iowa 612, we said on page 624, 232 N.W. 477, 483:

'With the letter proposition (the one now raised by the appellant in the case at bar) we cannot agree. The general rule is too well settled to need citation of authority that each Legislature is an independent body entitled to exercise all legislative power under the limitation of the Constitution of this state and the United States, and no Legis-

lature can pass a law which would be binding on subsequent legislatures. We think this rule applies to the situation before us (the one before us in the case at bar). In other words, section 47 of the Code 1927 was utterly disregarded by the Legislature; yet it cannot be held invalid because thereof. Authorities on this proposition are not numerous, but those we have been able to find announce this doctrine.'

"So far, then, as section 47 of the Code is concerned, section 1171-a4 thereof, by implication, repealed section 4753-a11 under consideration."

The rule was likewise announced in the case of *Barber v. Housing Authority of City of Rome*, 5 S.E. 2d 425, 427, in the following language:

"(3.4) (b) The amendatory act of 1939 is attacked on the further ground that it violates art. 3, sec. 7, par. 17, of the constitution (Code, § 2-1817), precluding the amendment or repeal of any law or Code section 'by mere reference to its title, or to the number of the section of the Code,' and requiring a distinct description of the law to be amended or repealed and the alteration to be made. It has been held that this provision is 'confined to repeals and amendments expressly made,' and does not apply to changes made by 'implication' *(Nolan v. Central Georgia Power Co.*, 134 Ga. 201 (3), 67 S. E. 656; *Swift v. Van Dyke*, 98 Ga. 725-727, 26 S. E. 59; *Durham v. State*, 166 Ga. 561, 144 S. E. 109), and that 'an act which does not purport to amend or repeal any particular law or statute is not within (its) prohibition.' "

#2. Insofar as the declaration of the term of office for which a person is a candidate, in view of the provision of section 331.7, Code 1958:

"The length of term for which any person is a candidate and the time when the term begins shall be indicated on the ballot."

and the following provision of section 39.18, Code 1958:

"It shall be specified on the ballot when each shall begin his term of office."

I refer to the following controlling opinion appearing in the *Report of the Attorney General for 1932*, at page 201, as follows:

"ELECTIONS—NOMINATION PAPERS: Where nomination papers did not state term, new papers should be secured.

"April 6, 1932. *County Attorney, Clarinda, Iowa:* This will acknowledge receipt of your request of March 22nd, which is as follows:

'I would like to have an opinion from your office on the following question and set of facts: A candidate has made his announcement in the papers of the county that he is a candidate for the office of county supervisor and has designated the term for which he is a candidate, namely the term commencing January 1, 1933. His political cards also designate the term. His nomination papers, which are signed and ready to file, state that he is a candidate for the office of County Supervisor but do not state the term.

'The question arises, should he secure new nomination papers, stating that he is a candidate for the office of County Supervisor, term commencing January 1, 1933, and have these papers signed by the required percentage of voters, or will it be permissible to add, "Term commencing January 1, 1933" to each of his nomination petitions which are already signed and ready to file?'

"In reply we would say that under the present statutes the candidate of whom you speak may not add to his nomination papers, and he should,

therefore, secure new nomination papers designating the particular office and term for which he desires to become a candidate."

This opinion, now of long standing, unchanged and unchallenged, is still the view of the department and is now confirmed.

#3. In answer to Question No. 1, set forth in your supplemental letter, I repeat the language of chapter 252, Acts of the 58th General Assembly, as follows:

"AN ACT relating to the election of members of the board of supervisors in certain counties, after reduction of membership of the board, and to amend chapter three hundred thirty-one (331), Code 1958.

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

"Section 1. Section three hundred thirty-one point seven (331.7), Code 1958, is hereby amended by inserting in line six (6) after the period the following:

> 'In counties of over eighty thousand (80,000) population where such proposition reduces the board to five (5) members, there shall be elected at large the number of members required by such proposition provided, however, that not more than one (1) supervisor shall be a resident of any one (1) township of such county.'

and by it exhibit the mandatory language of the Act, to wit:

"In counties of over eighty thousand (80,000) population where such proposition reduces the board to five (5) members, *there shall be elected at large*," etc.

Therefore, in compliance with the foregoing mandate, in counties having a board consisting of five members, the foregoing act restricts the power of the board in redistricting to members at large and not by districts, at the same time limiting each township to one member on the board.

#4. In answer to Question No. 2 contained in your supplemental letter, I would advise that the candidates in the primary receiving the highest number of votes cast for that office, and not less than 35 per cent of the vote in each category, to wit: a term of two years, or a term of three years, or a term of four years, all from the same township, shall be deemed to have been nominated.

Addressing itself to the provision of section 39.19, Code 1958, that no person shall be elected a member of the board of supervisors who is a resident of the same township of any of the members holding over, it was stated in the opinion of this department issued April 28, 1958, to the Hon. W. E. Darrington, State Representative, as follows:

"This appears to be the only statute respecting the eligibility of a person desiring to be a candidate for elective office. The statement therein made by the candidate is that he is 'eligible to the office for which I am a candidate.' The eligibility consists of his being of constitutional age, that is, 21 years of age, and a resident of the state six months and the county ten days. The fact that Green may not be elected and may not qualify for the office by reason of the prohibition contained in section 39.19 heretofore quoted deals with the eligibility of the person to be elected to the board of supervisors. Section 43.18 deals with the eligibility to be a candidate for the office. These statutes deal with different situations, one with the primary and one with the election. The same

situation appeared in the case of *Stafford v. State Election Board*, 203 Okla. R. 132, 218 P. 2d 617, where it was said:

'We are not dealing here with the eligibility of petitioner to hold the office if elected thereto. We agree with the contention of petitioner that the provision of the Constitution that members of the House of Representatives must be at least 21 years of age at the time of their election and not the primary election.

'The Constitution does not prescribe the qualifications of a candidate in a primary election. Therefore, it was within the province and rights of the Legislature to declare upon what terms and subject to what conditions the right to become a candidate before a primary election shall be conferred. The Legislature has exercised that right and petitioner is bound thereby.'

"In view of the foregoing I am of the opinion that Green may become a candidate for the board of supervisors for the term beginning January 2, 1959, and that the county auditor has the duty of placing his name upon the ballot as a candidate for the office."

#5. In answer to Question No. 3 in your supplemental letter, it is my opinion that in the case of two, or more than two, candidates in the general election having the same township residence and being candidates for the same term or different terms, the candidate receiving the highest number of votes cast will be declared elected. It may be said of this conclusion what was said in the case of *Arp v. Lage*, 236 Iowa 775, 777, with reference to the result of an election for membership in the board of supervisors where the election itself presents a situation where a candidate takes a chance of election or defeat. It was there said:

"In other words, a person elected supervisor must be able to show that he is not a resident of the same township as a holdover, or if he is, that he is also a resident of the same township as the one he succeeds, or, in townships with a city of thirty-five thousand, he must show that his election will not result in three members from such township. Because Arp was a resident of the same township as a holdover, and his election will result in three members from the township having the city of thirty-five thousand, his election falls within the prohibition and is invalid.

"We recognize that this construction makes the validity of an election in certain instances depend upon the outcome of the election of other candidates for other supervisor offices. But this arises by reason of the difference in the exceptions. The first is a personal exception, which applies to any candidate who is a resident of the same township as the member he seeks to succeed. The second is not a personal exception. It is based upon a situation. Of course, this situation might vary, depending upon the election or defeat of other candidates. This is the chance one takes who, as one of the prohibited class, seeks office in reliance upon this exception. As a resident of Davenport, Arp knew that there was one board member from that city and one candidate (Lage) from Davenport who was not in the prohibited class. He should have known that he would be in the prohibited class unless he would be able to show that his election would not result in three members from Davenport township. He cannot now argue that Lage's election is the one that makes three from Davenport for Lage did not rely in this exception. Lage relied on the first exception where residence in the same township as a holdover is immaterial so long as the candidate is a resident of the same township as the one he tries to succeed. It is Arp's election that makes three from Davenport. He relied solely on the second exception. Since his election results in three from Davenport it is

invalid and the trial court was right in so holding. The decree of the trial court is affirmed.—Affirmed."

#6. In answer to Question No. 4 propounded in your supplemental letter, I would advise it is my opinion that if a vacancy, as a result of a failure to elect a member or members to the board of supervisors in the 1960 election should occur, said vacancy would be filled in accordance with the provisions of section 69.8(5), Code 1958, which provides as follows:

"69.8 *Vacancies—how filled.* Vacancies shall be filled by the officer or board named, and in the manner, and under the conditions, following:

1. * * *

2. * * *

3. * * *

4. * * *

5. Board of supervisors. In the membership of the board of supervisors, by the clerk of the district court, auditor, and recorder.

6. * * *

7. * * *"

12.3 June 17, 1960

ELECTIONS: Nominations by conventions—Nomination of candidate by a convention is not limited to those whose names appeared on the primary ballot, under present provision of the law, chapter 43, Code 1958.

Hon. Melvin D. Synhorst, Secretary of State: This will acknowledge receipt of yours of the 7th inst. in which you submitted the following:

"It appears that none of the candidates for the Republican nomination for the office of United States Senator received thirty-five per cent of all the votes cast for such office in the June 6, 1960 Primary Election. Will the Republican State Convention be limited in making this nomination to selecting from among those candidates whose names appeared on the June 6, 1960 Primary Ballot, or may the Convention nominate a person whose name did not appear on the Primary Ballot?

"Your opinion on this question is respectfully requested."

In reply thereto, I advise as follows:

As early as the year 1904, the 30th General Assembly, by chapter 40, enacted a primary election law whereby the selection of county officers in counties having a population of 75,000 or over, was by primary election. In that chapter, after prescribing the mechanics of the county convention subsequent to the primary, section 14 thereof provided specifically with respect to the question propounded in your request, the following:

" * * * and no nominees shall be certified to except from among those whose names were printed upon the official ballot of the primary election."

However, said chapter 40 of the 30th G.A. was revised and repealed

by chapter 51 of the 32nd G.A., with the result that such provision was eliminated in such revision and repeal.

A subsequent revision of the primary law, original chapter 40 of the 30th G.A., occurred as appears in chapter 5 of the 40th General Assembly, Extra Session, and such revision again did not contain the express language hereinbefore quoted from chapter 40 of the 30th G.A., and it so remains eliminated in the express statutes of chapter 43, Code of 1958.

This legislative history clearly evidences the legislative intent that the names of the candidates printed upon the ballot are not the only persons for whom a convention can vote, and nominate. Such has been the view of this department by opinions, one appearing in the *Report of the Attorney General for 1909*, page 151, 156, which stated the following:

"8th. The county convention thus required to be held is authorized to nominate candidates for every office to be filled by the voters of the county, when no candidate for such office has for any reason not received a nomination at the preceding primary election. It is also authorized to nominate candidates for the office of judge of the district court in counties comprising one judicial district of the state, and to select delegates to the state and district conventions, as well as to elect members of the party central committee for senatorial and congressional districts.

"Inquiry has been made under this section as to whether or not the county convention would have the right to nominate a person for a county office who had not been a candidate before the primaries; in other words, the question is if the names of three persons appeared upon the primary ballot for county auditor, and no one of the three receives the necessary thirty-five per cent, would the convention have the right to nominate for county auditor some person other than one of the three voted for at the primary. It seems to me there can be but one answer to this question. The county convention is given the power to make nominations for all county officers for which no nomination was made at the primary. This would include not only the offices for which candidates were voted for at the primary, but also offices, if there should be any such, for which no candidate appeared on the primary ballot; the evident intent of the legislature being to leave the convention free to fill such places without limiting it to the persons who were voted for at the primary."

Another opinion in the *Report of the Attorney General* for 1911-1912, at page 727, states:

" * * *

"You call attention to the fact that your county comprises one senatorial district, and that at the primary election there were four candidates for the office of state senator, no one of which received the required 35 per cent of the total vote cast, and then you ask:

'Can the one who received the largest vote be declared nominee without the action of the county convention?'

"This question should be answered in the negative. Code supplement section 1087-a26 provides:

'The said county convention shall make nominations of candidates for the party for any office to be filled by the voters of a county when no candidate for such office has been nominated at the preceding primary election by reason of the failure of any candidate for any such office to receive 35 per centum of all the votes cast by such party therefor.'

"This department has further held that in making such nominations the county convention is not restricted to those candidates who received votes at the primary election, but may nominate a candidate for whom no vote was cast at the primary election."

And a subsequent opinion on October 15, 1930, in the *Report of the Attorney General*, at page 357, appears in terms as follows:

"We acknowledge receipt of your letter requesting an opinion of this department on the following question:

> The Democratic party had no candidate for either sheriff or auditor of this county on the ballot in our primary election, but for each office two or three names were written in and votes cast for them. The Democratic county convention then made a nomination for the office of sheriff and for the office of county auditor.
>
> Since the Democratic county convention the nominee for auditor withdrew her nomination and the Democratic party central committee made a nomination to fill the vacancy.

"You are referred to the case of *Zellmer v. Smith*, 221 N.W. 220; 206 Iowa 725. It will be seen from reading this case that where anyone is voted for on a ticket in the primary but who does not receive the required percentage the county convention has the right to make a nomination for such office.

"We are enclosing herewith copy of an opinion rendered by this department to the Honorable Ed M. Smith, Secretary of State, under date of September 26, 1930, which holds that a candidate has the right to withdraw, so the withdrawal of the nominee made by the county convention was proper and we are of the opinion that the Democratic party central committee has the power and authority under the statue to fill his vacancy in nomination.

"You are also advised that if someone was voted for in the primary on the ticket, that the convention is not then confined to make a nomination of the person whose name was written in and who was voted for, but may nominate anyone they desire."

See also the case of *Zellmer v. Smith*, 206 Iowa 725.

Further evidence of the legislative intent is furnished by statutory authorization of convention proceedings, and in none of these enactments is there either express or implied limitation on the power of nomination by convention.

Insofar as the county convention is concerned, the duties are prescribed by *Code section 43.97(1)*, as follows:

"43.97 Duties performable by county conventions. The said county convention shall:

1. Make nominations of candidates for the party for any office to be filled by the voters of a county when no candidate for such office has been nominated at the preceding primary election by reason of the failure of any candidate for any such office to receive the legally required number of votes cast by such party therefor.

* * * "

Insofar as the district convention is concerned *section 43.101(1) of the 1958 Code* provides the following:

"43.101 District convention. Each political party shall hold a senatorial

or congressional convention in districts composed of more than one county:

1. When no nomination was made in the primary election for the office of senator in the general assembly, or of representative in congress, as the case may be, because of the failure of any candidate to receive the legally required number of votes cast by his party for such candidates.

* * * "

Insofar as the state convention is concerned *Code section* 43.109(1) provides:

"43.109 Nominations authorized. Said state convention shall make nominations of candidates for the party for any office to be filled by the voters of the entire state:

1. When no candidate for such office has been nominated at the preceding primary election by reason of the failure of any candidate for any such office to receive the legally required number of votes cast by such party therefor.

* * * "

Note that each of these enactments originally required a candidate to achieve 35 per cent of the primary vote, as well as the highest vote cast at said primary election. However, all of these statutes now use the language hereinbefore quoted with respect to authority to make nominations, not by reason of the failure to achieve the 35 per cent, but by reason of the failure of any candidate for any such office "to receive the legally required number of votes cast" for such candidates. These sections include not only the highest vote and 35 per cent, but also at least 5 per cent or 10 per cent of the vote for governor at the preceding election.

And that is the rule of the *Zellmer* case heretofore cited. In that case it was stated:

"In the case before us, not only was 35 per cent of the vote cast required, but also a vote equal to 10 per cent of the party vote at the last general election. The plaintiff met the 35 per cent requirement, but failed to meet the 10 per cent requirement. Was this a 'failure of any candidate for any such office to receive the *legally required number* of votes cast by such party therefor?' We think it was. That the legislature used the words above quoted advisedly, appears from other sections, as well as from section 624. The identical language is used in other sections. See section 597 and paragraph 2 of section 590. Our interpretation of section 624 fits into section 625, above quoted. It will be seen that the prohibition against nomination by a party convention is confined to those cases where 'no party was voted for in the primary election.' In this case the plaintiff and another were 'voted for.' The same form of prohibition was contained in the former statute, section 1087-a25, Code Supplement, 1913, but it was quite inconsistent with the first part of the statute, which affirmatively authorized a party convention to nominate a candidate only when the failure of the primary nomination resulted from the failure to receive 35 per cent of the vote. Perhaps it would be more accurate to say, not that the two parts of the former statute were inconsistent, but that a manifest gap was left beween the two provisions. There was an apparent oversight of the case where a candidate was voted for by writing his name upon the ballot. Such a case was not covered in terms by the affirmative power conferred in the first part of the section, nor yet in the specific prohibition contained in the last part thereof.

"We think that the enactment of the present section 624 was intended to cure such oversight and to broaden the first part of the old statute so as to make it apply to a failure of a primary nomination, whether it resulted from a failure to receive 35 per cent or from a failure to receive 10 per cent of the voting strength of the party."

And pertinent to this situation is the following with respect to conventions: (*American Jurisprudence,* Vol. 18, page 268, title: ELECTIONS)

"In the absence of statutory regulations, it has control over its own proceedings and affairs and may proceed according to party usages and customs. The discharge of the duties imposed on the convention involves the exercise of judgment and discretion on the part of its members, and a majority of them have, in the absence of fraud or oppression, the right to control the action of the convention and to correct or reverse any action taken by it, and its final determination as to candidates or any other question within its jurisdiction will be followed by the courts."

In conclusion, there remains to be considered the question whether Code section 43.110 limits the selection to persons whose names appeared on the primary ballot. It provides as follows:

"43.110 *Nominations prohibited.* In no case shall the state convention of a party make a nomination for an office unless in the primary election of that party a person has received for such office at least one-half of the number of votes required for nomination by section 43.66, except nominations to fill vacancies in office when such vacancies occurred too late for filing of nomination papers."

The foregoing section was amended from its previous form in 1941 by chapter 81, section 3, Acts of the 49th G.A., the amendment reading as follows:

"Sec. 3. Section six hundred thirty-seven (637), Code 1939, is hereby amended by striking from lines three (3) and four (4) of said section, the words, 'for which no person was voted for in the primary election of such party,' and inserting in lieu thereof the words, 'unless in the primary election of that party a person has received for such office at least one-half (½) of the number of votes required for nomination by section five hundred ninety-four (594).' "

This amendment is of interest for the reason that the printed bill, H. F. 33, bore a printed explanation stating it was the purpose of the bill to prevent anyone who had not actively sought the nomination in the primary from receiving it at the convention. However, printed explanations on a bill are not part of the law nor are they controlling over the plain language of the law. As the supreme court has said, in construing statutes, the question is not what the legislature should have said, or might have intended to say, *but what it did say—Shelby County Hospital v. Harrison County,* 249 Iowa 146, 86 N.W. 2d 104.

In the quoted enactment, the legislature used the indefinite article "a" in the phrase "a person." It could have used the definite article "the" and it might have intended to do so, but it did not. For this reason, and on the basis of the *Zellmer* case, supra, and the prior legislative history, we conclude that nomination of a candidate by the convention in the described circumstances is not limited to those whose names appeared on the primary ballot.

12.4 November 4, 1960

ELECTIONS: Qualification as elector—

1. A write-in vote, wherever placed on the ballot, requires an "X" placed in the square opposite the name of the write in.

2. While generally speaking, upon marriage, the residence of the husband becomes the residence of the wife, the wife of such resident who has never lived in the State of Iowa, is not a qualified elector of the state.

Mr. W. K. Cash, Monroe County Attorney: This will acknowledge receipt of yours of the 2d inst. as follows:

"Pursuant to our telephone conversation of this date, I am requesting opinions on the two questions hereinafter set out.

"Question number one involves an interpretation of Section 49.99 regarding the counting of a ballot or vote for a person whose name has been written in on the ballot. Under the wording of Section 49.99 an "X" must be placed in the square opposite the name written in on the ballot. Would this requirement control against the provisions of Section 49.97, which provides that a person may vote a straight ticket by simply placing a cross in the circle at the head of that ticket? This would assume, of course, that the name was written in on the party ticket under which the circle had been crossed, or is it necessary and required in order to be a vote for the 'write-in' candidate, that an "X" be placed in the square opposite the name of the 'write-in' in addition to the 'X' in the circle above.

"Question number two involves a residence requirement for an absent voter who has requested an absent voter's ballot and obtained and voted it. Under these circumstances the person requesting the ballot is the wife of a resident of this county who is now stationed in a foreign state in the Armed Services of this country. This voter is a resident of the state in which the service man is stationed and has never lived in the State of Iowa. Is the rule, that the wife's residence is the same as that of her husband, applicable to meet the residence requirement for a voter in this State, even though she has never actually lived within the State of Iowa herself?

"I realize that the time is short but if you could give us an answer to these questions prior to election day so that we can advise our election boards, it would be greatly appreciated."

(1) In reply thereto, I advise as follows:

In answer to Question #1, which involves interpretation of section 49.99, Code 1958, respecting the write-in ballot and the necessity of placing an "X" in the square opposite the name written in, I would advise you that in my opinion, under the plain terms of that statute, the placing of an "X" where there is a write-in vote opposite the name is a plain requirement thereof. Such statute provides:

"49.99 Writing name on ballot. The voter may also insert in writing in the proper place the name of any person for whom he desires to vote and place a cross in the square opposite thereto. The writing of such name without making a cross opposite thereto, or the making of a cross in a square opposite a blank without writing a name therein, shall not affect the validity of the remainder of the ballot."

In this connection I enclose herewith copy of opinion issued Sept. 17,

1958, to J. Henry Lucken addressed to this situation. I am of the opinion, therefore, that a write-in vote wherever placed on the ballot, requires an "X" to be placed in the square opposite the name of the write in.

(2) In answer to your Question #2, I am of the opinion that the wife of a resident of your county who has never lived in the State of Iowa, is not a qualified elector of the State of Iowa because she has never actually lived within the borders of the state. It is to be said that while generally speaking, upon marriage the residence of the husband becomes the residence of the wife, residence for voting purposes is fixed by Art. II, Sec. 1, of the Constitution of Iowa, providing as follows:

> "ELECTORS. Section 1. Every male citizen of the United States, of the age of twenty-one years, who shall have been a resident of this state six months next preceding the election, and of the county in which he claims his vote sixty days, shall be entitled to vote at all elections which are now or hereafter may be authorized by law."

This has been interpreted to mean actual physical presence within the state and not an intention to become a resident. See the case of *State of Iowa v. Minnick*, 15 Iowa 123, 126, where it is said:

"III. As to what constitutes a residence within the meaning of our election laws, we do not propose to discuss, further than to say that we see no objection to the instructions given to the jury upon this subject, and to which exceptions are now urged. We do not understand that the theory of said instructions, as claimed by counsel, is: 'That defendant could not gain a residence if he had a *present intention* of removing from the place where he was at work; that even if he intended to work in Fairview township six months, and after that return to Des Moines township he could not acquire a residence in Fairview.' The judge places the question before the jury as one of intention, and hence it is said that: 'A man may actually stay and sojourn in a township for six months and still not be a resident of such township, and he may be a resident when he has not sojourned a week. It is the intention of the party that is the rule. It must be a residence in good faith.' A voter may go into a township and remain their ten days or longer, for the sole purpose of voting, with no intention of remaining, and yet his residence is not changed. And then he may remove into such township an hour before he offers his vote, and if such removal is *bona fide*, he is entitled to vote. The time intervening is, of course, an important element in determining the question of intention, but it is not by any means always conclusive. A mere present intention of removing from the place where a person may reside, does not change such residence; but to come to a place with no intention of remaining, with the purpose of returning so soon as some temporary object is accomplished, does not fix the residence. Such a person is a temporary sojourner and not a resident within the meaning of our election laws."

See the case of Dorsey v. Brigham, 52 N.E. 303, where in a like situation as described in your letter, the wife was determined not eligible to vote in the county of her husband's residence. There, on page 307, it is said:

"Mr. Greenstone, husband of the voter, together with the voter, his wife, resided in Chicago, Cook county, until about the 11th day of January, 1897. He then went to Livingston county, and commenced work there as a tailor. His wife did not accompany him, but remained at the Chicago home, with their family, until the 12th day of February, 1897, when she came to Chatsworth and joined her husband. She had never been in Livingston county before the said 12th day of February, which was

but 65 days prior to the day of election, the day of the election included. By operation of law, the domicile of the husband is, for many purposes, the domicile of the wife. The marriage relation implies a common home for the husband and wife. In view of the fact that married persons may not be able to agree as to a place of residence, authority must reside in one of them to determine where the home shall be. The law casts upon the husband the burden of supporting the family, and for that reason empowers him to determine where the family shall abide. The domicile of the husband therefore fixes the domicile of the wife for purposes connected with the marriage relation and the duties of both husband and wife. The domicile of Mrs. Greenstone for such purposes and duties was in Livingston county at once after her husband determined to make the home of himself and family in that county. The statutory qualification is that the voter shall have resided in the county 90 days next preceding the election. The meaning to be given the word 'reside' is declared by the statute (Rev. St. c. 46, sec. 66) as follows: 'A permanent abode is necessary to constitute a residence, within the meaning of the preceding section.' An abode is the place where a person dwells. And. Law Dict. tit. 'Abode.' Residence and domicile may, in some cases, have the same meaning, but frequently they have other and inconsistent meanings, and import entirely different ideas. And. Law Dict. p. 376; 21 Am. & Eng. Enc. Law, pp. 124, 125. 'A resident of a place is one whose place of abode is there, and who has no present intention of removing therefrom.' Id. p. 122. A married woman, by operation of law, may have a domicile in a place where she has never been, but it could not, with any correctness of speech, be said she was a resident of that place. On the day of the beginning of the period of 90 days preceding the election in question, Mrs. Greenstone was not in the county of Livingston, and had never been in that county on any day prior thereto, nor was she ever in the county until some 20 days after the beginning of the period of 90 days next preceding the election. She had her domicile in the county with her husband when he fixed that as the home of himself and family, but she did not become a resident until she was actually physically within the limits of the county. Her vote must be excluded from the count."

In view of the foregoing, I am of the opinion that in the situation you describe, the wife of the husband does not have a voting residence in Iowa.

12.5

Assistance in casting vote—No one may enter the booth with the voter to assist him in marking his ballot, except as provided in sections 49.90, 52.18, and 52.19, Code 1958. (Strauss to Scholz, Mahaska Co. Atty., 10/6/60) #60-10-4

12.6

Candidate qualifications—A citizen may run for office short term on regular party ticket and long term on independent ticket upon proper qualification at the same general election. (Strauss to Hall, St. Rep., 6/30/60) #60-6-40

12.7

Candidate qualifications—A defeated candidate in the primary election may qualify as a nominee in the general election by compliance with the provisions of ch. 45, 1958 Code of Iowa. (Strauss to Samore, Woodbury Co. Atty., 6/30/60) #60-6-41

12.8

Canvassing board—A canvassing board does not have the authority to

break the seal of the ballot envelope in its search for a missing pollbook in order to complete its canvass. (Strauss to Cash, Monroe Co. Atty., 11/21/60) #60-11-6

12.9

Constitutional convention—Secretary of state does not have a duty to publish the question "Shall there be a convention to revise the constitution, and amend the same?" (Strauss to Synhorst, Sec. of State, 7/19/60) #60-7-19

12.10

Constitutional convention—The question, "Shall there be a convention to revise the constitution, and amend the same?" *may* be placed on voting machines at the discretion of the governing body of the governmental unit purchasing the machine, i.e., board of supervisors, city or town council. (Strauss to Synhorst, Sec. of State, 7/20/60) #60-7-21

12.11

Constitutional convention—Whether the constitutional convention question is submitted to the voters on voting machines, or by separate paper ballots, is in the discretion of the boards of supervisors of the respective counties, or the city or town councils; the duty of the county auditor in the printing of ballots for use on the voting machines is ministerial. (Strauss to Scholz, Mahaska Co. Atty., 10/12/60) #60-10-7

12.13

Contests—Ballot marking—

1. The legislature not having provided otherwise, the only statutory court to determine an election contest is one on which the chairman of the board of supervisors presides, whether he be an interested party or not.

2. a. A check mark placed in the circle with crosses in the square beneath the circle, would not vitiate the validity of the vote, and the crosses should be counted.

b. The use of a ball point pen in marking the ballot is permitted and ballot is valid

c. The filling in of the circle, making a solid, colored circle thereof, deprives the voter of his statutory right to vote by and through the blank circle. The ballot should not be counted. (Strauss to Draheim, Wright Co. Atty., 11/18/60) #60-11-9

12.14

Contest court expenses—District court judges appointed to serve on contest court involving a state office are entitled to be paid from the state treasury under such appointment for their travel and attendance in the sum of $6.00 per day with such mileage as is allowed members of the general assembly as provided by sec. 61.14, Code 1958. The actual hotel and living expenses provided by secs. 605.2 and 604.26, Code 1958, is not available to such judges. (Strauss to Sarsfield, St. Comp., 1/5/59) #59-1-13

12.15

Electioneering—Writing the names of persons seeking office on a black-

board within the polling place, or within 100 feet of the polling place, would constitute electioneering prohibited by Code sec. 49.107. (Strauss to Draheim, Wright Co. Atty., 5/5/60) #60-5-9

12.16

Eligibility for office—A resident of X township has no voting residence in Y township and therefore lacks eligibility to be elected or hold the office of justice of the peace in Y township. (Strauss to Johnson, Poweshiek Co. Atty., 8/11/60) #60-9-1

12.17

Examining and testing voting machines—An individual holding and performing a contract to install voting machines is not barred thereby from representing his political party as a witness to the testing, and certifying as to the condition of the voting machines. For so witnessing and certifying he is not entitled to compensation, but such witnessing and certifying would not bar him from compensation provided by his contract. (Strauss to Schroeder, Jackson Co. Atty., 10/26/60) #60-10-15

12.18

Held on central standard time—Daylight savings time will not supersede standard time for the opening and closing of the polls on primary election day. Code sec. 43.37; 52 Am. Jur., par. 7, TIME. (Strauss to Leir, Scott Co. Atty., 4/6/60) #60-4-6

12.19

Independent names on official ballot—Where there are two independent candidates at the general election, the names of the candidates must be placed in separate columns under appropriate headings. (Strauss to Strand, Winneshiek Co. Atty., 8/30/60) #60-8-19

12.20

Invalid ballots—In voting, use of a check mark (√) instead of a cross (X) (authorized by section 49.92, Code 1958)) invalidates the ballot. (Strauss to Jensen, Taylor Co. Atty., 12/6/60) #60-12-11

12.21

Irregularities in ballots—Mere irregularities in ballots furnished electors will not void ballot and should be counted. (Bianco to Samore, Woodbury Co. Atty., 6/13/60) #60-6-18

12.22

Legislative contests—Section 51.12, Code 1958, concerning the duty of counting judges in relation to ballots with the accompanying sec. 51.16, 1958 Code, is a mandatory statute. (Erbe and Strauss to Contest Committee, 3/30/59) #59-4-2

12.23

Legislative contests—Section 51.9, Code 1958, concerned with counting of ballots by counting boards, with accompanying sec. 51.16, Code 1958, is a mandatory statute. Section 51.8, Code 1958, provides a ministerial duty and failure to comply therewith will not invalidate an election. (Erbe and Strauss to Hoffman, St. Sen., 3/30/59) #59-4-1

12.24

Municipal, changing terms—The use of the word "staggered" in referring to a term of office of the city council and mayor, in changing by election the terms thereof to four years, and the subsequent election of the mayor to a four-year term concludes that the voters were not deceived by the use of the word "staggered" and the term of the mayor is fixed at four years. (Strauss to Akers, St. Aud., 9/28/59) #59-9-35

12.25

Nomination papers—Ditto marks are permissible and legal for fixing the date upon which signature was written. Each individual nomination paper must be notarized separately. Figures are permissible in writing out the date. (Strauss to Smith, St. Rep., 2/16/60) #60-2-22

12.26

Nominating supervisors—Where five candidates are running on the Republican ticket for supervisor in the first supervisor's district of Tama County, Iowa, the one receiving the highest vote in the primary would be the nominee. Code sec. 43.53 provides that the choice is not dependent upon the candidate receiving 35 per cent of the vote. (Strauss to Willett, Tama Co. Atty., 4/20/60) #60-4-16

12.27

Nomination papers—Filing date—The dates for filing nomination papers for state office prior to the primary election of 1960, are the following: The first date for filing is March 14, 1960, and the final date for filing is April 2, 1960. (Strauss to Synhorst, Secy. of St., 12/29/59) #60-1-2

12.28

Party affiliation—Code sec. 43.41 and 43.44, each providing a method of changing party affiliation, are both operative and lawful. (Strauss to Pierce, St. Rep., 3/29/60) #60-3-27

12.29

Pasters—A sticker with a candidate's name on it may be pasted on the ballot by the elector instead of writing in the name of the person for whom he desires to vote. These stickers may be legally distributed 100 feet from the polling place. (Strauss to Samore, Woodbury Co. Atty., 5/10/60) #60-5-12

12.30

Polling place outside precinct—Code sec. 49.9 provides that no person shall vote in any precinct but that of his residence, except as provided in sec. 363.21. (Strauss to Neuzil, Johnson Co. Atty., 5/10/60) #60-5-13

12.31

Precinct committeeman—A public officer or employee may be a candidate for public office and precinct committeeman at the same primary election, and the name of such candidate for such offices may appear upon the same primary ballot. (Strauss to Flander, Bremer Co. Atty., 3/22/60) #60-3-19

12.32

Qualification of judges—Judges and clerks of elections shall be both

residents and eligible voters in the precincts in which they are appointed to serve. (Strauss to Hultman, Black Hawk Co. Atty., 9/20/60) #60-9-17

12.33

Residency requirements—1. To be entitled to vote or hold office, residence in the state for six months, in the county for sixty days, is required. 2. Such residency requirements must have been met at the time the affidavit of candidacy is filed. (Strauss to Schroeder, Jackson Co. Atty., 3/28/60) #60-3-21

12.34

Township nominations—The name of a candidate for a township office who was not legally nominated at the primary election under the provisions of Code sec. 43.53, may not be nominated by the county convention for such office, and his name may not legally be printed on the ticket of his party affiliation at the general election. (Strauss to Brown, Mitchell Co. Atty., 8/8/60) #60-8-11

12.35

Vacancies—Where a vacancy in county nomination exists, and such vacancy is filled by the County Central Committee, the county auditor has no other authority or duty than to place the name of such vacancy nominee on the ballot. (Strauss to Nelson, Story Co. Atty., 10/20/60) #60-10-11

12.36

Vacancy in candidacy—1. Verifying the number of signatures on nomination papers required by sec. 43.20, Code 1958, is the duty of the county auditor. 2. The primary law makes no provision for the filling of vacancies in candidates for primary elections. (Strauss to Gilmour, St. Sen., 5/3/60) #60-5-7

12.37

Vacancy in nomination—1. Insufficiency of nomination papers determined under ch. 44, Code 1958, would not have the effect of creating a vacancy in the nomination. 2. Filling a vacancy in candidates is restricted to a write-in vote. (Strauss to Johnson, Poweshiek Co. Atty., 5/9/60) #60-5-11

12.38

Voting machines—Under Code sec. 52.2, a three-to-two vote is not sufficient to meet the requirements of a "two-thirds vote" for the purpose of authorizing purchase of voting machines. (Abels to Bruner, Carroll Co. Atty., 2/16/60) #60-2-23

12.39

Voting machines—Use of voting machines in some precincts not equipped with party levers depends, under Code sec. 52.12, upon when ownership was acquired, rather than upon the model of machine used in other precincts. (Abels to Gray, Calhoun Co. Atty., 6/29/60) #60-7-3

12.40

Voting qualifications—Personnel of the United States Airforce based in

Woodbury County, Iowa, who are residents of the Capehart housing project located on land in the name of the United States, acquire no right to vote by virtue of their residence in said housing project. (Strauss to Samore, Woodbury Co. Atty., 9/26/60) 60-9-20

12.41

Withdrawal from candidacy—There is no provision in the law for the withdrawal of a candidate's name from the ballot after his nomination papers and affidavit have been filed. (Strauss to Hoth, St. Rep., 5/2/60) #60-5-5

CHAPTER 13

HEALTH

LETTER OPINIONS

13.1

Barber's license, shop location—Barbering cannot be practiced in the "living quarters" or "private home" of a licensee. A license cannot be denied a part-time barber, if he qualifies otherwise. (Bianco to Kenyon, Health Dept., 8/21/59) #59-8-20

13.2

Barber shop licenses—Under the provisions of sec. 158.11, it was the intent of the legislature to require a single barber shop license for each establishment or place of business, irrespective of the number of separately-licensed barbers conducting their own barbering business in the same establishment. (Bianco to Zimmerer, Comr. Pub. Health, 2/4/60) #60-2-14

13.3

Certification for free tuberculosis care—The certification contained in the form used by the Floyd County department of public welfare for free care of tuberculosis at the state sanatorium violates the provisions of sec. 254.8, and is contrary to the rules and regulations established by the department of health. (Peterson to Gernetzky, Bd. of Regents, 12/3/59) #59-12-9

13.4

Chiropodist—Chiropodist is the only name for licensed foot-doctor recognized by the Code of Iowa. (Abels to Reinheimer, Chir. Examiner, 1/5/59) #59-1-12

13.5

Cities and towns—May not build, operate, or license a nursing home as such but may accomplish the same result in a division or department of a municipal hospital. (Erbe to Blue, Ex Gov., 3/24/59) #59-3-21

13.6

City hospitals, board vacancy—A vacancy in the city hospital board of trustees may be filled by the city council of the town in which the hospital exists, and the vacancy appointee shall hold the office until the next regular election at which the vacancy may be filled. (Strauss to Morrow, Allamakee Co. Atty., 12/21/59) #59-12-19

13.7

Cosmetology—Board of cosmetology under present statute cannot require a surety bond as a prerequisite to establishing a school of cosmetology, nor can the board limit the number of such schools. (Bianco to Zimmerer, Comr. Pub. Health, 2/3/60) #60-2-10

13.8

Cosmetology—Under the provisions of ch. 157, Code 1958, license to practice electrolysis is an auxiliary license and all requirements for a cosmetology license must be met as a prerequisite to obtaining an electrolysis license. (Bianco to Zimmerer, Comr. of Pub. Health, 6/21/60) #60-6-30

13.9

County hospital trustees—The prohibition in Code sec. 347.9 against a "licensed practitioner" serving on the board of trustees was not intended to prevent a licensee who is not an actual *practitioner* from serving on such board. (Abels to Parkin, Jefferson Co. Atty., 6/30/60) #60-7-5

13.10

County unit—A county health unit plan may be established by mutual agreement between the boards of health of every city, town, and township in the county with the board of supervisors, and such written agreement should be executed by the board of supervisors and these several boards and the agreement made of record in the procedings of such boards. (Strauss to Hultman, Black Hawk Co. Atty., 5/26/59) #59-5-20

13.11

Dead bodies, removal—Persons other than funeral directors or embalmers may be permitted to remove dead human bodies from hospitals or residences for burial or other final disposition upon compliance with the provisions of ch. 141, Code of Iowa 1958, pertaining thereto. (Bianco to Zimmerer, Health Comr., 12/11/59) #59-12-17

13.12

Funeral directors—No license is required to make the name of the owner of a funeral home or chapel part of the name of such funeral home or chapel but any funeral directing or embalming done on such premises within the meaning of Code sec. 156.1 must be done by licensed personnel. (Abels to Brandt, Embalmer Bd., 3/23/59) #59-3-17

13.13

Hospitals, county—Trustees have no power to buy adjacent land for sole purpose of insuring against contingency of future undesirable neighbor. Proceeds of maintenance levy cannot be invested in bonds. (Abels to Harris, Greene Co. Atty., 10/29/59) #59-11-4

13.14

Hospitals, county—County hospitals organized under Code ch. 347 cannot finance improvements by means of revenue bonds issued under ch. 347A. (Abels to Parkin, Jefferson Co. Atty., 6/30/60) #60-7-4

13.15

Mental health centers—Payment for psychiatric examination and treat-

ment given by a *licensed physician using the facilities* of a community health center not having a licensed physician on its administrative staff may be a proper expenditure under Code sec. 230.24. (Abels to Ford, Des Moines Co. Atty., 1/14/60) #60-1-9

13.16

Mobile home park—Application for license—There is no relationship between the provisions of Code ch. 135D and ch. 358, as to "municipalities" contemplated in sec. 135D.3. (Bianco to Zimmerer, Comr. of Pub. Health, 9/22/60) #60-9-19

13.17

Mobile home park—Monthly license fees—A mobile home that is occupying space in a mobile home park is subject to monthly license fees required by sec. 135D.9, Code 1958. (Bianco to Winkel, Kossuth Co. Atty., 5/13/60) #60-5-15

13.18

Nursing—The wearing of a pin bearing the designation R.D.N. or use of such designation in signing correspondence violates Code secs. 147.72 and 152.5 if such use is made in connection with services performed or offered under the exemption from licensure contained in Code sec. 152.2(5), but not if used in social activity not related to performance of such services. (Abels to Sage, Nurse Exam., 3/23/59) #59-3-18

13.19

Pharmacists—vitamins—sale—Vitamins or vitamin products in concentrated form can be sold only in a licensed pharmacy, under the immediate personal supervision of a registered pharmacist. (Bianco to Rabe, Sec. St. Bd. of Pharmacy Exam., 8/4/60) #60-8-6

13.20

Public health nurse—Under the provisions of chapter 143 and section 152.1, Code of 1958, a registered nurse who has been employed as a public health nurse may be considered as such. (Bianco to Brown, Mitchell Co. Atty., 12/2/60) #60-12-7

13.21

Public hospitals—To convert city hospital to county hospital under Code ch. 347 as amended by the 58th G.A., electors of city and balance of county vote separately, and a majority is required in both elections. (Abels to Frye, Floyd Co. Atty., 8/26/59) #59-9-7

13.22

Rules and regulations—Under the provisions of Code sec. 135B.7, the state department of health can adopt, amend, promulgate and enforce such rules, regulations and standards with respect to the different types of hospitals to be licensed, either as "general" or "restricted" licenses, within the categories defined in Code sec. 135B.1(1) in accordance with the specific types of care or treatment for which such hospital is properly equipped. (Bianco to Zimmerer, Health Comr., 12/9/59) #59-12-15

13.23

Stream pollution—Power of local board of health to abate nuisances is

measured by secs. 137.13, 657.1 and 657.2, Code of Iowa. (Abels to Stephens, St. Rep., 3/2/59) #59-3-2

13.24

Vital statistics—In case of unattended self-delivery where mother refuses to sign birth certificate and coroner determined cause of death as "suffocation . . . *after* self delivery", coroner should sign birth certificate under Code secs. 144.16 and 144.18. (Abels to Chancellor, Reg. Vit. Stat., 4/14/59) #59-4-18

CHAPTER 14

HIGHWAYS

STAFF OPINIONS

LETTER OPINIONS

14.1 October 2, 1959

HIGHWAYS: School zones, within extensions of primary roads—
(1) Permission of highway commission need not be obtained for municipality establishing school zone and providing for stopping of all motor vehicles by use of movable stop signs. However the stop signs must conform to manual of uniform traffic control devices.

(2) Permission is necessary before placing flashing yellow signal on extension of primary highway not within the business district of a city with a population of 4,000 or over.

Mr. Gordon J. Forsyth, Emmet County Attorney: Your letter of September 2, 1959, presents the following questions:

"A question has arisen in this county concerning the placing of movable stop signs on extensions of primary highways within this county in connection with school zones.

"Under an opinion of the Attorney General dated August 23, 1955, and contained in the 1956 bound volume and entitled 'Report of Attorney General,' it is stated that the Iowa State Highway Commission has authority to regulate the erection of traffic control devices on primary roads and extensions of primary roads except in the business district on primary road extensions of cities with a population of 4,000 or over. This opinion does not, however, refer in any manner to section 321.249 of the 1958 Code of Iowa.

"We would appreciate the opinion of your office upon the following question:

"Is the consent of the Iowa Highway Commission required as a prerequisite to the establishment of a school zone in an Iowa municipality beyond the limits of the business district with a provision for stopping motor vehicles approaching the said zone on an extension of an Iowa Primary Highway through the use of movable stop signs and flashing yellow caution lights?"

Section 321.249, 1958 Code of Iowa, provides:

"School zones. Cities, towns and counties shall have the power to establish school zones and provide for the stopping of all motor vehicles approaching said zones, when movable stop signs have been placed in the streets in such cities and towns and highways in counties at the limits of the zones, this *notwithstanding the provisions of any statute to the contrary.*" (Emphasis supplied.)

Under the above statute, it is clear that the city has the power and authority to establish a school zone, and in so doing, to provide for stopping traffic when movable stop signs have been placed in the street. The *1956 Attorney General Report*, at page 88, contains the opinion mentioned by you. At first blush this opinion indicates that highway commission permission is necessary in order to place or maintain any traffic control device upon any highway under the jurisdiction of the state highway commission. See section 321.254, 1958 Code of Iowa. In view of the fact that section 321.249, supra, specifies "notwithstanding the provisions of any statute to the contrary," this indicates that section 321.254, supra, being a general statute, does not prevail over section 321.249, supra, which is the specific Code provision.

It is a well-established rule of statutory construction that a specific statute prevails over a general statute. In this instance sections 321.249 and 321.254, supra, are inconsistent and consequently within the rule of construction. *Iowa Mutual Tornado Insurance Association v. Fischer*, 245 Iowa 951, 65 N.W. 2d 162; *Liberty Consolidated School District v. Schindler*, 246 Iowa 1060, 70 N.W. 2d 544; *Crawford v. Iowa State Highway Commission*, 247 Iowa 736, 76 N.W. 2d 187. *Warren v. Iowa State Highway Commission*, 250 Iowa 473, 93 N.W. 2d 60.

Therefore, as to the city or municipality establishing a school zone and providing for the stopping of all motor vehicles by the use of movable stop signs, it is concluded that permission from the Iowa state highway commission need not be sought nor obtained. However, under sections 321.252 and 321.255, 1958 Code of Iowa, the movable stop signs must conform to the manual of uniform traffic control devices adopted by the state highway commission.

In addition, you have inquired as to the use of "Flashing yellow caution lights" in connection with establishing the school zone in question. Section 321.249, supra, does not in any way create an exception to section 321.254, supra, with respect to any traffic control device other than movable stop signs. Therefore, flashing yellow signals are not within the purview of the specific exception created thereunder. For that reason a flashing yellow signal is within the scope of section 321.254, supra, and the *1956 Attorney General Opinion* hereinbefore referred to.

Therefore, it is the opinion of this office that the permission of the state highway commission is necessary and required before placing a flashing yellow signal on an extension to a primary highway not within the business district of a city with a population of 4,000 or over.

14.2

Bridges and culverts—The responsibility for the construction and maintenance of culverts over three feet in diameter and of bridges, in cities controlling their own bridge levies, is in the city and not in the county; provided, however, that counties may at their option participate in the construction and maintenance of bridges in cities with a population of 8,000 or less. (Lyman to Milani, Appanoose Co. Atty., 2/24/60) #60-3-4

14.3

County hospital driveways—If located within corporate limits and open to vehicular traffic bearing members of the general public seeking hospitalization, snow should be removed by city equipment pursuant to Code sec. 389.12. (Abels to Harris, Greene Co. Atty., 6/14/60) #60-6-21

14.4

County levy for secondary roads—Cities controlling bridge levy included. County levies for secondary road construction do not include the taxable property in cities and towns since all cities and towns now control their own bridge levies. (Lyman to Anderson, Howard Co. Atty., 8/12/59) #59-8-8

14.5

County road equipment—County road equipment and labor may not be used on county fairgrounds whether owned by the county or by a fair association or society in the absence of express statutory authority authorizing such use. (Lyman to Larsen, St. Highway Com., 10/24/60) #60-10-14

14.6

Farm-to-market roads—The duty and responsibility for the repair and maintenance of a farm-to-market road located on the corporate line of a town, which road was materially damaged by reason of the town's action, is in the county and not in the city; and the maintenance on such a road cannot be abandoned by the county unless the road is removed from the farm-to-market system by appropriate action. (Lyman to Hoyman, Warren Co. Atty., 2/24/60) #60-3-5

14.7

Grade crossing safety fund—H.F. 156, 58th G.A., directs the allocation from the road use tax fund of $10,000 per month to the highway grade crossing safety fund beginning July 1959. (Strauss to Abrahamson, St. Treas., 7/22/59) #59-7-20

14.8

Institutional roads—The appropriation made by ch. 6, Acts of the 58th G.A., is not available to the board of regents for capital improvement by way of paving certain institutional roads. Such improvement may be effectuated under the provisions of ch. 207, Acts of the 58th G.A. (Strauss to Gernetzsky, Bd. of Regents, 1/22/60) #60-1-11

14.9

Intercounty drainage districts—

1. Under Code sec. 455.210 there is one engineer who need not be a county resident.

2. Freeholder appraisers may be from any county in district.

3. Engineer under Code secs. 455.30 and 455.203 may be the same person. (Lyman to Newell, Atty., 9/18/59) #59-10-4

14.10

Maintaining private roads—Private lanes or entrances may not be maintained with public machinery and cannot be elevated to the status of public roads or highways. (Faulkner to Fromm, Shelby Co. Atty., 9/7/60) #60-9-7

14.11

Metes and bounds descriptions are permissible except on official plats, ch. 409, Code 1958. No paving assessments outside municipalities except

as provided in secs. 311.1 to 311.11 inclusive, Code 1958. Chapters 471 and 472, Code 1958, determine procedure for acquiring right of way for roads. (Rehmann to Hafner, Assn. of Co. Comrs., 1/27/59) #59-1-6

14.12

Road extensions in towns—Establishment and location of an extension within city or town within sound discretion of board or commission in control of road system, and may be improved in accordance with Code sec. 314.5. (Lyman to Nelson, Story Co. Atty., 7/27/60) #60-7-27

14.13

Secondary road extension—Extension of a secondary road located wholly within one county may be improved by that county even though no part of the secondary road, as such, is located within that county. (Faulkner to Newell, Louisa Co. Atty., 9/7/60) #60-9-8

14.14

Secondary road extensions—In determining the average distance between houses or business houses with reference to sec. 314.5, Code 1958, all the houses along the proposed extensions are considered. It does not matter whether all the houses are on one side, or part on one side and part on the other. (Lyman to Ford, Des Moines Co. Atty., 6/23/59) #59-6-17

14.15

Secondary road maintenance—Whether statutory mileage limitation in Code sec. 79.9 applies to one who furnishes his own truck in connection with tree removal, depends on whether he is an employee or an independent contractor. (Abels to Mather, Sac Co. Atty., 6/15/60) #60-6-20

14.16

Secondary roads—Board of supervisors may not approve contributions toward the improvement of a road system located wholly within an adjoining county. (Lyman to Hoyman, Warren Co. Atty., 5/17/60) #60-6-6

14.17

Secondary roads—County boards of supervisors have no jurisdiction to establish inside city limits. (Abels to Burdette, Decatur Co. Atty., 9/9/59) #59-9-23

14.18

Secondary roads—Supervisors of several counties have no authority to enter into joint purchase of weighing machines for patrol purposes. (Abels to Larson, Asst. Story Co. Atty., 6/15/60) #60-6-24

14.19

Secondary roads—There is no authority for a county and a town to enter into an agreement, whereby both the county improvement of a secondary road extension and the town improvement in conjunction therewith can be consolidated and let as one contract, with the county having supervision over the construction; and where the county agrees to pay the initial cost of the entire project subject to reimbursement by the town. (Lyman to Salisbury, Jasper Co. Atty., 3/28/60) #60-3-23

14.20

Statutory width—Dedication of 60-foot roadway while statute fixing width thereof at 66 feet unless otherwise fixed, as provided in secs. 515 and 516, in the 1851 Code, was a dedication of a roadway of 66 feet, notwithstanding the 60-feet terms of the dedication. (Strauss to Roggensack, Clayton Co. Atty., 7/8/59) #59-7-9

14.21

Study committee funds—H.J.R. 12, 58th G.A. allocates $10,000 from the road use tax fund to pay expenses of the highway study committee to be available before the end of July 1959, and thereafter subject to requisition therefor. (Strauss to Abrahamson, St. Treas., 7/22/59) #59-7-21

14.22

Width—In the absence of any statute prescribing the width of a county road, there can be no presumptions of any specific width. (Lyman to Ford, Des Moines Co. Atty., 8/12/59) #59-8-14

CHAPTER 15

INSTITUTIONS

STAFF OPINIONS

LETTER OPINIONS

15.1 March 26, 1959

CHARGE OR LIEN FOR CARE OF MINORS—Section 1, chapter 120, Laws of the 56th G.A. amending section 223.16 of the Code, is not retroactive and does not cancel or suspend accumulated liens, accruing prior to July 4, 1955, effective date of amendment.

Mr. John F. Boeye, Montgomery County Attorney: Reference is made to your favor of recent date requesting opinion, which reads as follows:

"Section 223.16 of the 1958 Code of Iowa provides that no charge or lien shall be imposed on any property of any patient under 21 years of age, or upon the property of any person legally bound for the support of any such minor patient for the most of his support and treatment.

"It is my understanding that the effective date of the amendment relieving the minor's property of any charge was July 4, 1955. Does the 1955 amendment to Section 223.16 cancel or suspend accumulated payments made by Montgomery County for the care and keep of a minor from 1950 to July 4, 1955?

"The father of the minor child desires to purchase a piece of property and secure a Veterans Administration loan. Before this can be done, settlement of interpretation of a lien of over $2,000.00 for accumulated support and treatment must be answered."

The statute in question reads as follows:

"223.16. Support statutes applicable. All laws now existing, or hereafter made, creating liability, *pertaining to liens* and providing for the collection of amounts paid by counties from patients in the hospital for the insane and those legally bound for their support, and those defining persons legally bound for support, shall apply to this chapter. A patient in these hospitals and those legally bound for his support shall be liable to the county to the same degree and in the same manner as though such patient were an inmate of a hospital for the insane, provided that no charge or lien shall be imposed upon the property of any patient under twenty-one years of age or upon the property of persons legally bound for the support of any minor patient, for the cost of his support and treatment in these institutions."

The provision of the law referred to above was enacted by the 56th General Assembly as an amendment to section 223.16 of the Code. The effective date was July 4, 1955.

The effect of this amendment is to relieve the property of any patient under twenty-one years of age or persons legally bound for the support of such minor, from any charge or lien therefor. (See OAG 1956, p. 156.)

Your question stated in another form would be: Is the amendment in question retroactive? We think not.

The statutory lien provided by section 230.25 with regard to insane

patients is made applicable under section 223.16 to inmates of the Glenwood State School and the Woodward State Hospital.

The general rule is that statutes will be construed to be prospective only and not retrospective or retroactive—*Bascom v. District Court of Cerro Gordo County*, 231 Iowa 360, 1 N.W. 2d 220. A statute will not be construed to be retroactive unless it is the intent of the legislature to make it so and such intent is clearly expressed therein. In Re: *Hall's Estate*, 233 Iowa 1148, 11 N.W. 2d 379; *Young v. O'Keefe*, 82 N.W. 2d 111, 248 Iowa 751. Retroactive legislation is not favored. id. Such a statute presumably operates prospectively only and not retroactively. *Grant v. Norris*, 85 N.W. 2d 261, 249 Iowa 236.

We are unable to find any language in the amendment in question that indicates any intent of the legislature that this act should operate retrospectively. No pre-existing statute was repealed. The basic statute remains unchanged i.e., section 230.25, which creates the lien. There is an intent only to modify the extent of the lien as to patients in the Glenwood and Woodward State institutions, as further evidenced by the provisions of section 223.20, which sets out a graduated scale for the charge or lien, based upon age categories.

Therefore, it is our opinion that the 1955 amendment to section 223.16, i.e., section 1 of chapter 120, Laws of the 56th General Assembly, does not cancel nor suspend accumulated liens that have accrued prior to July 4, 1955.

15.2

Community mental health centers—A county can expend funds for psychiatric examination and treatment in the community mental health center upon a specific individual bill being presented by the health center for services to a given patient in a specific amount. (Strauss to Hultman, Black Hawk Co. Atty., 6/30/60) #60-6-39

15.3

Transfers—Under ch. 161, Acts of the 58th G. A., a transferee from the Eldora Training School is not entitled to court-appointed counsel; therefore, a claim filed for compensation for attorney's fees will be disallowed. (Neely to Callenius, Bd. of Control, 2/4/60) #60-2-15

CHAPTER 16

INSURANCE

STAFF OPINIONS

LETTER OPINIONS

16.1 December 22, 1959

INSURANCE: Domestic animal coverage—After partial payment of loss by county, excess may be claimed under policy of insurance as a contractual obligation even though any tort claim against the dog owner would be extinguished.

Mr. Charles R. Warren, Insurance Department of Iowa: Receipt is acknowledged of your letter of December 8 as follows:

"We have just received Mr. Strauss' opinion regarding the interpretation of Chapter 352 where a farmer has insurance covering loss or destruction of animals. Mr. Strauss has stated that the Domestic Animal Fund is not available to an owner of sheep injured by dogs where his claim has been paid by an insurance carrier. We have a question concerning mutual policies and other similar policies which show coverage for losses resulting from dogs, to be excess of any loss paid by other sources. With such companies, the procedure is to withhold payment until the end of the year after the county has determined the amounts to be paid by them from the Domestic Animal Fund. In this case, there would have been no payment of an insurance carrier prior to the payment by the county. Perhaps you can clarify this point for us in such a way that we can suggest a revision of form to those companies which pay only in excess of any loss by the county or other sources."

I have read the opinion to which your letter refers (STAFF to Wright, Davis County Attorney, 11/19/59). The gist of that opnion appears contained in the following quotation from page 2 of the opinion:

" . . . neither the owner of the sheep is entitled to recover damages out of the domestic animal fund, nor is the insurance carrier that underwrote the owner's risk entitled to assert any subrogation right against this fund . . . . "

It appears to me the situation resulting is much the same as exists in the case of automobile liability coverage where the driver of an insured vehicle not owned by him has secondary coverage for excess liability under the omnibus clause of his own policy. The primary coverage could be likened to the domestic animal fund and the omnibus clause coverage to the policy you describe. The excess would be the amount over that actually paid from the domestic animal fund capable of being shown as actual loss on proof of loss submitted to the company *after* any payment by the county.

Since the payment by the company would be based on contract rather than sounding in tort, payment of such excess *by the company* to the farmer would not be precluded by the case of *Hodges v. Tama County,*

91 Iowa 578, even though there would be no apparent subrogation right in the company against the county or dog owner.

16.2 February 3, 1960

INSURANCE: Domestic animal coverage—

1. The fact that the claimant for damages against the county fund has covered his damage claim by insurance, is not a bar by itself from recovery of damages from the county fund.

2. However, if the claimant has been paid in part or in full from any source, either by insurance, or from the owner of the animal causing the damage, or otherwise, then he has no recourse against the fund, and damages from the county will be denied.

3. Any insurance covering claimant's damage over and above what he may have recovered from the county fund is permissible, and possession of such an excess coverage policy or recovery thereunder will not bar his recovery upon his insurance policy.

Mr. Donald E. Skiver, Osceola County Attorney: Pursuant to our telephone conversation, I would advise that under opinion issued by this department November 19, 1959, and a subsequent opinion issued December 22, 1959, in respect to recovery of damages for injury to domestic animals from the county fund, the following rules prevail:

1. The fact that the claimant for damages against the county fund has covered his damage claim by insurance, is not a bar by itself from recovery of damages from the county fund.

2. However, if the claimant has been paid in part or in full from any source, either by insurance, or from the owner causing the damage, or otherwise, then he has no recourse against the fund, and damages from the county fund will be denied.

3. Any insurance covering claimant's damage over and above what he may have recovered from the county fund is permissible, and possession of such policy or recovery thereunder will not bar his recovery upon his insurance policy.

16.3 October 21, 1960

INSURANCE: Investment contracts—Under section 502.3(1), Code 1958, the facts determine whether or not a transaction is an investment contract under said section.

Hon. William E. Timmons, Insurance Commissioner of Iowa. Attention Robert L. Walters, Superintendent of Securities: This will acknowledge receipt of your request for opinion dated October 4, 1960, in which you state the following:

"Enclosed herewith marked exhibits A and B, please find two instruments currently being distributed in certain parts of this state and for which varying cash considerations are being paid.

"This department is persuaded after an examination of these instruments and their method of distribution that they constitute securities pursuant to the definition contained in Section 502.3(1) of the Code of Iowa (1958) as amended. Since these instruments have not been registered for sale under Chapter 502 of the Code of Iowa and since the individuals selling these instruments have not been licensed as agents pursuant to the same chapter, all transactions made in this respect represent possible violations of the Iowa Securities Act. Prior to pursuing this matter further, however, we believe it expedient to obtain from your office an opinion as to the status of these instruments under the Iowa Securities Law.

"Therefore, we respectfully request that you provide us with an opinion in respect to the following questions:

"1. Do the instruments of the Southwest Machinery and Equipment Company enclosed herewith and marked Exhibits A and B constitute securities within the definition contained in Section 502.3(1) of the Code of Iowa (1958) as amended?

"2. Are those individuals who solicit and sell these instruments in the state of Iowa subject to licensing as securities agents as contemplated in Section 502.11 of the Code of Iowa (1958) as amended?

"In view of the continuing nature of the solicitation and sale of these instruments in this state, we request that you provide an opinion incident to the above points as expeditiously as possible."

In reply thereto, we advise as follows:

Section 502.3(1), Code 1958, provides to wit:

"Definitions. When used in this chapter the following terms shall, unless the text otherwise indicates, have the following respective meanings:

"1. 'Security' shall include any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest in an oil, gas, or mining lease, collateral trust certificate, preorganization certificate, preorganization subscription, any transferable share, investment contract, or beneficial interest in title to property, interest in or under a profit-sharing or participating agreement or scheme, or any other instrument commonly known as a security."

The definition of the term "security" is very broad in order to protect the public from speculative schemes calculated to despoil credulous individuals of their savings. *Wagner v. Kelso,* 195 Iowa 959,193 N. W. 1. While all instruments may not be securities, a combination of instruments and the manner in which they are used may make the instruments securities. In the case of *State v. Gopher Tire & Rubber Co.*, 146 Minn. 52, 177 N. W. 937, it was held that, even though certain instruments were purportedly not security or investment contracts, where an individual was led to invest money in a common enterprise with the expectation of earning a profit solely through the efforts of someone other than himself, this would constitute a security or investment contract.

Relating to the above principles to the problem outlined in your letter, the question arises as to whether the bill of sale for property and a subsequent lease back of the property constitute a security transaction.

In a recent case of *Securities and Exchange Commission v. Howey,* 328 U. S. 293, 66 S. Ct. 1100, 90 L. Ed. 1244, the court held that where

a promoter offers to sell land and conveys same by deed and then enters into service contract upon the expectation of great returns in the investment of money, even though the instruments used in the transaction are not commonly referred to as securities, the transaction was an investment contract. The court said, on page 301 of Volume 328 U. S., in the *Howey* case, supra, the following:

"The test is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others. If that test is satisfied, it is immaterial whether the enterprise is speculative or nonspeculative or whether there is a sale of property with or without intrinsic value. (Cases cited.) The statutory policy of affording broad protection to investors is not to be thwarted by unrealistic and irrelevent formulae."

Normally the sale of property and a lease-back agreement are not considered a security transaction. However, the facts presented in your letter, the instruments executed by the parties appear to be part of a single transaction, wherein the investor is led to invest money in a common enterprise upon the expectation of unrealistic profits to be earned solely through the efforts of someone else other than themselves. Thus the answer to your first question is affirmative based upon the facts presented.

Section 502.11, Code 1958, in pertinent part, provides:

"Registration of dealers and salesmen. No dealer or salesman shall engage in business in this state as such dealer or salesman or sell any securities including securities exempted in section 502.4, except in transactions exempt under section 502.5, unless he has been registered as a dealer or salesman in the office of the commissioner of insurance pursuant to the provisions of this section."

The law is well settled in this state that where a person is selling a security, he is required to be licensed as provided in section 502.11, Code 1958. *State v. Ferguson*, 249 Iowa 361, 86 N. W. 2d 901.

Therefore, the answer to your second question is affirmative.

16.4

Automobile warranties—Voluminous complaint file reviewed and, on the basis of the manner of doing business thereby revealed, it is concluded:

1. Certain "warranty" companies are engaged in writing insurance.

2. The insurance written is of a type subject to regulation under the existing statutes of Iowa.

3. Purchases of such auto "warranty" insurance are entitled to the benefits of the Iowa Unauthorized Insurers Process Act. (Abels to Timmons, Ins. Comr., 10/9/59) #59-10-14

16.5

Benefit societies—If outside the exemptions in Code secs. 510.29 and 510.31, become subject to regulation as "insurance" by charging a fixed assessment for a fixed time in lieu of "death notices." (Abels to Timmons, Comr. of Ins., 6/28/60) #60-7-2

16.6

County vehicles—Chapter 517A, Code 1958, does not authorize cover-

ing by insurance, liability of the county arising out of accident in the performance of its duties by its agents. County motor vehicle liability insurance on vehicles owned by the county may not be increased to the limits of ch. 517A, but if the vehicle is used, liability insurance to the limit of ch. 517A may be purchased. (Strauss to Leir, Scott Co. Atty., 7/8/59) #59-7-10

16.7

Credit unions—Group life policy—The group life contracts entered into between CUNA Mutual and Iowa credit unions conform to the provisions of Code sec. 509.1(2f). (Abels to Timmons, Ins. Comr., 11/19/59) #59-11-20

16.8

Employee welfare funds—Such funds are not insurance and contributions thereto are not taxable as premiums. (Abels to Timmons, Ins. Comr., 6/8/60) #60-6-14

16.9

Loan insurance—Savings and loan supervisor is authorized to approve private corporations, under the provisions of ch. 338, Acts of the 58th G.A., engaged in the underwriting of loan insurance. (Strauss to Akers, St. Aud., 1/25/60) #60-1-13

16.10

Mutual benefit association—Bylaws and application examined and conclusion reached that subject association cannot be regulated as an insurance company in the absence of further evidence showing it, in fact, conducts itself like an insurance company. (Abels to Timmons, Ins. Comr., 10/30/59) #59-11-7

16.11

Mutual benefit societies—Are not subject to insurance laws, do not sell insurance, and membership solicitors need not obtain insurance agent's license. However, a membership solicitor who misrepresents membership as insurance may be subject to prosecution under Code sec. 713.1. (Abels to Milani, Appanoose Co. Atty., 8/31/59) #59-9-13

16.12

Organization—Reinsurance—Under Code secs. 508.6 and 521.11, in a situation where all other statutory requirements have been met, it would be no violation of either section for the commissioner to issue a certificate to become effective midnight December 31 and for the commission to then approve a reinsurance plan subject to the condition that such plan not go into effect until midnight of December 31. (Abels to Timmons, Ins. Comr., 10/12/59) #59-10-16

16.13

Policy cancellation—Under H.F. 210, 58th G.A., the phrase "receipt of certified or registered mailing" refers to the entry made by the post office in the company's certified or registered mail book when the cancellation notice is mailed and *does not* refer to a return receipt obtained by the post office from the addressee upon delivery of such notice. (Abels to Bennett, Ins. Comr., 6/30/59) #59-7-5

16.14

Reinsurance—County mutual association premium tax exemption. (Rehmann to Bennett, Ins. Comr., 3/10/59) #59-3-5

16.15

Securities division—Installment sales—Where a certificate is paid for by installments due each time a hog is delivered rather than at regular calendar intervals, the irregularity of the installment periods does not take the certificate out of the definition of "stock" in Code sec. 501.1. (Abels to Walters, Ins. Dept., 12/2/59) #59-12-8

16.16

Securities division—Membership sales—Promotion plan involving sale of coupon books appears within definition contained in Code sec. 503.2. (Abels to Ford, Des Moines Co. Atty., 7/11/60) #60-7-8

16.17

Vending machines—Machines dispensing policies providing indemnity for loss of life, limbs or sight, where the policies are countersigned before insertion in the machine and are delivered in blank to the purchaser, are in violation of Code sec. 515.52. (Abels to Timmons, Ins. Comr., 3/18/60) #60-3-16

CHAPTER 17

LABOR

LETTER OPINIONS

17.1

Child labor—Employment of minors under sixteen years of age in restaurants. (Craig to Lowe, Labor Comr., 9/17/59) #59-9-26

17.2

Child labor laws—A "shoe shine parlor" is a "shop" as contemplated by sec. 92.1, Code 1958. (Pesch to Lowe, Labor Comr., 7/16/59) #59-7-16

17.3

Child labor, restaurants—Drive-in establishments selling ice cream and soft drinks, as a principal business, are "restaurants" within the meaning of sec. 92.11, Code 1958. (Faulkner to Lowe, Labor Comr., 6/23/59) #59-6-18

17.4

Child labor; street trades permits—Duties imposed on public school personnel by Code secs. 92.6 and 92.13, relative to physical inspection, exist irrespective of whether applicant be enrolled in public or private schools. (Abels to Samore, Woodbury Co. Atty., 6/17/59) #59-6-11

17.5

Employment agencies—

1. Matters of privity of contract may not be considered by this department.

2. Violation of fee limitation punishable as provided in sec. 94.12, Code 1958.

3. Interest on principal secured by a promissory note, no provision appearing in the contract to the contrary, would not be a part of the fee subject to limitation of sec. 94.6, Code 1958. (Pesch to Lowe, Labor Comr., 6/24/60) #60-6-34

17.6

Employment agencies; fee limitation—Section 94.6, Code 1958, construed. "Annual gross earnings" means the actual earnings realized on a per annum basis. (Pesch to Lowe, Labor Comr., 6/2/59) #59-6-6

17.7

Employment agencies—License—

1. Sale of license hypothetical question.

2. Commission has no authority to interfere with employment agency franchise agreements.

3. Franchise agreement does not constitute a partnership.

4. Names of all partners must appear on application for employment agency license.

5. Fee of 2 per cent of total annual gross earnings for employment at less than $250 a month violates Code section 94.6.

6. Wage assignments for future earnings unenforceable.

(Craig to Lowe, Labor Comr., 11/28/60) #60-12-3

17.8

Health standards at railroads stations—Decision concerning accident reporting in railroad maintenance shops does not specifically cover situation of health standards at railroad stations. (Craig to Lowe, Labor Comr., 7/14/60) #60-7-15

17.9

Railroad station—A railroad station is a "workshop," as defined in section 88.3, 1958 Code of Iowa. (Craig to Stanley, St. Rep., 12/6/60) #60-12-9

17.10

Union "checkoff"—H.F. 116, 58th G.A., amending ch. 736A, Code 1958, authorizes the deduction of labor organization dues by order signed by the employee alone without the signature of the spouse. The foregoing H.F. 116 is not effective out of the provisions of sec. 549.4, Code 1958, respecting assigning of wages upon the signature of both employee and spouse. (Strauss to Conner, St. Rep., 7/13/59) #59-7-13

CHAPTER 18

MOTOR VEHICLES

STAFF OPINIONS

LETTER OPINIONS

18.1 February 2, 1959

MOTOR VEHICLES—Final Conviction, Meaning of—For purposes of section 321.209, Code 1958, a conviction becomes final upon a judgment of conviction being entered and spread upon the record, without awaiting the completion of an appeal from said judgment.

Mr. Russell I. Brown, Commissioner, Department of Public Safety: Your letter under date of January 30, 1959 is at hand wherein you ask for an opinion on the following question:

"In Section 321.209, do the words 'when such conviction has become final' mean that the conviction becomes final upon a judgment being entered by a court having jurisdiction of the matter without awaiting the completion of an appeal from said judgment?"

Section 321.208, Code 1958, provides:

"For the purposes of this chapter the term 'conviction' shall mean a final conviction. Also for the purpose of this chapter a forfeiture of bail or collateral deposited to secure a defendant's appearance in court, which forfeiture has not been vacated, shall be equivalent to a conviction."

Section 321.209, Code 1958, in pertinent part provides that:

"The department shall forthwith revoke the license of any operator or chauffeur, or driving privilege, upon receiving a record of such operator's or chauffeur's conviction of any of the following offenses, *when such conviction has become final:* * * *." (Emphasis ours.)

Section 321.207, Code 1958, provides in pertinent part, that:

"Every court having jurisdiction over offenses committed under this chapter, or any other law of this state or any city traffic ordinances, other than parking regulations, regulating the operation of motor ve-

hicles on highways, shall forward to the department a record of the conviction of any person in said court for violation of any of said laws, * * *."

What is meant by "final conviction" as used in the motor vehicle laws of the State of Iowa, as the same pertain to mandatory revocation of operator's and chauffeur's licenses, has not been the subject of judicial interpretation by our supreme court.

The words "final conviction" were, however, presented to the supreme court of North Dakota in *Thompson v. Thompson*, 78 N. W. 2d 395. The statutes under consideration by the North Dakota supreme court in the *Thompson* case, supra, were and are identical to the Iowa provisions heretofore set out in this opinion, to wit: sections 321.208 and 321.209, Code 1958. The North Dakota supreme court said therein:

"The term 'final conviction' cannot be given a hard and fast definition. Where the term is found in the statute its meaning depends upon the intention of the legislature as disclosed by the context of the statute in which it is used in correlation with other statutes bearing upon the subject. * * * The conclusion is inescapable that the conviction of * * * of operating a motor vehicle while under the influence of intoxicating liquor * * * , was a final conviction insofar as the action of the district court is concerned and was intended by the legislature to be such under the driver's license law."

In the case of *State v. Berres*, 270 Wis. 103, 70 N. W. 2d 197, the supreme court of Wisconsin, in construing a section of the Wisconsin code which provides that "the commissioner shall forthwith revoke the operator's license upon receiving the record of such operator's conviction of any of the following offenses when such conviction has become final:", said:

"We must, if it is reasonably possible, construe the statute so as to avoid inconsistency and conflict, and to give effect to every part of it. State v. Hackbarth, 228 Wis. 108, 279 N. W. 687. In observance of the rule we are compelled to conclude that for the purposes of the statute here involved, a conviction becomes final when the court which has rendered it has exercised all the powers confided to it and has made an adjudication of guilt."

And in the case of *Parker v. State Highway Department*, 224 S. C. 263, 78 S. E. 2d 382, the supreme court of South Carolina said:

"We think the word 'convicted' as used in the statute under consideration contemplates only a verdict of guilty and sentence thereon *and was not intended to preclude the suspension of the license of the person so convicted until the determination of his appeal* and an end of the prosecution. If the latter had been meant, undoubtedly some provision would have been made for notice to the Highway Department of appeals and their disposition. The statute has no such provision. It contains no reference to an appeal from a conviction." (Emphasis ours.)

In the case of *Goulter v. Huse*, 196 Wash. 652, 84 P. 2d 126, the supreme court of Washington stated:

"Even though there was an appeal there was a judgment of conviction upon which the director had a right to suspend the vehicle operator's license."

In answer to your question, we would, therefore, advise you that for purposes of section 321.209, Code 1958, a conviction becomes final upon

a judgment of conviction being entered by a court having jurisdiction of the matter and the same spread upon the record, without awaiting the completion of an appeal from said judgment.

18.2 **June 12, 1959**

MOTOR VEHICLES: Suspension of license to operate and suspension of registration for nonpayment of judgment—

1. Provided a foreign judgment falls within the definition of judgment as the same appears in section 321A.1(2), Code 1958, and the exceptions as provided in sections 321A.13 and 321A.16 are not applicable, the commissioner must suspend the license and registration of the person against whom such judgment was rendered, upon said commissioner's receipt of a certified copy of such judgment.

2. The test is not whether the court rendering the judgment is a court of record, but rather, whether such court is one of competent jurisdiction.

3. Suspension and revocation for offenses committed in a foreign state are governed by section 321.210(6), Code 1958, and as to judgments by these applicable sections of chapter 321A, Code 1958.

4. Type and quality of evidence required before action is taken is governed by U.S.C., Title 28, sections 1738 and 1739.

Mr. Russell I. Brown, Commissioner, Department of Public Safety: Your letter under date of April 1, 1959, is at hand wherein you ask for an opinion on the following matters:

"Under the provisions of Section 321A.13, Code 1958, or any other provisions of the Code to your knowledge, can the Department suspend the license to operate motor vehicles and motor vehicle registrations of the individual who failed to pay the judgment in J. P. Court located in Illinois?

"Further, if the Court rendering the judgment in a foreign state were a Court of record, it would justify the Department in suspending the individual's motor vehicle privileges?

"Where an Iowa individual, licensed to operate in Iowa, is suspended or revoked in a foreign state, to what extent can Iowa extend reciprocity to that foreign state by taking suspension action or revocation action in Iowa on this Iowa resident?

"Particularly, if Iowa can grant the reciprocity to foreign state judgments or suspensions, and thus suspend the Iowa operating privileges, what type, kind or quality of evidence must the Department have in its possession to prove its authority for suspending or revoking an Iowa driver who has had the indicated action taken against him in a foreign state because of an accident or traffic violation in said foreign state?"

In reply thereto:

Section 321A.1(2), Code 1958, reads as follows:

"The following words and phrases when used in this chapter shall, for the purposes of this chapter, have the meanings respectively ascribed to them in this section, except in those instances where the context clearly indicates a different meaning:

" * * *

"2. Judgment. Any judgment which shall have become final by expiration without appeal during the time within which an appeal might have been perfected, or any judgment if an appeal from such judgment has been perfected, which has not been stayed by the execution, filing and approval of a bond as provided in rule 337(a) of the rules of civil procedure, or any judgment which shall have become final by affirmation on appeal, rendered by a court of competent jurisdiction of any state or of the United States, upon a cause of action arising out of the ownership, maintenance, or use of any motor vehicle, for damages, including damages for care and loss of service, because of bodily injury to or death of any person, or for damages because of injury to or destruction of property, including the loss of use thereof, or upon a cause of action on an agreement of settlement for such damages."

Section 321A.13, Code 1958, provides:

"1. The Commissioner upon receipt of a certified copy of a judgment, shall forthwith suspend the license and registration and any nonresident's operating privilege of any person against whom such judgment was rendered, except as hereinafter otherwise provided in this section and in section 321A.16.

"2. If the judgment creditor consents in writing, in such form as the commissioner may prescribe, that the judgment debtor be allowed license and registration or nonresident's operating privilege, the same may be allowed by the commissioner, in his discretion, for six months from the date of such consent and thereafter until such consent is revoked in writing, notwithstanding default in the payment of such judgment, or of any installments thereof prescribed in section 321A.16, provided the judgment debtor furnishes proof of financial responsibility.

"3. Any person whose license, registration, or non-resident's operating privilege has been suspended or is about to be suspended or shall become subject to suspension under the provisions of sections 321A.12 to 321A.29, inclusive, may be relieved from the effect of such judgment as hereinbefore prescribed in said sections by filing with the commissioner an affidavit stating that at the time of the accident upon which such judgment has been rendered the affiant was insured, that the insurer is liable to pay such judgment, and the reason, if known, why such insurance company has not paid such judgment. Such a person shall also file the original policy of insurance or a certified copy thereof, if available, and such other documents as the commissioner may require to show that the loss, injury, or damage for which such judgment was rendered, was covered by such policy of insurance. If the commissioner is satisfied from such papers that such insurer was authorized to issue such policy of insurance at the time and place of issuing such policy and that such insurer is liable to pay such judgment, at least to the extent and for the amounts required in this chapter, the commissioner shall not suspend such license or registration or nonresident's operating privilege, or if already suspended shall reinstate them."

And section 321A.16, Code 1958, to which reference is made in section 321A.13, supra, provides as follows:

"1. A judgment debtor upon due notice to the judgment creditor may apply to the court in which such judgment was rendered for the privilege of paying such judgment in installments and the court, in its discretion and without prejudice to any other legal remedies which the judgment creditor may have, may so order and fix the amounts and times of payment of the installments.

"2. The commissioner shall not suspend a license, registration, or nonresident's operating privilege, and shall restore any license, registration,

or nonresident's operating privilege suspended following nonpayment of a judgment, when the judgment debtor gives proof of financial responsibility and obtains such an order permitting the payment of such judgment in installments, and while the payment of any said installment is not in default.

"3. In the event the judgment debtor fails to pay any installment as specified by such order, then upon notice of such default, the commissioner shall forthwith suspend the license, registration, or nonresident's operating privilege of the judgment debtor until such judgment is satisfied, as provided in this chapter."

It will be noted that section 321A.13, supra, expressly provides that the commissioner upon receiving a certified copy of a judgment shall forthwith suspend as provided therein, except as otherwise provided in such section, to wit: 321A.13, and in section 321A.16, supra. This statute, 321A.13, in view of the above definition of the word "judgment," makes no exception in the case of a judgment debtor who was a resident of this state when the foreign judgment was obtained. The legislature clearly intended that such judgment debtor should not be granted operating and registration privileges until the judgment was satisfied as provided in chapter 321A, Code 1958.

Your attention is directed to *31 Am. Jur.*, Justices of the Peace, sec. 96, p. 268, where it is stated:

"The rule as to the conclusiveness of a justice's judgment is applicable to foreign as well as to domestic judgments, for the rendition of a judgment by a justice of the peace is a judicial proceeding within the meaning of section 1 of Article 4 of the United States Constitution; and where it is made in one state, it is as conclusive between the parties and privies thereto, although living in another state, as a judgment of the highest court of record. The fact that it cannot be authenticated in the manner prescribed by Congress does not change the rule, for the conclusive effect of a judgment rests upon the authority of the court, upon its acting within its jurisdiction, upon its preserving its decision in proper records, and upon the policy and necessity of determining by law the end of controversy, and these reasons apply to the judgments of justices of the peace as well as to any others. But to give conclusive effect to foreign judgments, the jurisdiction of the justice to render the judgment, as well as the judgment itself, must be shown."

Therefore, if the judgment obtained in justice of the peace court in Illinois falls within the definition of judgment heretofore set out, and if a certified copy of same is received by the commissioner of public safety of this state, and the exceptions as provided in sections 321A.13 and 321A.16 do not apply, said commissioner must suspend the license and registration of the person against whom such judgment was rendered.

In answer to your second question, we would advise that it is not a matter of whether the court rendering judgment in a foreign state is a court of record, but rather, whether the judgment was rendered by a court of competent jurisdiction. (321A.1(2), supra.)

Your third question is expressly answered by section 321.210(6), Code 1958, which reads as follows:

"The department is hereby authorized to suspend the license of an operator or chauffeur without preliminary hearing upon a showing by its records or other sufficient evidence that the licensee:

"* * *

"6. Has committed an offense in another state which if committed in this state would be grounds for suspension or revocation."

and those sections of chapter 321A, heretofore set out and applicable to nonsatisfaction of judgment.

In answer to your fourth and last question, we think it appropriate to note that the authority to suspend heretofore referred to is not reciprocity as such, but authority as expressly provided by these statutes set out above.

As to the type and quality of evidence you, under section 321A.13, or your department under section 321.210(6), must have received before you or it may act pursuant to the above statutes, you are referred to *Authentication of Records*, U.S.C. Title 28, sections 1738 and 1739, which also appear in Volume 1, *Code of Iowa 1958*, at page lviii.

18.3 July 27, 1959

MOTOR VEHICLES: Proof of financial responsibility—When a license to operate a motor vehicle is suspended under the provisions of chapter 321A, notice of such must be sent by restricted certified mail to the licensee or served on him personally.

Notice of suspension of registration must be sent by restricted certified mail to the registrant or served on him personally.

Mr. Russell I. Brown, Commissioner, Department of Public Safety: This will acknowledge receipt of your letter under date of July 13, 1959, wherein you request a legal opinion on the following matter:

"Does Section 321.16 of the 1958 Code apply in any way to the suspensions authorized by Chapter 321A—I have reference to both the security after an accident type suspensions, *and* the judgment type suspensions authorized in Chapter 321A?

"If your answer to the above questions is in the negative, then would the service of notice of a suspension on a driver by ordinary mail be legally sufficient notice to him? If not, then by what method should a driver be notified of his suspension for failure to comply with the Financial Responsibility Law?"

In reply thereto:

Section 321.16, Code 1958, reads as follows:

"*Whenever the department* is authorized or *required to give any notice under* this chapter *or other law regulating the operation of vehicles*, unless a different method of giving such notices is otherwise expressly prescribed, *such notice shall be given either by personal delivery* thereof to the person to be so notified *or by restricted certified mail addressed to such person* at his address as shown by the records of the department. Return acknowledgment is required to prove such latter service.

"Proof of the giving of notice by personal service may be made by the certificate of any officer or employee of the department or affidavit of any person over eighteen years of age, naming the person to whom such notice was given and specifying the time, place, and manner of the giving thereof." (Emphasis added.)

Section 321A.5 (security required following accident), Code 1958, in pertinent part reads as follows:

"1. The commissioner shall, immediately or within sixty days after the receipt of a report of a motor vehicle accident within this state which has resulted in bodily injury or death or damage to the property of any one person in excess of fifty dollars, suspend the license of each operator and all registrations of each owner of a motor vehicle in any manner involved in such accident, and if such operator is a nonresident the privilege of operating a motor vehicle within this state, and if such owner is a nonresident the privilege of the use within this state of any motor vehicle owned by him, unless such operator or owner or both shall deposit security in a sum which shall be sufficient in the judgment of the commissioner to satisfy any judgment or judgments for damages resulting from such accident as may be recovered against such operator or owner; *provided notice of such suspension shall be sent by the commissioner to such operator and owner not less than ten days prior to the effective date of such suspension and shall state the amount required as security.*" (Emphasis added.)

The "judgment type suspensions authorized in Chapter 321A" to which you refer are covered by the following Code sections:

Section 321A.13, Code 1958, reads as follows in pertinent part:

"1. The commissioner upon receipt of a certified copy of a judgment, shall forthwith suspend the license and registration and any nonresident's operating privilege of any person against whom such judgment was rendered, except as hereinafter otherwise provided in this section and in section 321A.16."

It will be noted that the above pertinent part of Section 321A.13, supra, expressly provides that the commissioner, upon receiving a certified copy of a judgment, shall forthwith suspend as provided therein, except as otherwise provided in such section, to wit: 321A.13, and in section 321A.16 which provides for installment payment of a judgment to preclude the suspensions taking place.

Section 321A.17, Code 1958, subparagraph 1 thereof, reads as follows:

"Whenever the commissioner, under any law of this state, suspends or revokes the license of any person upon receiving record of a conviction or a forfeiture of bail, the commissioner shall also suspend the registration for all motor vehicles registered in the name of such person, except that he shall not suspend such registration, unless otherwise required by law, if such person has previously given or shall immediately give and thereafter maintain proof of financial responsibility with respect to all motor vehicles registered by such person."

It thus becomes apparent that proof of financial responsibility for the future is required, (1) upon suspension or revocation upon receipt of a record of conviction or a forfeiture of bail, and (2) upon nonsatisfaction of a judgment as that term is defined in chapter 321A, Code 1958.

We are of the opinion that the words "or other law regulating the operation of vehicles" appearing in section 321.16, supra, encompass chapter 321A, Code 1958. Therefore, it is our opinion that the notice required by section 321A.5, supra, must either be served personally or sent to the licensee by restricted certified mail.

As to the suspension of the registration of all motor vehicles registered

in the name of the person convicted or who forfeits bail, the following statutes are applicable:

Section 321.101, Code 1958, reads as follows:

"The department is hereby authorized to suspend or revoke the registration of a vehicle, registration card, registration plate, or any nonresident or other permit in any of the following events:

" * * *

"7. When the department is so authorized under any other provision of law.

" * * * * "

Section 321.104, Code 1958, reads as follows:

"It is a misdemeanor, punishable as provided in section 321.482 for any person to commit any of the following acts:

" * * *

"3. Any person who shall fail to surrender any certificate of title or registration card or license plates upon cancellation, suspension or revocation of the same by the department *and notice thereof as prescribed in this chapter.* (Emphasis added.)

" * * * * "

In view of the foregoing it is our further opinion that sections 321.101(7), 321.104(3) and 321A.17(1), Code 1958, are in pari materia and must be construed, as to notice, with reference to each other. Therefore, whenever the commissioner suspends the registration of a motor vehicle registered in the name of a person who has had his license to operate a motor vehicle suspended by the commissioner upon his receipt of a record of conviction or a forfeiture of bail, notice of suspension of such registration must be sent by restricted certified mail to the registrant or served on him personally.

18.4 August 13, 1959

MOTOR VEHICLES: Financial responsibility—An automobile liability policy may be adequate for purposes of filing an acceptable form SR 21 evidencing security following an accident under Code section 321A.5 without meeting the requirements of a motor vehicle liability policy for purposes of filing an SR 22 as proof of financial responsibility.

Mr. Russell I. Brown, Commissioner, Department of Public Safety: Your letter under date of April 24, 1959, is at hand wherein you ask for an opinion on the following matter:

"Recently the Department's Safety Responsibility Division has had the question come up as to whether or not the type of insurance policy which is required in order to *except* an individual from the security after an accident requirements must meet the requirements for the type of insurance policy which will satisfy the *future* financial responsibility requirements of Chapter 321A.

"The Department is considering the construction of regulations announcing the policies of the Safety Responsibility Division with respect to the administration and enforcement of Chapter 321A, consequently it

is felt that this basic question as what kind of an insurance policy is acceptable for exempting one from the security after an accident requirements is deemed essential."

In reply thereto:

Section 321A.5, Code 1958, reads, in pertinent part, as follows:

"1. The commissioner shall, immediately or within sixty days after the receipt of a report of a motor vehicle accident within this state which has resulted in bodily injury or death or damage to the property of any one person in excess of fifty dollars, suspend the license of each operator and all registrations of each owner of a motor vehicle in any manner involved in such accident, and if such operator is a nonresident the privilege of operating a motor vehicle within this state, and if such owner is a nonresident the privilege of the use within this state of any motor vehicle owned by him, *unless such operator or owner or both shall deposit security in a sum which shall be sufficient in the judgment of the commissioner to satisfy any judgment or judgments for damages resulting from such accident as may be recovered against such operator or owner;* provided notice of such suspension shall be sent by the commissioner to such operator and owner not less than ten days prior to the effective date of such suspension and shall state the amount required as security.

"2. *This section shall not apply* under the conditions stated in section 321A.6 or to any of the following:

"a. *To such operator or owner if such owner had in effect at the time of such accident an automobile liability policy with respect to the motor vehicle involved in such accident;*

"b. *To such operator, if not the owner of such motor vehicle, if there was in effect at the time of such accident an automobile liability policy or bond with respect to his operation of motor vehicles not owned by him;*

"3. *No such relief* or bond *shall be effective under this section unless issued by an insurance company* or surety company *authorized to do business in this state,*

* * * * * * * * *,

however, every such policy or bond *is subject, if the accident has resulted in bodily injury or death, to a limit, exclusive of interest and costs, of not less than ten thousand dollars because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, to a limit of not less than twenty thousand dollars because of bodily injury to or death of two or more persons in any one accident, and, if the accident has resulted in injury to or destruction of property, to a limit of not less than five thousand dollars because of injury to or destruction of property of others in any one accident.*

"* * * * * * * ."

(Emphasis added.)

Section 321A.9, Code 1958, reads, in pertinent part, as follows:

"1. The security required under sections 321A.4 to 321A.11, inclusive, shall be in such force and in such amount as the commissioner may require but in no case in excess of the limits specified in section 321A.5 in reference to the acceptable limits of a policy or bond.

* * * * *."

It is seemingly common practice to use the phrase, "proof of financial responsibility," in relation to both security following an accident and

proof of financial responsibility for the future. Such common parlance must be qualifed by existing statutory language, to wit:

Section 321A.1(10), Code 1958, which reads in part as follows:

"10. Proof of financial responsibility. *Proof of ability to respond in damages for liability, on account of accidents occurring subsquent to the effective date of said proof*, arising out of the ownership, maintenance, or use of a motor vehicle * * * * *."

(Emphasis added.)

Proof of financial responsibility when required may be given by a certificate of insurance; or a bond; or a certificate of deposit of money or securities. (Section 321A.18, Code 1958.) The certificate of insurance must certify that there is in effect a motor vehicle liability policy for the benefit of the person required to furnish proof of financial responsibility. (Section 321A.19, Code 1958.)

It should be noted at this point that as used in the present Motor Vehicle Financial Responsibility Act, the aforesaid phrase, to wit: "proof of financial responsibility," relates only to "proof of ability to respond in damages for liability, on account of accidents occurring subsequent to the effective date of said proof, arising out of ownership, maintenance, or use of a motor vehicle."

Section 321A.21(1), Code 1958, defines a motor vehicle liability policy as follows:

"1. A 'motor vehicle liability policy' as said term is used in this chapter shall mean an owner's or an operator's policy of liability insurance, certified as provided in section 321A.19 or section 321A.20 as proof of financial responsibility, and issued, except as otherwise provided in section 321A.20, by an insurance carrier duly authorized to transact business in this state, to or for the benefit of the person named therein as insured."

The remaining subsections of Section 321A.21, Code 1958, to wit:

Subsections 2 through 11 inclusive, set out the substantial elements of a motor vehicle liability policy.

I come now to the primary question, to wit: must the *automobile policy* relating to and as security following an accident meet the requirements of a *motor vehicle liability policy* relating to and as proof of financial responsibility?

Although section 321A.9, supra, provides that the security required following an accident "shall be in such form and such amount as the commissioner may require but in no case in excess of the limits specified in section 321A.5 in reference to the acceptable limits of a policy or bond," the substance required of such security is left to the statute thus providing, to wit: section 321A.5, supra. Such section is not in pari materia with section 321A.21, supra, which sets out and establishes the material and substantial elements of a motor vehicle liability policy relating to and as proof of financial responsibility.

Therefore, the question aforegoing is answered in the negative.

18.5 **September 1, 1959**

MOTOR VEHICLES: Mandatory revocation of operator's or chauffeur's licenses.

1. The date of mandatory revocation is the date on which the department of public safety makes the proper entry on its records showing revocation.

2. No notice required to be given to licensee of mandatory revocation by the department.

3. Even though a record of conviction is slow in its arrival to the department the mandate of revocation must be complied with by the department.

Mr. D. M. Statton, Commissioner, Department of Public Safety: Receipt is acknowledged of your letter under date of August 18, 1959, reading as follows:

"Your Opinion is requested on the following related matters:

"In an Opinion from your Office on the 23rd day of October 1958 to Mr. Emery L. Goodenberger, Madison County Attorney, Winterset, Iowa, you stated that your Office was of the opinion that upon conviction of driving a motor vehicle while under the influence of intoxicating liquor the date of mandatory revocation is the date of revocation by the Department of Public Safety. For clarification upon this point we respectfully request your Opinion upon the following questions:

"1. By date of the revocation by the Department of Public Safety does this mean that we are to interpret this as the date that the conviction is received in this office and the date the record entry is made upon the driver's record or is this the date that notice of revocation is sent to the licensee?

"2. As pertaining to the above question, what type of notice must be sent by the Department notifying the licensee of revocation? Must the Department send the notice by restricted certified mail as defined by Section 321.16, Code of Iowa 1958, or need any notice whatever be sent to a licensee revoked under Section 321.209, sub-paragraph 1-7, Code of Iowa 1958?

"3. In the case of a mandatory revocation under Section 321.209 where the conviction does not reach the Department of Public Safety for a considerable period of time, for instance two years after conviction, does the Department have a statutory obligation to revoke as provided in Section 321.209, sub-paragraph 1-7?"

In reply thereto:

At the outset we think it proper to point out the distinction between the words *suspension* (suspend, suspended) and *revocation* (revoke, revoked) as they appear in sections 321.209, 321.210, 321.211, and 321.215, Code of Iowa 1958.

In the case of *Bush v. Fletcher*, 196 Misc. 134, 92 N.Y.S. 2d 865, 866, the Court pointed out that "there is a substantial difference between a suspension and a mandatory revocation of an operator's license." The Iowa law is no exception. For example, section 321.212, Code 1958, provides that "upon revoking a license the department shall not in any event grant application for a new license until the expiration of one year after such revocation." No like provision is contained in chapter 321,

Code 1958, relating to suspension. Also another example of the distinction between the two words is apparent in section 321.211, Code 1958, which in substance provides for notice of *suspension* to the licensee and an opportunity upon his request for a hearing on the matter before the commissioner or his duly authorized agent. Mandatory *revocations* are excepted from this section. Mandatory revocations are also excepted from the appeal section, to wit: section 321.215, Code 1958.

Still another distinction is apparent and evidenced by section 321.206, Code 1958, wherein the general assembly has meticulously specified that the trial court shall take up the operator's or chauffeur's license whenever any person is convicted of any offense for which chapter 321 makes mandatory the *revocation* of such license or licenses. Upon such taking up of the license or licenses the court must forward the same together with a record of such conviction to the department of public safety. This duty, so imposed on the trial court, does not extend to *suspension* of such licenses.

The materiality and relevancy of the aforesaid distinctions will become evident in the answers to the questions submitted in your letter set out above.

The opinion of the attorney general to which you make specific reference, held:

"Upon conviction of driving a motor vehicle while under the influence of intoxicating liquor, the date of mandatory revocation in this instance, is the date of the revocation by the Department of Public Safety."

When the department of public safety receives the operator's or chauffeur's license and record of conviction as prescribed in section 321.206, supra, such conviction being one for which revocation is mandatory, the licensing authority, here the department of public safety, is required to *revoke* the operator's or chauffeur's license immediately. See: *Ashcraft v. State,* 68 Okla. Crim. 308, 98 P. 2d 60. The department has no power to disregard the judgment of conviction. *Application of De Martino,* 19 N.Y.S. 2d 529, 259 App. Div. 794, affirmed 30 N.E. 2d 486, 284 N.Y. 231

Insofar as the department's revocation is concerned it is a ministerial act of making the proper entry showing the revocation of the operator's or chauffeur's license of the person convicted *Ellis v. Department of Motor Vehicles,* 51 Cal. App. 2d 753, 125 P. 2d 521. The act of revoking is ministerial only and is mandatory. *Emmertson v. State Tax Commission,* 93 Utah 219, 72 P. 2d 467, 113 A.L.R. 1174, 1176.

Therefore, the date of mandatory revocation is the date on which the department of public safety makes the proper entry on its records showing the revocation of the operator's or chauffeur's license.

In answer to your second question it is our opinion that no notice is required to be given by the department of public safety to a licensee whose operator's or chauffeur's license has been mandatorily revoked by such department pursuant to receipt of a record of conviction for conviction of any of the offenses enumerated in section 321.209, Code 1958. There is no statute requiring such notice being given by the department. Notice (actual) has been afforded to a licensee so convicted by virtue of the fact that he or she stands in open court, is convicted, and the

operator's or chauffeur's license is taken up by the trial court. As the Utah Supreme Court said in *Emmertson*, supra:

"The section makes mandatory the revocation of the license upon proof of conviction of any of the offenses enumerated therein, *without notice to the holder of the license* and without discretion or judgment on the part of the commission. * * * * * * *."

Therefore, notwithstanding the fact that notice is required to be given to a licensee when his or her operator's or chauffeur's license has been suspended, no notice is required to be given by the department to the licensee when such licensee has had his or her operator's or chauffeur's license revoked pursuant to and in accordance with the mandate of the legislature appearing in section 321.209, supra.

Your third and last question is answered in the affirmative.

18.6

Board of supervisors—If the county board of supervisors has adopted a resolution limiting the weight of trucks or other commercial vehicles on certain bridges on secondary roads, and if the limitations are designated by appropriate signs, under section 321.473, 1958 Code of Iowa, a truck or other commercial vehicle operation in excess of such limitation would constitute an illegal act, unless the truck or other commercial vehicle is within the exceptions stated in section 321.453, 1958 Code as amended. (Faulkner to Schroeder, Jackson Co. Atty., 10/5/60) #60-10-3

18.7

Brake requirements—Section 321.430 (4), Code 1958, Code requires service brakes upon all wheels; therefore, service brakes are required on wheels on an extra axle, commonly referrerd to as a "cheater." (Pesch to Cothern, Clarke Co. Atty., 2/22/60) #60-3-3

18.8

Certificate of title—Transfer by operation of law.

1. When a vehicle is sold to satisfy a storage lien (Ch. 579, Code 1958) the treasurer of the county in which the last certificate of title was issued, upon satisfaction of the conditions set forth in sec. 321.47, Code 1958, may issue a certificate of title.

2. Such certificate of title must contain a statement of existing liens unless proper evidence shows their satisfaction or extinction. (Pesch to Timmons, Asst. Dubuque Co. Atty., 6/2/59) #59-6-7

18.9

Certificate of title—Liens—Liens should be recorded upon the certificate of title in the order presented to the county treasurer. (Craig to Davidson, Page Co. Atty., 9/7/60) #60-9-11

18.10

Department defined—The department of public safety under the commissioner constitutes the motor vehicle department. (Pesch to Brown, Pub. Safety Comr., 1/29/59) #59-2-22

18.11

Emergency vehicles—A driver of an authorized emergency vehicle assumes a special privilege when such vehicle is operated in the immediate pursuit of an actual violator of the law. (Pesch to Timmons, Asst. Dubuque Co. Atty., 2/20/59) #59-2-5

18.12

Examinations of applicants—A duly appointed and authorized examiner of the Iowa highway safety patrol does no violence to the provisions of Code sec. 321.220, when examining applicants for operator's or chauffeur's licenses. (Pesch to Cady, Franklin Co. Atty., 12/1/59) #59-12-5

18.13

Fees, bad checks—When payment has not been made of the required registration fee due to a "bad check," the department may suspend or revoke all evidences of such registration if, upon reasonable notice and demand for payment, payment is not made. (Pesch to Brown, Pub. Safety Comr., 4/24/59) #59-5-3

18.14

Financial responsibility—An action for damages, within the contemplation of sec. 321A.7(2), is instituted when commenced under the provisions of R.C.P. 48. (Craig to Statton, Comr. Pub. Safety, 5/10/60) #60-5-14

18.15

Financial responsibility—Failure to deposit security following an accident, and, failure to provide proof of financial responsibility not being crimes, the department of public safety may not suspend, under sec. 321.210(6), Code 1958, the operating privileges of an Iowa resident who fails to deposit security following an accident or fails to provide proof of financial responsibility in a foreign state. (Pesch to Statton, Comr. Pub. Safety, 8/26/59) #59-9-5

18.16

Financial responsibility—The registration of a motor vehicle must be suspended or revoked under Code sec. 321A.17(1)(2) irregardless of the manner in which the same is registered, if said vehicle is registered in the name of the person whose license has been suspended or revoked. (Pesch to Brown, Pub. Safety Comr., 1/23/59) #59-1-3

18.17

Fuel tax—Persons licensed as distributors under Div. 1 of ch. 324, Code 1958, are not subject to the permit provisions contained in secs. 324.52,

324.53.

The test is not whether a truck is licensed (registered) as an Iowa vehicle but rather whether the owners of said trucks are distributors licensed under Div. 1, ch. 324, Code 1958. (Pesch to Abrahamson, St. Treas., 1/26/59) #59-3-1

18.18

Financial responsibility—Code secs. 321A.14, 321A.17 and 321A.29—

1. Privileges suspended under Code secs. 321A.14 and 321A.17 may not be recovered until proof of future financial responsibility is posted;

2. Once proof is posted, licensee may cancel proof and surrender privileges, and three years from date first required to post proof, recover privileges. (Craig to Statton, Comr. Pub. Safety, 8/8/60) #60-8-10

18.19

Financial responsibility—Licensee whose license continues to be revoked under sec. 321A.17, Code 1958, must be given notice by personal service or restricted certified mail. (Craig to Statton, Comr. Pub. Safety, 8/10/60) #60-8-13

18.20

Fuel tax permits—The treasurer of state has a specific statutory duty to revoke a refund permit when no claim for refund has been made by the permit holder for a period of one year from the date of issuance of such permit. Section 324.19, Code 1958. (Pesch to Abrahamson, St. Treas., 5/11/59) #59-7-1

18.21

Fuel tax reciprocity—The treasurer of state may not enter into reciprocal agreements with other states concerning motor fuel and special fuel use tax for interstate motor vehicle operations. (Pesch to Abrahamson, St. Treas., 5/11/59) #59-5-8

18.22

Fuel tax refunds—H.F. 4 does not extend the refund for taxes paid on motor fuel used in operation or propelling of truck-mounted feed mixers and pelleting machines. (Pesch to Abrahamson, St. Treas., 6/25/59) #59-7-2

18.23

Length of load—

1. The restriction of three feet contained in sec. 321.458, Code of Iowa, modifies both front wheels and front bumper, if so equipped, unless in conflict with sec. 321.363, Code of Iowa.

2. A frame extended beyond the normal position of the front bumper, if an integral part of the vehicle and not a load, does not constitute a violation of sec. 321.458, Code of Iowa. (Lyman to Highway Com., 12/22/59) #59-12-21

18.24

Licensing minors—A minor, notwithstanding the fact that such minor is married, must secure the required signature on an application for a student's permit, operator's permit, or instruction permit, all as required by sec. 321.184, Code 1958. (Pesch to Brown, Pub. Safety Comr., 4/14/59) #59-5-1

18.25

Lien of registration fee—The unpaid portion of a registration fee provided for in ch. 321, Code 1958, is and continues as a lien on the vehicle irrespective of transfer to a new owner. (Pesch to Statton, Comr. Pub. Safety, 8/26/59) #59-9-4

18.26

Mandatory revocations—

1. It is the duty of the motor vehicle department to revoke operator's and chauffeur's licenses.

2. Revocations of operator's and chauffeur's licenses upon conviction of an offense calling for mandatory revocation are effective as of the date made by the department of motor vehicles.

3. Code sec. 321.282 does not apply during the interval between the date of conviction or plea of guilty to an offense requiring mandatory revocation by the department of motor vehicles and the date revocation is made by the department.

4. Code sec. 321.206 requires persons convicted of an offense requiring mandatory revocation to surrender their operator's or chauffeur's license to the Court. (Craig to Hudson, Pocahontas Co. Atty., 7/7/60) #60-7-6

18.27

Minors—Application for operator's license—A person under the age of 18 years cannot make application for an operator's license unless he complies with the requirements of sec. 321.184, 1958 Code of Iowa. (Craig to Morr, Lucas Co. Atty., 8/15/60) #60-8-14

18.28

Operator's license—Minor's school license—School operator's license only valid for driving to and from the particular school for which necessity thereof was shown upon granting license. (Craig to Cady, Franklin Co. Atty., 10/5/60) #60-10-2

18.29

Penal provisions—A violation of sec. 321.319, Code 1958, constitutes a misdemeanor, punishable upon conviction as provided in sec. 321.482, Code 1958. (Pesch to Templeton, Hancock Co. Atty., 2/22/60) #60-3-2

18.30

Railroad crossing signals—Signals which do not alternately direct traffic to stop and proceed are not traffic-control devices as will excuse motor vehicle drivers required to stop at railroad grade crossings from doing so. (Craig to Johnson, Lee Co. Atty., 5/2/60) #60-5-4

18.31

Re-examination of licensee—Failure to submit to a re-examination under sec. 321.186, Code 1958, is a misdemeanor punishable as provided in sec. 321.482, Code 1958. (Pesch to Brown, Pub. Safety Comr., 7/21/59) #59-7-19

18.32

Refund of prorate registration fees—Refund of prorate fees is governed by sec. 321.126, Code 1958, and no refunds are permitted unless the considerations contained in said section are complied with. Erroneously-collected fees returnable under sec. 321.173, Code 1958. (Pesch to Carlson, Reciprocity Bd., 5/16/60) #60-5-16

18.33

Registration—A vehicle which formerly was a registered motor vehicle but which is no longer capable of propelling itself need not display a registration plate while being towed on the highway from the premises of the former registered owner to a salvage yard. (Craig to Morr, Lucas Co. Atty., 5/20/60) #60-6-7

18.34

Registration—Where a motor vehicle is owned by a nonresident and registered in the state of nonresidence and facts are not present to make sec. 321.55, Code 1958, applicable, it may be operated or permitted to be operated in this state without registering the said vehicle in this state; provided the said vehicle is duly registered in the state of nonresidence and otherwise complies with the provisions of sec. 321.53, Code 1958, as amended. (Pesch to Stoebe, Humboldt Co. Atty., 1/27/60) #60-2-2

18.35

Registration refund—Power of attorney—Power of attorney form provided under the provisions of sec. 321.49(2), Code 1958, may not be used for the purpose of making a registration refund under sec. 321.126. (Craig to Milani, Appanoose Co. Atty., 7/22/60) #60-7-23.

18.36

Safety chains—A farm wagon and farm tractor need not be equipped with a safety chain as provided in sec. 321.462, Code 1958. (Pesch to Van Ginkel, Cass Co. Atty., 12/4/59) #59-12-12

18.37

School buses—Discharging of pupils—Section 321.372, Code 1958, relating to discharging of pupils from school buses applies to school districts of cities and towns. (Pesch to Statton, Pub. Safety Comr., 2/9/60) #60-2-18

18.38

School bus stops—Four-lane highways—Motor vehicles on four-lane highways must comply with section 321.372(3) even when operating on a separate roadway. (Craig to Samore, Woodbury Co. Atty., 11/8/60) #60-11-8

18.39

Special fuel, dispensing—Held: Illegal to dispense fuel directly from a mobile tank wagon into the fuel supply tank of a motor vehicle at any place other than the licensed place of business or location. (Bianco to Abrahamson, St. Treas., 7/22/59) #59-7-24

18.40

Special fuel distributor license—The motor vehicle fuel tax law contains no provisions pertaining to special fuel distributors. No license required. (Pesch to Abrahamson, St. Treas., 6/26/59) #59-7-3

18.41

Speed—Section 321.285, Code 1958, as affected by sec. 321.291, Code 1958.

An information, accusing a person of operating a motor vehicle upon a highway at a speed greater than will permit such person to bring such vehicle to a stop within the assured clear distance ahead, need not contain therein a specific allegation of speed in miles per hour. (Pesch to Winkel, Kossuth Co. Atty., 8/3/59) #59-8-6

18.42

Speed limits on secondary roads—

1. Before secondary road speed limits are effective, appropriate signs giving notice thereof must be erected by the county boards of supervisors.

2. As to the extent of such erection and posting, reference is made to the *Manual of Uniform Traffic Control Devices for Streets and Highways*, published by the Iowa State Highway Commission. (Pesch to Tow, Safety Dept., 8/27/59) #59-9-9

18.43

Sunday law constitutional—H. F. 311, 58th G.A., amending Code sec. 322.3, prohibiting the buying or selling at retail of new or used motor vehicles on Sunday is presumptively constitutional. (Erbe and Strauss to Loveless, Gov., 4/1/59) #59-4-5

18.44

Sunday sale ban—A trailer home being a vehicle subject to registration under the laws of this state comes within the purview of ch. 243, Acts of the 58th G.A. (Pesch to Samore, Woodbine Co. Atty., 12/4/59) #59-12-11

18.45

Truck operators permits—

1. No permit required of the owner of a motor truck under ch. 327, Code 1958, when the owner of such motor truck rents such truck to another and the person renting such truck operates the same.

2. A permit is required of the owner if he hauls under oral contract and holds himself out generally and hauls for anyone who calls upon him to do so. (Pesch to Pappas, Cerro Gordo Co. Atty., 12/3/59) #59-12-10

18.46

Temporary restricted licenses—Under 58th G.A., sec. 4, ch. 322:

1. The word "convicted" appearing therein means a final conviction upon which a suspension of an operator's or chauffeur's license was activated.

2. The original operator's or chauffeur's license remains under suspension during the effective period covered by the temporary restricted license.

3. Violation of the temporary restricted license is governed by sec. 321.193, Code 1958.

4. Department may not require that a temporary restricted license be displayed on the vehicle.

(Pesch to Brown, Pub. Safety Comr., 7/22/59) #59-7-26

18.47

Weight—Garden plants or nursery products are not "raw farm products" entitled to 25 per cent tolerance under sec. 321.466. (Lyman to Schach, Highway Com., 5/4/59) #59-5-5

18.48

Truck permit fees—The Order of the Commerce Commission, issued August 6, 1958 and in force January 1, 1959, exceeds its powers in providing for fees to be paid on both tractors and trailers. Their legal authority exists only to the extent of imposing the fee upon the tractor. (Strauss to Loveless, Gov., 6/24/59) #59-6-23

CHAPTER 19

SCHOOLS

STAFF OPINIONS

LETTER OPINIONS

19.1 May 19, 1959

SCHOOLS: Reorganization—Under Code section 275.12 et seq., once a petition is filed, there cannot be a voluntary dismissal.

Mr. T. C. Strack, Grundy County Attorney: Reference is made to your letter of May 11 and the telephone conversation of May 15, which disclosed the following:

"On February 3, 1958, in accordance with the notice which was published according to law, the joint County Boards of Grundy, Black Hawk and Tama Counties held a hearing upon the proposed school district, and, after the hearing, entered an order of February 13, 1958, which established the boundaries of the proposed district but excluded portions which were asked for in the original petition. On March 3, 1958, an appeal was filed with the State Department of Public Instruction and on hearing the State Department of Public Instruction affirmed the decision of the joint Boards. An appeal to the District Court of Grundy County, Iowa, was taken and on April 2, 1959, the Court filed a decree affirming the decision of the joint County Boards and the State Department of Public Instruction. No other action was taken until May 8, 1959, on which date a dismissal was filed in the Office of the County Superintendent of Grundy County, Iowa, dismissing the original petition. The dismissal was signed by the attorney as 'Attorney for the Petitioners in the above entitled cause'.

"Section 275.18 requires that within thirty days from the date of the

final determination of the boundaries the County Superintendent, in the case, of Grundy County, shall call an election in the proposed school corporation. In the normal course of events, it is our understanding that the time for appeal to the District Court having elapsed, the County Superintendent should now call a special election on the formation of the proposed district. We have found no authority for the voluntary dismissal of a petition once a final order has been entered setting the boundaries.

"1. Under the above facts, is the County Superintendent still required to call an election, and, if he fails to do so, can he be compelled to call an election by proper Court action?

"2. Can a petition for the formation of a community school district be dismissed voluntarily once the order setting the boundaries of the proposed district has become final?"
in reply thereto:

The procedure for reorganization of school districts is set out in chapter 275, Code 1958. In order to fully answer the questions in your letter, a brief discussion of the method of reorganization is necessary. In order to start a reorganization of a school district where part or a whole of two or more districts may be united into a single district a petition must be filed with the county superintendent of schools in accordance with the provisions of section 275.12, Code 1958. The petition itself is nothing more than a proposal for reorganization submitted to the county superintendent signed by the prerequisite number of persons who are to be included in the reorganization, ordering the county superintendent of schools to set a date for hearing before the county board of education as provided in section 275.14, Code 1958.

The position referred to in section 275.12 et seq., Code 1958, is not a request for the granting of a favor or the redress of a wrong but a statutory privilege granted by the legislature to the persons involved to have a hearing upon a plan of reorganization and if approved by the proper authorities, then the submission to the people as a whole in the form of a special election which is mandatory. The only way a petition or preferably a plan of reorganization, can be dismissed, once it is filed with the county superintendent of schools, is by action of the county board or boards of education at a hearing based upon objections filed in accordance with section 275.14, Code 1958, or lack of jurisdiction as found in the case of *State ex rel Harberts v. Klemme Community School District*, 247 Iowa 58, 72 N. W. 2d 512, *Hohl v. Board of Education*, 250 Iowa 502, 94 N.W. 2d 787, or because the plan of reorganization contains some fatal defect as in the case of *State ex rel Warrington v. Community School District of St. Ansgar*, 247 Iowa 1167, 78 N.W. 2d 86.

There is no statutory authority for the voluntary dismissal of the petition referred to in section 275.12 et seq., Code 1958, and none can be reasonably implied. Thus under the doctrine of *expressio unius exclusio alteriores* as discussed in the case of *De Berg v. County Board of Education*, 248 Iowa 1039, 82 N.W. 2d 710, the legislative intent is quite clear, that after the approval by the proper authority whether it be the county board or boards of education, state department of public instruction, or the courts of the State of Iowa, when the decision is final with regard to the approval of such a petition, then there must be an election as provided in section 275.18, Code 1958. The purpose of the special election is to let the people determine for themselves whether or not there

should be a reorganization of the school district which is their vested right as provided in Art. II section 1, *Const. of Iowa.*

Section 275.18, Code 1958, provides:

" * * * the county superintendent with whom such petition is filed shall call a special election within thirty days from the date of the final determination of such boundaries, * * *. In the case of joint districts, no notice for an election shall be published until the time for appeal, * * * has expired."

In your letter it appears that no further court proceedings were taken after the decision of the district court. Rule 335, *Rules of Civil Procedure* provides:

"Appeals to the supreme court must be taken within, and not after, thirty days from the entry of the order, judgment or decree * * *"

Therefore, on May 3, 1959, the decision of the district court became the "final determination of such boundaries." The county superintendent of schools has an "enforceable duty" as defined in section 661.6, Code 1958, which may be subject to an action of mandamus as provided therein.

The answers to your questions are as follows:

1. Affirmative.

2. Negative.

19.2 June 18, 1959

SCHOOLS: Reorganization—Portions of districts of less than four sections remaining after one reorganization proceedings, which have been included in a duly-filed petition for another reorganization, continue to function as districts until "completion" of the pending reorganization, the exclusive jurisdiction of which while it lasts, precludes attachment elsewhere of such portions under Code section 275.5.

Mr. Asher E. Schroeder, Jackson County Attorney: Receipt is acknowledged of your letter of June 16 as follows:

"A petition was filed with the Jackson County Superintendent of Schools on January 12, 1959, asking for a Community School District under Chapter 275. The petition was approved by Joint County Board action, Order was published as required by law, a successful election was held as outlined in 275.18, a new board was properly elected, and New Community School District will go into effect July 1, 1959. *Said election, however, reduced two Rural Independent Districts to less than four sections.* (275.5)

"About the same time the above mentioned proposal was started, another petition was filed with the County Superintendent on January 23, 1959, asking for another Community School District, the territory lying West of that included in Proposal A, but contiguous to it. (Sponsors of the two proposals had previously met and set up a mutual boundary as per County Plans. Thus, the remaining portions of two Rural Independent Districts left out of the first proposal were included in the second.)

"The Joint Boards approved second petition, but same was appealed

to State Department of Public Instruction under 275.16. The State Department upheld the County Board's action, but did not render decision until May 23, 1959. Thus, election cannot be held until after July 1, 1959.

"The questions which I submit for your opinion are as follows:

"1. Shall the County Board of Education attach the remaining 'less than four sections' portions of the two Rural Independent Districts before July 1, 1959, even though these portions are tied up in litigation?

"2. If not, can each of these operate as an official School District during the 1959-1960 school year, even though less than four sections each?"

1. It appears from the facts stated in your letter that the "portions of less than four sections" which will remain in each of the rural independent districts as of July 1 are included in the petitioned-for boundaries of a pending reorganization. In the case of *State ex rel Harberts v. Klemme School District*, 247 Iowa 48, 72 N.W. 2d 512, the supreme court held a prior pending reorganization is "protected" until "completed." The county board cannot defeat the prior jurisdiction over disposition of the territory in question by attaching it elsewhere. If the pending reorganization is ultimately defeated, its prior jurisdiction will then terminate and the county board can then make the necessary attachment. If the pending reorganization is ultimately successful, there will then be no "remaining portions" for it to attach.

2. Until "completion" of the pending reorganization it appears the existing rural independent districts, even though reduced to less than four sections of land, must continue to function as rural independent districts, the powers of the county board under the last sentence of section 275.5 being held in check by the prior exclusive jurisdiction over disposition of the territory of the pending proceedings. Historically, this will not be the first time rural independent districts of less than four sections have for a time remained in existence as an incident to consolidation. See 1954 *Report of the Attorney General* page 81. Also see *State ex rel Little v. Owens*, 244 Iowa 1356, 60 N.W. 2d 521. While its existence continues, the abbreviated district "must provide in some manner for the education of students of proper age and residing within such district."—*Manders v. Consolidated District*, 241 Iowa 883, 43 N.W. 2d 714, 717.

19.3 December 3, 1959

SCHOOLS: Reorganization—A newly-formed community school district cannot be substantially changed once it is organized under chapter 275, Code 1958.

Mr. Robert W. Burdette, Decatur County Attorney: This is to acknowledge receipt of your letters of October 28 and November 2, and our conversation of November 5, in which you posed the following question:

"Is it possible for a portion of one of these newly organized districts to be transferred out of the district to become a separate entity, and if that is not possible, can that portion be attached to some other district?"

In reply thereto, I advise as follows:

Section 275.1, Code 1958, provides in pertinent part:

"It is hereby declared to be the policy of the state to encourage the reorganization of school districts into such units as are necessary, economical and efficient and will insure an equal opportunity to all children of the state."

The legislature established minimum standards and methods of effectuating reorganization. Section 275.9, Code 1958, provides:

"When any school district is enlarged, reorganized, or changes its boundaries, pursuant to the plans hereinabove provided for, such enlargement, reorganization, or boundary change shall be accomplished by the method hereinafter provided.

"The provisions of sections 275.1 to 275.5, inclusive relating to studies, surveys, hearings, and adoption of county plans shall constitute a mandatory prerequisite to the effectuation of any proposal for district boundary change. It shall be the mandatory duty of the county board or joint county boards to dismiss the petition if the above provisions are not complied with fully."

According to the facts as presented, it appears that a community school district (hereafter referred to as "W" community school district) came into existence on July 1, 1959. Subsequent to that date, there has been a general concern about changing the boundaries of the "W" community school district. The boundary change would reduce the "W" community school district to an area about the same size as a former consolidated district which was included in the new community school district.

Before the "W" community school district came into existence, the county board of education had already determined:

1. The entire area of the "W" community school district is necessary to its formation.

2. The number of pupils who reside in the "W" community school district meets the statutory requirements found in section 275.3, Code 1958.

3. The assessed valuation of taxable property located within the "W" community school district was sufficient to support the said district.

The supreme court of Iowa has consistently held that the procedural statutes with respect to reorganization are to be liberally construed. *State ex rel Warrington v. School District of St. Ansgar*, 247 Iowa 1167, 78 N.W. 2d 86. However, such construction must be "reasonably done without violence to the manifest spirit and intent of the legislature." *Wall v. County Board of Education*, 249 Iowa 209, 86 N.W. 2d 231, citing from *Ondler v. Rowe*, 187 Iowa 1116, 175 N.W. 32. However, administrative agency in the absence of a statute cannot change a prior decision unless (1) there is a change of condition within the school district subsequent to its decision or (2) other considerations materially affecting the merits have intervened. *Keller v. City of Council Bluffs*, 246 Iowa 202, 66 N.W. 2d 113.

Thus if the proposed petition for reorganization would substantially change the "W" community school district below the standard that the county board of education has determined to be an economical or efficient school district, the county board of education would be bound to dismiss such petition because it would defeat the purpose behind reorganization.

When a school district is reorganized under chapter 275, Code 1958, the former school districts lose their identity, in the portion of the district affected by reorganization. Section 275.11, Code 1958, in pertinent part clearly indicates the above principle; it provides:

" * * * contiguous territory located in two or more school districts may be united into a single district * * * "

Therefore in answer to your question, it is not possible for a portion of a community school district to be transferred out of the district to become a separate entity, unless that portion meets all of the statutory requirements as set out in chapter 275. If that portion is not set out it can only be attached to another district if the remaining portion of the community school district substantially meets the determination made by the county board of education in establishing the community school district.

19.4 January 27, 1960

SCHOOLS: I.S.E.A. membership—Teachers are not "laborers" and membership or nonmembership of public school teachers in labor union organization or professional associations may not be the subject of a provision in their contract with the school district.

The Honorable Charles E. Grassley, State Representative: This will acknowledge receipt of your letter in which you submitted for opinion the following:

"Please give me your official opinion on the matter of whether or not professional teachers' organizations and unions come under the provisions of Chapter 736A of the Iowa Code of 1958. I refer particularly to organizations like the American Federation of Teachers and the Iowa State Education Association.

"Many of the recruitment practices of these organizations are similar to those of any labor union. For instance, I have evidence that many school districts (to be more exact, the superintendents) require membership in the Iowa State Education Association as a condition of employment. In an instance or two, membership in the ISEA is stated in the teacher's contract—this amounts to a 'union shop' agreement, does it not?"

In reply thereto I advise as follows:

Chapter 736A, Code 1958, to which you refer, known as the right-to-work law, was enacted by the 52d General Assembly and appears as chapter 296 of the laws of that session of the legislature, and became effective May 1, 1947. The title of the Act is this:

"AN ACT to make it unlawful to discriminate in the employment of any person either because of membership or nonmembership in a labor union, organization or association, or to require any person to pay dues or other charges thereto as a condition of employment, and to make it unlawful to deduct labor organization dues or other charges from the compensation of an employee unless the employee has authorized such deduction as provided in this act, and to prescribe penalties for violations and relief by injunction to prevent or stop violations."

Assuming, without concluding whether public employees, and specifi-

cally teachers, are employees within the terms of that act, it is to be observed that this department, by opinion appearing in the *Report of the Attorney General* for 1946, as page 162, denies the right to compel public employees to be members of a union. While what was said there pertained particularly to boards of supervisors, yet it is equally applicable to the governing body of school districts. Pertaining to what is said in your letter, it is there said:

"It is therefore clear that whether a person is a member of a labor union or not a member of a labor union has no place in the discretion lodged in the Board of Supervisors. Such membership is neither a requisite nor a bar to public employment. It is therefore quite apparent that the powers granting the Supervisors administrative discretion is limited by the will of the people expressed in laws enacted by the Legislature. This power is subject to curtailment or expansion by the Legislature within its constitutional limitations. They may not abuse or exceed those powers, express or implied. What the Legislature cannot legally do, the Board, in its administrative capacity, cannot do. Neither can bargain away the discretion vested in the Supervisors."

The foregoing principle as applicable to all employees, public or private, has been confirmed in the right-to-work law exhibited now as chapter 736A, Code 1958. Your letter does not detail other facts as violative of either the rule of that opinion or the subsequently-enacted right-to-work law.

I might say to you that insofar as the profession of teaching is concerned, the cases seem to be quite unanimous in the conclusion that the word "laborer" as commonly understood and used, does not include within its meaning, the profession of teaching.

Typical of such cases is the case of *Universal Pictures Corporation v. Superior Court in and for Los Angeles County,* 50 P. 2d 500, 501, 9 Cal. App. 2d 490:

"However, with but few exceptions, it seems to be generally conceded, that individuals whose principal efforts are directed to the accomplishment of some mental task, such as those of ministers of the gospel (Church of Holy Trinity v. U.S., 143 U.S. 457, 12 S. Ct. 511, 36 L. Ed. 226); lawyers (Latta v. Lonsdale /C.C.A./ 107 F. 585, 52 L.R.A. 479; Gay v. Hudson River E.P. Co. /C.C./ 178 F. 499); doctors (Weymouth v. Sanborn, 43 N.H. 171, 80 Am. Dec. 144); teachers (School District v. Gautier, 13 Okla. 194, 73 P. 954; Tatsukichi Kuwabara v. U.S. /C.C.A./ 260 F. 104; Lesuer's Case, 227 Mass. 44, 116 N.E. 483, L.R.A. 1918F, 197); or actors (Wirth v. Calhoun, 64 Neb., 316, 89 N.W. 785; In re Ho King /D.C./ 14 F. 724); or those persons generally known and recognized as professional men or women, even though in its broad sense perform 'labor,' are not to be, nor should be, classified as 'laborers.' That such a conclusion is in accord with the popular, everyday notion of what constitutes 'labor' is so well recognized and attested as a fact that its existence needs no illustration; but it is common knowledge that the 'pick-and-shovel' man, or even the skilled mechanic, regards as ridiculous the suggestion that any so-called 'white collar' individual ever performs any real labor; and the same idea, perhaps to a somewhat lesser degree, prevails as to a subordinate clerk in comparison with a high-salaried executive, or a man in any well-recognized professional employment; and to make use of an example that strikes nearer home, to the 'man on the street,' the suggestion that a judge ever 'labors' is simply absurd."

and in *Words and Phrases,* Volume 24, at page 56, where it is said "A laborer is one who performs manual labor," citing in support thereof

numerous cases from various jurisdictions. See generally the title LABORER in the foregoing-designated *Words and Phrases.*

In *People v. Sacks,* 150 N.Y.S. 2d 222, 224, 2 Misc. 2d 201, it was said generally in reference to the statute prohibiting labor on Sunday, the following:

"(2) At the outset it may be borne in mind, as stated in 51 C.J.S., Labor or Labour, p. 472, that:

'The precise line between what is commonly called "labor" and other employment cannot be drawn with absolute accuracy. However, with but few exceptions, it is generally conceded that the activities of individuals whose principal efforts are directed to the accomplishment of some mental task are not in accord with the popular, everyday notion of what constitutes "labor".'

"Again, in 35 C.J.S., p. 929, it is said that 'the term "laborer" has been held not to include an agent who sells goods by sample, an architect, a bookkeeper, a bookkeeper and auditor, a bookkeeper and general manager, a civil engineer, a clerk,' etc.

"This general line of demarcation is indicated in the following: 51 C.J.S., Laborer or Labourer, p. 476, under the caption 'Popular, Restricted or Lexical Meaning,' and at p. 475 of the same volume, under the caption, 'Labor or Laborer in General. See also American and English Encyclopedia of Law, 2d Ed., Vol. 18 at p. 71. At p. 73 of that volume will be found case citations in which the following were held not to be laborers: Clerks, auditors, bookkeepers, and a general manager. To the same effect see also the following cases: Universal Pictures Corporation v. Superior Court, etc., 9 Cal. App. 2d 490, 50 P. 2d 500 et seq.; Oliver v. Macon Hardware Co., 98 Ga. 249, 25 S.E. 403, 404; Buchanan v. Echols, 8 Ga. App. 565, 70 S.E. 28; Russell Flour & Feed Co. v. Walker, 148 Okl. 164, 298 P. 291, 292; Indiana Northern Tract Co. v. Brennan, 174 Ind. 1, 87 N.E. 215, 220, 90 N.E. 65, 68, 91 N.E. 503, 30 L.R.A., N.S., 85."

So far as the Iowa supreme court is concerned in the case of *Lames v. Armstrong,* 162 Iowa 327, it was said as to who is a "laborer," the following:

"One engaged in the livery business is or may be a laborer, and his team of horses and wagon, or other vehicle, exempt, if thereby he habitually earns his living. Root v. Gay, 64 Iowa 399. Appellant also contends that, even though it be held that the Legislature intended to specify the classes of persons above referred to and then limit the exemption law to other laborers within the strict definition of 'laborer,' still appellant would be a laborer according to the definition in Krebs v. Nicholson, 118 Iowa 134. The definition there given is that a laborer is 'one who is engaged in some toilsome physical occupation; one who performs work which requires little skill or special training.' This is the definition usually given in its restricted sense, but it ought not to be so construed in the exemption laws. It may mean one who labors or works with mind or body. 24 Cyc. 810. An insurance agent is not a professional man. Cummings v. Ins. Co., 153 Iowa 579-586. Under the concession, appellant works or labors as much as a livery man."

In the case of *Krebs v. Nicholson, et al.,* 118 Iowa 134, the Court said:

"A laborer is defined to be one who is 'engaged in some toilsome physical occupation; one who performs work which requires little skill or special training.' 4 Century Dictionary 3318. While it cannot be said as a matter of law, that the plaintiff's occupation was of the most toilsome nature, it still required some physical effort, and but little skill or special

training as we understand it; and if by his labor he earned his living, he was a laborer, within the meaning of the statute."

Relative to the status and activities of public employees as members or nonmembers of unions, 31 *A.L.R. 2d*, page 1142, contains an annotation entitled: "Union organization and activities of public employees." The following textual statements appear therein: (pp. 1154, 1166, 1170)

"Sec. 8. Union membership generally. The right to prohibit firemen and policemen from becoming or remaining union members (usually implemented by an order of the police or fire commissioner, or some equivalent official, denying departmental employees the right to join a union), has frequently been upheld or approved."

"Sec. 17. Recognition of union for or including public employees. Although many government agencies have recognized unions among their employees as valid, so long as collective bargaining in the sense that private industry knows it is not involved, and strikes are outlawed, ordinances, rules, regulations, and resolutions of the governing bodies of municipal corporations prohibiting policemen and firemen from being or becoming members of labor unions, upon penalty of dismissal, have been sustained by the courts as within the power of the governing body, and, in some instances, as not infringing upon any constitutional rights of the public employees."

"Sec. 19. As to collective bargaining. Public employers cannot abdicate or bargain away their continuing legislative discretion and are therefore not authorized to enter into collective bargaining agreements with public employee labor unions. Constitutional and statutory provisions granting the right of private industry to bargain collectively do not confer such right on public employers and employees."

The power to contract with teachers is prescribed by statute. See 1950 *Report of the Attorney General*, page 50. The pertinent statute, section 279.13, Code 1958, makes no provision for a contractual agreement relative to the teacher's membership in any organization. Only school boards, not superintendents, are authorized to contract with teachers. See *Harris v. Manning Ind. Dist.*, 245 Iowa 1295, 66 N.W. 2d 438.

In connection with the foregoing, I enclose copy of the supporting opinion appearing in the *Report of Attorney General* of 1946, to which I have previously referred.

19.5

Acceptance of gifts—Code secs. 297.2 and 297.3 do not limit nor do they apply to acceptance of the *use and occupancy* of federally-owned lands by way of gift from the federal government for a period of twenty years. What effect, if any, said sections may have upon the power to retain all of the land when fee title passes to the district at the end of the twenty years is purely speculative and need not be determined at this time. (Abels to Parkin, Jefferson Co. Atty., 1/22/59) #59-1-9

19.6

Attachment—Attachment by county board of education under Code sec. 275.5 is in full force and effect until final determination of an appeal. (Rehmann to Bruner, Carroll Co. Atty., 8/28/59) #59-9-12

19.7

Ballots—Directing ballots in school elections to be printed does not in-

clude therein mimeographing or other forms of impression of such ballots. (Straus to Pierce, St. Rep., 5/25/59) #59-5-18

19.8

Buildings and grounds—

1. Under sec. 296.2, Code 1958, before indebtedness, schoolhouse sites being contracted for must in all instances be submitted to the electors.

2. School districts cannot purchase on real estate contracts. Under Code sec. 297.3, a school can acquire thirty acres plus two blocks exclusive of street for the schoolhouse site. (Rehmann to Willett, Tama Co. Atty., 6/25/59) #59-6-24

19.9

Compatibility of office—A member of the state legislature cannot at the same time be a member of a county board of education. The two offices are incompatible. (Strauss to McDonald, Dallas Co. Atty., 12/7/60) #60-12-12

19.10

County board—Vacancies on the county board of education should be filled as provided in Code sec. 273.4 and not by special election. (Rehmann to Johnson, Poweshiek Co. Atty., 10/28/59) #59-11-3

19.11

Directors—Vacancies on the entire school board would exist if none of the directors were properly qualified under Code sec. 277.28 or Code ch. 78. *Quo warranto* is the proper procedure against a *de facto* board of directors. (Rehmann to King, Marshall Co. Atty., 11/20/59) #59-11-22

19.12

Distribution of assets and liabilities—Only tribunals created by law can make distribution under Code secs. 275.29 and 275.30; if equitable, such distribution is binding. (Rehmann to Bruner, Carroll Co. Atty., 4/17/59) #59-4-22

19.13

Division of assets—County superintendent has no duty nor may he aid in division of assets under sec. 275.29, Code 1958. (Rehmann to Boeye, Montgomery Co. Atty., 6/30/59) #59-6-26

19.14

Election of treasurer—Under Art. XI, Sec. 6, Constitution of Iowa, the office of treasurer should be filled for the unexpired short term at the general school election in September, 1960. In addition, under Code sec. 277.26, a treasurer should be elected to fill the two-year term commencing July 1, 1960. (Rehmann to Greenfield, Guthrie Co. Atty., 8/5/60) #60-8-9

19.15

Elections—Polling places outside director districts but within the school district. (Abels to Buchheit, Fayette Co. Atty., 2/20/59) #59-2-26

19.16

Elections—Two directors elected under Code sec. 275.25 will serve a term from July 1 until the next regular school election in September. (Rehmann to Anderson, Howard Co. Atty., 12/29/59) #60-1-3

19.17

Federal statutes—Application of Public Law 85, ch. 836. (Rehmann to Davis, Dept. Pub. Instr., 2/20/59) #59-2-6

19.18

High school district—The record action of the board of directors of a school district does not change the status of a school district to a nonhigh school district until the end of the current fiscal year. (Rehmann to Brown, Mitchell Co. Atty., 11/30/60) #60-12-5

19.19

Mileage—Teachers come within sec. 79.9, Code 1958. (Rehmann to Gray, Calhoun Co. Atty., 2/23/60) #60-2-27

19.20

Nominating committee—Under Code sec. 257.5 there is no express authority for seating an alternate for a specific delegate. The credential committee can seat the alternate to fill a vacant alternate position. (Rehmann to Hardin, Marion Co. Atty., 9/22/59) #59-9-29

19.21

Officers—The office of board of directors of community schools and board of supervisors of a county are incompatible. (Rehmann to Poston, Wayne Co. Atty., 3/25/59) #59-3-26.

19.22

Refund of taxes—Board of education has no authority to distribute to the taxpayers on a pro-rata basis the surplus in the general fund where the school district goes out of existence. (Rehmann to McGrath, Van Buren Co. Atty., 7/23/59) #59-7-27

19.23

Reimbursement—Under Code sec. 284.1, school districts are not eligible to receive reimbursement from a municipal corporation, if the municipal corporation annexes an area within said school district. (Rehmann to Miller, St. Sen., 11/23/59) #59-11-23

19.24

Reorganization—A petition under sec. 275.17, Code 1958, should not contain statement showing the proposed schoolhouse site. (Rehmann to Skiver, Osceola Co. Atty., 4/22/59) #59-4-28

19.25

Reorganization appeals, joint districts—The joint county boards cannot properly be made a party to an appeal from their decision rendered under Code sec. 275.16. Where improperly named, interested local or county board should intervene. (Abels to McGrath, Van Buren Co. Atty., 1/27/59) #59-1-7

19.26

Reorganization—Attorney fees are not part of expenses in sec. 275.26, Code 1958. (Rehmann to Scholz, Mahaska Co. Atty., 2/15/60) #60-2-21

19.27

Reorganization—Board of directors of old school districts can exercise their power under Code sec. 297.15 until July 1, following the election of reorganization under ch. 275, Code 1958. (Rehmann to Garretson, Henry Co. Atty., 4/28/59) #59-4-31

19.28

Reorganization—

1. Chapter 192, Acts of the 58th G.A., amending ch. 275, Code 1958, is an integral part of the reorganization laws.

2. A nonhigh-school district can petition only once for admission in a contiguous high school district under ch. 192, Acts of the 58th G.A., in the absence of a material change in conditions. (Rehmann to Wright, Supt. Pub. Instr., 9/10/59) #59-9-24

19.29

Reorganization—County superintendent of schools may call for the organization of a newly-elected board prior to July 1, which is the effective date of the reorganized school district. (Rehmann to Mather, Sac Co. Atty., 5/21/59) #59-6-1

19.30

Reorganization—Distinction between consolidated districts and independent districts uncertain in view of *Des Moines Independent Community School District v. Board of Supervisors.* (Rehmann to Cooper, Buena Vista Co. Atty., 3/30/59) #59-3-29

19.31

Reorganization—Distribution of assets should be considered as a whole as of the date the distribution is to be made. (Rehmann to Dunn, Hardin Co. Atty., 3/15/60) #60-3-15

19.32

Reorganization—Effect of blanket legalizing act, S. F. 74, 58th G.A. (Abels to Dewel, St. Sen., 2/16/59) #59-2-15

19.33

Reorganization—Effect of creation of new district upon teachers' contracts under Code sec. 275.33. (Abels to Jensen, Taylor Co. Atty., 1/7/59) #59-1-17

19.34

Reorganization—Enlargement of boundaries by county board of education under Code secs. 275.15 and 275.16 rendered risky by *Brooker v. Ludlow,* 192 Iowa 760, 179 N.W. 145 in view of clause stricken by sec. 14, ch. 129, 57th G.A. (Abels to Van Ginkel, Cass Co. Atty., 3/16/59) #59-3-11

19.35

Reorganization, equalization levy—In Dallas County, Iowa, the Lincoln Township School District ceased to be a corporation July 1, 1958, upon the establishment of the Central Dallas Community School District, which included a part thereof; and a tax levy on said Lincoln Township School District after said date, to accumulate the sum of $11,000 found owing by said school district to others than the Central Dallas Community School District, would be unauthorized. (Strauss to McDonald, Dallas Co. Atty., 4/20/60) #60-4-15

19.36

Reorganization—

(1) Extraterritorial bus routes subject to approval of county board under Code sec 285.9.

(2) Voluntary dismissal of action without prejudice under R.C.P. 215. (Abels to Stephens, St. Rep., 3/26/59) #59-3-28

19.37

Reorganization—Lame-duck contracts. Conflict in statutes discussed and declaratory judgment procedure recommended. (Abels to Davis, Pub. Instr. Dept., 5/22/59) #59-5-17

19.38

Reorganization—Portion of land formerly a part of another school district is not relieved of prior tax levy. Portion of land included in new school district is liable for tax levy of new school district. (Rehmann to Norelius, Crawford Co. Atty., 3/24/59) #59-3-24

19.39

Reorganization—The proper method for determining how to proceed directly under a decree or decrees of a court is by applying to the court for a supplemental decree or order. (Abels to Graham, Audubon Co. Atty., 2/13/59) #59-2-16

19.40

Reorganization—There cannot be two concurrent reorganizations, one under Code secs. 275.12-23, and the other under ch. 192, Acts of the 58th G.A. (Rehmann to Neuzil, Johnson Co. Atty., 4/21/60) #60-4-17

19.41

Reorganization—The residents of the entire school district vote on the proposition of reorganization as provided in Code sec. 275.20 even though a prior election was voted on by the same residents with relation to another portion included in another district. Chapters 491-504 inclusive, inapplicable to school reorganization. (Rehmann to Sturges, Plymouth Co. Atty., 3/19/59) #59-3-16

19.42

Reorganization—The school district to which a "leftover portion" of less than four sections was attached by the county board is an affected district in terms of sec. 275.29, Code 1958. (Rehmann to Murray, Webster Co. Atty., 6/30/59) #59-6-28

19.43

Reorganization—Under sec. 275.27, Code 1958, as amended by H.F. No. 104, 58th G.A., community school districts shall be a part of the county school system of the county in which the greatest number of electors of said district reside at the time of the special election. (Rehmann to Getscher, Fremont Co. Atty., 6/25/59) #59-6-25

19.44

Reorganization—Under sec. 275.12 a petition for reorganization cannot be reactivated once it has been dismissed except by repetitioning provisions in said section. (Code 1958) (Rehmann to Greenfield, Guthrie Co. Atty., 10/26/60) #60-10-16

19.45

Reorganization—

1. Under secs. 275.1 and 275.5, Code 1958, the county board of education has the duty of attaching those areas of less than three sections, even though there may be a legal prohibition against attaching them.

2. The school district can exercise no jurisdiction over that territory which is included within federally-owned lands.

3. The portion of a school district which lies within federally-owned lands belongs to the school district for the purpose of ascertaining the eligibility of those to attend school tuition-free and in the determination of state aid. (Rehmann to Ford, Des Moines Co. Atty., 7/25/60) #60-7-26

19.46

Reorganization—Void petition no jurisdictional bar to subsequent petition under Code sec. 275.12. (Cases cited.) (Rehmann to Hoover, Clay Co. Atty., 4/6/59) #59-4-10

19.47

Reorganization—When a school district is divided by a reorganization into two noncontiguous parts, one part being an area less than four sections, it must be attached as provided under Code sec. 275.1. (Rehmann to Murray, Webster Co. Atty., 4/19/60) #60-4-13

19.48

Reorganization—Without specific statutory authority to the contrary, the board of directors of a new community school district which comes into existence July 1 cannot consider a merger petition as provided under ch. 192, Acts of the 58th G.A., (Rehmann to McGee. 1/12/60) #60-1-15

19.49

Sale of site—Code sec. 297.16 requires appraisal only where adjoining owner and school corporation disagree on value of site. (Abels to Cahill, Des Moines Co. Atty., 1/5/59) #59-1-15

19.50

School buses—Under Code sec. 321.343, school buses are required to stop at railroad tracks in a business or residential district. (Rehmann to Winkel, Kossuth Co. Atty., 11/15/59) #59-11-24

19.51

Schoolhouse and sites—Under Code secs. 278.1(2) and 277.2, a school board has authority to dispose of urban school property without reference to Code ch. 297, but such disposition can be made only for adequate consideration and the sum of $1.00 is ordinarily classed as "nominal" rather than "adequate". (Abels to Oeth, Dubuque Co. Atty., 12/10/59) #59-12-16

19.52

Schoolhouse sites—A school board cannot purchase with undesignated surplus in the schoolhouse fund a school site in excess of 30 acres, as provided in section 297.3, Code 1958. (Rehmann to Anderson, Howard Co. Atty., 11/28/60) #60-11-11

19.53

Schoolhouse sites—Rededication of public lands under Code sec. 409.46 can only be accomplished if the land in question was platted for public use or deeded to the city at the time the plat was filed. (Rehmann to Morrow, Allamakee Co. Atty., 3/4/60) #60-3-10

19.54

School sites—Under Code sec. 297.22(3), the $10,000 limitation is upon each school site to be sold. Board of directors has authority to give easement. (Rehmann to Pappas, Cerro Gordo Co. Atty., 3/30/60) #60-4-3

19.55

Sites—School board can not pay for test well before purchase. (Rehmann to Van Ginkel, Cass Co. Atty., 3/24/59) #59-3-22

19.56

Special education—School boards cannot legally pay tuition for tutoring of children requiring special education unless such classes are established under the provisions of Code ch. 281. (Rehmann to Gray, Calhoun Co. Atty., 11/25/59) #59-12-4

19.57

Special education—Under Code sec. 281.9, county boards are entitled to be reimbursed directly from the state if all school districts participating are within the jurisdiction of the county board. (Rehmann to Martin, Keokuk Co. Atty., 10/7/59) #59-10-13

19.58

State aids—Federal agency school districts are not entitled to state aids for Indian pupils residing on the reservation, by virtue of the provisions of ch. 110, Acts of the 26th G.A. (Rehmann to Wright, St. Supt., 12/24/59) #60-1-1

19.59

Status—School districts are quasi-corporate entities formed for educational purposes, not for profit. (Rehmann to Pappas, Cerro Gordo Co. Atty., 11/4/59) #59-11-9

19.60

Tax levy—Under Code sec. 275.32, a schoolhouse tax can be voted at the

same time as a bond issue. However, bond issue is subject to the general provisions of Code ch. 296. Rehmann to Turner, Chickasaw Co. Atty., 10/5/59) #59-10-9

19.61

Teacher contracts—Under Code sec. 279.13, a modification to an original contract constitutes a new contract for the ensuing year and precludes another school district from contracting with a teacher as a matter of law. (Rehmann to McDonald, Dallas Co. Atty., 5/4/60) #60-5-8

19.62

Teachers' retirement pay—Appropriation of $450,000 for the purpose of paying teachers' retirement allowance during each year of the biennium includes payments made after the effective date of the Act in the current year of the biennium. (Strauss to Sarsfield, St. Comp., 3/12/59) #59-3-8

19.63

Textbooks—Disposal of textbooks by county board of education is a matter of administrative determination as limited by Code sec. 273.13(4). County board of education can be the only depository. (Rehmann to Salisbury, Jasper Co. Atty., 9/16/59) #59-9-25

19.64

Transportation—School boards are under no obligation to take bids for the supply of gasoline for their school buses. Any person aggrieved by the contract executed by the school board may bring appeal under Code ch. 290. (Rehmann to Gray, Calhoun Co. Atty., 12/28/59) #59-12-22

19.65

Transportation—Under Code sec. 285.10(7) schools cannot arrange for outside financing for the purchase of busses but must deal directly with the dealer. (Rehmann to Watts, Adams Co. Atty., 9/17/59) #59-10-3

19.66

Tuition—Attendance outside of county. *(Novak v. Oneida Township School Board,* _____ Iowa _____, 95 N.W. 2d 291 cited.) (Rehmann to Gray, Calhoun Co. Atty., 4/13/59) #59-4-14

19.67

Tuition—County boards have no statutory duty to determine which school district is responsible for tuition. (Rehmann to Falk, Page Co. Atty., 10/30/59) #59-11-6

19.68

Tuition—Independent and consolidated school districts cannot send students on a limited basis to another school district part time for special courses. Under Code sec. 273.2 to maintain a four-year high school all courses must be taught within the school district itself. (Rehmann to Hasbrouck, Guthrie Co. Atty., 3/17/59) #59-3-10

19.69

Tuition—There is no statutory authority for the payment of tuition for

persons committed to mental health institute. (Rehmann to Lisle, Spkr., H.R., 12/9/59) #59-12-14

19.70

Tuition—Under Code secs. 279.18 and 282.20 "bond principal" properly enters into the computation. (Abels to Rigler, St. Sen., and Cunningham., St. Rep., 2/26/59) #59-2-28

19.71

Vacancies—Vacancy is created when a member of the board moves from one director district to another director district within the same school corporation. (Rehmann to Te Paske, Sioux Co. Atty., 4/6/60) #60-4-8

CHAPTER 20

STATE OFFICERS AND DEPARTMENTS

STAFF OPINIONS

LETTER OPINIONS

20.1 March 4, 1959

STATE OFFICERS AND DEPARTMENTS: Lieutenant governor—Personal expenses for hotel, meals, and other similar expenses of the lieutenant governor incurred while performing duties as presiding officer of the legislature are not authorized.

Mr. Glenn D. Sarsfield, State Comptroller: This will acknowledge receipt of yours of the 27th ult. in which you submitted the following:

"Chapter 1, section 15, Acts of the Fifty-seventh General Assembly, reads as follows:

'Sec. 15. For the office of Lieutenant Governor there is hereby appropriated from the general fund of the state for each year of the biennium beginning July 1, 1957, and ending June 30, 1959, a sum sufficient to pay such actual and necessary expenses as are incurred when said Lieutenant Governor is required by reason of his office to leave the county of his residence but not to exceed the sum of fifteen hundred dollars ($1500.00) per annum; and itemized expense account shall be so certified by said officer entitled thereto to the state comptroller, which account shall be rendered quarterly.'

"I respectfully request an opinion as to whether or not the Lieutenant Governor may be paid from the above appropriation for his hotel, meals, and other similar expenses while in Des Moines during the legislative session because of his duties as Lieutenant Governor."

In reply thereto I advise as follows: Based on the provisions of section 15 of Article IV and section 25 of Article III of the Constitution, both here exhibited:

"Term—compensation of lieutenant governor. Sec. 15. The official term of the Governor and Lieutenant Governor, shall commence on the second Monday of January next after their election, and continue for two years, and until their successors are elected and qualified. The Lieutenant Governor, while acting as Governor, shall receive the same pay as provided for Governor, and while presiding in the Senate, shall receive as compensation therefor, the same mileage and double the per diem pay provided for a Senator, and none other."

"Compensation of members. Sec. 25. Each member of the first General Assembly under this Constitution, shall receive three dollars per diem while in session; and the further sum of three dollars for every twenty miles traveled, in going to and returning from the place where such session is held, by the nearest traveled route; after which they shall receive such compensation as shall be fixed by law; but no General Assembly shall have power to increase the compensation of its own members. And when convened in extra session they shall receive the same mileage and per diem compensation, as fixed by law for the regular session, and none other."

and the case of *Gallarno v. Long*, 214 Iowa 805, I am of the opinion that the lieutenant governor may not legally be paid from the appropriation contained in section 15 of ch. 1, Acts of the 57th General Assembly, shown by you in your letter for his hotel, meals and other like expenses while presiding in the senate at Des Moines during the legislative session. Insofar as the *Gallarno* case is concerned, it is to be said that while the exact question here propounded was not decided by the court its argument therein used together with the concurrence of Justice Evans appears decisive of this conclusion. That case, in interpreting chapter 1, Acts of the 43rd General Assembly, providing as follows:

"Each member of the general assembly and the lieutenant governor shall be paid his actual necessary expenses incurred while in attendance at a session of the legislature, which shall in no case exceed five hundred dollars ($500) for any regular session. Sworn itemized claims therefor shall be filed with the state board of audit and the provisions of chapter twenty-five (25) of the code shall be applicable thereto. The members of the forty-third general assembly, including the lieutenant governor, shall be entitled to the benefits thereof."

stated:

" * * * As will soon be shown, and as already has been indicated, there is a marked distinction between legislative or governmental expenses and mere personal expenses of the legislators. Personal expenses are for the comfort and convenience of the state official or employee, while at his official residence or abode, and those expenses have nothing to do with the performance of his duty as a state official or employee. Such expenses are those incurred for room, house rent, meals, laundry, clothes, personal communications by telephone, telegraph, or letter, and other things of like character. If the legislator, other state officer, or state employee maintains a home or place of abode at the seat of government or at any other place contemplated by the nature of his office or employment, he cannot be expected by the state at his own expense to maintain a home or abode at some other place. Hence, if the state expects such officer or employee to go on state business from his official home or abode to another place or to other places, the expense of traveling there and returning therefrom, his board and lodging while on the

trip, may, when properly authorized by the legislature, be charged to the state in addition to the salary or compensation of such individual. An illustration of such governmental expense may be found in the case of a district Judge who maintains his residence in one county and is required to go to another county in his district to hold court. While traveling to and from, and obtaining board and lodging in, the last-named county, such official is incurring governmental, as distinguished from a personal, expense. So, too, a legislative expense is incurred by the legislators in the performance of their duties. These legislative expenses are the costs necessary to enable the legislature to properly perform its functions. * * * "

and on page 816 thereof stated:

" * * * Beyond peradventure of doubt, the framers of the present Constitution intended that the mileage and per diem provided in the Constitution was to afford the compensation from which each member of the legislature should pay his personal expenses. It is equally clear that those framers of the Constitution understood and believed that the personal expenses of the legislators were to be borne by them. Those framers of the Constitution likewise understood the distinction between legislative and personal expenses. * * * "

and on page 822 it was observed:

"As before explained, the Lieutenant Governor 'shall receive as compensation * * * the same mileage and double the per diem pay provided for a senator, and none other.' How can the Lieutenant Governor, then, under that constitutional provision, obtain the expenses contemplated by Chapter 1, Acts of the Forty-third General Assembly? When fixing the compensation for the Board of Education, how can compensation be given to that body on the basis of the expenses to be paid the legislature under this act? Continuing the inquiry, it may also be asked, how can the legislator in extra session receive any part of these expenses when, according to the Constitution, he is to receive such mileage and per diem compensation as the legislator receives in extra session, and none other? Obviously, then, Chapter 1, Acts of the Forty-third General Assembly, is not the equivalent of the per diem required by Section 25, Article III, of the Constitution. There are at least two reasons why this is so: First, this expense money is not definite and certain as is the per diem required by the Constitution; and, second, the expense money cannot be used as a basis under the scheme contemplated by the Constitution in fixing the compensation for the legislature at extra session, the Lieutenant Governor, and the members of the Board of Education. Therefore, this legislation is clearly, plainly, and palpably unconstitutional."

Together with the foregoing observations I exhibit the special concurrence of Justice Evans which directly is pertinent to the question submitted and is as follows:

"I concur in the result. I do not concur fully in the discussion. I readily agree that the distinction between *legislative* expenses and *personal* expenses is to be observed in the consideration of the case. The power to allow the former inheres in the legislative function and may always be exercised. The power to allow the latter does not so inhere, nor may it be exercised by the legislature, except to the extent of constitutional permission. Section 25, Article III, of the Constitution expressly forbids the allowance of any other *personal* expenses than the mileage provided for in said section. Chapter 1, Acts of the 43rd G.A., does purport to permit the allowance of *personal* expenses, which Section 25, Article III, of the Constitution forbids. The Act is therefore in violation of the Constitution. In my judgment, that ends argument. I think that

the decision should be predicated upon that ground and not upon the ground that the Act in question constituted an allowance for *compensation.* The Act purports to allow *personal expenses.* I would read it according to its terms."

These are the reasons that in my opinion require the answer to your question to be in the negative.

20.2 March 23, 1959

STATE OFFICERS AND DEPARTMENTS: Iowa Development Commission—All receipts from sales of manufacturers' directory published by the state and sold by commission must be deposited each month in the general fund of the state. Sections 16.2, 17.23, and 17.27, Code of Iowa, 1958.

E. B. Storey, Director, Iowa Development Commission: Receipt is acknowledged of your communication of recent date, submitting the following question:

"I would appreciate very much receiving a formal opinion relative to the retention of funds by the Iowa Development Commission, obtained from the sale of its Manufacturers Directory.

"It was our understanding that action by the 57th General Assembly eliminated this retention of funds, however, your formal opinion will be greatly appreciated."

Accompanying said letter is a sample copy of the Directory of Manufacturers of Iowa, a buyer's guide for Iowa products, issued by the Iowa Development Commission.

We note that this book was published by the State of Iowa and contains a sale price of $5.00 per copy.

The answer to your question is to be found in the following sections of the 1958 Code of Iowa, to wit:

"Section 16.2 Duties. The superintendent of printing shall:

* * *

7. Have legal custody of all Codes, session laws, books of annotations, tables of corresponding sections, *publications,* except premium lists published by the Iowa state fair board, containing reprints of statutes or departmental rules, or both, reports of state departments, and reports of the supreme court, and sell, account for, and distribute the same as provided by law.

* * * * "

"Section 17.23 Price of departmental reports. The state printing board shall establish and fix a selling price for all other state departmental reports *and any other state publications it may designate,* which price per volume shall be the amount charged any person, other than public officials, who may desire to purchase the same; such price shall cover the cost of printing and distribution. The state printing board may distribute gratis to such state or local public officials, or offices, it may deem necessary, copies of departmental annual reports."

"Section 17.27 Other necessary publications—when necessary to sell.

There may be published other *miscellaneous documents*, reports, bulletins, *books, and booklets* that are needed for the use of the various officials and departments of state, or are of value for the information of the general assembly or the public, in form and number most useful and convenient, to be determined by the printing board.

"When such publications paid for by the public funds furnished by the state, contains reprints of statutes or departmental rules, or both, they shall be sold and distributed at cost by the department ordering same. Such publications shall be obtained from the superintendent of printing on requisition by the department and the selling price shall be determined by the printing board by dividing the total cost of printing, paper and binding by the number printed. Said price shall be set at the nearest multiple of ten to the quotient thus obtained. Distribution of such publications shall be made by the superintendent of printing gratis to public officers, purchasers of licenses from state departments required by statute, and departments. *Funds from the sale of such publications shall be deposited monthly in the general fund of the state.*"

It would appear that the buyer's guide is a publication issued by the commission in carrying out the duties of the commission as prescribed by the provisions of section 28.7 of the Code. Such books are required to be sold and distributed at a cost determined in accordance with the foregoing statute.

Therefore, it is our opinion, in answer to your question, that in compliance with the provisions of the last sentence of section 17.27, all receipts from the sale of said book, "Directory of Manufacturers of Iowa," shall be covered into the general fund of the State of Iowa each month.

20.3 June 26, 1959

STATE OFFICERS AND DEPARTMENTS: **Appropriations**—Section 16, H.F. 745, 58th G.A., shows a general appropriation of $792,600 to the board of control, but when divided into detail the appropriation aggregates $1,167,600. The journals of the house and senate may be resorted to, to explain the difference between the amount of the general appropriation and the aggregate of the detailed appropriation.

Mr. Glenn D. Sarsfield, State Comptroller: This will acknowledge receipt of yours of the 25th inst. in which you submitted the following:

"Section 16, House File No. 745, Acts of the 58th General Assembly, reads as follows:

'BOARD OF CONTROL

'Sec. 16. For the board of control of state institutions in addition to any other appropriation for mental health for such institution selected by said board, subject to the approval of the budget and financial control committee, there is hereby appropriated from the general fund of the state for each year of the biennium beginning July 1, 1959, and ending June 30, 1961, the sum of seven hundred ninety-two thousand six hundred dollars ($792,600.00) or so much thereof as may be necessary to be used in the following manner:

'For salaries, support, maintenance, repairs, replacements, alterations or equipment and miscellaneous purposes $375,000.00

'The said sum of three hundred seventy-five thousand dollars ($375,000.00) shall be used as follows: For out-patient care to approximately 2,400 mental patients in county homes; for aid and support to community mental health clinics; and to strengthen children's programs.

'For mental health services at the Training School for Boys, the Training School for girls, the Juvenile Home, the Iowa Annie Wittenmyer Home, the Women's Reformatory, the Men's Reformatory, and the State Penitentiary $375,000.00

'For upgrading the salary schedule of attendants at the four (4) mental health institutes located at Cherokee, Clarinda, Mount Pleasant and Independence and the two (2) Institutions for the mentally retarded, located at Glenwood and Woodward $417,600.00

'Total for additional mental health ..... $792,600.00'

"You will observe that the three items shown total $1,167,600.00, which would indicate that one of the items of $375,000.00 shown above is not to be included in the total appropriation provided by this section.

"I respectfully request an opinion as to the following:

1. What is the total annual amount appropriated by Section 16?

2. In the event that you should rule that the total is $792,600.00, for what may the portion of the appropriation of $375,000.00 be used?"

In reply thereto I advise as follows:

1. The foregoing appears to be part of the enrolled bill designated as H.F. 745. As such, the state of Iowa is committed to the rule that the enrolled bill, nothing to the contrary appearing on its face, is conclusive evidence of its textual content and its lawful enactment, and cannot be impeached by the legislative journals or evidence extrinsic of the journals. See *Carlton v. Grimes*, 237 Iowa 912, 23 N.W. 2d 882. However, there is something to the contrary appearing upon the face of this Act, to wit: the Act appropriates from the general fund of the state for each year of the biennium beginning July 1, 1959, and ending June 30, 1961, the sum of $792,600.00. However, the appropriation as divided in detail by the Act aggregates the sum of $1,167,600.00 which, as you indicate, is $375,000.00 in excess of $792,600.00. In other words, the difference between the aggregate sum of $792,600.00 and the $1,167,600.00 is the sum of $375,000.00.

This discrepancy on the face of the Act justifies resort to the legislative journal to ascertain the intent of the legislature. Reference to the senate journal of the 58th General Assembly dated May 6, 1959, page 1373, discloses the conference committee report on H.F. 745 which, among other items, contains the following:

"c. Further amend section sixteen (16) by adding the following after line twelve (12). 'The said sum of three hundred seventy-five thousand dollars ($375,000.00) shall be used as follows: For out-patient care to approximately 2,400 mental patients in county homes; for aid and support to community mental health clinics; and to strengthen children's programs.

"For mental health services at the Training School for Boys, the Training School for Girls, the Juvenile Home, the Iowa Annie Wittenmyer Home, the Women's Reformatory, the Men's Reformatory, and the State Penitentiary ..... $375,000.00"

I therefore answer your question as follows. The total amount appropriated by sec. 16, H.F. 745, as shown by the conference report of a joint committee of the House and Senate, which conference report is shown by the journal to have been adopted by the Senate and by the journal of the House on page 1708 on the same date was adopted by the House that the total amount appropriated was $792,600.00.

2. In view of the conference report herein exhibited and referred to, the sum of $375,000.00 is appropriated for the following purposes:

"For salaries, support, maintenance, repairs, replacements, alterations or equipment and miscellaneons purposes * * * For out-patient care to approximately 2,400 mental patients in county homes; for aid and support to community mental health clinics; and to strengthen children's programs. * * * For mental health services at the Training School for Boys, the Training School for Girls, the Juvenile Home, the Iowa Annie Wittenmyer Home, the Women's Reformatory, the Men's Reformatory, and the State Penitentiary."

20.4 July 22, 1959

STATE OFFICERS AND DEPARTMENTS: Tax commission personnel—

(1) Tax commission cannot hire independent contractor to instruct assessors at schools.

(2) Tax commission cannot pay expenses of assessors at these schools, since they are not employees of the state.

Mr. John J. O'Connor, Chairman, Iowa State Tax Commission: This will acknowledge receipt of a letter from Ballard B. Tipton, director of the property tax division, Iowa state tax commission, in which he submitted the following:

"Mr. Dennis Nelson, Council Bluffs City Assessor and Chairman of the Manual Committee of Assessors, and the undersigned this day conferred with members of the State Tax Commission regarding approval of the new Iowa Real Property Appraisal Manual that is about ready for offset printing, and also with regard to schools of instruction to be held later this year for introducing the new Manual to the assessors and their deputies.

"It is in the planning for the instruction program that the State Tax Commission will contract with J. L. Jacobs & Company, Appraisal Engineers, Chicago, Illinois, for the services of one of their associates to come to Des Moines and conduct either a three-day or five-day school of instruction for either 8 or 12 assessors who would be picked for training as instructors in presenting the new manual to other assessors in the state at scheduled district schools of instruction that would be three days in length. The 8 or 12 city and county assessors selected to be instructors would, of course, have hotel expenses, meals, and travel expenses in attending a three or five-day school of instruction to be held in Des Moines, their instructions to be given by an associate of J. L. Jacobs & Company. The question arises as to whether the State Tax Commission could legally reimburse those assessor-instructors for expenses that they would have in attending either a three or five-day school of instruction on the use of the new manual.

"In addition, those same 8 or 12 assessor-instructors would subsequent to the school of instruction at Des Moines be expected to attend, as in-

structors, district schools of instruction to be held in selected cities in the state to be attended by assessors, both city and county, of the particular district, and those district meetings would be for a three-day period. Those assessor-instructors would during those district schools of instruction have in most cases hotel, meals and travel expenses. Another question then is as to whether the State Tax Commission could legally reimburse direct those assessor-instructors for such expenses at the district schools of instruction, where they would be acting as instructors of other assessors.

"If you rule that the State Tax Commission could not legally reimburse such assessor-instructors either for their expenses at the school of instruction at Des Moines to instruct them, or in their attending as instructors the district schools, then would you regard that the State Tax Commission could legally reimburse the assessor-instructors under an arrangement such as the following?

"The State Tax Commission proposes to contract with J. L. Jacobs & Company for the services of one of its personnel in instructing the 8 or 12 selected assessors, and that Jacobs representative would also attend the district schools of instruction. Supposing that Jacobs & Company would agree to regard those 8 or 12 Iowa assessors as their employees or independent workers, and would pay direct to the assessors their hotel, meals and travel expense at both Des Moines and the district meetings, and J. L. Jacobs & Company would in turn bill the State Tax Commission for such amounts dispersed to the 8 or 12 Iowa assessors, and the State Tax Commission would then pay the J. L. Jacobs & Company the amount that was so dispersed to the Iowa assessors. Further assuming that J. L. Jacobs & Company would agree to that sort of arrangement, and would enter into a contract with the State Tax Commission and so provide for the arrangement in the contract, could the State Tax Commission legally enter into that sort of contract and in that way indirectly reimburse the assessor-instructors for their expenses as instructors?

"If you rule that the State Tax Commission could not legally handle the matter in that way with J. L. Jacobs & Company, then your advice is respectfully asked for whether there would be a way that the State Tax Commission could legally reimburse such assessor-instructors."

In answer to your questions, we are of the following opinions:

1. In answering the questions you have submitted, another question must be answered first, namely, can the state tax commission hire J. L. Jacobs & Company as instructors in the use of the aforementioned manual? It would appear that the tax commission may employ personnel as needed to carry out their powers found in section 421.16, subsections 1 and 2, Code of 1958. This appraisal manual is one such attempt by the commission to arrive at a more uniform valuation across the state by the local assessors. Yet, to contract with J. L. Jacobs & Company would put the aforementioned company in the position of an independent contractor with the tax commission. There is no authority allowing the commission to enter into such a relationship. The powers granted by statute speak only of "employees." Therefore, the tax commission may do one of two things, either (1) send present employees into Chicago to receive instruction, so that in turn they may instruct the assessors; or (2) the tax commission may employ individual personnel of J. L. Jacobs & Company for a limited time to instruct assessors without the foregoing contractual arrangement. One word of caution must be expressed here, when the tax commission does employ anyone they must comply with section 421.12, Code of 1958, which provides the following:

"421.12 Secretary. The commission may appoint a secretary, and may employ such other assistants and employees as *may be included in the budget submitted by said commission to the comptroller* for the payment of the compensation for which money has been provided by appropriation." (Emphasis added.)

2. In answer to your question concerning whether the tax commission may reimburse these assessor-instructors for their expenses incurred either at the school of instruction to be held at Des Moines or at the district meetings, I would advise you that the state tax commission may not reimburse these men. The state tax commission is authorized to pay traveling expenses under section 421.16, Code of 1958, which for your convenience is set forth below:

"421.16 Expenses. The members of the commission, secretary and assistants shall be entitled to receive from the state their actual necessary expenses while traveling on the business of the commission; * * *."

An assessor must be considered to be a full-time employee of either a city or a county under chapter 291, section 17(1), Acts 58th G.A. 1959, as follows:

"Sec. 17. Duties of assessor. The assessor shall:

"1. Devote his entire time to the duties of his office and shall not engage in any occupation or business interfering or inconsistent with such duties."

Since assessors are employees of a political subdivision of the state and not of the state, as shown above, the tax commission is not authorized to pay their expenses in view of the wording of section 421.16, Code of 1958, supra. A prior opinion of this department lends credence to this proposition, which may be found in the 1932 *Report of the Attorney General* at page 202, wherein it is stated:

"We are are of the opinion that it would not be legal or proper for your department to certify payment of traveling expense of one not employed by the state."

3. In answer to your second question concerning whether the state tax commission could furnish expenses for these assessors by a contractual arrangement with J. L. Jacobs & Company, we are of the opinion to advise you that you cannot. The law does not allow one to do indirectly what he could not do directly.

4. In your letter you asked if our opinion was in the negative would there be any other way that the state tax commission could legally reimburse such assessors. Our conclusion to this question is that there is no other way for the state tax commission to reimburse these men. The only alternative left is for either the particular city or county to pay their expenses while the assessor is in attendance at these schools. You are referred to a 1956 *Report of the Attorney General* at page 70.

20.5 August 6, 1959

STATE OFFICERS AND DEPARTMENTS: Vacations—A state employee devoting less than full time to the performance of his duties is

not entitled to vacation with pay within the provisions of section 79.1, Code 1958.

Mrs. Esther Wright, Secretary, Board of Control of State Institutions: This will acknowledge receipt of yours of the 22nd inst. in which you submitted the following:

"Are regularly employed part time people legally entitled to vacation time? The following two cases illustrate the problem:

"A person has worked a number of years giving about one-fourth of his time. Another person is working one-half time and has so worked for two years.

"Are these two employees entitled to vacation with pay?"

In reply thereto I advise as folows: Vacation of employees of the board of control is authorized by the provisions of section 218.17, Code 1958, providing as follows:

"Authority for vacation. Vacations and sick leave with pay as authorized in section 79.1 shall only be taken at such times as the executive officer or the business manager in charge of said officer or employee, as the case may be, may direct, and only after written authorization by him, and for the number of days specified therein. A copy of such permit shall be attached to the payroll of the institution for the month during which the vacation was taken, and the payroll shall show the number of days the person was absent under the permit."

The vacations thus authorized are those authorized in section 79.1, Code 1958, which provides as follows:

"Salaries—payment—vacations—sick leave—injuries in line of duty. Salaries specifically provided for in an appropriation act of the general assembly shall be in lieu of existing statutory salaries, for the positions provided for in any such act, and all salaries shall be paid in equal monthly or semimonthly installments and shall be in full compensation of all services, except as otherwise expressly provided. All employees of the state including highway maintenance employees of the state highway commission are granted one week's vacation after one year's employment and two weeks' vacation per year after the second and through the tenth year of employment, and three weeks' vacation per year after the tenth and all subsequent years of employment, with pay. Leave of absence of thirty days per year with pay may be granted in the discretion of the head of any department to employees of such department when necessary by reason of sickness or injury; unused portions of such leave for any one year may be accumulative for three consecutive years. Provided, however, that notwithstanding the foregoing limitations, state highway commission maintenance employees, uniformed members of the division of highway safety and uniformed force and members of the division of criminal investigation and bureau of identification, except clerical workers, of the department of public safety may upon the recommendation of the commissioner with the approval of the executive council be granted additional leave of absence with pay, for injuries sustained in line of duty. It is further provided that employees of institutions under the state board of regents who are employed for nine months or more in any twelve-month period shall be entitled, in the discretion of the board, to a leave of absence with pay of two and one-half days for each month of employment when necessary by reason of sickness or injury, and such portion as is unused may be accumulated to a total of ninety days acquired over a period not exceeding four consecutive years or consecutive twelve-month period."

This statute does not expressly provide a vacation allowance with pay

for these services. However, its terms and previous legal interpretations thereof preclude implication thereof. Among these is the assumption that a year is a unit of time conditioning an employee's right to vacation with pay and the amount of the vacation is measured by the year unit of employment. More particularly, the day that measures times under the statute is a "calendar day and not a working day". See 1954 *Report of the Attorney General,* page 28. A calendar day is a day of twenty-four hours. A week under the statute, therefore, plainly consists of seven calendar days. A week is seven consecutive days, ordinarily beginning with Sunday and ending with the following Saturday. See *Words and Phrases,* Volume 45, page 12, et seq. In other words, a vacation day is a calendar day. An employee working two hours or three hours, if entitled to a vacation at all, would under this interpretation be entitled to a calendar day with pay. The anomalous character of this conclusion is apparent when the foregoing shows such an employee taking a calendar day vacation with pay as the equivalent of a day of two- or three-hour service with pay. Clearly, this was not the legislative intent. The employees described by you are not therefore entitled to vacation with pay under section 79.1.

20.6 September 22, 1959

STATE OFFICERS AND DEPARTMENTS: Practice experience—The requirement of sec. 116.9, 1958 Code of Iowa, that applicants for the accountancy examination have one year of experience with a licensed practitioner is not met by 2,000 hours of work in less than 365 days, but means one calendar year.

Iowa Board of Accountancy, Attention Donald R. Denman: In your letter of September 18, you state as follows:

"Section 116.9 of the Code of Iowa defines the qualifications for examination of candidates for a certified public accountant's certificate to practice. Among other things, it states that a candidate may be a graduate of a college or university commerce course of at least three years majoring in accounting, and in addition shall have had at least one year's service as a staff accountant in the employ of a practitioner entitled to registration under this chapter.

"Occasionally the Iowa Board of Accountancy receives an application from a candidate who meets the aforementioned requirements, except that he lacks a few days, or possibly a week of having achieved a full calendar year of service as a staff accountant.

"This is to request your opinion as to whether the candidate may comply with the experience requirement under the law without actually having served as a staff accountant for a full 365 days.

"In the past the Board has had to accumulate the hours of experience for a candidate who may have worked intermittently for a period in excess of one year. In so doing, the Board has determined that 2,000 working hours represent a year's experience. However, in the occasional case in which we are asking your opinion, we desire to know whether 2,000 or more hours of work performed in something less than 365 calendar days will fulfill the requirements of the law."

The applicable statute is section 116.9, 1958 Code of Iowa, which provides as follows:

"116.9 Qualifications for examination. Every applicant for the examination provided for in section 116.9 must be over twenty-one years of age, a resident of this state, a citizen of the United States or have declared his or her intention to become such, of good moral character, a graduate of a high school having at least a four-year course of study or its equivalent as determined by the board of accountancy, or shall pass a preliminary examination to be given by the board at least thirty days before the regular examination; and a graduate of a college or university commerce course of at least three years, majoring in accounting, and in addition shall have had at least one year's service as a staff accountant in the employ of a practitioner entitled to registration under this chapter.

"The following shall, however, be accepted in lieu of the college or university commerce course and the one year of service.

1. Three years continuous practical accounting experience as a public accountant or as a staff accountant.

2. Three years continuous employment as a field examiner under a revenue agent-in-charge of the income tax bureau of the treasury department of the United States, or as a field examiner in the auditor's, comptroller's, banking, income tax, or insurance departments of this state."

To answer your question, I refer you to *Report of the Attorney General,* 1938, page 153. It is there stated that an applicant for the accountancy examinations must meet the requirements set out in the Iowa Code, and that the Iowa board of accountancy has no authority to substitute some other type or kind of experience for the type of experience specifically set out in the statute.

It is logical to assume that if an applicant for the accountancy examinations must have the *type* of experience required by the statute, said applicant must also have the *amount* of experience required by the statute. The statute states that an applicant shall "have had at least one year's service" in the employ of a registered practitioner. In *Davis v. Hardin County,* 104 Iowa 204, 73 N.W. 576 (1897), the Iowa supreme court said that "Unless, from the context or otherwise, a different intent is gathered, the word 'year', when used in a statute, is construed to mean a calendar year."

From the above authorities, it is my opinion that the answer to your question is negative. The term "year" means a calendar year of 365 days, and 2,000 or more hours of work performed in less than 365 days will not fulfill the requirements of section 116.9, 1958 Code of Iowa.

20.7 October 12, 1959

STATE OFFICERS AND DEPARTMENTS: Welfare appropriation—

The appropriations made by the 58th G.A., to the social welfare department are amplified by the unexpended balances of the appropriation made by the 57th G.A. to that department remaining on June 30, 1959, subject to maximum limitation of such balances as described by chapter 10, Acts of the 58th G.A.

Mr. Glenn D. Sarsfield, State Comptroller: This will acknowledge receipt of yours of the 30th ult. in which you submitted the following:

"Chapter 4, Acts of the 57th General Assembly, reads as follows:

'AN ACT to appropriate from the general fund of the state of Iowa for the biennium beginning July 1, 1957, and ending June 30, 1959, to the social welfare department for the purpose of aid to blind fund, aid to dependent children fund, child welfare fund, emergency relief fund and the old-age assistance fund.

'BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

'Section 1. For the social welfare department there is hereby appropriated from the general fund of the state for each year of the biennium beginning July 1, 1957, and ending June 30, 1959, the sum of seventeen million three hundred thirty-five thousand dollars ($17,335,000.00) to be used in the following manner:

For aid to blind fund	$ 500,000.00
For aid to dependent children fund	2,950,000.00
For child welfare fund	350,000.00
For emergency relief fund	35,000.00
Old-age assistance fund	13,500,000.00
Grand total of all appropriations for all purposes for each year of the biennium for the social welfare department	$17,335,000.00

'In addition to said grand total of appropriations there is hereby appropriated for each year of the ensuing biennium to the social welfare department the sum of five hundred thousand dollars ($500,000.00) to supplement the above funds as needed, the expenditure of which supplemental appropriations shall be subject to the approval of the budget and financial control committee.

'Sec. 2. No more than the amount herein appropriated to each fund plus the unexpended balance in each fund on June 30, 1957, shall be expended from the state funds for the purposes of each said fund during the biennium beginning July 1, 1957, and ending June 30, 1959. Any balance remaining in the funds, to which appropriations are made by this Act, at the end of the ensuing biennium shall revert to the general fund of the state.'

"Chapter 10, Acts of the 58th General Assembly, reads as follows:

'AN ACT to permit the retention of certain balances in the funds appropriated for the welfare program administered by the state board of social welfare.

'BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

'Section 1. Section two (2), Chapter four (4), Acts of the Fifty-seventh General Assembly, is hereby amended by striking from line seven (7) the period after the word "state" and inserting the following: ", except that balances not to exceed the following specified amounts may be retained in each fund:

Aid to dependent children	$600,000.00
Old-age assistance	500,000.00
Aid to the blind	80,000.00
Emergency relief	50,000.00"

'Sec. 2 This Act being of immediate importance shall be in full force and effect from and after its passage and publication in The Tipton Advertiser, a newspaper published at Tipton, Iowa, and the Lyon County Reporter, a newspaper published at Rock Rapids, Iowa.'

"Chapter 9, Sections 1 and 2, Acts of the 58th General Assembly, read as follows:

'Section 1. For the social welfare department there is hereby appropriated from the general fund of the state for each year of the biennium beginning July 1, 1959, and ending June 30, 1961, the sum of eighteen million three hundred thirty-five thousand dollars ($18,335,000.00) to be used in the following manner:

For aid to blind fund	$ 550,000.00
For aid to dependent children fund	3,500,000.00
For child welfare fund	350,000.00
For emergency relief fund	35,000.00
Old-age assistance fund	13,765,000.00
Aid to the disabled fund	125,000.00
Support for Indians residing on a reservation	10,000.00
Grand total of all appropriations for all purposes for each year of the biennium for the social welfare department	$18,335,000.00

Sec. 2. No more than the amount herein appropriated to each fund plus the unexpended balance in each fund on June 30, 1959, shall be expended from state funds for the purposes of each said fund during the biennium beginning July 1, 1959, and ending June 30, 1961. Any balance remaining in the funds, to which appropriations are made by this Act, at the end of the ensuing biennium shall revert to the general fund of the state.'

"I wish to call your attention to certain statutory provisions in the Code of Iowa, regarding these various funds, with particular reference to the aid to the blind, and aid to dependent children funds, all of which are listed as follows:

Old Age Assistance	Chapt. 249.36
Child Welfare	Chapt. 235
Emergency Relief	Chapt. 251
Aid to blind	Chapt. 241.21
Aid to dependent children	Chapt. 239.12

'AID TO THE BLIND

'Section 241.21 * * * *

Any unexpended balance of the fund appropriated or allocated by the state which remains in the fund for aid to the blind at the end of each biennium shall not revert to the general fund of the state, any law to the contrary notwithstanding.'

'AID TO DEPENDENT CHILDREN

'Section 239.12 * * * *

Any unexpended balance of the fund appropriated or allocated by the state which remains in the fund for aid to dependent children at the end of each biennium shall not revert to the general fund of the state, any law to the contrary notwithstanding.'

"In addition to the foregoing, I wish to also call your attention to Section 8.32, Code of Iowa, 1958, which reads in part as follows:

'Section 8.32. Conditional availability of appropriations. All appropriations made to any department or establishment of the government as receive or collect moneys available for expenditure by them under present laws, are declared to be in addition to such repayment receipts, and such appropriations are to be available as and to the ex-

tent that such receipts are insufficient to meet the costs of administration, operation, and maintenance, or public improvements of such departments.

'Provided, that such receipts or collections shall be deposited in the state treasury as part of the general fund or special funds in all cases, except those collections made by the state fair board, the institutions under the state board of regents and the state conservation commission.'

"The State Board of Social Welfare has petitioned this office for permission to retain all balances of the various state funds under its administration on hand as of June 30, 1959.

"I respectfully request an official opinion as to whether or not balances of Social Welfare state funds which may be carried forward from the biennium ending June 30, 1959, to the biennium beginning July 1, 1959, are to be restricted to the amounts specified in Chapter 10, Acts of the 58th General Assembly, or if the entire balance of such funds may be carried forward."

In reply therefore I advise you as follows:

Chapter 4 of the Acts of the 57th General Assembly, as amended by chapter 10 of the Acts of the 58th General Assembly, provides the following:

"Section 1. For the social welfare department there is hereby appropriated from the general fund of the state for each year of the biennium beginning July 1, 1957, and ending June 30, 1959, the sum of seventeen million three hundred thirty-five thousand dollars ($17,335,000.00) to be used in the following manner:

For aid to blind fund	$ 500,000.00
For aid to dependent children fund	2,950,000.00
For child welfare fund	350,000.00
For emergency relief fund	35,000.00
Old-age assistance fund	13,500,000.00
Grand total of all appropriations for all purposes for each year of the biennium for the social welfare department	$17,335,000.00

"In addition to said grand total of appropriations there is hereby appropriated for each year of the ensuing biennium to the social welfare department the sum of five hundred thousand dollars ($500,000.00) to supplement the above funds as needed, the expenditure of which supplemental appropriations shall be subject to the approval of the budget and financial control committee.

"Sec. 2. No more than the amount herein appropriated to each fund plus the unexpended balance in each fund on June 30, 1957, shall be expended from state funds for the purposes of each said fund during the biennium beginning July 1, 1957, and ending June 30, 1959. Any balance remaining in the funds, to which appropriations are made by this Act, at the end of the ensuing biennium shall revert to the general fund of the state, except that balances not to exceed the following specified amounts may be retained in each fund:

Aid to dependent children	$600,000.00
Old age assistance	500,000.00
Aid to the blind	80,000.00
Emergency relief	50,000.00"

The amendment which appears above as part of chapter 4, Acts of the 57th General Assembly, appears separately as follows:

"Section 1. Section two (2), Chapter four (4), Acts of the Fifty-seventh General Assembly, is hereby amended by striking from line seven (7) the period after the word 'state' and inserting the following: ', except that balances not to exceed the following specified amounts may be retained in each fund.

Aid to dependent children	$600,000.00
Old age assistance	500,000.00
Aid to the blind	80,000.00
Emergency relief	50,000.00'

"Sec. 2. This Act being of immediate importance shall be in full force and effect from and after its passage and publication in The Tipton Advertiser, a newspaper published at Tipton, Iowa, and the Lyon County Reporter, a newspaper published at Rock Rapids, Iowa."

The amendment provided by House File 168, now chapter 10, Acts of the 58th General Assembly, became the law by publication on March 26, 1959.

Section 2 of chapter 9, Acts of the 58th General Assembly, being House File 747, provides the following:

"Sec. 2. No more than the amount herein appropriated to each fund plus the unexpended balance in each fund on June 30, 1959, shall be expended from state funds for the purposes of each said fund during the biennium beginning July 1, 1959, and ending June 30, 1961. Any balance remaining in the funds, to which appropriations are made by this Act, at the end of the ensuing biennium shall revert to the general fund of the state."

The appropriations made by the 58th General Assembly will be amplified only by the maximum of the unexpended balances in the appropriations made by the 57th General Assembly remaining on June 30, 1959, as described by chapter 10, Acts of the 58th General Assembly. Such maximum balances on June 30, 1959, are these:

Aid to dependent children	$600,000.00
Old age assistance	500,000.00
Aid to the blind	80,000.00
Emergency relief	50,000.00

Any other balances of state appropriation of the 57th General Assembly shall revert.

You refer to certain statutory provisions regarding these various funds, being section 241.21, insofar as aid to the blind is concerned, and section 239.12, insofar as aid to dependent children is concerned, and to the provisions of section 8.32 with regard to the conditional availability of appropriations. Sections 241.21 and 239.12 are in conflict with the Acts here under consideration, and section 8.32 appears to have no applicability. These statutory provisions, insofar as they are in conflict with these enactments, are in suspense so long as the Acts of the 57th and 58th General Assemblies as exhibited in this opinion, are operative, i.e., until June 30, 1959.

20.8 November 16, 1959

STATE OFFICERS AND DEPARTMENTS: YMCA building control—

The powers of the executive council do not include transfer of appropriation made to it to the commission for the blind, nor may it permit requisitions to be made therefrom by the commission, nor does it have power to turn the YMCA building, together with control of custodial and employee personnel to such commission.

Executive Council of Iowa, Attention W. Grant Cunningham, Secretary: This will acknowledge receipt of yours of the 2d inst. with accompanying letter of Mr. Kenneth Jernigan, Director of the Commission for the Blind, both of which are exhibited as follows:

"Your formal opinion is respectfully requested on the six questions set forth in the attached letter dated November 2, 1959, which was received by the Executive Council from Mr. Kenneth Jernigan, Director, Commission for the Blind.

"Your attention is respectfully directed to Chapter 173, Acts of the 58th G.A. of Iowa, which provides that the Commission shall: 'Establish, manage and control a special training, orientation and adjustment center or centers for the blind.' Under the provisions of this enactment, your formal opinion is also requested as to whether the Blind Commission may spend its regularly appropriated funds to alter, repair, equip and maintain an orientation and adjustment center located in the City of Des Moines?

"Because of the time factor involved, your early attention to this request would be appreciated."

MEMORANDUM

To: Members of the Executive Council Date:

From: Kenneth Jernigan, Director November 2, 1959

Commission for the Blind

Re: Utilization and Control of the YMCA Building

"Earlier this year the legislature appropriated money to purchase the YMCA building at Fourth and Keosauqua Way in Des Moines. At the same time it appropriated $50,000.00 to equip, alter, and maintain the structure. I believe it is generally agreed by almost everyone that the building was purchased for the use of the blind.

"Despite the obvious legislative intent some questions have been raised concerning the control and utilization of the building. These questions have apparently resulted from the wording of the legislation authorizing the purchase. There has been considerable confusion. The Commission for the Blind was authorized late in June, by the Executive Council, to hire an architect to begin plans for alterations on the building. In September, this authorization was cancelled verbally by the Secretary of the Executive Council because of advice he received from one of the people in the Attorney General's office. Consequently, all planning has been stopped and we are at a complete standstill, not knowing how to proceed or what we have the power to do or not to do.

"The Executive Council has always been extremely helpful and cooperative insofar as the programs of the Commission for the Blind are concerned. I am sure that the Council is as anxious as the Commission to clear up the confusion so that we can begin to plan with certainty for

the future. As I see it, two points are involved: 1) The Commission for the Blind needs the entire building for the development of its program. 2) All staff working in the building (custodial and maintenance, as well as professional) must be responsible to the Commission if we are to develop a sound program. I can document either or both of these points in detail if the members of the Council should wish me to do so. In fact, my letter to the Council under date of June 19, 1959, deals with these matters in some detail. I would like to call the attention of the Council once again to that letter and respectfully ask that the requests contained in it receive favorable action.

"Always, we come back to the legal questions involved. Therefore, I wonder if it would not be well to ask the Attorney General for a formal ruling on these questions. It is a fact that the building was technically placed under the control of the Executive Council and the money appropriated to the Council:

"1. If the council sees fit to do so, does it have the power to allow the Commission for the Blind to draw requisitions (subject to Council approval) against the $50,000.00 appropriated for the equipment, alteration, and maintenance of the building?

"2. If the Council sees fit to do so, does it have the power to give the $50,000.00 to the Commission outright with the understanding that the money be used in connection with the building and subject to the usual practices governing Commission expenditures?

"3. Since no building can be substantially altered without preliminary planning by an architect and since the $50,000.00 in question was expressly appropriated for the equipment, *alteration*, and maintenance of the building, is there any legal prohibition against the use of part of the $50,000.00 for architectural services?

"4. If the Executive Council sees fit to do so, does it have the power by resolution to turn the entire YMCA building over to the Commission for the Blind for its uses?

"5. If it sees fit to do so, does the Executive Council have the power to permit the Commission for the Blind to employ and control all staff (custodial and maintenance, as well as professional employees) in the building?

"6. If the answer to five is yes, is there any legal requirement which would force the custodial employees in the building technically to be carried on the payroll of the Department of Buildings and Grounds, rather than on the payroll of the Commission for the Blind?

"If the foregoing questions can be satisfactorily resolved and the Commission for the Blind given the go-ahead signal, I believe we will be able to develop a program for the blind which will be among the best in the nation. There are, of course, many problems still unsolved—the biggest one being the lack of money to put the building into proper condition. It is the hope of the Commission for the Blind that the Executive Council will be able to make available additional funds for this purpose.

"In this connection it might be mentioned that the Library of Congress has recently agreed to give us a complete talking book record and Braille library for Iowa. The books and records will be made available to us without cost but we must provide the space and library staff. If we are to take advantage of this offer, we must be prepared to begin the operation of the library within the next few months. It will require at least one entire floor of the YMCA building. In addition to this memorandum.

I am herewith submitting to the council, a copy of a letter setting forth the details concerning the proposed library.

"I hope it will be possible for us to have answers to the questions raised in this memorandum very soon, for until we get such answers all of our efforts are at a standstill."

Subsequent to the receipt of the foregoing, there was furnished to the attorney general other documentary material bearing upon the situation under examination including address to the legislative intent in the acquisition of the YMCA building, the purposes for which it was acquired, and the uses to which it was designed to be put after acquisition. Such documentary evidence, together with the legislative actions as disclosed by laws enacted to effectuate their purposes, follow. The statutes are these:

1. Chapter 423, Laws of the 58th General Assembly in a Joint Resolution providing for the purchase of the YMCA building in terms as follows:

"Section 1. The state executive council is hereby authorized to exercise in the name of the state of Iowa an option dated April 18, 1959, granted to the state of Iowa by the Young Men's Christian Association of Des Moines, Iowa to purchase for the sum of three hundred thousand (300,000) dollars the following described property located in the City of Des Moines, County of Polk, Iowa, to wit: Lot Thirteen (13), New YMCA Plat, and the building and appurtenances thereon and thereunto belonging, located at Fourth (4th) and Keo Way, Des Moines, Iowa, together with the furnishings thereof and therein located but excepting, however, the items listed with the Director of the Iowa Commission for the Blind. Notice of the exercise of the option shall be sent by registered mail to the Young Men's Christian Association of Des Moines, Iowa, at Fourth (4th) and Keo Way, Des Moines 8, Iowa, or written notice shall be given in person.

"Sec. 2. There is hereby appropriated out of any funds in the state treasury not otherwise appropriated the sum of three hundred thousand (300,000) dollars to be used by the executive council in the purchase of the above-described real estate and the building and appurtenances thereon and the sum of fifty thousand dollars ($50,000.00) for repairs and maintenance of said building and purchasing additional equipment therein. The executive council shall requisition a warrant for such amount and it shall be paid to the Young Men's Christian Association of Des Moines, Iowa, upon delivery of a warranty deed to the state of Iowa with covenants of full warranty, along with delivery of an abstract of title showing marketable title in the vendor and the property free and clear of all liens and encumbrances, and delivery of possession.

"Sec. 3. This Act being deemed of immediate importance shall be in full force and effect after its publication in the Belle Plaine Union, a newspaper published at Belle Plaine, Iowa, and the Osceola Sentinel, a newspaper published at Osceola, Iowa."

2. Chapter 1, section 5, Laws of the 58th General Assembly, provides the appropriation made to the commission for the blind, in terms as follows:

"Sec. 5. For the office of the commission for the blind there is hereby appropriated from the general fund of the state for each year of the biennium beginning July 1, 1959, and ending June 30, 1961, the sum of one hundred twenty-five thousand dollars ($125,000.00) or so much thereof as may be necessary to be used in the following manner:

For salary of director	$ 7,500.00
For salaries, support, maintenance and miscellaneous purposes	$117,500.00
Grand total of all appropriations for all purposes for each year of the biennium for the office of the commission for the blind	$125,000.00"

3. The statutory duties of the commission for the blind are contained in section 93.6, Code 1958, exhibited as follows:

"93.6 Duties. The commission shall:

"1. Prepare and maintain a complete register of the blind of the state which shall describe the condition, cause of blindness, capacity for education and industrial training, and such other facts as the commission deems of value.

"2. Assist in marketing of products of blind workers of the state.

"3. Ameliorate the condition of the blind by promoting visits to them in their homes for the purpose of instruction and by such other lawful method as the commission deems expedient.

"4. Make inquiries concerning the causes of blindness to ascertain what portion of such cases are preventable and co-operate with the other organized agents of the state in the adoption and enforcement of proper preventive measures.

"5. Provide for suitable vocational training whenever the commission shall deem it advisable and necessary. The commission may establish workshops for the employment of the blind, paying suitable wages for work under such employment. The commission may provide or pay for, during their training period, the temporary lodging and support of persons receiving vocational training. The commission shall have authority as provided in this chapter to use any receipts or earnings that accrue from the operation of workshops, but a detailed statement of receipts or earnings and expenditures shall be made monthly to the state comptroller.

"6. Discourage begging, either directly or indirectly, on the part of the blind within the limits of the state.

"7. Make an annual report to the governor of its proceedings for each fiscal year. It shall embody therein a properly classified and tabulated statement of its estimates for the ensuing year with its own opinion of the necessity or expediency of appropriations in accordance with such estimates. Such annual report shall also present a concise review of the work of the commission for the preceding year with such suggestions and recommendations for improving the condition of the blind as may be expedient.

"8. Perform all other duties required of it by law.

4. The foregoing section 93.6 was amended by chapter 173, Laws of the 58th General Assembly, in terms as follows:

"Section 1. Section ninety-three point six (93.6), Code 1958, is hereby amended by adding the following subsections:

1. Establish, manage and control a special training, orientation and adjustment center or centers for the blind.

2. Establish and maintain offices for the commission.

3. Accept gifts, grants, devices or bequests of real or personal property from any source for the use and purposes of the commission."

In connection with the statutes it is to be borne in mind:

1) That both the executive council and the commission for the blind are agencies of the state, having such powers as are conferred respectively upon them by the legislature.

2) That appropriation of public funds from the state treasury is a constitutional right of the legislature. Article III, Sec. 24, Iowa Constitution.

3) That an appropriation thus made cannot be diverted from the purposes for which it was designated by the legislature. Section 8.39, Code 1958, with respect to the foregoing rule, provides the following:

"8.39 Use of appropriations — transfer. No appropriation nor any part thereof shall be used for any other purpose than that for which it was made except as otherwise provided by law; provided that the governing board or head of any state department, institution, or agency may, with the written consent and approval of the governor and state comptroller first obtained, at any time during the biennial fiscal term, partially or wholly use its unexpended appropriations for purposes within the scope of such department, institution, or agency.

"Provided, further, when the appropriation of any department, institution, or agency is insufficient to properly meet the legitimate expenses of such department, institution, or agency of the state, the state comptroller, with the approval of the governor, is authorized to transfer from any other department, institution, or agency of the state having an appropriation in excess of its necessity, sufficient funds to meet that deficiency."

4) The agency to which an appropriation is made only has the power of its expenditure, and then only for the purposes for which it was appropriated, unless otherwise provided by law. This rule has the support of section 8.38, Code 1958, which provides as follows:

"8.38 Misuse of appropriations. No state department, institution, or agency, or any board member, commissioner, director, manager, or other person connected with any such department, institution, or agency, shall expend funds or approve claims in excess of the appropriations made thereto, nor expend funds for any purpose other than that for which the money was appropriated, except as otherwise provided by law. A violation of the foregoing provision shall make any person violating same, or consenting to the violation of same liable to the state for such sum so expended, together with interest and costs, which shall be recoverable in an action to be instituted by the attorney general for the use of the state, which action may be brought in any county of the state."

5) The transfer of appropriated funds from one department to another is provided by section 8.39, Code 1958, heretofore quoted and is limited to be made by the state comptroller with the approval of the governor. Where one department has an appropriation in excess of its necessities, transfer thereof to another department to meet a deficiency is authorized.

6) In connection with the foregoing budgetary requirements, attention is directed to section 8.40, Code 1958, which provides the following penalties for violation of the foregoing-quoted statutes:

"8.40 Misdemeanors—removal—impeachment. A refusal to perform any of the requirements of this chapter, and the refusal to perform any rule or requirement or request of the governor and/or the state comptroller made pursuant to or under authority of this chapter, by any board member, commissioner, director, manager, building committee, or other officer or person connected with any institution, or other state department or establishment as herein defined, shall subject the offender to a penalty of two hundred fifty dollars, to be recovered in an action instituted in the district court of Polk county by the attorney general for the use of the state, and shall also constitute a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court. If such offender be not an officer elected by vote of the people, such offense shall be sufficient cause for removal from office or dismissal from employment by the governor upon thirty days notice in writing to such offender; and, if such offender be an officer elected by vote of the people, such offense shall be sufficient cause to subject the offender to impeachment."

Therefore, answers to your questions follow:

1. Answer to your Question #1 is in the negative.

2. Likewise, answer to your Question #2 is in the negative.

3. Answer to your Question #3 is in the negative.

4. Answer to your Question #4 is in the negative.

5. Answer to your Question #5 is in the negative.

In connection with your questions #5 and #6, attention is directed to section 18.2, subsections 1 and 4, Code 1958, providing as follows:

"18.2 Duties. It shall be the duty of the superintendent, except as otherwise provided by law, to:

1. Have charge of, preserve and adequately protect the state capitol and grounds, and all other state grounds and buildings at the seat of government, and all property connected therewith or used therein or thereon.

2. * * *

3. * * *

4. Have at all times, charge of and supervision over the police, janitors, and other employees of his department in and about the capitol and other state buildings at the seat of government. The police when serving in and about the capitol and other state buildings at the seat of government are hereby designated as peace officers.

* * * "

7) An additional question appears in the request to you where it is stated:

"Your attention is respectfully directed to Chapter 173, Acts of the 58th G.A. of Iowa, which provides that the Commission shall: 'Establish, manage and control a special training, orientation and adjustment center or centers for the blind.' Under the provisions of this enactment, your formal opinion is also requested as to whether the Blind Commission may spend its regularly appropriated funds to alter, repair, equip and maintain an orientation and adjustment center located in the City of Des Moines?"

Pertinent to this question is chapter 173, Acts of the 58th General Assembly heretofore exhibited herein. Such act imposed additional duties

upon the commission for the blind, the first of which provides: "establish, manage and control a special training orientation and adjustment center or centers for the blind." The duties therein imposed upon the commission for the blind is to *establish* such *special training, orientation and adjustment center.* Generally the meaning of this word is described in the case of *Muscatine Lighting Co. vs. City of Muscatine,* 205 Iowa 82, 87, as follows:

"The power to issue bonds is by Section 722 limited to the purpose of making 'payment of the cost of establishing the same, including the cost of land condemned, * * * ' except where an existing plant or incomplete parts of a plant, are acquired, in which case power is given to 'apply the proceeds of the bonds * * * in making extensions and improvements to such works or plants so acquired.' It is very evident from the terms, as well as the spirit, of the statutes that the various words, such as 'purchase,' 'establish,' 'erect,' 'maintain,' 'operate,' 'extensions,' 'improvements,' 'repairs,' and their cognates and derivatives, though some of them have little variance in meaning, and blend into each other, are used in different senses. In Section 720, the words 'purchase,' 'establish,' and 'erect,' in the first sentence, are of different connotation. The word 'establish' has meaning such as 'originate,' 'institute,' 'set up,' 'found,' 'ordain,' 'constitute.' Before the municipality may proceed to purchase or erect one of these utilities, its 'establishment' must be authorized. This word has reference to the founding or ordaining of the enterprise, and the invocation of legal authority for it, as well as to its physical construction or acquisition. While in these statutes, as in many others, there is tautology, we are, nevertheless, of the opinion that authority 'to issue bonds for the payment of the cost of establishing the same, including the cost of land * * * ' is also a limitation of power; and while the word 'establish' is not, in that connection, limited to the concept of merely invoking the authority of the law for construction, but necessarily includes the physical acquisition of a plant, nevertheless the authority granted to issue bonds and to use the proceeds may not be extended to purposes other than erecting or constructing a plant or puchasing and completing by extension and impovement an existing plant or parts of a plant."

And applying the rules therein set forth to the context of the pertinent statutes, it appears that while there is a duty to "establish" imposed upon the commission for the blind, it is not implemented by other language extending other meaning to the word "establishment" than that it be an authority to "originate" and "initiate." It did not provide further implementation for the purpose of performing the duty of establishing imposed upon the commission. This duty apparently was imposed upon the executive council under the provisions of senate joint resolution #18 designated as chapter 423, Laws of the 58th General Assembly, for the appropriation to the executive council in the sum of $50,000, to be used for repairs and maintenance of the building and the purchase of additional equipment therein.

It would appear, therefore, that the commission for the blind, while authorized to expend its regularly-appropriated fund in the performance of its specified duties, including the establishment of the center heretofore referred to, the duty of altering, repairing, equipping, and maintaining the building and the center is in the executive council.

20.9 February 19, 1960

STATE OFFICERS AND DEPARTMENTS: I.P.E.R.S.—Whether doc-

tors, dentists and other professional personnel having private practice and employed part time by state institutions and other public employing units are eligible to membership in the Iowa public employees' retirement system is determined by the statutory provisions of chapter 97B, Code of 1958, and not by federal statutes and rules of common law.

Iowa Employment Security Commission, Attention Judge Allen, General Counsel: This will acknowledge receipt of yours of the 21st ult. in which you submit the following:

"The Employment Security Commission respectfully requests an Attorney General's opinion as to whether an individual performing service for the State, or a political subdivision thereof, may acquire or retain membership in the Iowa Public Employees Retirement System although the individual is, or becomes, ineligible for coverage under the Federal Social Security Act.

"This request stems from a recent ruling of the Bureau of Old Age, Survivors and Disability insurance holding that doctors, dentists and some other professional persons engaged in private practice who perform part-time service for state institutions and other public employing units are not eligible for Social Security coverage based on such part-time service if the major portion of their income is derived from private practice. The Federal bureau deems such persons to be independent contractors or self-employed persons, rather than public employees. Under the ruling, many professional people who have been contributing to the Federal retirement system for periods extending as far back as January 1, 1951, will lose all of the Federal retirement credits they have built up in public employment and will be eligible to receive only a refund of their contributions.

"The Bureau's position, as stated by Ewell T. Bartlett, Assistant Director of the Bureau's Division of Claims Policy, is appended hereto. Also appended is a copy of an Iowa Attorney General's opinion by Clarence A. Keding under date of February 1, 1954, ruling that employees of newly-created school districts may not be enrolled as members of the Iowa Public Employees Retirement System until they have acquired Federal Social Security coverage, or until it has been determined that the employee group of which they are members is not entitled to such coverage. That opinion has been interpreted by the Commission as excluding as a member of the State retirement system.

"In applying that interpretation to individuals disqualified for Social Security coverage under the recent Federal directive, a number of cases have been discovered in which individuals will lose substantial credits acquired through many years of membership in the State system, they will receive none of the state retirement benefits they have been anticipating, in addition to loss of their Federal benefits.

"We find nothing in the Iowa statutes that would seem clearly and directly to say that an employee who is legally covered under the provisions of the Iowa Public Employees Retirement System must be covered under Federal Social Security in order to retain his membership in the State system, and we can see no reason why it should be so."

In addition thereto, I exhibit statement of Ewell T. Bartlett, Assistant Director of the Bureau's Division of Insurance, Claims Division.

" 'With the exception of a few occupational groups, members of which are employees by statutory definition, the Social Security Act, as presently amended, provides for the use of the common-law control test in deciding whether an individual is an employee. Generally, an individual

is held to be an employee under common law when the person for whom the services are performed has the right to control and direct the individual who performs the services not only as to the result to be accomplished by the work but also as to the details and the means by which that result is to be achieved. That is, an employee is subject to the will and control of the employer not only as to what shall be done but as to how, where and when it shall be done.

" 'Generally, a doctor of medicine or a dentist who has no private practice but performs full-time medical or dental services for an industrial concern, hospital, institution, or other type of organization, may be subject to the degree of direction and control necessary to establish an employer-employee relationship under the common-law rules. Such services are creditable for social security purposes unless excepted by some other special provisions of the law. On the other hand, it is generally found that a doctor of medicine or a dentist who has a private practice and, in connection therewith, examines and treats employees of an industrial concern, inmates of an institution, etc., as a part-time service is not an employee. In the usual case of this type, the understanding between the parties indicates that the rights and obligations stemming from an employment relationship are not intended to be assumed. Professional services requiring a high degree of skill are contracted for and direct control and supervision by the concern or institution over the means and details by which the work is to be accomplished is not contemplated. While in a rare, compelling factual situation it may not be impossible to find an individual rendering part-time medical services to be an employee, it has been our experience that members of the medical or dental professions do not ordinarily endanger their main source of livelihood, their private practices, by working under such restrictive conditions in a part-time activity as to warrant a finding of employer-employee relationship.' "

The Kading opinion referred to by you is not attached because in the view that I take of this matter, it has no significance in the situation as explained hereinafter.

In my view the foregoing situation resolves itself into only one question, to wit: Is a doctor or dentist and some professional persons engaged in private practice and who perform part-time services for state institutions and other public employing units, eligible for membership in the Iowa public employees' retirement system. In so determining this question it would appear that the discussions involved in the questions included in your request are collateral to the question herein answered, and in no way resolve the question. The statutory definition of an employee of the Iowa public employees' retirement system is contained in section 978.42, Code of 1958, and in providing who is embraced in the membership of the system stated among other things:

" * * * The term 'employee' as used herein shall not include any individual performing any service in any calendar quarter in which the remuneration for such service does not equal or exceed the sum of two hundred dollars or any services performed during school vacations or outside of school hours by individuals who are students and who devote their time and efforts chiefly to their studies, rather than to incidental employment."

Obviously, according to the plain terms of the foregoing, an employee within the provisions of the foregoing statute does not include one whose remuneration does not equal or exceed $200 in any calendar quarter.

On the other hand it is clear that one who performs services under an

employer-employee relationship under chapter 978.42 and whose remuneration equals or exceeds $200 per quarter is under the terms of the Act, an employee. The foregoing language permits no dilution thereof, in the conditioning of its effect upon the question of services rendered, where they are rendered, by whom they are rendered and for whom they are rendered. The statute is plain and generic and needs no interpretation under firmly-settled rules of law.

Whether membership in the Federal social security system is prerequisite to membership of an employee in the Iowa public employees' retirement system; whether such persons are within the system; whether the amount of such earnings condition such membership may not be a test of membership of IPERS by the definition of an employee in the Federal social security act, or by any common-law rule. There is no such provision requiring such prerequisite membership either in chapter 97B, being the Iowa public employees' retirement system, or in chapter 97C, Code of 1958, being the Federal social security enabling Act. As a matter of fact, it appears that who qualifies for the IPERS membership and benefits is purely a matter of state control and not federal. "Part-time employees" is not by itself expressly treated in chapter 97B, Code of Iowa. It does not have express recognition in such chapter. It appears as a factor in the administration of the chapter and appears in its relationship to membership in IPERS and, at least as far as this question, hereunder explained, is concerned, only as implied in the limitations of chapter 97B.42 hereinbefore set forth.

In examination of the Kading opinion, I find no support for the finding of the employment security commission that membership in the Federal system is a prerequisite to membership in the Iowa public employees' retirement system. Such opinion operated on an isolated situation existing at the time of conversion of the old age assistance system into the federal social security system and merely held that:

The term "employer" as defined in section 41 of chapter 72, laws of the 55th General Assembly, did not include a newly-created "employer unit" until after the Iowa commission had (1) negotiated on appropriate amendment to the federal-state contract appending that new unit or (2) it had been determined that such unit was not eligible for federal social security coverage for some reason.

This clearly does not justify the conclusion of the commission to which you refer, nor is the conclusion of this opinion affected by common-law rule defining the term "employee." Section 97B.42 heretofore quoted, supersedes any common-law definition of an employee. It is said in *Southerland on Statutory Construction 3rd Ed.*, par. 5305:

"But general and comprehensive legislation, prescribing minutely a course of conduct to be pursued, the parties and things affected, and elaborately describing limitations and exceptions is indicative of a legislative intent that the statute should totally supersede and replace the common law dealing with the subject matter."

There are numerous cases cited in the foregoing, one of which is *Dramer v. Rebman*, 9 Iowa 114.

And in 11 *Am. Jur.* §4, titled Common Law, it is said:

"In other words, the common law governs, generally speaking, where the statutory law of the state is silent upon a given question. Ordinarily,

however, it is only the common-law principles of a general nature, and not those which are of a local or special character, that are retained in force."

And section 4.2, Code of 1958, states:

"The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. Its provisions and all proceedings under it shall be liberally construed with a view to promote its objects and assist the parties in obtaining justice."

I would therefore advise:

1. That neither expressly nor impliedly is there authority for the fact that membership in the federal social security system is a prerequisite to membership in the Iowa public employees' retirement system.

2. That participation in the Iowa public employees' retirement system by part-time employment of doctors, dentists and other professional persons having private practice, by state institutions and other public employing units is determined by the rules of employer-employee relationship as provided in the Iowa public employees' retirement system Act.

3. That the definition of "employee" under the Federal social security system will not determine membership in the Iowa public employees' retirement system.

4. Nor will rules of the common law as to what constitutes such relationship prevail over a statutory provision as to what constitutes employment in the Iowa public employees' retirement system.

20.10 August 1, 1960

STATE OFFICERS AND DEPARTMENTS: Board of regents—The state board of regents does not have the authority to authorize the state teachers college to offer a liberal arts program as well as a teacher training program. That change should be initiated by legislative action.

State Board of Regents, Attention Mr. Carl Gernetzky, Chairman Finance committee: This will acknowledge receipt of yours in which you request an opinion on the following matter:

"Is it within the authority of the State Board of Regents to authorize the Iowa State Teachers College to offer a course of study leading to a Bachelor of Arts degree to students who do not wish to be teachers? In other words, may the State Teachers College offer a Liberal Arts program as well as a teacher training program?

* * *

"If it is not within the authority of the Board of Regents to authorize the above changes, will you please indicate how it may be done and what steps are necessary?"

In reply thereto, I advise as follows:

The particular statute concerning itself with the problem submitted is section 268.1, Code 1958, which provides the following:

"268.1 Official designation. The normal school at Cedar Falls, for the special instruction and training of teachers for the common schools, shall be officially designated and known as the 'Iowa State Teachers College'."

This current statute now exists in the same terms in which it was enacted by the 16th G.A., chapter 129, par 1, subject only to a change in name by the 33rd General Assembly, chapter 171, par. 1, from the "State Normal School" to the "Iowa State Teachers College."

In concluding that the answer to your question is in the negative, I find support thereof both legislative and judicial.

Insofar as the legislative action is concerned, an attempt by the then board of education to do what is now proposed was frustrated by the 35th G.A., as shown by the following journal record. In that assembly there was introduced in the senate a bill, which among other things provided in section 1 thereof, the following:

"Section 1. That section four (4), chapter 170 of the Acts of the Thirty-third General Assembly is hereby amended by inserting after the word 'state' and before the word 'to' in the sixth line thereof the following: 'and shall prescribe courses of study. Such courses of study shall be provided and maintained in the several educational institutions as may be adapted to the education of both sexes with regard to the general purposes of such institutions, and shall include home economics, and may be duplicated to such extent as will advance the educational interests of the state.' "

Sec. 3 thereof provided the following:

"That whereas conditions have arisen which makes it unwise for the state board of education to carry into effect its order of October 8, 1912, relating to changes in the courses of study in the different schools under supervision of the board, therefore be it resolved that the board of education is requested to rescind its order of October 8, 1912."

This bill, with such provisions, was passed by the senate. See senate journal of the 35th G.A., April 4, 1913, page 1638.

In the action of the house on the bill, as shown by house journal of April 9, 1913, at page 2149, the following resolution was offered and adopted:

"RESOLUTION TO REQUEST THE STATE BOARD OF EDUCATION TO RESCIND ITS ORDER OF OCTOBER 8, 1912.

"That whereas, conditions have arisen which make it unwise for the state board of education to carry into effect its order of October 8, 1912, relating to changes in the courses of study in the different schools under supervision of the board, therefore be it

"RESOLVED, That the board of education is requested to rescind its order of October 8, 1912.

"Motion prevailed and the resolution was unanimously adopted."

Thereafter, as shown by house journal of April 9, 1913, pages 2149-2150, the house adopted the following amendment:

"* * * by striking out section 1 and inserting in lieu thereof the following:

'Section 1. That section four (4), chapter one hundred seventy (170), Acts of the Thirty-third General Assembly, is hereby amended by inserting after "state" in line 6 of said section the following: "to change, discontinue or prescribe colleges and departments in the state university of Iowa, divisions and departments in the state college of agriculture and mechanics arts, and courses of study in the state teachers' college by a two-thirds affirmative vote of the entire board. Such colleges, divisions, departments and courses of study shall be provided and maintained in the several educational institutions as may be adapted to the education of both sexes with regard to the general purposes of such institutions, and shall include home economics, and may be duplicated to such extent as will advance the educational interests of the state;" ' "

And after adopting amendments to the title, the bill as so amended was passed by the house and the title agreed to.

Upon its return to the senate, senate journal at page 1971 shows the following senate record:

"HOUSE MESSAGES CONSIDERED.

"Senate File No. 541, a bill for an act regulating the appointment and defining the powers and duties of the state board of education relative to the courses of study for the state educational institutions under their control and amending sections one (1) and four (4), chapter 170, of the laws of the Thirty-third General Assembly, relating thereto and providing for the rescision of a certain order of the state board of education with reference to said matters.

"HOUSE AMENDMENT.

"Amend Senate File 541 by striking out section one (1) and inserting in lieu thereof the following:

'Section 1. That section four (4), chapter one hundred seventy (170), acts of the Thirty-third General Assembly, is hereby amended by inserting after "state" in line 6 of said section, the following: "to change, discontinue or prescribe colleges and departments in the state university of Iowa, divisions and departments in the state college of agriculture and mechanics arts and courses of study in the state teachers' college by a two-thirds affirmative vote of the entire board. Such colleges, divisions, departments and courses of study shall be provided and maintained in the several educational institutions as may be adapted to the education of both sexes with regard to the general purposes of such institutions, and shall include home economics and may be duplicated to such extent as will advance the educational interests of the state." '

"Also by striking from the title thereof all after 'thereto' in the fifth line of said title.

"Also insert the figures 'one hundred seventy (170)' following the word 'chapter' in title, sections 1 and 2.

"Amend by striking section 3 from the bill.

"Passed on file."

Thus the senate declined to concur in the bill as thus amended.

There appears to be no subsequent legislative action or consideration of this matter, and section 268.2, Code 1958, providing the following:

"268.2 Branches of study. Physical education, including physiology and hygiene, shall be included in the branches of study regularly taught

to and studied by all pupils in the college, and special reference shall be made to the effect of alcoholic drinks, stimulants, and narcotics upon the human system."

has been unchanged by legislative action since its enactment in 1886.

The foregoing action of the legislature led to this observation:

HISTORY OF EDUCATION IN IOWA, by C. R. Aurner, Vol. 4, pages 111-112:

"To the preliminary effort of gaining information as a basis for action the new governing body gave personal attention. Indeed, the collection of information relative to the problems involved in the management of the three institutions seems to have been a prime consideration during the first biennium. It was finally concluded that in at least two lines of work duplications should be eliminated, namely, in engineering and in liberal arts work. And it was proposed in 1912 that engineering should be offered exclusively at Ames and that liberal arts work should be offered exclusively at the University. The reasons for this proposed change are fully set forth in the second report from the State Board of Education in 1912. Furthermore, it was determined to move home economics from the College at Ames to the University at Iowa City, and for this change the reasons were likewise submitted. At the same time the ultimate designs in developing each institution along lines believed by the Board of Education to be legitimate and consistent were laid down. It should be said that in arriving at these conclusions the board had consulted men who in other Commonwealths were distinguished in their fields of work. Moreover, some of these views were not unlike those presented by the Whipple Commission.

"When the coordination plans outlined by the Board of Education were fully comprehended the friends of all three institutions protested with considerable vigor. In fact, investigations were immediately begun to find out the real status of the situation as well as the true or what seemed to be the true intention of the creators of these three schools located unfortunately, as has often been remarked, at different points in the State. The whole matter caused much comment which can not be presented within the limits of this work. In this connection it is only necessary to observe that legal action to prevent the maturing of the plans of the board was imminent. In the midst of the conflict and while the Thirty-fifth General Assembly was in session the Board of Education at the request of the House of Representatives rescinded this order of October 8, 1912, in the matter of coordination."

Insofar as judicial precedent is concerned, it appears that a comparable situation is presented in the case of *State ex rel Prchal v. Dailey et al.*, 234 N.W. 45, 56 S.D. 554, where under a statute similar in terms to chapter 268, Code 1958, a board of regents of South Dakota, in the exercise of their control over a normal school, provided a course of study for the training of teachers to qualify them to teach in the grade schools below the high schools, and in addition they prescribed additional curricula for those schools "leading to an advanced degree," changed the names of the schools, designated them as colleges, and established them as teachers' colleges authorized to teach a college course and train teachers qualified to teach in high schools and other higher institutions of learning. Action in prohibition of the state of South Dakota by Prchal was instituted against the members of the board of regents, claiming that they had exceeded their authority in making these normal schools teachers' colleges, and preventing a continuance of the foregoing unauthorized acts. The court, in an exhaustive opinion, addressed

itself to the extent of the power conferred upon the board. We call attention particularly to the following observations as pertinent to the narrow question submitted to this department.

"Under the subject 'Art of teaching,' respondents say 'the art of teaching' calls for and requires proper instruction in all of the subjects which a student in the normal schools may be required to teach in the public schools. This is not obvious. It might well be that a teacher entering a normal school for training could be required to possess such knowledge before being allowed to enter. Many professional schools do require some education before matriculation in such schools. Law and medical schools require learning in college courses not offered by them but which must be acquired elsewhere. The act of teaching as a professional course may alone cover a considerable field, but we cannot see why it need cover any subject to be taught. In the statute the art of teaching is recognized as distinct from the subject to be taught. Subjects that pertain to a common school education are easily ascertained by recourse to the grade school course The argument that the teacher of a grade school will be greatly improved by a college education and that the background furnished by such an education will be of such benefit as to warrant its requirement by the regents is not tenable. To sustain that contention would be to remove all restrictions and leave the regents supreme in prescribing the qualifications for teachers. The Legislature has in the past and does now prescribe the character of the certificate to entitle one to teach a grade school. The regents cannot increase those requirements. These normal schools being established for the exclusive purpose of training grade school teachers cannot be used in whole or in part to train high school and other teachers without legislative authority. Such authority we do not find. It is not an answer to say a teacher trained and qualified to teach a high school is also qualified under the statute to teach a grade school. As heretofore indicated, the welfare of the common schools may be in the opinion of the Legislature better protected by providing a large supply of well qualified and highly trained teachers for such schools who are not qualified to teach elsewhere and who if they teach must teach in the grade schools. If the Legislature should be of this opinion, it would certainly have a right to establish schools for that purpose. These schools have been established by the terms of the act for an exclusive limited purpose, and without legislative action such purpose cannot be enlarged. We realize the impracticability of confining the curriculum of any school to hard and fast rules. The curriculum of these schools must be largely within the discretion of the regents. The limits within which the discretion must be exercised will be readily discerned if the regents will bear in mind that these schools are teacher training schools for grade school teachers. If the present one or two year courses are sufficient to qualify teachers for such schools, that is all that should be given. But there can be no reason why such courses shall not conform to the first years of a teachers' college so that students taking the first years in these schools shall receive credit therefor if they afterwards pursue a higher education in the college. No one questions the good faith of the regents in what they have done in raising the rank of these schools. Equal good faith in reducing their rank to the limits prescribed by statute ought to be accomplished without difficulty or disputes."

In the subsequent cause entitled *State ex rel, Bryant et al., v. Dolan et al.*, 249 N.W. 923, 61 S.D. 530, where the powers of the board of regents of South Dakota were drawn in question with respect to the discontinuance and continuance of certain courses in certain educational institutions, the court there observed, as pertaining to the question before it, the following:

"Many of the issues before the court in this case were considered by it in the case of *State ex rel Prchal v. Dailey et al.*, supra, and we believe that case furnishes rules of law by which the record under consideration should be measured and the issues arising thereunder determined. In the majority opinion, written by the late Judge Burch, the legal effect of the purpose statutes, constituting the charters under which our institutions of higher learning are maintained and conducted, is stated as follows: 'And though it be conceded the regents have very broad powers in respect to the curricula of the schools under their control, it is self-evident they cannot by the exercise of that power change their character.'

"In a special concurring opinion one of the judges of this court states the legal effect of the so-called 'purpose statutes' in more concrete form as follows: 'As to each educational institution under the control of the regents, it must be held that the general scope of the powers of the board as to courses of study and the kind, type, or nature of the school that shall, in fact, be maintained, are limited by the foundation purpose of the school as prescribed by the Legislature. Within those limits the discretion of the board of regents is vast and subject to little, if any, control. Beyond those limits there is no question of controlling discretion. There is an utter lack of power and authority to act. Either the limit is there or else no limit of any sort conceivably exists.'

"In view of the law as stated in the Prchal case from which the above is quoted, the ultimate determination of this case must depend upon the construction to be placed upon the statutes declaring the purposes of the educational institutions involved in this proceeding, together with a construction of the legislation, state and federal, pertaining to 'land grant colleges,' hereinafter discussed.

"It is conceded by the pleadings that the defendants have discontinued the courses of general or professional engineering and home economics at the State University, and that said defendants are continuing the courses complained of at the School of Mines and the State College, with one or two exceptions not here material, for the same have been abandoned, so a detailed statement of the facts involved in this case is unnecessary."

In conclusion, the board of regents does not have the authority to make the changes suggested in your letter. These changes should be initiated by legislative action.

20.11 August 4, 1960

STATE OFFICERS AND DEPARTMENTS: Pharmacists—vitamins—sale—Vitamins or vitamin products in concentrated form can be sold only in a licensed pharmacy, under the immediate personal supervision of a registered pharmacist.

Mr. J. F. Rabe, Secretary, Board of Pharmacy Examiners: We herein acknowledge your request for our opinion on the legality of dispensing vitamin preparations by means of vending machines in eating establishments, etc.

Under the existing law of Iowa, vitamin products in concentrated form, whether pills, capsules, tablets, or drops, are "drugs" and not proprietary medicine. *O.A.G.* 1944, p. 164. Section 155.1 of the Code states any person who engages ". . . in the business of selling, or offer-

ing or *exposing for sale, drugs* and medicines at retail" is deemed to be engaged in the practice of pharmacy, and as such is regulated under the police powers of this State. *Reppert v. Utterback,* 206 Iowa 314, 217 N.W. 545 (1928).

Under such regulations, no person may engage in the practice of pharmacy without first obtaining a license from the state department of health. Section 147.2 of the Code.

More direct authority on the point in question is found in section 155.6 of the Code which states that "No unlicensed person or licensed pharmacist shall allow anyone who is not a licensed pharmacist to sell, or dispense any drugs . . . unless the same be done under the *immediate, personal supervision* of a licensed pharmacist, . . .".

The terms "sell, or dispense" would appear to be broad enough to include any methods of disbursement from a display rack to a vending machine. It follows the sale of vitamins in concentrated form intended to be used for the mitigation, prevention or cure of disease of man or animal, (regardless of method of disbursement) must be made in a licensed pharmacy, under the direct, personal supervision of a licensed pharmacist in the State of Iowa. *O.A.G.* 1944, p. 164, 166.

A "pharmacy" as defined in section 155.3(2) is ". . . a drug store in which drugs and medicines are exposed for sale or sold at retail, . . ." A retail pharmacy license under section 155.10, must be obtained in order to establish, conduct or maintain such a pharmacy.

By reason of the above authorities, the answer to your question is found in the conclusions stated in *O.A.G.* 1944, p. 164, 166 which holds:

"1. That vitamins or vitamin products in concentrated form, whether sold in pills, capsules, tablets or drops come under the classication of drugs, within the meaning of the Iowa Pharmacy Law.

"2. That the sale of vitamins in concentrated form intended to be used for the mitigation, prevention or cure of disease of man or animal, *must be made in a licensed pharmacy, under the supervision of a licensed pharmacist in the State of Iowa.*"

20.12

Aeronautics commission, liens—To be enforceable against bona fide purchaser for value, the lien provided in Code sec. 328.47 must be recorded with the appropriate federal agency. (Abels to Wolverton, Air Enf. Off., 10/30/59) #59-11-5

20.13

Accountancy board—Disposal of records. Disposal of bank statements and cancelled checks within discretion of the curator with the chairman of the board of accountancy and board of trustees as provided for in sec. 303.10, Code 1958. (Gritton to Hansen, Bd. Secy., 1/13/59) #59-1-21

20.14

Aircraft registration—

1. Under Code sec. 329.12(1) State Commission may procure and pay for decals and stickers if they, in fact, assist in the promotion of aeronautics in Iowa.

2. Such decals or stickers may not be issued in lieu of regular registration certificates.

3. Promotional stickers may by regulation be required to be displayed on aircraft if so designed as to serve a dual purpose in aid of enforcement. (Abels to Wolverton, Enf. Off., 6/2/59) #59-6-8

20.15

Engineers—Architects—An engineer registered under ch. 114, Code 1958, with an area of proficiency in architectural engineering, may hold himself out as an architectural engineer without violating the provisions of ch. 118. (Rehmann to Johnson, Lee Co. Atty., 6/16/60) #60-6-5

20.16

Board of Accountancy—Eligibility to take C.P.A. examination. Residence is a matter of intention, and as such board of accountancy must make fact determination as to whether an individual is a "resident of Iowa." (Craig to Denman, Bd. of Acct., 10/19/59) #59-10-22

20.17

Board of control—The authorization and approval of claims for purchase of all articles and supplies needed at the institution under its control is not delegable to a subordinate but must be exercised by the board of control of state institutions. However, those duties going to mode and form may be delegated to a subordinate, for example, the clerical work to prepare that which is substance which the board must approve and authorize. (Pesch to Bd. of Control, 12/19/58) #59-1-19

20.18

Board of control—The board of control, having acted as a board in approval of a claim for merchandise purchased, the same being reflected in the minutes of said board, may designate and delegate, said designation and delegation also having been made of record, to subordinate the ministerial duty of signing for the board of control indicating board approval. (Pesch to Bd. of Control, 2/6/59) #59-2-12

20.19

Board of eugenics—Persons to be reported—Epileptics are not among those persons to be reported to the state board of eugenics. (Pesch to St. Bd. of Eugenics, 9/19/60) #60-9-15

20.20

Board of regents—Notes or bonds issued by a public body may not be sold for less than par, under sec. 75.5, Code 1958. (Strauss to Gernetzky, St. Bd. of Regents, 3/9/60) #60-3-12

20.21

Board of regents—The name "Iowa State Teachers College" conferred by statute (sec. 268.1, Code 1958), can only be changed (1) by the legislature, or (2) by the state board of regents, *if* the legislature confers upon said board the power to do so. (Strauss to Gernetzky, St. Bd. of Regents, 3/31/60) #60-3-29

20.22

Delinquent—registration refund—Claim should be submitted to the legislative claims committee by the person claiming the refund, Code sec. 328.24 being nearly identical with Code sec. 321.126(1). (Abels to Aero. Com., 2/8/60) #60-2-17

20.23

Election contests—The statement of contest filed in the contest of Cecil V. Lutz v. Stanley Watts for a seat in the House of Representatives is deemed sufficient within the principles laid down in the contest of Woolridge v. Robinson, 57th G.A., and the provisions of sec. 62.14, Code 1958. (Strauss to Kluever, St. Rep., 2/3/59) #59-2-14

20.24

Election proclamation—Cost of publication of governor's general election proclamation is payable by the county in which said publication originates. (Strauss to Loveless, Gov. St. of Iowa, 10/7/60) #60-10-5

20.25

Employees' vacations—Vacation rights arise after one, two, etc. years of employment and are not prorated to any time of employment less than a year. (Strauss to Brinkman for Tax Com., 3/11/59) #59-3-7

20.26

Employment security—A fact determination made by the commission and a ruling issued thereon must be adhered to and followed by the board of control of state institutions. (Pesch to Bd. of Control, 1/20/59) #59-1-8

20.27

Fire marshal—Defining words used in rules and regulations promulgated by the state fire marshal. Defining the words "important building" is a matter for the state officer or agency promulgating the rules wherein the words aforesaid appear. (Pesch to Statton, Comr. Pub. Safety, 8/26/59) #59-9-3

20.28

Fire marshal—Rules promulgated relating to storage and handling of liquified petroleum gases. Whether an insured has complied with the bylaws relating to storage of liquefied petroleum gases of the insurer is a private matter and of no concern to this department. (Pesch to VanGinkel, Cass Co. Atty., 8/6/59) #59-8-7

20.29

Governor—The governor would have authority to issue patent for land sold by the state more than 75 years prior thereto, for which no patent had previously been issued. (Strauss to Loveless, Gov., 9/17/59) #59-9-27

20.30

Highway commission, hospital trustee—No incompatibility between the offices of a member of the highway commission and a member of the

board of trustees of a county hospital. (Strauss to Stong, Misc., 4/2/59) #59-4-7

20.31

Highway patrol salaries—From the appropriation provided in ch. 1, sec. 47(3), Acts of the 58th G. A., additional increases in salary for highway patrolmen may be authorized by the executive council. (Strauss to Sarsfield, St. Comp., 6/29/60) #60-6-38

20.32

Highway study committee expenses—Expenses of the highway study committee incurred prior to July 4, 1959, thus without statutory authorization, may not be paid. The appropriation of $25,000 to the Iowa legislative research bureau by S.F. 521, now ch. 8, Acts of the 58th G. A., may be used to pay the expenses of the three-member advisory committee authorized by the statute and expense of nonresident consultant or consultants assisting the bureau in the performance of the duty imposed. (Strauss to Ringgenberg, Leg. Res. Bur., 8/7/59) #59-8-9

20.33

Industrial commissioner—Attorneys' fees—Subrogation—Under S.F. 428 the total attorneys fees would be deducted from the total recovery and only the proportionate amount, as allowed by the district court, would be deducted from the amount of the subrogation recovery. (Gritton to Fischer, St. Rep., 4/14/59) #59-4-15

20.34

Interim committee vacancies—1. Where a vacancy occurs in the senate membership of the budget and financial control committee it is the duty of the president of the senate to fill the vacancy and pursuant to a legal presumption that the duty has been performed, one approved for a full term on the committee which office did not exist will be deemed to be appointed to fill the unexpired term due to the vacancy. 2. Which is the majority or minority party as mentioned in sec. 2.41, Code 1958, is determined by the composition of the several bodies of the General Assembly. (Erbe and Strauss to McManus, Lt. Gov., 2/23/59) #59-2-3

20.35

Interstate cooperation commission—A member of the board of control ceases to be an administrative officer when he resigned therefrom, and therefore is no longer eligible to be a member of the Iowa Interstate Cooperation Commission. (Strauss to Ringgenberg, Leg. Res. Bur., 11/23/60) #60-11-10

20.36

I.P.E.R.S.—Member of federal civil service retirement program.—An individual is a member of the federal civil service retirement program when he is employed in a position covered by the program. If he terminates such employment he is no longer a "member" of the federal civil service retirement program for purposes of Code ch. 97B as amended by the 58th G. A. (Craig to Carter, Empl. Sec. Com., 8/5/59) #59-9-1

20.37

I.P.E.R.S.—Regular full-time employment—Criteria for determining when an employee retired under IPERS is entitled to receive a monthly retirement allowance when re-employed. (Craig to Carter, Empl. Sec. Com., 9/3/59) #59-9-18

20.38

Investigation—Expense of commissioners appointed by the governor under the provisions of ch. 67, Code 1958, is not payable out of the $50,000 appropriated by S.J.R. 8 nor is any money available under ch. 67 for such expenses. (Strauss to Sarsfield, St. Comp. 4/29/59) #59-4-33

20.39

Korean bonus board—Under sec. 35B.4, Code 1958, Korean bonus is available to persons on active duty in armed forces between June 27, 1950 and July 27, 1953, aggregating 120 days prior to July 27, 1953. Active service prior to June 27, 1950, should not be counted in determining qualification for such bonus. (Strauss to Kauffman, Exec. Secy., 6/1/59) #59-6-5

20.40

Lease of armory—Real property owned by the State of Iowa cannot be leased in the absence of express legislative authority. (Forrest to Tandy, Adj. Gen., 4/14/59) #59-4-16

20.41

Legislative programs—Under Code sec. 13.7 no occasion exists for the appointment of special assistant attorneys general for the purpose of preparing departmental legislative programs. (Erbe to Berlin, Ia. Aer. Com., 1/8/59) #59-1-4

20.42

Liquor commission—No authority to permit sale in grocery stores. (Gritton to Leir, Scott Co. Atty., 8/13/59) #59-8-15

20.43

Liquor commission—Section 123.47, Code 1958, does not prohibit placing signs on the outside of state liquor stores. (Gritton to Smith, Liquor Com., 7/29/59) #59-7-38

20.44

Mine inspector—Code sec. 82.18 does not give the mine inspector authority to require an abandoned mine be resealed or refilled if the original seal or fill proves inadequate. (Craig to Aubrey, St. Mine Insp., 5/31/60) #60-6-10

20.45

Mine inspector—Pitless scales—Sec. 215.14, Code 1958, does not apply to coal mine scales. (Craig to Aubrey, St. Mine Insp., 9/6/60) #60-9-5

20.46

National guard—National guard property losses constituting state lia-

bility to the federal government for the liquidated amount are payable by the comptroller under sec. 8.13(1) only if demand is made within three months from the time that all events have occurred which fix the liability . (Forrest to Croft, St. Comp. Office, 3/3/59) #59-3-3

20.47

Natural resources council—Nonregulated use; when permit required—A permit may be required when a "nonregulated" use is beyond the realm of being ordinary. (Maggert to McMurray, Ia. Nat. Resources Council, 8/3/60) #60-8-4

20.48

Orphan's educational fund—Under sec. 35.9, Code 1958, a minor child of a veteran who was killed in service during specific war periods, must be a graduate from a high school or its equivalent, and must have lived in Iowa for two years preceding his application therefor, to be eligible for educational aid from the state's orphan's educational fund. (Strauss to Patterson, Ia. Bonus Bd., 8/15/60) #60-8-15

20.49

Public safety—Ch. 24, Acts of the 58th G. A., sec. 1, authorizes construction of two radio stations in addition to moving location of headquarters station. (Craig to Statton, Comr. of Pub. Safety, 6/3/60) #60-6-12

20.50

Real estate—A license to sell real estate is terminated by its voluntary surrender. (Strauss to Hart, Real Est. Co., 9/17/59) #59-9-28

20.51

Real estate commission—Contract of employment by construction company authorizing an employee, at a stated salary, to hold open house on its housing projects and arouse interest in purchasing houses therein, is not within the exception of required possession of real estate license. (Strauss to Hart, Real Est. Com., 10/27/59) #59-10-29

20.52

Reciprocal compacts—The Governor has no authority under section 247.5, Code 1958, to enter into a reciprocal compact that embraces within its provisions all juveniles. (Strauss to Ringgenberg, Leg. Res. Bur., 10/21/60) #60-10-13

20.53

Registration of leased aircraft—Since, under Code sec. 328.25, registration fees take the place of tax, the word "owner" in Code sec. 328.20 takes the definition employed in Code sec. 428.9 for purposes of personal property tax. (Abels to Wolverton, Aero. Com., 3/21/60) #60-3-17

20.54

Registration—Temporary registration of firms is not permitted under Code sec. 116.19. (Gritton to Hansen, Acct. Bd., 2/4/59) #59-2-10

20.55

Senator—A duly-elected and qualified state senator is ineligible to hold

the office of inheritance tax appraiser. (Strauss to Hultman, Black Hawk Co. Atty., 5/26/59) #59-5-21

20.56

Senator—A state senator in the General Assembly cannot at the same time hold office as a member of the Iowa natural resources council under provisions of Art. III, sec. 22 of the Constitution of the State of Iowa. (Strauss to Loveless, Gov., 1/7/59) #59-1-16

20.57

Soldiers' relief commission—The reasonable cost of the bond required of members of the soldiers' relief commission under Code sec. 250.6, also of an executive secretary of said commission, shall be paid from the general fund of the county in which the bond is filed, as provided by Code secs. 64.11 and 64.15, as amended by ch. 98, 58th G.A. (Strauss to Patterson, Ia. Bonus Bd., 8/18/60) #60-8-16

20.58

State aid to school districts—The budget and financial control committee has power to make an allocation for aid to a school district which, by reason of reduction in area during the biennium resulting from reorganization, is unable to carry on a reasonable educational program as determined by the state department of public instruction, without levying a tax in excess of 100 mills. (Strauss to Paul, Budget and Control Com., 7/18/60) #60-7-17

20.59

Title to real property acquired by the board of control—Pursuant to authorization by the 58th G. A., title should be taken and held in the name of the State of Iowa for use of and by the board of control of state institutions. (Pesch to Bd. of Control, 5/3/60) #60-5-6

20.60

Transportation expense—State funds are not available for the payment of insurance upon the household goods of a state highway commission employee, said expense not being an actual transportation expense within the terms of ch. 206, Acts of the 58th G.A. (Strauss to Sarsfield, St. Comp., 3/28/60) #60-3-25

20.61

Truck permit fees—The order of the commerce commission issued August 6, 1958, and in force January 1, 1959, exceeds its powers in providing for fees to be paid on both tractors and trailers. Their legal authority exists only to the extent of imposing the fee upon the tractor. (Strauss to Loveless, Gov., 6/24/59) #59-6-23

20.62

Truck permit refunds—Commerce commission is without authority to refund fees paid to the commission under an order issued by it under sec. 327.9, Code 1958. (Strauss to Loveless, Gov., 5/28/59) #59-6-2

20.63

Uniform allowances—The commissioner of public safety has neither

duty nor authority to provide uniforms for the fire marshal's office and the radio communications division of the public safety department, nor is he authorized to provide a clothing allowance for members of the bureau of criminal investigation. (Strauss to Exec. Council, 1/26/60) #60-1-14

20.64

Vacations—Head of department, commission or agency of State of Iowa may allow employee vacation prior to anniversary date, provided employee has completed one full year of employment. (Gill to O'Connor, St. Tax Com., 3/24/60) #60-3-20

20.65

Vocational and educational facilities—Section 246.27, Code 1958, controls the manner in which funds may be used for vocational and educational facilities of institutions under the jurisdiction of the board of control. (Pesch to Burke, Bd. of Control, 10/14/60) #60-10-9

20.66

Welfare appropriation—The appropriations made by the 58th General Assembly to the Social Welfare Department are amplified by the unexpended balances of the appropriation made by the 57th G.A. to that department remaining on June 30, 1959, subject to maximum limitation of such balances as described by ch. 10, Acts of the 58th G.A. (Strauss to Smith, St. Welfare Bd., 7/28/59) #59-7-34

20.67

Workman's compensation paid by adjutant general under Code section 29.27—The amount of compensation to be paid is measured by ch. 85. However, such payment is not made under Code sec. 85.49. (Strauss to Johnson, Asst. Adj. Gen., 9/27/60) #60-9-21

CHAPTER 21

TAXATION

STAFF OPINIONS

LETTER OPINIONS

21.1 June 5, 1959

TAXATION: Property Tax—Moneys and Credits—

(1) Listing of factors to consider in determining whether foreign corporations doing business within and without Iowa are engaged in merchandising.

(2) Information insufficient to determine whether capital stock of Standard Oil Company (Indiana) is exempt from moneys and credits tax.

(3) The capital stock of railroad companies which enter Iowa are not exempt from the moneys and credits tax.

Mr. Leon N. Miller, Chairman, Iowa State Tax Commission: This is to acknowledge receipt of your letter of May 5, 1959, in which you request an opinion of this office stated as follows:

"The Property Tax Division receives numerous requests from assessors, county treasurers, investment concerns, and from individuals interested in investment securities from the standpoint of investing funds, as to whether shares of capital stock of certain foreign corporations carrying on their business in Iowa are exempt from the Iowa moneys and credits tax, because those particular corporations very possibly qualify for exemption under Code section 427.1(20).

"That portion of subsection 20 of section 427.1, which provides for exempting from taxation the shares of capital stock of corporations engaged in merchandising as defined in section 428.16, offers more trouble in the administration of the moneys and credits tax law than the other portions of that subsection 20. There seems to be no doubt but what the shares of capital stock of such foreign corporations as F. W. Woolworth & Company, S. S. Kresge Company, Sears, Roebuck & Company, Montgomery Ward & Company, J. C. Penney Company, Katz Drug Company, and Walgreen Company squarely come within that particular portion of subsection 20, and are exempt from the Iowa moneys and credits tax when held by residents of the state of Iowa. Those particular corporations are definitely recognized as merchandisers throughout the United States, and it is a known fact that they have retail merchandise stores in various cities in Iowa from which merchandise is sold at retail to the buying public. They are clear-cut cases, and definitely qualify as 'corporations engaged in merchandising as defined in section 428.16.'

"There are, however, many foreign corporations or corporations organized under the laws of other states, carrying on their business within the state of Iowa, that also do business in other states and some of them in foreign countries, and who are operating as manufacturers and producers as well as merchandisers. Such corporations would be, among others, Standard Oil Company of Indiana, The Texas Company, Phillips Petroleum Company, Firestone Tire & Rubber Company, Swift and Company, and others. Nationwide those particular corporations would probably be classified as predominantly manufacturer or producer, but insofar as their operations in the state of Iowa are concerned, they may have a single retail outlet in this state, and have no manufacturing plant or production facility in Iowa. Those foreign corporations have some of their capital stock in the hands of residents of the state of Iowa, and in attempting to determine whether those shares of stock are exempt from the Iowa moneys and credits, it is often difficult to know just what factors are to be taken into consideration in deciding whether the corporation is 'engaged in merchandising as defined in Iowa Code section 428.16.' It appears that the Iowa Supreme Court has considered such problem heretofore in the case of Lichty v. Board of Review of Waterloo, 230 Iowa 756, (1941), and also in the case of Cherry v. Board of Review of City of Cedar Rapids, Iowa, 238 Iowa 189, (1947).

"Our question is, as before stated herein, just what factors must be taken into consideration by assessors and personnel of the State Tax Commission in determining whether some foreign corporations doing business both within and without the state of Iowa are in fact engaged in merchandising as defined in Code section 428.16, so as to make the corporation's shares of capital stock in the hands of Iowa residents exempt from the Iowa moneys and credits tax? If because such foreign corporation has a single retail sales or wholesale sales outlet in this state, regardless of its other operations in Iowa or elsewhere, is sufficient to exempt from taxation in this state its shares of capital stock, then there will be many corporations exempted that at the present time the Property Tax Division is holding their shares of capital stock to be subject to the Iowa moneys and credits tax.

"Herewith is copy of letter dated February 10, 1958 from Standard Oil Company (Indiana), Chicago, Illinois, wherein they request that the

State Tax Commission hold that their shares of capital stock be held exempt from taxation in the hands of Iowa residents because the corporation qualifies as a corporation engaged in merchandising as defined in section 428.16 of the 1958 Code of Iowa. The undersigned regards it advisable for the Standard Oil Company request to be ruled on by the legal staff, and respectfully recommends that this request be referred to the legal department for a legal opinion.

"This letter is intended as an application for tax exempt classification of the shares of this Company from local taxation to owners under the Moneys and Credits Act by virtue of the exemption of the capital stock of corporations engaged in merchandising *within the state* as provided in the Statute in sections 427.1(20) and 428.16.

"With respect to our Iowa business we are exclusively a 'merchant' as defined in said section 428.16. We do *only* a merchandising business within the state and have no manufacturing activities of any nature there.

"This Company conducts its business in fifteen midwestern states wherein it engages principally in merchandising, selling merchandise at both wholesale and retail. Most of the petroleum products sold by it are manufactured at its own refineries all located in other states. Other petroleum products are also bought and sold. In addition, much of its sales to service stations and to consumers consists of automobile accessories and farm items. Sales in the mid-west area including Iowa are made through many thousands of service stations, bulk stations and tank trucks.

"This Company, as a merchant, has in its possession and under its control within the State of Iowa, with authority to and for the purpose of sale, a very substantial amount of personal property purchased with a view to its being sold, or which has been consigned to it from places out of the state to be delivered or shipped by it both within and without the state.

"This Company, within the State of Iowa,—

has no manufacturing business, manufacturing employees, or manufacturing properties;

maintains a Regional Sales Office in Des Moines exclusively for its merchandising business;

sells merchandise to several hundred service station operators;

has pipe line properties and motor tank trucks which are used for the transportation of completely refined (manufactured) petroleum products which are for sale within and without the state;

sells merchandise direct to consumers at or from a great many bulk plants and tank trucks;

employs several hundred salesmen and sales agents;

Its salesmen call upon and sell to wholesalers, retailers, industrial users, farmers, and other consumers;

It sells tires, batteries, motor oils, and many other items which it purchases for resale at a profit;

owns or leases hundreds of properties in the state in connection with its merchandising business. Our annual tax bill upon our Iowa properties including inventories exceeds a half million dollars;

It owns and pays taxes upon merchandise inventories at hundreds of locations well scattered over the entire state.

"A most recent case upon the points involved herein is *Cherry v. Board of Review* (1947), 238 Iowa 189, 26 N. W. 2d 316. It cleared up the matter as to whether consideration should be given to business done *outside* the state, which the prior (1941) case left somewhat doubtful *(Lichty v. Board of Review*, 230 Iowa 756, 298 N. W. 654). The Cherry case, after discussing the Statute specifically with respect to whether business (including manufacturing) outside of the state should be given consideration to determine the status of merchandising 'within the state,' held that it should not. Only the business done within the State of Iowa is to be considered in construing the exemption. As pointed out above—all of our Iowa business is merchandising, none manufacturing.

"I respectfully request your reconsideration of this matter at your earliest convenience.

"We also need to be definitely advised as to whether the shares of capital stock of railroad companies that enter and run through or serve any part of the state of Iowa are to be exempted from the Iowa moneys and credits tax when held by residents of the state of Iowa. (Section 429.2, 1958 Code.) We have in mind such railroad companies as Chicago, Rock Island & Pacific R. R. Company, Chicago, Milwaukee, St. Paul & Pacific R. R. Company, Chicago & North Western Ry. Company, Chicago Great Western R. R. Company and Minneapolis & St. Louis R. R. Company. Railroads operating in Iowa are, of course, assessed by the State Tax Commission under the provisions of Chapter 434, 1958 Code of Iowa. We respectfully request a legal opinion as to the taxability of the shares of capital stock of railroad companies, taking into consideration the provisions of subsection 20 of Code Section 427.1"

The following sections of the Code of Iowa (1958) are relevant to your first question wherein you request a determination from this office of what factors must be considered to determine whether a foreign corporation, doing business both within and without Iowa, is engaged in merchandising so as to render that corporation's shares of stock exempt from the moneys and credits tax in the hands of Iowa residents:

"427.1 Exemptions. The following classes of property shall not be taxed:

" * * *.

"20. Capital stock of companies. The shares of capital stock of telegraph and telephone companies, freight line and equipment companies, transmission line companies as defined in section 437.1, express companies, corporations engaged in merchandising as defined in section 428.16, domestic corporations engaged in manufacturing as defined in section 428.20, and manufacturing corporations organized under the laws of other states having their main operating offices and principal factories in the state of Iowa, and corporations not organized for pecuniary profit.

" * * *. "

"428.16 'Merchant' defined. Any person, firm, or corporation owning or having in his possession or under his control within the state, with authority to sell the same, any personal property purchased with a view to its being sold, or which has been consigned to him from any place out of this state to be sold within the same, or to be delivered or shipped by him within or without this state, except a warehouseman as defined in section 542.58, shall be held to be a merchant for the purposes of this title."

The question of what tests are to be applied in order to determine whether a corporation engages in merchandising so as to be exempt under the provisions of section 427.1(20) supra, has been before the supreme

court of Iowa in *Lichty v. Board of Review*, 230 Iowa 756, 298 N. W. 654 (1941); and *Cherry v. Board of Review*, 238 Iowa 189, 26 N. W. 2d 316 (1947).

In *Lichty v. Board of Review*, supra, the supreme court held that the stock of a foreign corporation which operated mills in five states, including Iowa, and sold through branches in Iowa, its own manufactured products (63 per cent of total), and merchandise purchased from others for resale (37 per cent of total), was not exempt from taxation as stock of "corporations engaged in merchandising as defined in section 6971." The following is quoted from the court's opinion:

"Here the factual situation is not complicated. The principal business of the corporation was the manufacturing conducted in its five plants. In connection with the disposition of its manufactured products the corporation, no doubt, found it advantageous to sell, at its Iowa branches, related products manufactured by others. Although the volume of such goods sold was substantial, this merchandising appears to have been subsidiary to its manufacturing business and in part incidental thereto. Resale of goods purchased from others amounted to only 37 per cent of its Iowa Sales. This percentage would be much lower if all sales of goods manufactured in the various plants be taken into account. * * *."

Cherry v. Board of Review, supra, concerns the exemption status of the stock of a corporation which operated their manufacturing plants, one of which was located in Iowa. In connection with the Iowa plant, a sales division was maintained. Items manufactured both in Iowa and other states were transferred to the sales division. The Court found that the sale of products manufactured by the corporation, both through its sales division in Iowa and by its Iowa plant to other sales divisions, was in excess of the sales of jobbing merchandise (merchandise bought for resale from others) and that, therefore, the stock of said corporation was not exempt as the stock of a corporation engaged in merchandising.

A study of the supreme court opinions referred to above reveals that the following is to be used as guides in determining whether a corporation is engaged in merchandising so as to render its shares of stock exempt from the moneys and credits tax as provided in section 427.1(20), Code of Iowa (1958). First, as stated in *Lichty v. Board of Review*, supra, a corporation cannot be both a manufacturer and a merchant. It is either one or the other or neither. Further, it is clear from a reading of the opinions above mentioned that it is the main business of the corporation within the state of Iowa that is determinative of whether a corporation qualifies as one "engaged in merchandising." Another rule to be observed, according to the two above-mentioned cases, is that the sale of the corporation's own products, no matter where manufactured, is not to be considered merchandising activity. It was stated in *Cherry v. Board of Review*, supra, that capital investments, comparison of employment figures in the merchandising as opposed to the manufacturing area, costs of operation and inventories are not to be regarded as determinative in the consideration of whether a corporation is engaged in merchandising so as to render the stock of same exempt from the moneys and credits tax.

It is elementary that taxation is the rule and exemption the exception, and anyone claiming an exemption must show clearly that, in this case, the capital stock is exempt within the terms of the statute. *Wagner v. Board of Review of City of Glenwood*, 232 Iowa 58, 4 N. W. 2d 405,

(1942); *Board of Directors of Fort Dodge Independent School District v. Board of Supervisors of Webster County*, 228 Iowa 544, 293 N. W. 38 (1940).

Applying these considerations to the information presented in the letter quoted above, wherein Standard Oil Company of Indiana requests that their shares of capital stock be declared exempt from the moneys and credits tax in the hands of Iowa residents, it immediately becomes apparent that such a determination cannot be made from the information provided. Whereas the statement is made that "most of the petroleum products sold by it are manufactured at its own refineries all located in other states," no figures are presented which show a comparison of sales of products within Iowa manufactured by the corporation as opposed to sales of products within Iowa purchased by the corporation for resale. The status of capital stock for purposes of taxation is determined by the assessor. It is not the function of this office to determine questions of fact.

The following sections of the Code of Iowa (1958), are relevant to your inquiry as to whether the capital stock of railroad companies that enter Iowa are to be exempted from the moneys and credits tax when held by Iowa residents.

"427.1 Exemptions. The following classes of property shall not be taxed:

" * * *.

"20. Capital stock of companies. The shares of capital stock of * * * freight line and equipment companies, * * *.

" * * *."

"429.2 Moneys—credits—annuities—bank notes—stock. Moneys, credits, and corporation shares or stocks, except as otherwise provided, cash, circulating notes of national banking associations, and United States legal tender notes, and other notes, and certificates of the United States payable on demand, and circulating or intended to circulate as currency, notes, including those secured by mortgage, accounts, contracts for cash or labor, bills of exchange, judgments, choses in action, liens of any kind, securities, debentures, bonds other than those of the United States, annuities, and corporation shares or stocks not otherwise taxed in kind, shall be assessed and, excepting shares of stock of national, state, and savings banks, and loan and trust companies, and moneyed capital as hereinafter defined, shall be taxed upon the uniform basis throughout the state of five mills on the dollar of actual valuation, same to be assessed and collected where the owner resides."

The questions appear to be whether a railroad company is a freight line and equipment company within the meaning of section 427.1(20), supra, and whether the shares of stock of railroad companies are taxed in kind within the meaning of section 429.2, supra.

In considering what is meant by the term "freight line and equipment companies" as such term is used in the statute, it is well to consider the legislative history of this exemption. Chapter 62 of the Twenty-ninth General Assembly provided for the taxation of freight line and equipment companies. Section 8 of said chapter provided as follows: "The individual stockholders or owners of interests of said companies shall not be required to list their shares or interests in such companies so long as the companies pay the taxes on their property as herein pro-

vided." This section first appeared in the Code as section 1342-g Supplement (1913). The Fortieth General Assembly-Extra Session placed, as nearly as possible, all the tax exemption statutes in one section. This appeared as section 6944, Code of Iowa (1924). In making the transition, the exemption provisions were condensed and modified. Thus, the wording of many of the exemption provisions was changed. After the Code revision was effected, there was no longer an exemption provision within the chapter relating to the taxation of freight line and equipment companies, and a provision was made in section 6944(20), Code of 1924, to exempt the shares of capital stock of freight line and equipment companies. This section is the predecessor to the present section 427.1(20), Code of Iowa (1958). It is the opinion of this office that the exemption granted to shares of stock of freight line and equipment companies relates to freight line and equipment companies as defined in sections 435.2 and 435.3, Code of Iowa (1958).

With reference to that portion of section 429.2, Code of Iowa (1958), which states that "corporation shares not otherwise taxed in kind, shall be assessed," this office is unable to find any provision wherein railroad company stocks are taxed in kind. It is, therefore, the opinion of this office that the shares of capital stock of railroad companies that enter Iowa are not exempt from the moneys and credits tax when held by residents of the state of Iowa.

21.2 July 21, 1959

TAXATION: ASSESSORS—House File 709 provides that the members of the three taxing bodies shall vote as a unit in the conference board and that a majority of the members in the unit shall determine the vote of the unit. Held, that one cannot constitute a majority and that at least two must be present to comprise a voting majority.

Held, also, that under House File 709, applicants to take the examination for assessor and deputy assessor must make application with the state tax commission and need not make application within any prescribed time prior to the scheduled examination.

Held, also, that the conference board is authorized to fix the salary of the assessor each year for the ensuing year.

Held, also, that members of the examining board may not be appointed out of the membership of the conference board.

Held, also, that the county assessor's bond shall be approved by the board of supervisors; that the city assessor's bond shall be approved by the mayor or as otherwise provided by ordinance; that the county assessor's bond shall be kept with the county auditor, and the city assessor's bond shall be kept either in the city assessor's office or with the clerk of the approving body.

Mr. John J. O'Connor, Chairman, Iowa State Tax Commission: This will acknowledge your letter of July 2, 1959, in which you request the opinion of this department on the following questions relative to the new assessors' law, commonly known as House File 709.

"1. It is provided in Sec. 2 of House File 709, with respect to Conference Boards that, 'The majority vote of the members present of such unit shall determine the vote of the unit'. Supposing that at a called

meeting of a Conference Board one voting unit has only one member present, for instance, only one member of a board of supervisors is present. Is that one member's vote on matters before the Conference Board to be considered the 'majority vote' of the particular voting unit of which he is a member? If not, how many members of a voting unit have to be present to make possible a 'majority vote' of the particular voting unit?

"2. Secs. 3, 5 and 10 of House File 709 contain provisions respecting examining boards, examination of applicants for the position of assessor, and for the examination for position of deputy assessor. Are applicants for the positions of assessor and deputy assessor required to file their applications to take the examination for the positions with the examining board or are they to be filed with the State Tax Commission? Are applications for the positions of assessor and deputy assessor to be accepted right up to and including the day of the scheduled written examination given by the State Tax Commission, or is the deadline for filing at a time previous to the day of examination?

"3. Sec. 16 of House File 709, provides that each year the conference board shall meet to consider the proposed budget for the assessor for the ensuing year, and among other things the conference board shall authorize the salaries and compensation of members of the board of review, the assessor, chief deputy, other deputies, fieldmen and other personnel, and determine the time and manner of payment. Most of the present county assessors were last appointed to their office in the year 1957, for four year terms commencing January 1, 1958, and ending December 31, 1961. Can the salaries of those county assessors now serving a four-year term be increased for the remainder of that term by the conference board under provisions of House File 709?

"4. Sec. 3 of House File 709, as enrolled, provides for an Examining Board. Can members of the conference board be appointed to and serve on the Examining Board, or must the members of the Examining Board be persons who are not members of the conference board?

"5. Sec. 15 of House File 709, as enrolled, requires assessors and deputy assessors to furnish bond for the performance of their duties in such amount as the conference board may require. The question arises as to which official is to approve the bond of a city assessor and his deputy, and which official is to approve the bond of a county assessor and his deputy. Also, who shall have custody of those bonds of the assessors and deputies uopn their being filed and approved?"

Question 1. The relevant part of section 2 of House File 709 reads as follows: "The majority vote of the members present of each unit shall determine the vote of the unit." In this connection, your attention is directed to section 4.1, Code of Iowa (1958), which requires that statutory language be construed according to context and common usage. Webster's New Collegiate Dictionary defines "majority" as being the greater part of two numbers which are regarded as parts of a whole. This definition has been approved by the supreme court of Iowa in *Mills v. Hallgreen*, 146 Iowa 215, 124 N. W. 1077. Applying this definition, it is concluded that one person cannot comprise a majority, since one cannot be the greater part of two numbers.

You also ask how many members of a voting unit need be present to make possible a majority vote of the particular voting unit. It would seem that it is necessary to have at least two members present. In such event, of course, it would take two votes to pass a given resolution.

Question 2. In response to this question, it is necessary to look at the

provisions contained in the prior law on this subject. Section 441.3, Code of Iowa (1958), provided that:

"441.3 Vacancy in assessor's office. * * * Persons desirous of taking such examination shall notify the state tax commission in writing at least twenty days before the date fixed by the tax commission for such examination. * * *."

It would seem consistent with the intent of the legislature in adopting House File 709 to require applications to be filed with the tax commission, rather than with the examining board. This is so since both under the old law, and under House File 709, it is provided that the examination is to be conducted by the commission. In this respect, there has been no appreciable change in the law. Since the commission is required to conduct the examination, applications to take the examination should be made with the commissioner.

The old law provided also that in case of the county assessor, twenty (20) days notice be given the tax commission by an applicant for an examination. House File 709 makes no such requirement. Therefore, it must be concluded that no notice need be given either to the tax commission or local examining board within any prescribed time prior to the scheduled examination.

Question 3. In answer to this question, it is necessary to examine and compare the salary provisions contained in chapters 441 and 405, Code 1958, (the prior county and city assessor law) with those found in House File 709.

"441.6 Bond and salary. * * *.

"The county conference as established by the provisions of section 442.1 shall fix the salary of the county assessor which shall not be more than that of the salary of the county auditor in each county, 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."

"405.10 Salaries—dog fee. The city assessor, chief deputy, and all other deputies shall receive such annual salary as may be determined and fixed in the amount and manner as provided in section 405.18. * * *."

"405.18 Budget. All expenditures under this chapter shall be paid as hereinafter provided.

" * * *.

"Such combined budget shall contain an itemized list of the proposed salaries of the city assessor and each deputy, the amount required for field men and other personnel, their number and their compensation; * * *.

"Not later than July 21 of each year, the mayor shall, by written notice, call a joint meeting of the city council, school board and county board of supervisors to consider such proposed budget and shall fix and adopt a consolidated budget for the ensuing year.

" * * *.

"At the joint meeting the three taxing bodies shall authorize:
"1. * * *.

"2. The salaries and compensation of members of the board of review,

the assessor, chief deputy, other deputies, field men, and other personnel, and determine the time and manner of payment.

" * * *."

The salary provisions in House File 709 are found in section 16 and read as follows:

"Sec. 16. Budget. All expenditures under this chapter shall be paid as hereinafter provided.

"Not later than July 1 of each year the assessor, the examining board, and the board of review, shall each prepare a proposed budget of all expenses for the ensuing year. * * * Said budgets shall be combined by the assessor and copies thereof forthwith filed by him in triplicate with the chairman of the conference board.

"Such combined budgets shall contain an itemized list of the proposed salaries of the assessor and each deputy, * * *.

"Each year the chairman of the conference board shall, by written notice, call a meeting to consider such proposed budget and shall fix and adopt a consolidated budget for the ensuing year not later than July 15.

"At such meeting the conference board shall authorize:

"1. * * *.

"2. The salaries and compensation of members of the board of review, the assessor, chief deputy, other deputies, field men, and other personnel, and determine the time and manner of payment.

" * * *."

Section 441.6, Code of 1958, supra, authorized the fixing of the county assessors' salary by the conference board, and section 405.10, Code of 1958, supra, gave authority for the payment of the city assessor and deputies. It is noted that, except as provided in section 16, House File 709 contains no similar provisions.

It is a basic tenet of statutory construction that statutes shall, if possible, be interpreted so as to render them effective and operative, *Sutherland Statutory Construction*, 3rd Edition, paragraph 4510. Applying this rule, it is concluded that the legislature must have intended that the assessors' salary be governed and controlled by section 16 of House File 709, supra. This section provides that each year, not later than July 15, the conference board is authorized to fix and adopt a budget for the ensuing year. Contained in said annual budget shall be the salaries of the assessor, chief deputy, and other deputies. Since no other provision fixing and authorizing the assessors' salary exists in House File 709, it is clear that the intention of the legislature was that the salary shall be set annually by the conference board in adopting the budget for the ensuing year.

Question 4. House File 709 in section 3 provides that each voting unit of the conference board is required to appoint one qualified person to serve as a member of the examining board. No indication is given as to whether the persons so selected may also be members of the conference board. Section 4 provides that a member so appointed may be removed by the voting unit of the conference board which appointed him. If then, it were determined that the examining board could be made up of mem-

bers of the conference board, it is conceivable that a member of the conference board could vote on his own discharge.

A further conflict of interest could develop in view of the fact that the examining board certifies the results of the test and the executive ability of the applicant to the conference board, and the conference board in turn appoints the assessor out of the list of eligibles.

Where the two boards are wholly independent of each other, a more impartial selection of assessor is assured. It is, therefore, the opinion of this department that the conference board in selecting the members of the examining board should select persons outside of their own membership.

Question 5. The answer to this question may be found in chapter 64 of Code of Iowa (1958), which provides in section 19, that the county assessor's and deputy assessor's bond shall be approved by the board of supervisors, and the city assessor's and deputy assessor's bond is to be approved by the mayor or as provided by municipal ordinance. Section 64.33 provides that the county assessor's bond is to be kept with the county auditor, and in case of the city assessor, the bond is to be kept either in the city assessor's office or with the clerk of the approving body.

21.3 July 29, 1959

TAXATION: Property tax—Military service tax credits—An exemption to a relative of a veteran named in section 427.4, Code of Iowa (1958), may be granted only after said relative files a claim for exemption as provided in section 427.5, Code of Iowa (1958).

Mr. James W. Hudson, Pocahontas County Attorney: This is to acknowledge receipt of your letter of July 1, 1959, in which you request an opinion of this office, stated as follows:

"In view of the opinion issued by Mr. Brinkman dated April 28, 1959, is it now necessary for one of the relatives listed in Section 427.4 to make a new application for the military service tax credit in the event that the veteran dies after making his claim for exemption but prior to the time the Board acts on said claim?"

The applicable sections of the Code of Iowa (1958) are section 427.3 (which provides for exemptions for the property of veterans), section 427.4 (which provides for exemptions for the property of certain relatives of veterans in case the veteran does not claim exemption), and section 427.5, which reads in part as follows:

"427.5 Reduction—discharge of record—oath. Any person named in section 427.3, provided he is a resident of and domiciled in the state of Iowa, shall receive a reduction equal to his exemption, to be made from any property owned by such person and designated by him by proceeding as hereafter provided. In order to be eligible to receive said exemption or reduction the person claiming same shall have had recorded in the office of the county recorder of the county in which he shall claim exemption or reduction, the military certificate of satisfactory service, order transferring to inactive status, reserve, retirement, or order of separation from service, or honorable discharge of the person claiming or through whom is claimed said exemption; in the event said evidence of satisfactory service, separation, retirement, furlough to reserve, in-

active status, or honorable discharge is lost he may record in lieu of the same, a certified copy thereof. Said person shall file with the city or county assessor, as the case may be his claim for exemption or reduction in taxes under oath, which claim shall set out the fact that he is a resident of and domiciled in the state of Iowa, and a person within the terms of section 427.3, and give the volume and page on which the certificate of satisfactory service, order of separation, retirement, furlough to reserve, inactive status, or honorable discharge or certified copy thereof is recorded in the office of the county recorder and may include the designation of the property from which he desires said exemption or reduction to be made, and shall further state that he is the equitable and legal owner of the property designated therein. The assessor shall tabulate and deliver or file said claims with the county auditor, having his recommendations for allowance or disallowance indorsed thereon. * * *."

A reading of these statutes would, at first glance, lead one to the conclusion that only those persons enumerated in section 427.3, Code of Iowa (1958), would be required to file a claim for exemption and if none of the persons named in section 427.3 files a claim for exemption the persons enumerated in section 427.4 are eligible for the exemption in the name of the veteran, and the statute seemingly does not provide that the persons named in section 427.4, supra, must file a claim for exemption in order to be eligible to receive same. A reading of section 427.5, supra, discloses that "Any person named in section 427.3, * * *, shall receive a reduction equal to his exemption, * * *, by proceeding as hereinafter provided. * * *. Said person shall file * * * his claim for exemption * * *." Some doubt as to this conclusion appears upon a perusal of the provisions of sections 427.6, 427.7, and 426A.3, Code of Iowa (1958), which leads one to the conclusion that a claim must be filed before an exemption can be granted.

It is helpful to examine section 6946, Code of Iowa (1939), as amended by chapter 241, Acts of the 49th General Assembly, and chapter 194, Acts of the 51st General Assembly, and section 6947, Code of Iowa (1939), as amended by chapter 242, Acts of the 49th General Assembly. Section 6946 contains provisions for both the exemptions to veterans and the exemptions to relatives. Section 6947 is in part as follows:

"6947. Any person named in section 6946, provided he is a resident of and domiciled in the state of Iowa, shall receive a reduction equal to his exemption, to be made from any property owned by such person and designated by him by proceeding as hereafter provided. In order to be eligible to receive said exemption or reduction the person claiming same shall have had recorded in the office of the county recorder of the county in which he shall claim exemption or reduction, the military honorable discharge of the person claiming or through whom is claimed said exemption; in the event said honorable discharge is lost he may record in lieu of said discharge, a certified copy of said discharge. Said person shall file with the county auditor his claim for exemption or reduction in taxes under oath, which claim shall set out the fact that he is a resident of and domiciled in the state of Iowa, and a person within the terms of section 6946, and give the volume and page on which the honorable discharge or certified copy thereof is recorded in the office of the county recorder, and may include the designation of the property from which he desires said exemption or reduction to be made, and shall further state that he is the equitable and legal owner of the property designated therein. * * *."

It immediately becomes apparent that section 6947, supra, requires the relative, as well as the veteran, to file a claim for exemption. It is

when this statute appears in the Code of Iowa (1946) that it is split into two sections and, instead of referring to both 427.3 and 427.4 in 427.5, reference is made only to 427.3. The military service tax credit has been consistently construed so as to require a claim to be filed whether it is the veteran who is to be granted the exemption or a relative of such veteran. The opinions appearing at page 32, 1946 *Report of the Attorney General,* and page 44 of the 1950 *Report of the Attorney General,* are just two of many examples that the law has consistently been so construed. It would appear, in view of the legislative history of these sections, that such construction is correct. It is the apparent intent of the legislature that one make claim before one may be granted the military service tax credit.

In the letter containing your request for an opinion, you make reference to a "policy of the state tax commission to allow the claim of a deceased veteran for his widow when a veteran dies prior to the time the board passes on the claim." The state tax commission confirms the fact that such a policy has been in existence. It has been the construction by the tax commission that a claim must be filed by the relative of a veteran before said relative may be granted the military service tax credit. The policy above referred to is the lone exception to this construction. It is the opinion of this office that said policy is not consistent with the applicable statutes and, therefore, should not be upheld.

To specifically answer your question, this office is of the opinion that in order to qualify for the military service tax credit a person named in section 427.4, Code of Iowa (1958), must apply for such exemption in the event the veteran dies after making his claim for exemption but prior to the time the board of supervisors acts upon said claim.

21.4 September 8, 1959

TAXATION: Income tax withholding from nonresidents—The tax commission has no authority to require withholding agents to withhold from payments of gross income to partnerships or corporations.

Mr. John J. O'Connor, Chairman, Iowa State Tax Commission: This is to acknowledge receipt of your letter of August 26, 1959, in which you request an opinion of this office stated as follows:

"I am submitting a question to you for your consideration and opinion upon a matter of interpretation of the non-resident withholding requirements of the Iowa Income Tax Law.

"Many building contractors doing construction work in Iowa frequently sublet specialty work such as plumbing, roofing, cooling systems, heating systems, electrical wiring, etc., to subcontractors whose places of business are located outside the borders of Iowa. For the most part, these out-of-state subcontractors are corporations or partnerships. They are not individuals being paid wages or compensation for services as such.

"The Tax Commission has for some time required Iowa contractors who sublet work which is performed in Iowa to out-of-state subcontractors, to withhold 4 percent of the gross amount paid under the subcontract.

"It has recently been submitted, however, that the Tax Commission

has no authority to require an Iowa contractor to withhold from an out-of-state subcontractor who is doing business as a partnership or corporation, as the withholding requirement applies only to non-resident individuals.

"Because of far reaching importance as to whether or not the principal contractors are required to withhold from an out-of-state subcontractor who is doing business as a partnership or corporation, we respectfully request that your Department review this matter and issue a Staff Opinion setting forth your interpretation."

The relevant provisions of the Code of Iowa (1958) are as follows:

"422.16 Withholding agents and nonresidents.

"1. Excepting as provided herein and in section 422.17, every withholding agent shall deduct and withhold in each calendar year five percent of all gross income, in excess of fifteen hundred dollars, which such withholding agent pays, including the five percent so withheld, to any nonresident during such calendar year, provided, however, that on incomes derived entirely from salaries not exceeding four thousand dollars, the amount withheld shall be two percent. In case the nonresident files with the state commission a verified statement, in such form and containing such information as the commission shall prescribe, showing that any income described therein is derived from a source upon which the net income will be less than twenty percent of the gross income, the commission, if satisfied that such statement is correct, shall give to such nonresident a certificate directing the withholding agent to withhold only one percent of the described income. Upon receipt of such certificate, the withholding agent shall withhold only one percent of the income described in such certificate in excess of seventy-five hundred dollars; and no part of the first seventy-five hundred dollars shall be withheld."

This provision was amended by chapter 296 of the Acts of the Fifty-eighth General Assembly by changing the applicable percent of withholding from 5 percent to 4 percent.

"422.4 Definitions controlling division. For the purpose of this division and unless otherwise required by the context:

"* * *.

"8. The word 'resident' applies only to individuals and includes, for the purpose of determining liability to the tax imposed by this division upon or with reference to the income of any tax year, any individual domiciled in the state, and any other individual who maintains a permanent place of abode within the state."

"* * *.

"10. The word 'individual' means a natural person; and where an individual is permitted to file as a corporation, under the provisions of the Internal Revenue Code of 1954, such fictional status shall not be recognized for purposes of this chapter, and such individual's taxable income shall be computed as required under the provisions of the Internal Revenue Code of 1954 relating to individuals not filing as a corporation, with the adjustments allowed by this chapter."

"* * *.

"12. The word 'nonresident' applies only to individuals, and includes all individuals who are not 'residents' within the meaning of subsection 8 hereof."

"13. The term 'withholding agent' means any individual, fiduciary, corporation, association, or partnership in whatever capacity acting,

including all officers and employees of the state or of any municipal corporation or political subdivision of the state, that is obligated to pay or has control of paying to any nonresident any 'gross income', within the meaning of section 422.8, in excess of fifteen hundred dollars in any calendar year."

"422.32 Definitions. For the purpose of this division and unless otherwise required by the context:

"* * *.

"4. * * *.

"The words, terms, and phrases defined in subsections 1, and 3 to 10, section 422.4, division II, when used in this division, shall have the meanings ascribed to them in said section except where the context clearly indicates a different meaning."

"422.38 Statutes governing corporations. All the provisions of sections 422.15 to 422.22, inclusive, of division II, insofar as the same are applicable, shall apply to corporations taxable under this division."

It is clear from a reading of the above-quoted statutes that a withholding agent is not required to withhold from payments of gross income made to a partnership. Section 422.16, Code of Iowa (1958), makes it clear that a withholding agent must withhold from payments of gross income made to "nonresidents." The definition of the term "nonresident" states that that term only applies to "individuals," and an "individual" is defined as a "natural person." Citation of authority is unnecessary to conclude that a partnership is not an individual.

One must go into the legislative history of the withholding provisions of the Iowa income tax law to arrive at an answer as to whether withholding is required from payments of gross income to corporations whose places of business are located outside the borders of the state of Iowa.

A perusal of the applicable statutes at first leads one to the conclusion that some type of withholding is required from some nonresident corporations. The provisions of section 422.16, supra, are assimilated into the division relating to the business tax on corporations by the terms of section 422.38, supra. It is arguable that the legislature meant something when it placed the withholding provisions into the corporation tax sections. The definition of the term nonresident would seem to prevent any withholding from payments to a corporation, since the term nonresident is restricted to individuals. The definition of the term "nonresident," however, is restricted to Division II by the terms of the introductory provisions of section 422.4, supra. Section 422.32, supra, adopts for purposes of Division III almost all of the definitions of terms contained in section 422.4, supra, but does not adopt the definition of the word "nonresident." This leaves the word "nonresident" seemingly undefined for purposes of Division III of chapter 422, Code of Iowa (1958).

The Iowa law contained no provision for withholding from nonresidents until May 28, 1937, the first day following the last publication of chapter 184 of the Acts of the Forty-seventh General Assembly. This legislation provided that sections 6943-F15a, 6943-F15b and 6943-F15c (now sections 422.16, 422.17 and 422.18) were to be inserted after section 6943-F15, Code of Iowa (1935), (now section 422.15). At the time that this legislation was passed, section 6943-F34, Code of Iowa (1931), pro-

vided that all of the provisions of section 6943-F15 to 6943-F18, inclusive, of Division II shall apply, insofar as applicable, to corporations taxed under Division III. Thus, by numbering the withholding provisions 6943-F15a, 6943-F15b and 6943-F15c these provisions were assimilated into Division III by 6943-F34. A reading of the title to chapter 184 of the Acts of the Forty-seventh General Assembly indicates no intention to withhold from payments to corporations. This title reads as follows:

"AN ACT to amend chapter three hundred twenty-nine-F one (329-F1), code, 1935, and sections sixty-nine hundred forty-three-f four (6943-f4), sixty-nine hundred forty-three-f five (6943-f5), sixty-nine hundred forty-three-f eight (6943-f8), sixty-nine hundred forty-three-f nine (6943-f9), sixty-nine hundred forty-three-f fifteen (6943-f15) and sixty-nine hundred forty-three-f twenty-five (6943-f25), sixty-nine hundred forty-three-f sixty-three (6943-f63) and sixty-nine hundred forty-three-f sixty-five (6943-f65), code, 1935, all relating to the taxation of the income of individuals, fiduciaries, trusts and estates, and to the administration and collection of such tax; and to impose a tax upon certain income of any nonresident derived from sources within this state, and providing for the collection and administration of such tax, and for withholding agents, as defined herein, to withhold and pay to the board certain amounts due by them to certain nonresidents as an aid to the collection (sic) of said tax, and to appropriate certain funds."

Another problem is that if it were asserted that withholding was to be effected from certain corporations under the provisions of section 422.38, Code of Iowa (1958), the question still remains as to what corporations are nonresidents. No definition of that term as it is to apply to corporations is available.

It is the opinion of this office that the legislature did not intend to provide for withholding from gross income paid to any corporation and that section 422.38 provides no authority for the tax commission to require withholding from payments made to out-of-state corporations.

21.5 October 12, 1959

TAXATION: Property tax—Apportionment of taxes—

1. The assessor, county auditor and county treasurer have no power with respect to the apportionment of taxes.

2. The board of supervisors cannot apportion taxes on its own motion.

3. If any portion of the tax assessed against a tract of property, the title to different portions of which is vested in different parties in severalty, remains unpaid, the board of supervisors may, opon proper application, order an apportionment of the taxes remaining unpaid.

4. If no apportionment has been ordered and the land in question is sold for taxes all of the tract originally assessed which is subject to tax sale must be sold for said unpaid taxes.

Mr. Charles H. Scholz, Mahaska County Attorney: This is to acknowledge receipt of your recent letter in which you request an opinion of this office stated as follows:

"1. Where ownership of a tract of real estate, assessed and valued for tax purposes as one entire unit for the tax year 1957, becomes vested

in different parties in severalty during the 1958 tax year, but such vesting of title occurs after the County Assessor or City Assessor has completed his assessment rolls and the Board of Review has completed its work and has finally adjourned its 1958 session, does either the Assessor, the County Auditor or the County Treasurer, acting either separately or collectively, have any power to make any apportionment of the taxable valuation established for the entire tract as between the separate tracts, either with or without the joint consent and approval of each of the several owners of the separate tracts involved, or must such apportionment be made by the Board of Supervisors in accordance with the procedure which is outlined in Chapter 449 of the Code of Iowa?

"2. Assuming that the Assessor, County Auditor or County Treasurer, or all of them, do have authority to make such apportionment, what procedure must they follow in correcting the tax lists accordingly?

"3. Assuming that the Assessor, County Auditor or County Treasurer, or all of them, have such authority, and do exercise it in an intervening tax year such as 1958 or 1959, may the Assessor or the Board of Review make a different revaluation in a subsequent intervening tax year?

"4. Are the answers to any of the foregoing questions altered by the fact that the ownership of one of the tracts has vested in the State of Iowa, a county, school district, or municipality, and if so, to what extent?

"5. Assuming that neither the Assessor, County Auditor or County Treasurer has the authority to make an apportionment, and the owner of one of the tracts does not make application to the Board of Supervisors in accordance with the provisions of Chapter 449 of the Code, can the Board of Supervisors make the appropriate apportionment on its own motion, and if it does so, is such apportionment binding on the Assessor or Board of Review in intervening tax years?

"6. If the owner of one of the tracts has paid all, or a part of the entire tax assessed against the entire tract which was originally assessed as one unit, can the Board of Supervisors then make any apportionment, in view of the provisions of Section 449.1, which specifically state that apportionment may be had only 'before the tax is paid'?

"7. Assuming (a) that no correction or apportionment has been made by either the Auditor or the Board of Supervisors, (b) that the State of Iowa, a county, a school district, or a municipality owns a part only of the entire tract which was originally assessed as one unit, and (c) a part or all of the entire tax entered on the tax list remains unpaid at the time of the Treasurer's annual tax sale in the following December, is the Treasurer required to offer that part of the original tract, the ownership of which still remains in a private individual or corporation, for the collection and payment of the entire tax which was originally assessed, levied and entered upon the tax list against the entire original tract?

"8. Assuming that the owner of one of the tracts involved pays one-half of the taxes for the current year, and that a correction or apportionment of the tax levied against the entire tract is thereafter made or ordered by the Auditor or Board of Supervisors, which correction or apportionment allocates less tax to the one portion of the tract than the owner thereof has already paid, can a refund of the overpayment of tax be made to that owner, and what procedure must be followed in connection with such refund?

"9. Is the answer to any of the foregoing questions altered by the fact that such transfer of ownership was the result of a contract, the terms of which were such that the owner of the original entire tract

agreed to pay all or a particular portion of the taxes assessed in the year of sale against the portion of the tract so sold?

"10. If no correction or apportionment is made for the taxes assessed for the year in which the sale occurred, and the owner of the portion which remains subject to taxation pays the entire taxes assessed against the entire tract for that year, but desires a correction or apportionment to be made for the succeeding tax year, what procedure should be followed in making such correction or apportionment for the succeeding tax year?"

It is the opinion of this office that any apportionment to be made under the conditions described in your first question must be effected by action of the board of supervisors pursuant to the provisions of chapter 449, Code of Iowa, 1958. The assessor has no function with respect to changing assessments or making any changes on the assessment rolls subsequent to the first day of May. See section 28, chapter 291, Acts of the 58th General Assembly. The assessor may, of course, assess and list omitted property subsequent to that time under the provisions of section 443.6, Code of Iowa, 1958, but this power does not include the apportionment of valuations already established. The auditor is granted the power to correct errors in assessments and to assess and list omitted property. (Section 443.6, Code of Iowa, 1958.) There is no error in assessment involved in your question. The property presumably was correctly assessed and the need for apportionment only arises as a result of a change in ownership of a part of the tract subsequent to assessment. Thus, it appears that the auditor has no power to apportion the valuation between the portions of the tract assessed as one unit, and subsequently divided. The treasurer is given the power to demand payment of taxes upon property which is "withheld, overlooked, or from any other cause not listed and assessed." (Section 443.12, Code of Iowa, 1958.) The treasurer also, under the provisions of section 443.14, Code of Iowa, 1958, must assess all omitted property. Again, it is our conclusion that no authority is granted to the treasurer to effect an apportionment such as described in your first question.

Since your second and third questions assume that the assessor, auditor or treasurer have some authority with respect to apportionment, it is unnecessary to answer these questions.

In answer to your fourth question, no power with respect to apportionment of taxes is granted to the assessor, auditor or treasurer. This is true no matter whether the several owners of the real estate in question are individuals or governmental units.

The authority of the board of supervisors with respect to the apportionment of taxes when the property has been assessed as one parcel and subsequently the title is vested in different parties in severalty is contained in chapter 449, Code of Iowa, 1958. Section 449.1 reads as follows:

"449.1 Application. When a tract of real estate has been assessed and taxed as one item of property, and thereafter and before the tax is paid, the title to different portions of said real estate becomes vested in different parties in severalty, and the said owners are unable to agree as to what portion of the total tax each portion of the real estate should bear, any of said parties may file with the board of supervisors a written application for the apportionment of said tax."

This section provides, among other things, for the conditions which must be present in order to commence proceedings to apportion taxes

on real estate. In order to commence such proceedings the statute is clear that any one of the parties who is an owner in severalty of a portion of the tract of real estate which was assessed and taxed as one item of property must file a written application for apportionment. To construe this statute in such a manner as to allow the board of supervisors to apportion taxes on its own motion would be to contravene its express provisions.

In reply to your sixth question, you are advised that if all the tax assessed against the entire tract has been paid there is nothing left to apportion. If there is some portion of the tax remaining to be paid it would appear to be proper, if application for apportionment is made, for the board of supervisors to apportion the tax remaining unpaid. The statute does not specifically provide that apportionment may be had only before the tax is paid. The statute provides that the title to the different portions of real estate must become vested before the tax is paid in order for the board of supervisors to properly order an apportionment of the taxes. With respect to the taxes already paid upon the entire tract prior to an application for an order of apportionment, such taxes are properly paid and the only amount left to be apportioned is the amount of taxes on the entire remaining unpaid.

The answer to your seventh question depends upon the entity which owns a part of the entire tract originally assessed as one unit and the time when such entity acquires said portion of the tract originally assessed as one unit. If the State of Iowa becomes the owner of the portion in question, there is no lien for unpaid taxes against the portion owned by the State. This is by virtue of the provisions of section 445.28, Code of Iowa, 1958, as interpreted by the attorney general in an opinion appearing at page 692 of the 1938 *Report of the Attorney General.* If the property is acquired by a county, school district or municipality devoted to public use and not used for pecuniary profit, prior to date of levy, said property is exempt from taxation under the provisions of section 427.1(2), Code of Iowa, 1958, as interpreted by an opinion of the attorney general dated March 26, 1959, a copy of which is enclosed. If said property is acquired by a county, school district or municipality subsequent to date of levy, said property is subject to taxation. If a tax sale is conducted it must be conducted upon the entire property (except as limited by sections 445.28 and 446.34, Code of Iowa, 1958. If the sale is conducted only upon a portion of the property by reason of sections 445.28 and 446.34, Code of Iowa, 1958, the property must be offered for the entire tax originally assessed, levied and entered upon the tax list upon the entire tract. There is no duty to apportion taxes on the initiative of the taxing authorities. In the absence of an application for apportionment and the entry of an apportionment order by the board of supervisors, the portion of the tract upon which the tax is a lien must be offered for sale for the entire tax. In this connection see 1940 *Report of the Attorney General,* page 474.

Your eighth question is partially answered in the answer to your sixth question. The taxes paid prior to the apportionment order by the board of supervisors are paid upon the entire tract. The only taxes left to apportion between the portion of the tract assessed as one unit are the half of the taxes remaining unpaid. There is no possibility of refund, thus the question of whether a refund can be made need not be answered.

In answer to your ninth question, you are advised that this office per-

ceives no difference in the answers to any of the preceding questions by virtue of the fact that one person was to pay all or a certain portion of the taxes in the year of sale. Any order of apportionment by the board of supervisors would not, as between the parties to the contract, alter any of the provisions of the contract.

In answer to your tenth question, you are advised that if the owner of a portion of the tract desires relief in a year subsequent to the year that the tract is divided and he had paid the taxes on the entire tract for the preceding year, there would appear to be no reason why he could not apply to the board of supervisors for an order of apportionment in the manner provided for in chapter 449, Code of Iowa, 1958.

21.6 October 19, 1959

TAXATION: Sales tax—Exemption—

1. The fact that sales are engaged in without motive of profit, standing alone, does not necessarily result in the conclusion that such sales are not engaged in with the object of gain, benefit or advantage.

2. Whether a particular activity is an educational activity is primarily a question of fact.

3. In order to find that gross receipts are exempt under the provisions of section 422.45(3), Code of Iowa, 1958, it must appear that the gross receipts must be from an educational, religious or charitable activity and that the entire net proceeds (the amount left after operating expenses and maintenance costs are paid) are expended for educational, charitable or religious purposes.

Mr. John J. O'Connor, Chairman, Iowa State Tax Commission: This is to acknowledge receipt of your recent request for an opinion of this office as to the applicability of the Iowa retail sales tax to certain activities of the Community Drama Association of Des Moines, Iowa, which has pending an assessment appeal before the state tax commission. Under the provisions of section 422.54, Code of Iowa, 1958, the state tax commission must decide whether the Iowa retail sales tax is applicable to the activities of the Community Drama Association of Des Moines and the amount of sales tax due and owing, if any. This office may not assume the function of the state tax commission in rendering a decision upon this matter. However, acting in the capacity of legal adviser to officials of the State of Iowa, this office may answer certain legal questions which arise in connection with this matter, namely:

1. What tests are to be applied to determine whether a certain activity constitues a business?

2. What constitutes "educational activities" within the meaning of that term as used in section 422.45(3), Code of Iowa, 1958?

3. What is the meaning of "entire net proceeds" as that term is used in section 422.45(3), Code of Iowa, 1958?

With respect to your first question, your request indicates that it is the contention of the Drama Association that the Iowa retail sales tax should not apply to said Association's sales of tickets to dramatic presentations for the reason that the Association is a nonprofit activity.

The law imposing Iowa retail sales tax on tickets of admission (section 422.43, Code of Iowa, 1958) is as follows:

"There is hereby imposed, beginning the first day of April, 1937, a tax of two percent upon the gross receipts from all sales of tangible personal property * * * ; and a like rate of tax upon the gross receipts from all sales of tickets or admissions to places of amusement * * * ."

Other statutes relevant to this question are as follows:

"422.42 Definitions. The following words, terms, and phrases, when used in this division, have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

" * * * .

"4. 'Business' includes any activity engaged in by any person or caused to be engaged in by him with the object of gain, benefit, or advantage, either direct or indirect.

"5. 'Retailer' includes every person engaged in the business of selling * * * tickets or admissions to places of amusement * * * .

"6. 'Gross receipts' mean the total amount of the sales of retailers, * * * ."

Thus, it is to be noted that before one has gross receipts he must be a retailer and a retailer is one engaged in a business and business is any activity engaged in with the object of gain, benefit, or advantage. If there be no activity engaged in with the object of gain, benefit, or advantage, there are no gross receipts upon which to impose the Iowa retail sales tax.

The sales tax laws of the states of California, Ohio, and Arizona contain provisions identical to the "gain, benefit, or advantage" provisions of the Iowa retail sales tax law. The courts of those states have had occasion to interpret these provisions.

In the case of *Union League v. Johnson*, 18 Cal. 2d 275, 115 P. 2d 425, a nonprofit social club operated dining rooms and a bar at which were sold food and drinks to members only at a loss. The loss on the operation was made up from dues paid by members. The club contended that it was not subject to the California sales tax because the sales were not made with the object of gain, benfit, or advantage. In answer to this contention, the California Appeals Court said:

"It is significant that the statute does not include the word 'profit' in its definition but imposed a tax upon the transaction of one conducting business 'with the object of gain, benefit or advantage, either direct or indirect'. Assuming that no profit was either intended or realized by the club from the operations of its dining rooms and bar, it does not follow that there was no 'gain, benefit or advantage'. Few persons would go to a club without these facilities and they undoubtedly largely contribute to the success of such an enterprise."

In *Los Angeles City High School District v. State Board of Equalization*, 71 Cal. App. 2d 669, 163 P. 2d 45, the school district sold property no longer needed for school purposes. The court held that the sales were subject to the tax, stating that the sales were
" 'business' and an 'activity' for 'gain, benefit or advantage, either direct or indirect' as those terms likewise are used in the act, and the term 'business' is not used in the commercial sense attributed to it by appel-

lants but must be interpreted in the light of the statutory definition set forth in the act."

In State ex rel City Loan and Savings Co. of Wapakoneta v. Zellner, 133 Ohio St. 263, 13 N.E. 2d 235, the Ohio court held that when a chattel mortgagee took possession of the mortgaged goods and sold same the object was gain, benefit or advantage and that those terms did not necessarily mean that the sale need be conducted with the idea of profit.

The Arizona court in *O'Neil v. United Producers & Consumers Co-op.,* 57 Ariz. 295, 113 P. 2d 645, held that sales by a nonprofit cooperative organized under the Arizona Co-operative Marketing Act were subject to the Arizona sales tax for the reason that such sales were engaged in with the object of gain, benefit or advantage.

You are advised that in order to find that the amount derived from the sale of memberships to the Community Drama Association of Des Moines are "gross receipts" there must be a finding that the sales were engaged in with the object of "gain, benefit or advantage." The fact that the sales were engaged in with no motive of profit does not necessarily mean that the sales were not engaged in with the object of gain, benefit or advantage. If the sales are engaged in with the object of advancing or improving the position of the association, it may be said that the sales are engaged in with the object of gain, benefit or advantage. Whether the sales of this association fall within this category is a matter of fact which it is the function of the tax commission to decide.

Your request further indicates that there is some doubt as to the construction to be placed upon that portion of section 422.45(3), Code of Iowa, 1958, which relates to the exemption of gross receipts from educational activities under certain circumstances.

Section 422.45(3), Code of Iowa, 1958, reads as follows:

"422.45 Exemptions. There are hereby specifically exempted from the provisions of this division and from the computation of the amount of tax imposed by it, the following:

" * * * .

"3. The gross receipts from sales of tickets or admissions to state, county, district and local fairs, and the gross receipts from educational, religious, or charitable activities, where the entire net proceeds therefrom are expended for educational, religious, or charitable purposes."

You have indicated that there is some doubt as to whether the act of presenting amateur theatrical productions by the Community Drama Association of Des Moines can be classified as an educational activity within the meaning of the statute quoted above.

The Articles of Incorporation of this association filed with the secretary of state provide, in part, as follows:

"The business and objects of this Association shall be to conduct a school or drama association, producing amateur theatrical productions, for educational, civic and benevolent purposes. And to this end it may * * * give amateur theatrical productions and may charge admission to said theatrical productions or entertainments; may conduct free, or aid entertainments of an educational or literary character, and do anything and everything provided in chapter 394 of the 1931 Code of Iowa, and

anything and everything incident to or necessary for the carrying out of its objects or purposes."

You are advised that whether the act of presenting amateur theatrical presentations is an educational activity is primarily a question of fact to be decided by the tax commission when passing upon the applicability of the Iowa retail sales tax to sales of admissions to such presentations. Your attention is directed to the New York Court of Appeals decision *of Claim of Guerin*, 298 N. Y. 46, 80 N. E. 2d 326, and *Boston Symphony Orchestra, Inc., v. Board of Assessors of the City of Boston*, 294 Mass. 248, 1 N.E. 2d 6, a decision of the Supreme Judicial Court of Massachusetts. One decision holds that an organization formed for the purpose of encouraging musical acts which presented operatic productions was organized solely for educational or literary purposes. The other decision contains statements to the effect that the Boston Symphony, when giving concerts, is not using property for educational purposes. These cases set out many of the tests deemed to be relevant to determine whether a particular activity is educational. Among them are the purposes for which the entity is organized, the need or lack of need for teachers and a regular class of instruction, whether such activities have traditionally been regarded as educational and the competition or lack of competition with activities admittedly not educational.

These decisions and the numerous distinctions made and tests presented illustrate how highly factual is the determination of whether a particular activity is or is not educational.

With respect to your third question, section 422.45(3), Code of Iowa, 1958, provides that there is exempted from the Iowa retail sales tax "the gross receipts from educational, religious, or charitable activities when the entire net proceeds therefrom are expended for educational, religious, or charitable purposes."

It can be seen from the wording of the statute that initially there must be an educational, religious or charitable activity. The gross receipts from this educational, religious or charitable activity are exempted from the sales tax if the entire net proceeds from this activity are expended for educational, religious or charitable purposes. Net proceeds are those proceeds derived from the activity over and above the expenses of conducting the activity. Net is ordinarily taken to mean clear of all deductions and charges. The supreme court of Iowa in *Keokuk Waterworks Company v. Keokuk*, 224 Iowa 718, 277 N.W. 291, said:

"'Net' means what is left after operating expenses and maintenance costs are paid."

A similar conclusion was reached in *In Re Estate of Whitman*, 221 Iowa 1114, 266 N.W. 28. These net proceeds must be expended for educational, charitable or religious purposes in order that the gross receipts from the educational, charitable or religious activity be exempted from the Iowa retail sales tax. Applying these considerations to the case at hand in order to find the gross receipts from the sale of admissions to performances conducted by the Community Drama Association of Des Moines to be exempt from the Iowa retail sales tax, the tax commission must find that said performances are an educational, religious or charitable activity. If this test is satisfied, the tax commission must further find that the entire net proceeds from this activity (the amount left after payment of expenses to conduct such activity) are expended for char-

itable, educational or religious purposes. If such is the case, the gross receipts are exempt. If not, the gross receipts are subject to tax.

21.7 November 30, 1959

TAXATION: Forms approved for administering chapter 306, Acts of the 58th G. A. Statute requires notice of personal tax lien be filed with the county recorder. Lien and release need not be recorded.

Mr. John J. O'Connor, Chairman, Iowa State Tax Commission: This will acknowledge receipt of your letter dated September 28, 1959, concerning the proposed official forms for use in administering chapter 306, Acts of the 58th G. A. As stated in your letter, chapter 306, Acts of the 58th G. A., provides that the county treasurer may, if he had reason to believe that a resident owner of taxable personal property is about to remove from the county, or dispose of his property, declare the taxes immediately due and payable, and file a notice of lien with the county recorder. It is this notice of personal tax lien, together with the release thereof, which you have submitted to this office for an opinion as to their legal sufficiency.

Insofar as the notice of personal tax lien is concerned, it is suggested that lines 14 and 15 be altered by striking the words, "except as particularly exempted" and inserting in lieu thereof, "subject to the provisions contained in." This suggestion is made for the reason that subsection 2 of chapter 306, Acts of the 58th G. A., provides neither an exemption from the tax, nor prevents the county treasurer from acting under subsection 1 of the Act, but rather seeks only to establish the rights of prior purchasers and mortgagees.

The submitted form entitled Release of Personal Property Tax Lien is, in the opinion of this department, legally sufficient and fully meets the requirements necessary for release of lien.

Your letter also requests an opinion as to whether it is necessary for the county recorder to record the lien as well as file it; and further, whether the county treasurer having collected the taxes, is required to file the release of personal property tax lien with the recorder, and in the event the answer to this latter question is in the affirmative, whether the release must be recorded.

In response to these questions it becomes necessary to examine chapter 306, Acts of the 58th G. A., which is set out in pertinent part as follows:

"Section 1. Chapter four hundred forty-five (445), Code 1958, is hereby amended by adding the following section:

"Whenever the county treasurer shall have reason to believe that any owner of taxable personal property, who is a resident of the state of Iowa and against whom personal property taxes have been assessed, is about to remove from the county or is about to dispose of his personal property, he shall immediately regard and declare the taxes due and payable, shall file a notice of such lien with the county recorder, and shall proceed immediately to collect such taxes, together with costs and any interest and penalty that may be due, by distress and sale of the personal property so assessed which is not exempt from taxation. In the event the county treasurer proceeds to collect such taxes prior to date of levy, the

amount of such taxes shall be presumed to be taxable value of such property multiplied by the tax rate established at the date of levy next preceding."

It is believed significant that the legislature used the word "file" rather than "record" in setting out the duty of the county treasurer. The words have a separate and distinct meaning in the law and may not be considered synonymous. Filing means merely depositing the instrument with the recorder, whereas recording means transcribing or writing the instrument in the records of the recorder, *Naylor v. Moody, (Ind.) 2 Blackford 247.*

It must, therefore, be presumed that the legislature in using the word "file," intended something other than "record."

So far as the release is concerned, it would seem entirely consistent with the statute as above set forth to require the county treasurer upon collecting the taxes, to file the release with the county recorder. Inasmuch as it is not necessary that the lien be recorded, it is likewise unnecessary for him to record the release.

NOTICE OF PERSONAL TAX LIEN

State of Iowa, County of.....ss.
Whereas, the undersigned, Treasurer of.....County, Iowa, has reason to believe that the taxpayer, hereinafter named, a resident of the State of Iowa, is about
* to remove from the county
* dispose of his personal property, and
Whereas, there has been personal property taxes assessed against this taxpayer which are now unpaid,
Now, therefore, the Treasurer of said County pursuant to authority granted in Sec. 1—Chapter 306—Acts of the 58th General Assembly, State of Iowa, does hereby declare all personal property taxes hereinafter described, are now due and payable and are a lien in favor of.....County, Iowa upon all property and rights to property belonging to the taxpayer below named, except as particularly exempted by Section 2, Chapter 306, Acts of the 58th General Assembly.

.....
Name of Taxpayer

.....
Address

Year Assessed

Personal Property Tax — TOTAL
Interest
Penalty
Costs
Total

Witness my hand and seal of this office at.....,
Iowa, this.....day of 19.....,

.....
Treasurer.....County, Iowa

* If this does not apply, mark off.

PERSONAL PROPERTY TAX LIEN

.....County, Iowa
vs.
Property of
.....
.....

State of Iowa)
) ss.
.....County)
Filed this.....day of.....
19..... at..... o'clock..... M.
as document or file no.....
.....
Recorder
by .....
Deputy

RELEASE OF PERSONAL PROPERTY TAX LIEN

State of Iowa,.....County
I, the undersigned, Treasurer of.....County, Iowa, do hereby certify that the lien for personal property taxes filed with the County Recorder of this County on..... ....., 19....., and entered by Recorder as document or file no....., against the property of ....., in the amount of $..... is paid, satisfied and discharged.
WITNESS my hand and seal of this office at..... Iowa, this.....day of....., 19.....
.....
Treasurer of.....County, Iowa

RELEASE OF PERSONAL PROPERTY TAX LIEN

Against the property of
.....
in favor of
.....County, Iowa
STATE OF IOWA)
) ss.
.....County)
.....County
Filed this.....day of
.....19.....at.....
o'clock.....M., as document or file no.....
.....
Recorder
by.....
Deputy

21.8 December 8, 1959

TAXATION: Moneys and credits—Funds held in an employees' trust fund for benefit of the employees of banks, insurance companies, or other private concerns are required to be listed for taxation by the trustee of such employees' pension fund.

Mr. John J. O'Connor, Chairman, Iowa State Tax Commission: This will acknowledge receipt of your letter of September 18, 1959, in which you present the following questions for the consideration of this office:

"(1) Bank 'A', located within the state of Iowa, is acting as trustee of a certain employees' pension fund trust set up under a trust agreement, for the benefit of employees of a particular manufacturing concern located within the state of Iowa. Such bank, as trustee, is holding the

funds of said employees' pension fund trust in a separate account and those funds are a part of the bank's trust accounts. The trust is, of course, a separate entity. Are those funds so held by the bank as trustee taxable and subject to the Iowa moneys and credits tax? If so, are such funds taxable to the separate entity of which bank 'A' is acting as trustee?

"(2) Bank 'B', located within the state of Iowa, has set up under a written agreement an employees pension fund trust for the benefit of such bank's own employees, and the funds of such trust have been segregated and deposited in a separate account among the general trust accounts of the bank. Bank 'B', along with two individuals, is acting as co-trustee of the trust fund under the trust agreement. The two individual trustees are residents of Iowa. Are the funds of such employees' pension fund trust so deposited in bank 'B' taxable and subject to the Iowa moneys and credits tax? If so, are such funds taxable to the separate trust entity of which bank 'B' is a co-trustee?

"(3) Company 'C' is a mutual insurance company with its principal office and place of business in Iowa. It has set up under a written agreement an employees' pension fund trust for the benefit of the company's own employees, and the funds of such trust are kept within the state of Iowa. The trustees of such trust being two officers and one other employee of such insurance company, and they are all residents of the state of Iowa. Such employees' pension fund trust had a balance in a savings account in an Iowa bank as of January 1, and it also held shares of capital stock of foreign corporations not exempt under 1958 Iowa Code section 427.1(20), also some mortgages on Iowa real property. Assuming that all of the funds of such trust are taxable items, are they taxable to said employees' pension fund trust as a taxable entity, and subject to the Iowa moneys and credits tax? If the foregoing question is answered in the affirmative, would the answer be the same if the company involved were a stock insurance company rather than a mutual insurance company?

"(4) Are items of moneys and credits located within the state of Iowa, that ordinarily would be taxable if held by resident individuals of Iowa, be taxable to a trust set up for the benefit of employees of banks, insurance companies, and other private concerns, as an employees' pension fund, where those items of property are kept within the state of Iowa, regardless of whether the trustee is a bank, insurance company, or other corporation, or individual and where the trustee is also located within the state of Iowa?"

In response to questions (1) and (2), your attention is directed to section 428.1, Code of Iowa (1958), which reads in pertinent part as follows:

"428.1 Listing—by whom. Every inhabitant of this state, of full age and sound mind, shall list for the assessor all property subject to taxation in the state, of which he is the owner, or has the control or management, in the manner herein directed:

" * * * .

"3. The property of a beneficiary for whom the property is held in trust, by the trustee."

We can find no statute which would exempt funds held in a pension trust fund. Thus, under the well-accepted rule that unless specifically exempted, property is subject to taxation, it must be concluded that the pension trusts held by the bank as trustees and not solely as a depository, described in questions (1) and (2) of your letter, are subject to the

moneys and credits tax imposed by chapter 429, Code 1958, and under section 428.1, supra, are taxable to and required to be listed by the trustee of the fund, be he an individual, corporate, sole or cotrustee.

In response to question (3), you are advised that whether the sponsoring organization of the pension trust is a mutual or stock insurance company is not significant in determining whether the trust is to be taxed as moneys and credits. This conclusion is reached since section 428.1(3), supra, does not purport to tax the interest of the settlor, but rather seeks to tax the interest of the beneficiaries in the trust by requiring the trustee to list the trust property for taxation, *In re Assessment of Taxes v. Van Dyke*, 229 Iowa 295, 294 N.W. 319.

In the situation presented in your fourth question, it is the opinion of this office that items of moneys and credits which ordinarily would be taxed to a resident individual are likewise taxable to the trustee of an employees' pension trust fund, be that trust for the benefit of employees of banks, insurance companies or other private concerns. The fact that the trustee is a bank, insurance company or other corporation, will not affect the taxability of the trust, so long as the trust is an active trust and the trustee is not acting solely as a depository.

21.9 February 8, 1960

TAXATION: Assessors—Assessment expense fund—The auditor shall issue warrants on all requisitions issued by assessor for expenses, whether funds are vailable or not at time of presentation; unless the requisitions issued exceed expenditures allowed by yearly budget.

Mr. John J. O'Connor, Chairman, Iowa State Tax Commission: This will acknowledge receipt of a letter from Ray E. Johnson, Assistant Director, Property Tax Division, Iowa State Tax Commission, dated December 21, 1959. The letter set forth the following problem:

"An Opinion was recently rendered by Oscar Strauss, Assistant Attorney General, that any balance remaining in the City Assessor's fund at the end of this year could not be used in 1960.

"We have a letter from the City Assessor of Fort Madison reading as follows:

'State Tax Commission,
State Office Building,
Des Moines, Iowa

Mr. Ballard B. Tipton,
Director Property Tax

'It has been brought to my attention by the County Auditor that there will be no funds available for the operation of this office before late February or possibly March. I have been advised that it will be unnecessary to write requisitions as he will refuse to write the warrants.

'The reason for this is that tax money is very slow in coming in, and our budget is only 1.311 mills, consequently we will receive only about 1/100 of the total, and this would not pay our salaries & expenses during January & February.

'Is it possible to transfer funds that are not immediately needed elsewhere to the assessment expense fund?

'Please advise if this situation exists elsewhere, and any possible solutions.

Most Sincerely,
/s/ Willis L. Holland
Willis L. Holland,

cc. Lee Co. Auditor
Mr. E. F. McDonough'

"In view of these facts, we ask for an Opinion as to whether or not the County Auditor shall issue warrants on the City Assessor's requisitions on the City Assessor fund, before funds are available, but not exceeding the anticipated tax collection for 1960 for the said fund."

In response thereto, your attention is directed to chapter 291, section 16 of the Laws of the 58th General Assembly (1959) wherein the preparation of the budget and expenditures thereunder for the assessor's office is considered. A perusal of the aforementioned section fails to disclose any provision that states the assessor can issue requisitions only after the time when there are funds in "assessment expense fund"; to the contrary, the only provision for requisitioning funds applicable to the above situation is found in section 16, numbered paragraph "4." at lines 53 and 54, to wit:

"The assessor shall not issue requisitions so as to increase the total expenditures budgeted for the operation of the assessor's office."

In view of the above, the assessor cannot exceed that part of the anticipated tax collection allowed by the budget for the "assessment expense fund." Nevertheless, no statutory provision can be found that states that the assessor shall issue requisitions only when funds are available in the treasurer's office. When chapter 74, Code of Iowa (1958), is considered in conjunction with chapter 291, Laws of the 58th G.A. (1959), the answer to the foregoing problem becomes evident, that is, the assessor may issue requisitions until they equal the yearly anticipated revenue for his office, and if funds are unavailable at the time of presentation for payment, the procedure outlined in chapter 74 must be followed.

In conclusion, the auditor must honor these requisitions unless their total exceeds the expenditures allowed by the yearly budget, and issue warrants in accordance therewith.

21.10 February 8, 1960

TAXATION: Assessors—Section 66, chapter 291, Acts of the 58th G.A., is a nullity since it seeks to amend a repealed statute.

Mr. Robert Wilson, Muscatine County Attorney: This will acknowledge receipt of your letter of September 24, 1959, in which you request the opinion of this department on the following question:

"Chapter 291 of the Acts of the 58th General Assembly repealed Chapters 405, 405A, 441, 442 of the 1958 Code of Iowa and provided as follows, 'the following 54 sections are enacted in lieu thereof.' Section 66 of the

said Chapter 291, which attempts to amend Section 443.13 of the 1958 Code of Iowa, is not one of the 54 sections referred to in said Chapter 291.

"An opinion would be appreciated as to whether or not the provisions of Chapter 291, Section 66 of the Acts of the 58th General Assembly became law as of the effective date of this act?

"If the said Section 66 is not law are the provisions of 441.13, 1958 Code of Iowa, to be followed by the assessors?

"If your opinion is that neither of the above mentioned are in effect would you advise as to the procedure to be followed by the assessors?"

The following statutory provisions are relative to this inquiry:

"441.13 Actual, assessed, and taxable value. All property subject to taxation shall be valued at its actual value which shall be entered opposite each item, and shall be assessed at sixty percent of such actual value. Such assessed value shall be taken and considered as the taxable value of such property upon which the levy shall be made. The actual value in such cases shall be one and two-thirds times the assessed value as shown by the assessment rolls and may be so determined and ascertained.

"In arriving at said actual value the assessor shall take into consideration its productive and earning capacity, if any, past, present, and prospective, its market value, if any, and all other matters that affect the actual value of the property; and the burden of proof shall be upon any complainant attacking such valuation as excessive, inadequate, or inequitable."

Enacting clause of chapter 291, Acts of the 58th G. A.:

"Chapters four hundred five (405), four hundred five A (405A), four hundred forty-one (441) and four hundred forty-two (442), Code 1958, are hereby repealed and the following fifty-four (54) sections are enacted in lieu thereof:

" * * * .

"Sec. 66. Section four hundred forty-one point thirteen (441.13), Code 1958, is hereby amended by striking the period (.) in line four (4) and inserting in lieu thereof the following: '; except that in the case of merchandise inventories of retailers, such actual value shall be reduced, to reflect abnormal obsolescence, by one percent (1%) for each number (or major fraction thereof) of annual turnovers of merchandise less than twelve (12) as disclosed by the books and records of the business concerned, or as determined by the assessor in the absence of such books and records.' "

The basic question to be determined is whether an act, expressly repealed, may be effectively amended.

The question has not been decided in this jurisdiction; however, it has been considered by other courts which have applied the following rules:

Where the amendatory act is complete in and of itself, and is capable of being enforced and administered without reference to the repealed act, it is considered an effective act. The reference to the repealed act is dismissed as surplusage, and the will of the legislature as embodied in the provisions of the attempted amendment as enforced as an independent act. *Harris v. State ex rel.*, 228 Ala. 100, 151 So. 858.

Where, however, it is clear that the legislature enacted the amendment as part of a plan in which the continued existence of the repealed statute

is necessary, or where such intention is indicated by the fact that the amendment, standing alone, is unintelligible or incomplete, the provisions of the attempted amendment cannot be enforced. *State v. Cognevich*, 124 La. 414, 50 So. 439.

Some jurisdictions when faced with the problem have refused to consider the legislative intent and have stated flatly that an attempt to amend a repealed statute is invalid and abortive. *Helt v. Helt*, 152 Ind. 142, 52 N.E. 699.

It remains to apply these rules to the facts submitted. An examination of section 441.13, Code 1958, (the repealed act) shows that this section provided that all taxable property is to be valued at actual value, and assessed at sixty percent of actual value. Section 66, chapter 291, Acts of the 58th G. A., supra, (the amendatory act) seeks to establish an exception to the general rule contained in section 441.13, by providing a reduction from actual value on merchandise inventories having a slow turnover.

It can readily be seen that the amendatory act, being an exception to the act amended, is wholly dependent on the original act, and can be understood or administered only by reference to the original act.

Therefore, under either of the rules adopted by the courts, our conclusion must be that section 66, chapter 291, Acts of the 58th General Assembly, is a nullity.

Your question also asks whether section 441.13, Code of Iowa (1958), is to be followed by the assessors. The answer is no, since that provision was expressly repealed. However, the identical provision was re-enacted by section 21, chapter 291, Acts of the 58th G. A., and the assessors must proceed under this section.

21.11 March 15, 1960

TAXATION: Homestead and military service tax credit: (1) Person purchasing real property under installment contract is not a bona fide purchaser within sections 425.7(3) and 426A.6, Code of Iowa (1958).

(2) County treasurer has duty to determine whether person is a bona fide purchaser within statutes above.

John J. O'Connor, Chairman, Iowa State Tax Commission: This will acknowledge receipt of your letter of February 26, 1960, in which you request the opinion of this department relative to the following question:

"The following provision is contained in section 425.7(3), Code of Iowa 1958:

'In any case where a claim is so disallowed by the state tax commission and no appeal is taken from such disallowance, any amounts of credits allowed and paid from the homestead credit fund shall become a lien upon the property on which said credit was originally granted, if still in the hands of the claimant, and not in the hands of a bona fide purchaser and any amount so erroneously paid shall be collected by the county treasurer in the same manner as other taxes and such collections shall be returned to the state tax commission and credited to the homestead credit fund. The state tax commission shall also have the authority to

institute legal proceedings against a homestead credit claimant for the collection of all payments made on such disallowed credits.'

"Section 426A.6, Code of Iowa 1958, which is a part of the military service tax credit law, contains the following provision:

'In any case where a claim is so disallowed by the state tax commission and no appeal is taken from such disallowance, any amounts of credits allowed and paid from the military service tax credit fund shall become a lien upon the property on which said credit was originally granted, if still in the hands of the claimant, and not in the hands of a bona fide purchaser, and any amount so erroneously paid shall be collected by the county treasurer in the same manner as other taxes and such collection shall be returned to the state tax commission and credited to the military service credit fund. The state tax commission shall also have the authority to institute legal proceedings against a military service tax exemption claimant for the collection of all payments made on such disallowed exemptions.'

"A 'bona fide purchaser' is mentioned in both sections 425.7(3) and 426A.6, 1958 Code. Is a purchaser under an installment contract, regardless of the amount paid on the contract, a 'bona fide purchaser' as the term is used in said Code sections 425.7(3) and 426A.6?

"Whose duty and responsibility is it to determine whether the property on which the credit was originally granted is in the hands of a 'bona fide purchaser' when it is no longer in the hands of the claimant at the time the claim for credit was disallowed by the state tax commission and no appeal was taken from such disallowance?"

The general rule as to whether a contract purchaser may be a bona fide purchaser is stated in 92 *C. J. S.* 216, and provides as follows:

"The doctrine of bona fide purchaser applies only to the purchaser of the legal title. One who buys a mere equitable title to land is not a bona fide purchaser, but takes only such title as his vendor has, and subject to all defenses good against him, although in fact such purchaser had no notice of them."

This principle has been approved by the supreme court of Iowa in *Bell v. Pierschbacher*, 245 Iowa 436, 62 N. W. 2d 784, where the court stated:

"So it has been repeatedly held that actual payment of the purchase price before notice is necessary to constitute a bona fide purchaser. As sometimes said, a purchaser without notice, to be entitled to protection must be such not only at the time of the contract or conveyance, but also at the time the purchase price is paid."

It must, therefore, be our conclusion that a person buying real property pursuant to an installment contract is not a bona fide purchaser within sections 425.7(3) and 426A.6, Code of Iowa (1958).

As to the second question contained in your letter, it is noted that under sections 425.7(3) and 426A.6, supra, the county treasurer is required to recover any amount of the homestead or military service credit erroneously paid. This being so, it is entirely consistent to require the county treasurer to determine whether the property on which the credit was originally granted is in the hands of a "bona fide purchaser" when it has been sold at the time of the disallowance by the state tax commission.

21.12 June 1, 1960

TAXATION: **Property tax—Exemption**—An opinion interpreting the exemption pertaining to goods held in a public warehouse for ultimate sale or resale, under chapter 302, Acts of the Fifty-eighth General Assembly (1959).

Mr. John J. O'Connor, Chairman, Iowa State Tax Commission: This will acknowledge receipt of a letter from Ballard B. Tipton, director, property tax division, state tax commission, wherein the following inquiries were submitted:

"The Property Tax Division respectfully requests an official opinion on the following questions pertaining to Chapters 202 and 340, Laws of the 58th G.A.

"1. What legal meaning is to be given the word 'retail' where same appears in line 10 of Chapter 302, Laws of the 58th G.A.?

"2. Where the words 'provided such personal property is not offered for sale or sold by the owner at retail directly from the public warehouse' appear in lines 9 and 10 of said Chapter 302, is that part of such wording ending 'not offered for sale' to be read and interpreted as though it were separate and apart from the words that follow in said lines 9 and 10, wherein appears the word 'retail'?

"3. Sections 428.18 and 428.19, 1958 Code of Iowa, contain provisions respecting a warehouseman. Do the provisions of Chapters 302 and 340, Laws of the 58th G.A., limit the scope of or make ineffective the provisions of said Code Sections 428.18 and 428.19?

"4. Does Chapter 302, Laws of the 58th G.A., exempt from taxation merchandise in a public warehouse when such merchandise is owned by a person, firm or corporation maintaining an office at the same city or town in the state of Iowa where such warehouse is located, and having their own representatives (employees and sales agencies) who sell such merchandise to their various outlets?

"5. Does Chapter 302, Laws of the 58th G.A., exempt from taxation merchandise in a public warehouse, which merchandise is owned by a person, firm or corporation maintaining their own office and representatives and other company-owned warehouses, but who in addition also use public warehouses for storing of some of their merchandise?"

Chapter 302 of the Laws of the Fifty-eighth General Assembly (1959) reads as follows:

"AN ACT to amend chapter four hundred twenty-seven (427), Code 1958, to provide for tax exemption of goods held for sale or stored in a public warehouse.

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

"Section 1. Section four hundred twenty-seven point one (427.1), Code 1958, is hereby amended by adding a new subsection thereto as follows:

'All personal property intended for ultimate sale or resale, with or without additional processing, manufacturing, fabricating, compounding or servicing, stored in a warehouse of any person, copartnership or corporation engaged in the business of storing goods for profit as defined in section five hundred forty-two point fifty-eight (542.58), Code 1958, provided such personal property is not offered for sale or sold by the owner at retail directly from the public warehouse.' "

This is a tax exemption statute and, therefore, must be strictly construed and, if there is any doubt upon the question, it must be resolved against exemption. *Cornell College v. Bd. of Review of Tama County*, 248 Iowa 388, 81 N.W. 2d 25 (1957).

Further, your attention is directed to chapter 340, Acts of the 58th G.A. (1959), which amends section 542.58, the section referred to in chapter 302 set forth above. Chapter 340 reads as follows:

"AN ACT to define a public warehouse engaged in the business of storing goods for profit, as provided by section five hundred forty-two point fifty-eight (542.58), Code 1958.

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

"Section five hundred forty-two point fifty-eight (542.58), Code 1958, is hereby amended by adding a new subsection thereto as follows:

'A public warehouse shall mean a warehouse which is engaged in the business of storing goods for others for profit, which issues negotiable or non-negotiable warehouse receipts to the owners of goods stored therein, operating under a bailor-bailee relationship, offering and making available its facilities to the public generally under uniform tariffs or schedules of charges and rates for various commodities, products or services and always holding out or utilizing its facilities for public storage for hire and not for storage of any commodities or products directly or indirectly owned or controlled by the warehouse owner or operator.' "

Therefore, it must be noted that the only goods that are exempt under chapter 302 are those goods stored that are covered by warehouse receipt which creates a bailor-bailee relationship as opposed to the lessor-lessee relationship. Thus, if space in a warehouse is only leased, the goods stored under that lease remain subject to taxation as they were prior to the passage of chapter 302.

The following answers must be construed as pertaining only to those goods held under warehouse receipts.

I.

In response to the first question, the word "retail" as used in the aforementioned exemption statute is left undefined; therefore, under direction of section 4.1(2), Code of Iowa (1958), we must look to its commonly accepted and approved usage. In view of the definition of "Retail" found in 37A *Words & Phrases*, p. 165 et seq., and *Webster's New International Dictionary (Second Edition)*, this department is of the opinion that "retail" as used in chapter 302 is to be construed to mean a sale to the consumer or ultimate user.

II.

Regarding the second problem submitted, apparently the purpose of this exception to the exemption statute was to prevent the retailer from using this exemption provision to escape taxation under section 428.17, Code of Iowa (1958), which relates to stocks of merchandise. Viewed in this light, the answer then is that "offered for sale" and "sold" both pertain to "retail" transactions (which is defined in Division I of this opinion).

III.

In respect to Mr. Tipton's third inquiry, sections 428.18 and 428.19,

Code of Iowa (1958), must be examined, which are set forth below for your information.

"428.18 Warehouseman to file list. A warehouseman as specified in section 428.16 shall, upon request, file with the assessor a written statement showing all property in his possession belonging to another subject to taxation, and the name and address of the person, firm, corporation, or estate to which it belongs."

"428.19 Warehouseman deemed owner. If said warehouseman fails to furnish such statement all property in the possession of the warehouseman belonging to another subject to taxation, shall be deemed to be owned by the warehouseman for the purpose of taxation, and he shall be liable for taxes thereon."

From a reading of the foregoing provisions, one observes that the warehouseman is required to list with the assessor, only that property in his possession that is *subject to taxation.* Therefore, sections 428.18 and 428.19 are not rendered ineffective or limited by chapters 302 and 340 of the Laws of the Fifty-eigth General Assembly (1959), since the warehouseman must still list all property subject to taxation.

IV.

In reply to the fourth question, it is assumed that it relates to the last part of chapter 302, which reads:

" * * * directly from the public warehouse."

In other words, the issue is whether the goods are exempt when agents make sale by contacting prospective customers at a location other than the warehouse and the merchandise is delivered directly to the purchaser from the warehouse. As the question is stated in the letter quoted herein, the term "outlet" is used, indicating that you are referring to "wholesalers"; if this be the case, then the goods remain exempt because of the conclusions set forth in divisions I and II of this opinion; nevertheless, if a person is a "retailer", the business operation outlined in this division would render the goods taxable as stocks of merchandise under section 428.17, in accordance with the conclusions previously expressed herein.

V.

To answer the fifth question, your attention is directed again to chapter 302, supra, and upon examination, it becomes apparent that there is no restriction set forth therein, that the bailor in this situation must have all of his goods stored in public warehouses before any of the goods are exempt; nor does it qualify the exemption, in that it applies only to goods, where the owner does not reside in the same county. In conclusion, it makes no difference if the owner has warehouses of his own; under chapter 302 the goods stored in a "public" warehouse are exempt if intended for ultimate sale or resale, subject to the exception contained therein.

21.13 June 22, 1960

TAXATION: Delinquent personal tax—Lien on realty—Chapter 306, Acts of the 58th G. A. of 1959, amending chapter 445 of the Iowa Code,

creates lien on personal and real property for personal taxes assessed but not due when county treasurer believes taxpayer about to absent himself from the county without paying the taxes, providing notice is filed with the county recorder.

Robert N. Johnson, Lee County Attorney: I am in receipt of your letter of May 5, 1960, stating the following fact situation and questions:

"Fact situation: Delinquent personal taxes for the years 1951 to and including 1958 are shown on the Treasurer's delinquent tax list against the owner of real estate, who on April 11, 1960, conveyed said property by Warranty Deed.

"1st question. Does the section 2 of chapter 306, by reason of the last sentence thereof have any bearing on the lien of such delinquent taxes against the real estate of the party against whom said taxes are listed?

"2nd question. In line 8 of section 1 of chapter 306, above, is found the following words: 'shall file a notice of such lien with the County Recorder,'. Do those words have any relationship to the filing of notice of such lien as used in the last sentence of section 2 of chapter 306, above?

"Does the amendment of April 29, 1959, shown as chapter 306, have any bearing whatever on the lien against real estate provided by chapter 445-29 prior to the above amendment?"

In answer to your questions as to the effect of chapter 306 of the Acts of the 58th General Assembly on section 445.29 of the Code of Iowa, (1958), I submit the following:

The applicable Code sections 445.29 and 445.30 are printed below as amended:

"445.29 Lien of personal taxes. All poll taxes and taxes due from any person upon personal property shall, for a period of one year following December 31 of the year of levy, be a lien upon any and all real estate owned by such person or to which he may acquire title and situated in the county in which the tax is levied. From and after the expiration of said one year said taxes shall be a lien on all such real estate for an additional period of nine years provided said taxes are entered upon the delinquent personal tax list as provided by law. But in no instance shall said taxes be a lien after the expiration of ten years from December 31 of the year in which levied. This section shall apply to all poll taxes and to all taxes on personal property whether levied prior or subsequent to the time this section takes effect. Personal property taxes, together with any interest, penalty, or costs, shall be a lien in favor of the county upon all the taxable personal property and rights to property belonging to the taxpayer, such lien to relate back to and exist from the first day of January of the year in which such personal property is assessed. Such a lien shall not be effective or applicable, however, as against the rights of purchasers or mortgagees wro acquired an interest in or lien against real estate owned by the resident against whom such tax is assessed before the date that the treasurer files notice of such lien."

"445.30 Lien between vendor and purchaser. As against a purchaser, such liens shall attach to real estate on and after the thirty-first day of December in each year."

First, a history of chapter 306 is in order. It originated as House File 81 and was a single section. The explanation reads as follows:

"Under the present Iowa law a county treasurer may proceed by dis-

tress warrant, ordering the sheriff to seize and sell the taxable personal property of a taxpayer, only if the personal property taxes owed by that taxpayer are delinquent. If not delinquent, the sheriff must proceed by attachment in an ordinary suit at law. This bill allows the county treasurer to proceed by distress and sale before the taxes are actually delinquent but when he feels that the taxpayer is about to avoid the personal property taxes by moving from the county or by disposing of his personal property."

An *Opinion of the Attorney General*, 1958, p. 281, is headnoted:

"Personal property taxes become a lien upon personal property when delinquent on the first day of April after maturity in the event the first half has not been paid, and on the first day of October after maturity in the event second half is not paid. Personal property assessment does not create a lien."

This meant that no lien on personal property was created until the tax was delinquent and the original H. F. 81 was meant to correct this in cases where the taxpayer was believed to be preparing to remove himself from the county to which these taxes were due, whether for all or part of the taxable year of assessment.

This original bill was three times amended without comment.

The first amendment divided chapter 306 into two sections, the second being added to section 445.29. It is my opinion that the first section is meant to be a new section although the editors of the Annotated Code have added it to section 445.6. entitled "distress and sale." The words "A lien for the tax upon the taxable personal property so assessed shall relate back to and exist from the first day of January of the year for which it is assessed," were deleted from section one. This sentence was slightly changed and added to section 445.29 by this same amendment. In addition, an addition was made to section one of chapter 306 to enable the treasurer to compute the tax owing.

The second amendment was directed to section one of chapter 306 and deleted the word "payable" and inserted "shall file a notice of such a lien with the county recorder,".

The third amendment added to section 445.29 the following: "Such a lien shall not be effective or applicable, however, as against the rights of purchaser or mortgagees who acquired an interest in or lien against real estate owned by the resident against whom such tax is assessed before the date that the treasurer files notice of such lien."

The first amendment to section 445.29 made it possible to sell both personal and real property of the taxpayer to satisfy the tax owing on personal property prior to the placing of the taxpayer on the delinquent taxpayer list in regard to personal property, and prior to December 31, in regard to real property.

The second amendment provided a way to give notice of the creation of the lien to the public.

The third amendment exempted purchasers or mortgagees of realty owned by the taxpayer from liability for the tax unless they purchased their interest after notice of the lien was given by the county treasurer by filing at the office of the county recorder.

Prior to the amendment to section 445.29, *A. G. O.* 1922, p. 175, held that "Real estate transferred prior to December 31, is not subject to sale for personal taxes of the owner." The provision interpreted by this opinion is now found in section 445.30. Thus, a taxpayer removing himself from the county was able to transfer his real property free of his tax lien and the state has no recourse against the property taxed for the taxes owed when transferred by the taxpayer prior to December 31, of the year of levy.

In addition, *A. G. O.*, 1958, p. 281, states "personal property taxes become a lien upon personal property when delinquent on the first day of April after maturity in the event the first half has not been paid, and on the first day of October after maturity in the event second half is not paid. *Personal property assessment does not create a lien.*" (Emphasis added.)

It is my opinion that chapter 306 of the 58th G. A. did not mean to change the existing law. It did, however, provide an additional remedy in regard to collection of personal property taxes. In the first instance, section 445.6 is modified to allow the county treasurer, upon filing of notice and when he believes that a taxpayer is about to remove himself from the county without paying his personal property taxes and before these taxes are delinquent, to place a lien on said taxpayer's personal property and to sell it for the tax owing.

In the second instance, the amendment to section 445.29 makes it possible for the county treasurer to create a lien upon real property of the taxpayer prior to December 31, of the year of levy by filing notice with the county recorder. After this notice is filed, purchasers and mortgagees of the property of the taxpayer take the property encumbered by the tax lien and become responsible, then, for the taxes of the entire year of levy in contravention of section 445.30 as interpreted in *A. G. O.* 1922, p. 175.

Two additional comments should be made. They are in regard to the filing notice provision in section 445.29, as amended, and in regard to the necessity for the belief of the treasurer that the taxpayer is about to remove himself prior to the 31st of December of the levy year in regard to section 445.29.

In the first instance, the words of section 445.29, "treasurer files notice of such lien," must refer to the explicit notice requirement of section one of chapter 306 of the 58th G. A., when considering the history of chapter 306. Otherwise, the words would have no meaning.

In the second instance, it would appear that *A. G. O.*, November 30, 1959, when taken in conjunction with the "Notice of Personal Tax Lien" form approved by that opinion, would require that the provision of chapter 306, of the 58th G. A., section one, requiring belief on the part of the treasurer that the taxpayer was about to remove himself from the county, would also be a prerequisite for the filing of the new lien created by the amendment of section 445.29.

Lastly, I give specific answers to your questions.

Answer to question one: No, prior law in regard to sections 445.29 and 445.30 governs.

Answer to question two: Yes, as explained above.

Your summary question as to the bearing of chapter 306 on the real estate lien provided by section 445.29, I believe, has been answered by the discussion above.

21.14 July 13, 1960

REAL PROPERTY TAXES: (Suspended taxes—Life estate)—Real estate taxes are a lien affecting property against which they are assessed. At the death of a life tenant who has real estate taxes suspended by reason of being on old age assistance, the taxes become due and payable and may be enforced against the property upon which they are levied.

Mr. Charles Scholz, Mahaska County Attorney: Your request for an opinion is based on the following facts:

"A" owned property in fee simple and married "B". On May 20, 1946, "A" and "B" deeded to "C", who on the same date, deeded back to "A" and "B", husband and wife, for life, with remainder after the death of the survivor, to "D". "A" died January 7, 1954. On April 1, 1957, "B" began receiving old age assistance and the taxes for the years 1957 and 1958 were suspended. On February 4, 1959, "E" took a quit claim deed from "D" of the remainder interest.

Your question is, quoting from your letter, as follows:

"I request your opinion on the following question:

'Where real estate taxes assessed and levied against a particular tract of real estate have been suspended under the provisions of Section 427.9 of the Code of Iowa due to the fact that a life tenant occupying that parcel of real estate is receiving old age assistance, do such suspended taxes remain a lien upon said real estate, and are those taxes, together with the statutory 6 per cent interest thereon, collectible by sale of the real estate at a Treasurer's tax sale following the death of the life tenant, where the owner of the remainder interest in said real estate is neither the surviving spouse nor a minor child of the life tenant?'

"I call your attention to the provisions of Section 427.11 of the Code of Iowa which literally states that 'In the event that the petitioner shall sell any real estate upon which the tax has been suspended in the manner above provided, or in case any property, or any part thereof, upon which said tax has been suspended, shall pass by devise, bequest, or inheritance to any person other than the surviving spouse or minor child of such infirm person, the taxes, without any accrued penalty, that have been thus suspended, shall become due and payable, with 6 per cent interest per annum from the date of such suspension and shall be enforceable against the property or part thereof which does not pass to such spouse or minor child.' In the factual situation submitted, the petitioner has not, or will not have sold the real estate involved and it will not pass by devise, bequest or inheritance. On the other hand, Section 427.12 requires the County Treasurer to keep and maintain a 'suspended tax list' in his office, and the last paragraph of that statute provides that when suspended taxes have been entered in said list 'such entry shall on and after the date of said entry be a lien and notice thereof in accordance with the provisions of Sections 427.9 and 445.10' which implies that a lien for suspended taxes may continue even though the events referred to in Section 427.11 have not occurred and to this extent there appears to

be a conflict or ambiguity between the provisions of Section 427.11 and Section 427.12 with reference to the lien of suspended real estate taxes and collections thereof."

When an apparent ambiguity exists between two statutes, the Courts may invoke statutory construction to reach a reasonable conclusion. *Palmer vs. State Board of Assessment and Review,* 226 Iowa 92, 283 N. W. 415.

Unless excepted or exempted, it is the established law of this state that all property is to be taxed. *Northwestern States Portland Cement Co. vs. Board of Review,* 244 Iowa 720, 58 N. W. 2d 15. Therefore, there is a presumption that the property involved in the question you raise will be subject to the tax rather than excepted therefrom.

The operation of governmental bodies depends upon the taxation of the properties within its jurisdiction for purposes of securing revenue for such operation. After the listing and assessment is made, the levy upon each property is based upon its proportionate obligation and contribution to the governmental revenue for the year. Therefore, it is important in establishing the answer to the question at hand to consider that the legislature intended that the property ordinarily taxed would not be found to be excepted from taxation due to a limited or unreasonable construction of its statutes.

One of the basic principles to be recognized in determining the answer to the question you raise is that real estate taxes are not primarily a debt or obligation of a particular person, but are levied against the lands. In *Gates vs. Wirth,* 181 Iowa 19, 63 N.W. 215, it states:

"Considering real estate from the viewpoint of the taxing power, it is apparent that all lands afford permanent and substantial basis of revenue for governmental purposes. All lands are subject to taxation for that purpose, and for all time. As soon as lands pass out of the hands of the government, and a citizen becomes vested with title or ownership therein, no account is necessarily taken of the individual in whom the title rests, when we come to consider the right of the government to tax the property to meet the expenses of government. That right inheres in the government, independent of relationship of any particular individual to the land or to the title. The land itself, independent of the title held by individuals, is subject to taxation. The statute, however, points out the method to be pursued by the government in subjecting lands to the payment of taxes, so that the burden may be equitably distributed. It is apparent that the right of the government to subject lands to the payment of taxes for governmental purposes is in no way affected by the character of title under which it is held by the citizen.

"* * *

"The tax, when finally levied against the land, is not a debt or personal obligation of the landowner. It is a burden imposed by the government without his consent. The burden is imposed upon the land. He may discharge this burden. If he does not discharge it, the land itself is the only source from which payment may be secured that is open to the state."

Ownership of land is not without its burdensome duties. Property can be made subject to the payment of the general taxes as an incident to sovereignty without regard to the determination of individual ownership. *Stewart vs. Board of Supervisors,* 30 Iowa 9; *Nedderman vs. City of Des Moines,* 221 Iowa 1352, 268 N. W. 47; 51 *Am. Jur., Taxation,* Sec. 40.

Iowa taxes are levied against the property itself in the name of the "owner" thereof. The life tenant of such property is considered to be the "owner" for the purposes of taxation. *White vs. City of Marion*, 139 Iowa 479, 117 N. W. 254; 1938 *OAG*, 400, on page 403; 1956 *OAG* 130. The duty of payment of these general taxes is upon the life tenant in possession of the real estate in the absence of some contrary intent manifested by the character of the life estate and the remainder. *Kregel vs. Fredelake*, 184 Iowa 1318, 169 N. W. 642; *Reddish vs. Brown*, 190 Iowa 49, 179 N. W. 951. This principle, however, does not relieve the property of the burden of the taxes if the life tenant does not choose to pay. If he does not pay, the land may be sequestered by the governmental power and upon sequestration all title passes, including that of the remainderman.

Section 427.9 authorizes the suspension of the real estate taxes on the property of the life tenant when such a tenant is a recipient of old age assistance The effect of such suspension results in the postponement of the collection of such taxes. 1938 *OAG*, 400, at 404. Section 427.9 provides that the suspension shall continue on such property while such person is receiving old age assistance "for such time as such person shall remain the owner * * * of such property."

The taxes become a lien upon the property as indicated by section 427.12 and, but for the authorization of section 427.9 to the life tenant as a recipient of old age assistance to have such taxes suspended during the time he remains the owner, the property could have been sold for the taxes assessed against it. The burden of the taxes remains upon the property during the period of the ownership in question. Only enforcement of the lien for such taxes is delayed during the period of the suspension. Once the suspension is discontinued, the taxes become due and payable and may be enforced against the property upon which they are levied.

Examining the effect of section 427.11 and its relationship to the factual situation in question, it is clear that this statute contemplates the effect of suspended taxes upon property when there has been some sort of transfer, either by "sale" or by "devise, bequest or inheritance to persons other than the spouse or surviving minor child." The interest owned by "E" in the factual situation which you present is a present vested interest. The death of the life tenant or the destruction of the life tenancy creates no transfer as contemplated by section 427.11. The termination of a life tenancy only ripens the present interest to include present enjoyment by the termination of this life tenancy. Since the death of the life tenant cannot effect a transfer to an already existing present estate, the situation does not come within the purview of section 427.11.

Concluding therefore, that the taxes become due and payable when the life tenant is no longer the owner of such property for purposes of such taxation, and the remainderman becomes liable therefor as the owner, the question then arises as to the assessment of the penalty for the delayed payment. A penalty contemplates a wrong done for which there should be a "fine" or "forfeiture." *Stevenson vs. Stoufer*, 237 Iowa 513, 21 N. W. 2d 287. The legislature authorizes the suspension of taxes by statute. Therefore, it could not be considered in the nature of a wrong done to accomplish that which the statute authorizes. It should also be pointed out that the penalty is of the nature personal in character. *Stevenson vs. Stoufer*, supra. Since the remainderman was not liable

for the taxes during the period of the life tenancy, it would be unreasonable to assume that a penalty could be imposed upon him when he was not primarily liable for such taxes.

21.15

Assessments—Levee and drainage districts—Interest on assessment for benefits commences on the date of levy, except where payment is made pursuant to secs. 455.63 and 455.64. Code of Iowa (1958). (Brinkman to McDonald, Dallas Co. Atty., 11/12/59) #59-12-1

21.16

Boards of review—

(1) Upon the expiration of a prior term, appointment of a new member of the board of review shall be for a term of six (6) years.

(2) The conference board has no authority to reduce the number of members of the board of review.

(3) Where vacancy occurs in the board of review, appointment to fill vacancy shall be for the unexpired term of the replaced member.

(4) Term of member of board of review appointed upon the expiration of a prior term shall commence as of January 1, of the year of appointment. (Gill to O'Connor, Tax Com., 5/17/60) #60-5-17

21.17

Cigarettes—Cigarette sales act—Cigarette promotions wherein gift item is supplied with the purchase of cigarettes, must be made available to all cigarette wholesalers and retailers. (Gill to O'Connor, St. Tax Com., 8/9/60) #60-8-12

21.18

Cities and towns—Agricultural lands—Taxation of personal property used in connection with agricultural lands that are exempt from municipal taxation. (Dalton to McDonald, Cherokee Co. Atty., 5/3/60) #60-6-3

21.19

Cities and towns—Personal property used in the cultivation of agricultural or horticultural lands or tracts of 10 acres or more included within cities or towns, are not exempt from taxation. Section 404.15, 1958 Code of Iowa, does not extend that benefit to personal property. (Adams to Brown, Mitchell Co. Atty, 9/7/60) #60-9-9

21.20

City assessor—There is no statutory authority for the expenditure and disposition of any surplus remaining in "The City Assessment Expense Fund" created under ch. 405, Code 1958, and disposition thereof requires legislative action. (Strauss to St. Aud., 11/4/59) #59-11-8

21.21

City lots—Tracts of land of less than ten acres within a city or town are taxable at the city tax rate, and are not entitled to agricultural land credit. (Strauss to Davidson, Page Co. Atty., 4/12/60) #60-4-11

21.22

City property—Property owned by city and used for public purpose does not lose exempt status because income is derived by city for incidental use of property. (Brinkman to Dunn, Hardin Co. Atty., 4/10/59) #59-4-13

21.23

Corporate stock—

1. State-tax-commission-recommended forms used by the assessors in arriving at a fair assessment are public records.

2. The "main business" of a corporation determines whether or not it is a "merchandising" corporation.

3. The "actual value" of corporate stock under ch. 431, Code 1958, is apparently determined by the net worth of such corporation.

4. "Capital actually invested" is the amount deducted from the "actual value" of corporate shares of stock in determining the assessable value of such shares. (Gill to Nazette, Linn Co. Atty., 10/19/59) #59-10-21

21.24

County, tax sale—A county is not a "holder of a certificate" for purposes of sec. 446.37, Code of 1958, and their tax certificate is not cancelled after a lapse of 10 years. (Gill to Parkin, Jefferson Co. Atty., 7/10/59) #59-8-1

21.25

Credit unions—Furniture, fixtures and equipment of credit unions are not subject to personal property taxes. Dividends payable are not assessable to credit unions as moneys and credits. (Brinkman to Miller St. Tax Com., 5/28/59) #59-5-24

21.26

Destruction of records—The tax commission has authority to destroy all useless records and tax returns which have been in the commission's custody for at least five (5) years and are no longer of value. (Gill to O'Connor, Tax Com., 8/27/59) 59-9-11

21.27

Exemption—Capehart housing project exempt from taxation under sec. 511 of the Housing Act of 1956, thus overruling and withdrawing Attorney General's opinion issued August 19, 1959. (Gill to Samore, Woodbury Co. Atty., 3/31/60) #60-3-30

21.28

Exemption—Municipal property—When crops are raised on municipal property and the profit therefrom is used to maintain city park, the property so used is subject to taxation. (Gill to Morrison, Washington Co. Atty., 11/9/59) #59-11-13

21.29

Exemptions, time for claiming—Educational institutions as defined in sec. 427.1(11), Code of 1958, do not fall within the delayed claims pro-

vision of sec. 427.1(24), Code of 1958. (Gill to Forsyth, Emmet Co. Atty., 7/22/59) #59-8-2

21.30

Grain tax—The grain tax under sec. 428.35, Code of Iowa (1958), is imposed upon the handling or receiving of grain and not on the loading out or the purchasing of grain. (Gill to O'Connor, St. Tax Com., 8/29/60) #60-8-18

21.31

Grain tax—Handling or handled does not require the unloading of grain at a facility within the State of Iowa, only that it be physically present at such location and received for any purpose whatsoever under sec. 428.35, Code of Iowa 1958. (Gill to Samore, Woodbury Co. Atty., 2/15/60) #60-4-1

21.32

Homestead and military service exemptions—An "offer to buy" does not meet the statutory requirements for homestead and military service exemptions. (Adams to O'Connor, Iowa St. Tax Com., 7/14/60) #60-7-14

21.33

Homestead credit—Where a contract purchaser of real estate assigns his purchaser's equity as security for a loan, he is deemed equitable owner and is entitled to homestead tax credit. (Brinkman to Miller, Tax Com., 4/14/59) #59-4-17

21.34

Homestead credit—Where a person is committed to the penitentiary, the county board of supervisors may allow his property a homestead exemption if it finds that his family is in actual occupancy of the property upon which he formerly resided and that he intends in good faith to return to said premises upon his release from prison. (Brinkman to Sacks, Pottawattamie Co. Atty., 3/12/59) #59-3-9

21.35

Homestead tax credit—Disallowance by state tax commission of homestead tax credit more than one year after receipt of certification of said credit by the county treasurer is invalid. (Gill to Hanrahan, Polk Co. Atty., 5/18/60) #60-5-18

21.36

Homestead tax credit—Where applicant owns house on January 1, and prior to July 1, acquires the realty underlying house, the county board of supervisors, upon a finding that applicant meets statutory requirements, is authorized to allow homestead tax credit to the property. (Brinkman to Scholz, Mahaska Co. Atty., 9/1/59) #59-9-15

21.37

Income, nonresident's—Filing and payment by nonresident does not relieve withholding agent from his statutory primary responsibility. (Brinkman to Miller, St. Tax Com., 4/17/59) #59-4-23

21.38

Military service tax credit—Where veteran dies prior to the time the board of supervisors passes on the claim, the claim must be denied. (Brinkman to Miller, St. Tax Com., 4/28/59) #59-4-32

21.39

Mobile home fees—Nonresident servicemen—

1. The monthly fees provided for in chapter 135D of the Code of Iowa (1958) must be classified as a tax; and

2. A person on active duty with the Armed Forces cannot be taxed on his property except by the state of his residence at the time of call to active duty under Federal law. (Gill to O'Connor, Ch. Tax Com., 10/5/60) #60-11-2

21.40

Moneys and credits, deductions—Pledge to municipal hospital is not deductible from moneys and credits. An Iowa corporation, the capital stock of which is subject to assessment, and which makes return to assessor under which stock is assessed, is not allowed $5,000 deduction provided for in sec. 429.4, 1958 Code of Iowa. (Gill to Nelson, Story Co. Atty., 2/18/60) #60-3-1

21.41

Moneys and credits—Provisions of ch. 35B, Code 1958, directing the moneys and credits levy be used to pay the principal and interest of the Korean bonus bond, constitute a contract, and so long as there are outstanding bonds, they may not be repealed. (Strauss to Schroeder, St. Sen., 2/9/59) #59-2-18

21.42

Moneys and credits tax—Interest-bearing contracts—A subsequent writing that makes the original contract a noninterest-bearing one may relate back to the date of the first payment thereunder, depending on whether it is a modification or a waiver. (Gill to Draheim, Jr., Wright Co. Atty., 8/31/60) #60-9-3

21.43

Moneys and credits, trusts—Securities held in trust by a foreign trustee out of the state are not assessable as moneys and credits to the resident settlor-beneficiary. The power of revocation retained by the resident settlor, despite the inability to exercise the power on tax day is subject to taxation. (Gill to Leir, Scott Co. Atty., 8/10/59) #59-8-12

21.44

Moneys and credits—Where an executor has moneys and credits of an estate in his possession, he will list them in the county of his residence. (Adams to Kreuter, Asst. Linn Co. Atty., 7/20/60) #60-7-22

21.45

Monies and credits—The following items are not deductible as debts under sec. 429.4, Code 1958, from moneys and credits required to be listed by decedent's estate: (a) Federal estate tax, (b) Iowa inheritance

tax, (c) Attorney fees for representing executor of estate, (d) Executor's fee, (e) Court costs for the estate, (f) Federal income tax payable on decedent's final return, and (g) Iowa income tax payable on decedent's final return. (Gill to Salisbury, Jasper Co. Atty., 2/2/60) #60-2-8

21.46

Motor fuel—Computation and payment—Credits—Under the provisions of Code secs. 324.8 and 324.3, the deductions authorized under Code sec. 324.3 must be first taken from the total invoiced gallons, before the credit of 3 per cent may be deducted in computing the tax due. Bianco to Abrahamson, St. Treas., 10/22/59) #59-10-25

21.47

Motor fuel, refund to nonlicensee—Invoices and proof of claim for refund must be filed within three calendar months after date of purchase of fuel. (Bianco to Abrahamson, St. Treas., 11/5/59) #59-11-12

21.48

Motor vehicle fuel—aviation gas refunds—information confidential—Under the provisions of sec. 324.62, Code of Iowa 1958, the aeronautics commission is not authorized to receive information relative to claims for refunds made by users of aviation gasoline. (Bianco to Abrahamson, St. Treas., 2/11/60) #60-2-20

21.49

Motor vehicle fuel—When due—Penalty—The postmark of a report and remittance required under Code sec. 324.60 is the controlling date and time when the penalty accrues under Code sec. 324.64. (Bianco to Abrahamson, St. Treas., 10/22/59) #59-10-26

21.50

Old age assistance lien—Repeal of the levy of the old age assistance tax authorized by sec. 249.36, Code of 1958, does not eliminate the duty to pay the tax, and such taxes, when offered, should be accepted by the county treasurer and credited to the old age assistance fund. (Strauss to Sarsfield, St. Comp., 9/22/59) #59-9-30

21.51

Personal property assessment—Personal property is to be assessed in the county where it is regarded as most permanently located. (Dalton to Mather, Sac Co. Atty., 5/24/60) #60-6-8

21.52

Personal property assessment—

1. Where house mover stores houses on lot and resells them, they are deemed personal property, and assessed as merchandise inventory.

2. Assessor may not assess on basis of average inventory for the preceding year pursuant to Code sec. 428.17, where no inventory exists on January 1. (Brinkman to O'Connor, St. Tax Com., 10/15/59) #59-10-20

21.53

Personal property exemption—Killed, processed and frozen turkeys are

not exempt from taxation under the provisions of sec. 427.1(13), Code 1958. (Brinkman to Neuzil, Johnson Co. Atty., 1/26/59) #59-1-5

21.54

Personal property exemptions—Mink pelts held by the producer are not exempt as agricultural produce. (Brinkman to Draheim, Wright Co. Atty., 5/19/59) #59-5-15

21.55

Personal property—Situs for taxation—Personal property located permanently outside of the State of Iowa on assessment date is not subject to taxation. (Gill to Draheim, Wright Co. Atty., 6/3/60) #60-6-11

21.56

Personal property tax lien—County treasurer does not have authority to apportion personal property tax lien. Code sec. 445.29 does not create superior lien. (Dalton to Draheim, Wright Co. Atty., 5/25/60) #60-6-9

21.57

Personal property tax lien—Lien for personal property relates back to the first day of January of the year in which such taxes were assessed. (Gill to Hardin, Marion Co. Atty., 4/29/60) #60-4-21

21.58

Property tax—Agricultural produce exemption—The owner of grain, harvested within the past year, must have been the owner of the growing crop to be exempt under section 427.1(13), and, if not, must pay the grain handling tax imposed by section 428.35, Code of Iowa (1958). (Gill to O'Connor, St. Tax Comm., 12/19/60) #60-12-16

21.59

Property assessment—The term "greater part of the year" as used in sec. 428.8, Code of Iowa (1958), means more than half of the year. (Brinkman to Morr, Lucas Co. Atty., 4/21/59) #59-4-25

21.60

Property tax assessors—The assessor cannot mail an assessment roll to the taxpayer to fill out. (Gill to Fisher, St. Rep., 9/19/60) #60-9-16

21.61

Property tax assessors—The salary of an individual appointed to fill a vacancy in the office of county assessor for the balance of the term of the prior county assessor must be fixed at the same amount as that of the prior county assessor. (Strauss to Miller, St. Tax Com., 5/14/59) #59-5-12

21.62

Property tax exemption—An opinion withdrawing an opinion issued February 12, 1960, relating to the tax-exempt statutes of the Mayflower home. (Gill to Johnson, Poweshiek Co. Atty., 4/26/60) #60-4-19

21.63

Property tax exemption—Flowers being grown in a greenhouse are

exempt under the provisions of sec. 427.1(13) of the Code of Iowa, 1958. (Gill to Branstad, Winnebago Co. Atty., 1/28/60) #60-2-4

21.64

Property tax exemptions—

(1) Killed, processed and frozen turkeys are not exempt from taxation under the provisions of sec. 427.1(13), Code of Iowa (1958).

(2) Property held by a warehouseman is to be assessed by the owner thereof unless the warehouseman fails to furnish the statement provided for in sec. 428.18, Code of Iowa (1958), in which event said property is to be assessed to the warehouseman. (Brinkman to Neuzil, Johnson Co. Atty., 4/23/59) #59-4-30

21.65

Property tax—Homestead and military service tax exemption—One holding an accepted offer to buy qualifies as an owner for purposes of the homestead and military service tax exemption. (Adams to O'Connor, Ch. Tax Com., 10/13/60) #60-10-8

21.66

Property tax, homestead credit—The fact that an individual votes in one county and claims homestead tax credit in another does not, standing alone, require a denial of the claim for homestead tax credit. (Brinkman to Gray, Calhoun Co. Atty., 1/23/59) #59-1-4

21.67

Property tax—Homestead exemption—Deed to land for which homestead credit is claimed need not be recorded for claim to be allowed. (Adams to McGee, Mills Co., Atty., 8/3/60) #60-8-5

21.68

Property tax—Horticultural crop exemption—Flowers purchased by a greenhouse operator are exempt from taxation under sec. 427.1(13), 1958 Code of Iowa. (Gill to Branstad, Winnebago Co. Atty., 5/3/60) #60-6-2

21.69

Property tax liens—Lien of personal property tax provided by sec. 445.29, Code of Iowa (1958), is not a prior and superior lien to liens existing at the time the personal property tax becomes delinquent. (Brinkman to Van Ginkel, Cass Co. Atty., 4/8/59) #59-4-11

21.70

Property tax—moneys and credits—Interest on omitted and withheld moneys and credits commences on first of April for first installment and first of October for second installment. (Adams to O'Connor, St. Tax Com., 9/2/60) #60-12-1

21.71

Property tax—Notice of valuation—

1. Secs. 23 and 26, ch. 291, Acts of the 58th G.A., require but one notice of valuation be given the taxpayer at the time of assessment.

2. Notice of valuation may be delivered only at the time of assessment, which must be made on January 1, 1961, or thereafter. (Gill to Salisbury, Jasper Co. Atty., 6/8/60) #60-6-13

21.72

Property tax—Sections 445.42 through 445.46 do not apply when the owner of the personal property upon which a tax is sought to be collected is a resident of this state. (Brinkman to Barlow, Palo Alto Co. Atty., 3/26/59) #59-3-27

21.73

Real estate taxes—While the grantor in a deed dated November 28, 1960, vesting title in the United States of America, to real estate located in Iowa may be responsible for the payment of the taxes for the year 1960, payable in 1961, there is no method in Iowa by which such taxes can be collected from said grantor. (Strauss to Samore, Woodbury Co. Atty., 12/15/60) #60-12-15

21.74

Real property apportionment—Taxes assessed on real property as of January 1 are payable by the then owner, unless contracted otherwise. There can be no apportionment of the tax due between state (nontaxable entity) and individual. (Gill to Werling, Cedar Co. Atty., 5/10/60) #60-6-4

21.75

Real property—Exemptions—Statutes of exemption are strictly construed, and real property in order to be exempt has to qualify under the applicable section. (Dalton to Hoover, Clay Co. Atty., 4/28/60) #60-5-3

21.76

Real property—Remission of taxes—The county board of supervisors has no authority to remit the taxes on buildings, permanently affixed to land, which have been destroyed by fire. (Gill to Hudson, Pocahontas Co. Atty., 3/21/60) #60-3-18

21.77

Real property, tax deeds—A tax deed to the state board of social welfare prior to July 4, 1959, is void. Property properly assessed during the period in which the state board of social welfare held such a tax deed is a proper subject of taxation. (Peterson to Nelson, Story Co. Atty., 9/22/59) #59-9-31

21.78

Real property tax—Easement to county for public highway—Where county acquires easement for use as public highway, such property as is devoted to use as public highway is exempt from general property tax. (Gill to Scholz, Mahaska Co. Atty., 8/12/60) #60-9-2

21.79

Sales tax—Exemption—Gas used by farmer to dry corn is not processing and is subject to sales tax. (Dalton to Harris, Greene Co. Atty., 5/5/60) #60-5-10

21.80

Sales tax; interstate commerce—Though goods are shipped directly to customers from out of state, the fact that out-of-state seller has retail division in the state, orders are taken in Iowa by salesmen, and remittances are mailed to the Iowa retail division, makes the transaction subject to retail sales tax and not the use of tax law. (Gill to O'Connor, State Tax Com., 9/14/59) #59-10-2

21.81

Sales tax—Sales in interstate commerce—

1. When goods are delivered to a common carrier, which is also the purchaser, the sale is subject to sales tax.

2. Whether a sale is in interstate commerce depends on whether it is the seller's obligation to deliver the goods out-of-state to the buyer. (Gill to O'Connor, Ch. Tax Com., 9/9/60) #60-11-1

21.82

Sales tax—Whether sales tax on labor cost of reducing carcass of meat to various cuts of meat is subject to sales tax, depends on the facts of particular transaction. (Adams to Rigler, St. Sen., 9/12/60) #60-12-2

21.83

Tax deeds—A tax sale certificate holder may procure a tax deed without paying anything to holder of prior tax sale certificate. (Brinkman to Strand, Winneshiek Co. Atty., 4/9/59) #59-4-12

21.84

Tax sales—Special assessment—Where county sells real property at tax sale, it is required to sell for all delinquent taxes including special assessments. Where the county purchases property at tax sale pursuant to sec. 446.19, Code 1958, it is authorized to bid only the amount of the general taxes, interest, penalties and costs. (Gill to McDonald, Cherokee Co. Atty., 1/5/60) #60-1-5

21.85

Use tax—Sales by an out-of-state seller to future farmers of America chapters in Iowa are subject to use tax. (Brinkman to Cunningham, St. Tax Com., 2/16/59) #59-2-7

Use tax—Where Iowa resident sold his automobile to a nonresident dealer, and at some future date repurchased the identical automobile from the nonresident dealer for use in Iowa, the purchaser must pay use tax on said purchase and use. (Brinkman to Hindt, Lyon Co. Atty., 3/3/59) #59-3-4

CHAPTER 22

TOWNSHIPS

LETTER OPINIONS

22.1

Benefited fire districts—Under Code sec. 357A.2, any number of *adjoining* townships may be formed into a fire district. (Abels to Morrow, Allamakee Co. Atty., 3/14/60) #60-3-13

22.2

Cemeteries—Township trustees are not reversionary owners under sec. 566.20, 1958 Code of Iowa, and cannot validly sell or convey title to the abandoned cemetery lots under sec. 566.25, 1958 Code of Iowa. (Faulkner to Strand, Winneshiek Co. Atty., 3/23/59) #59-3-19

22.3

Cemeteries—Township trustees have no power to engage in the retail tombstone business. (Abels to Bedell, Dickinson Co. Atty., 7/29/59) #59-7-37

22.4

Elections—Polling place outside township—Necessity for new petition for each election under 57th G.A., ch. 66. (Gritton to Barlow, Palo Alto Co. Atty., 8/2/60) #60-8-2

22.5

Fence viewers—The party in whose favor the fence viewers made their decision is the proper party to bring suit to enforce it. (Abels to Samore, Woodbury Co. Atty., 6/21/60) #60-6-32

22.6

Fire districts—

1. Under Code sec. 357A.2, part of a township may be organized as a fire district (but not under Code sec. 359.42).

2. Under Code sec. 357A.13, part of a township may continue a levy under Code sec. 359.43, authorized prior to inclusion of the remainder of the township in 357A township.

3. The patrons to whom service may be extended under Code ch. 359 are enumerated in Code sec. 359.42. (Abels to Carlsen, Clinton Co. Atty., 11/24/59) #59-12-3

22.7

Fire protection—Housing for equipment may be jointly owned. (Abels to Hudson, Pocahontas Co. Atty., 7/24/59) #59-7-31

22.8

Fire protection—The maximum amount a township may raise for fire apparatus is defined by the 1958 Code, sec. 359.45. (Abels to Strand, Winneshiek Co. Atty., 7/23/59) #59-7-29

22.9

Fire protection—Whether a telephone system can be paid for as a fire alarm system, depends on actual use. Townships have no authority to pay for sending firemen to school. (Abels to Barlow, Palo Alto Co. Atty., 6/16/60) #60-6-27

22.10

Funds, litigation—Where township is entirely absorbed into other townships, disposition of funds cannot be accomplished by courts. Duties of county attorney depend on population of county. (Strauss to Leir, Scott Co. Atty., 11/17/59) #59-11-18

22.11

Halls and polling places—No power under Code sec. 359.28 to condemn site. (Abels to Buchheit, Fayette Co. Atty., 8/26/59) #59-9-2

22.12

Office rental—No authority to pay. (Abels to Mather, Sac Co. Atty., 6/10/60) #60-6-16

22.13

Powers—The power to condemn a site for a community center under Code sec. 359.28 and to levy a tax for a township hall under Code ch. 360 upon vote of the electors may be exercised concurrently where, in fact, the premises acquired can be and are intended to serve both functions with neither interfering with, detracting from, nor increasing the cost of the other. (Abels to Morr, Lucas Co. Atty., 11/5/59) #59-11-17

22.14

Public contract—Sec. 23.2, Code 1958, relative to the $5,000 limit for a public contract would apply where the total cost of the improvement exceeds $5,000, even though none of the five parties to the joint agreement under which the improvement is to be made, will be required to pay $5,000 as their proportionate share. (Strauss to Hudson, Pocahontas Co. Atty., 7/28/60) #60-7-28

22.15

Trustees—Interest in contract—It is unlawful for a township trustee to sell services or supplies to the township, but where the transaction has been fully executed, no refund should be claimed in the absence of showing of fraud or corruption. (Abels to Gray, Calhoun Co. Atty., 6/13/60) #60-6-17

CHAPTER 23

WELFARE

STAFF OPINIONS

LETTER OPINIONS

23.1 February 2, 1959

WELFARE: Support of poor—Duty of county—Medical services—Under the provisions of chapter 252, (Support of the poor) it is the duty of counties to furnish medical services to indigent poor, who qualify, notwithstanding the fact that there are funds available under a federal grant and administered by the state board of social welfare, where a county medical society refuses to accept employment under the state board plan.

Mr. Robert F. Schoeneman, Butler County Attorney: Reference is made to your recent favor, reading as follows:

"The federal funded Medical and Remedial Care Program has been turned down by the _____ County Medical Society. The Board of Supervisors now feel that they should turn down any claims for medical services given to all old age, dependent children, blind, etc. because there are other funds available, namely, the federal above referred to, that the doctors have refused. Would like to have your ruling on whether the Board can refuse medical claims made by the non-complying doctors on the theory that there are other funds available. Or, must the Board use county poor fund to pay medical bills regardless of the fact that this new federal fund has made other funds available for aid to recipients of medical treatment."

and in reply thereto, we state:

The answer to your question lies in the statutes hereinafter set forth and the authorities cited construing said statutes.

Section 252.25:

"The township trustee * * * *shall* provide for the relief of such poor persons * * * "

Section 252.26:

"The board of supervisors * * * may appoint as overseer of the poor * * * who shall have within said county * * * all the powers and duties conferred by this chapter on the township trustees. * * * "

Section 252.27:

"The relief may be either in the form of food, rent or clothing, fuel and light, *medical attendance*, or in money. * * * "

Section 252.31:

"County Expense. All moneys expended as contemplated in sections 252.25 to 252.30, inclusive, shall be paid out of the county treasury, after the proper account rendered thereof shall have been approved by the boards of the respective counties, and in all cases the necessary appropriations therefor shall be made by the respective counties. But the board may limit the amount thus to be furnished."

Section 252.32:

"The trustees in each township in counties where there is no county home, have the oversight and care of all poor persons in their township, and *shall* see that they receive proper care until provided for by the board of supervisors."

Section 252.33:

"Application for relief. The poor may make application for relief to a member of the board of supervisors, or to the overseer of the poor, or to the trustees of the township where they may be. If application be made to the township trustees and they are satisfied that the applicant is in such a state of want as requires relief at public expense, they may afford such temporary relief, subject to the approval of the board of supervisors, as the necessities of the person require and shall report the case forthwith to the board of supervisors, who may continue or deny relief, as they find cause."

Section 252.34:

"Allowance by a board. The board of supervisors may examine into all claims, including claims for medical attendance, allowed by the township trustees for the support of the poor, and if they find the amount allowed by said trustees to be unreasonable, exorbitant, or for any goods or services other than for the necessaries of life, they may reject or diminish the claim as in their judgment would be right and just. This section shall apply to all counties in the state, whether the are county homes established in the same or not. This and section 252.33 shall apply to acts of overseers of poor in cities as well as to township trustees."

Section 249.29:

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

It will be observed that the law imposes a duty to relieve the poor and provides that the expense of such relief shall be paid out of the county treasury the same as other disbursements for county purposes. (See *Council Bluffs Sav. Bk. v. Pottawattamie County*, 216 Iowa 1123, 1125; *Brock v. Jones County*, 145 Iowa 397, 407.) The aid furnished is deemed a charity to which the recipient is entitled and for which the county is obligated. (*In re Frentress' Estate*, 249 Iowa 783, 89 N.W. 2d 367, 368. Citing other authorities.)

The whole chapter in reference to support of the poor was enacted for a humane purpose. (*Cherokee County v. Smith*, 219 Iowa 490, 492.) The county board of supervisors may, before relief is furnished, establish a limit upon the amount to be furnished. But, when such limit has

not been established, they must allow the reasonable value of the services rendered. (*Hunter v. Jasper County*, 40 Iowa 568, 571.)

We are unable to find any provision in the law, whereby the county board of supervisors can avoid this duty and obligation simply because there is another source of funds (federal aid) with which to pay for such medical services in question, said federal aid being distributed through the state board of social welfare.

None of the three programs: old age assistance, aid for the blind and dependent children, as administered by the board of social welfare, provides for medical services. In fact there is an exception in the law, section 249.29, as to medical services as set forth in said statute. In other words, an old age assistance recipient would be entitled to receive medical services from the county, or other political subdivision of the state. (See *O.A.G.* 1938, p. 204, 207; 1940, pp. 28, 251 and 400; 1956 p. 168.)

It apepars, for some reason not disclosed by your letter, that the _____ county medical society does not wish to participate with the state board of social welfare in the program of federal medical aid, and further, that the _____ county board of supervisors feel they should refuse medical services to those who are recipients of old age benefits, the needy blind and dependent children. This is tantamount to denying medical relief, and an arbitrary refusal of such services.

Therefore, under these facts, it is our opinion that the county board of supervisors is charged by statute with the duty to provide and pay for medical services to indigent persons who qualify therefor, even though they may be recipients of old age assistance, needy blind persons or dependent children, notwithstanding that such services might be obtained and paid for out of federal funds, under the supervision of the state board of social welfare.

23.2 March 18, 1959

WELFARE: Actions—Costs—Under the provisions of section 252A.10, the actual costs to be advanced may be deferred within the discretion of the court upon proper application therefor.

Mr. H. T. Lewis, Assistant Scott County Attorney: Reference is made to your recent letter reading as follows:

"It has been the policy of this county that in connection with all actions filed under the Uniform Support of Dependents Law, whether filed by residents of this county or whether received from other states, that no Court costs of any kind, including sheriff's fees and mileage, are assessed where the pauper's affidavit has been filed.

"Apparently the only thing said in connection with costs in Chapter 252A is to the effect that there shall be no filing fee when the action is brought by an agency of the state or county and that actual costs incurred in this state incidental to any action brought under the provisions of this chapter shall be advanced by the initiating party or agency unless otherwise ordered by the Court.

"Of recent months there have been several actions filed under the Uniform Support of Dependents Law by residents of this county which were forwarded to other counties of this state. Actually all that was forwarded to the other counties was a summons for the defendant to appear and answer to the petition filed here in Scott County. This county does not assess costs for the filing of these actions where paupers' affidavits are executed. However, the sheriffs of the other counties in this state feel that when the summons in connection therewith are forwarded to them for service on the defendant that they should be paid their usual mileage and other fees for service of such summons. Apparently, they feel that even though the petitioner is not required to pay these fees, that same should be paid by the initiating county or in this instance by Scott County.

"It would be appreciated if your office would give us an opinion as to how such item as sheriff's mileage and costs should be handled."

Section 252A.10 provides as follows:

"Costs advanced. Actual costs incurred in this state incidental to any action brought under the provisions of this chapter shall be advanced by the initiating party or agency unless otherwise ordered by the court. Where the action is brought by an agency of the state or county there shall be no filing fee."

Here we find an express statutory provision as to how the costs shall be paid. In actions brought by an agency of the state or county, no filing fee need be paid. As to the other costs, it is left to the discretion of the court as to whether or not they shall be advanced, and under the clear language of the statute, "unless otherwise ordered by the court" we believe it is entirely within the discretion of the court as to whether or not they shall be deferred or advanced.

In 14 *Amer. Jur.*, section 48, at page 31, we find this statement:

"According to the views of some courts, the power to remit fees in forma pauperis was inherent at early common law and in proper cases now exists in courts of general jurisdiction in the absence of express statutory declaration."

We find this further statement:

"Other authorities take the view that the right to sue in forma pauperis originated in statute and depends for its existence upon statutory authorization."

We have been unable to find any citations of authority under section 252A.10, but we believe that it was clearly the intent of the legislature that within the discretion of the court, accruing costs in actions brought under the provisions of chapter 252A, could be deferred upon order of the court.

Therefore, it is our opinion that sheriff's mileage and costs in actions authorized by chapter 262A Code of Iowa, 1958, may be deferred by order of court and application therefor should be made to the court at the time of filing the case.

23.3 May 27, 1959

Old age assistance—Head tax—Senate File 47, 58th General Assembly,

repealed old age assistance head tax and abolished lien; therefore treasurers may no longer charge estates for delinquent old age assistance liens.

Mr. John W. Carlsen, Clinton County Attorney: We are in receipt of your recent favor reading as follows:

"Senate File 47, An Act to Repeal the *Head Tax* levied on adults to provide funds for the Old Age Assistance fund, and to abolish the liens charged against property for Delinquent Head Taxes, was enacted by the recent legislature and I assume signed by Governor Loveless.

"I would appreciate it if you would inform me whether or not Senate File 47 is interpreted as follows:

" 'As a result of said bill, the Treasurer will no longer charge estates for the delinquent old age assistance liens'?"

and in reply thereto, beg to advise:

Senate File 47, enacted by the 58th General Assembly, was approved March 18, 1959, and becomes effective July 4, 1959.

It repeals all of section 249.36, Code of 1958, except the first sentence thereof; all of sections 249.37, 249.38; and amends section 249.39, which provided for the levy of the tax and the method of collecting the same.

Section 5 of said Senate File 47 also provides as follows:

"All unpaid liens on real estate or other property which have arisen because the owners of said real estate or property have not paid the head tax, herein repealed, are abolished and released."

The intent of the legislature is quite clear, viz., to abolish the tax and the lien created thereby.

We, therefore, concur in your interpretation of Senate File 47, as stated in your letter, and as quoted herein.

23.4 June 5, 1959

WELFARE: Legal settlement—How acquired—Under Senate File 34, Acts 58th General Assembly:

1. By continuous present good faith residence for one year after July 4, 1959;

2. Notice to depart served prior to July 4, 1959 will not prevent acquiring legal settlement;

3. Such residence, without notice to depart, whether prior or subsequent to July 4, 1959, will establish legal residence;

4. One who has filed affidavit under old law, after notice to depart, without *new* notice to depart, acquires legal settlement after one year's continuous residency, whether prior or subsequent to July 4, 1959.

Mr. Vincent E. Johnson, Poweshiek County Attorney: Reference is made to your favor of recent date wherein you state:

"Under Section 252.20 of the 1958 Code of Iowa, a provision is made for authorities of a county to give a 'notice to depart' to persons coming into the county from another State or coming into the county from an-

other county, which persons are county charges or likely to become such, the purpose of the notice to prevent such persons from acquiring legal settlement and rendering them ineligible to receive poor relief from the funds of the county.

"(1) Does the bill preventing or doing away with the *notice to depart* provisions passed by the recent legislature make it possible for those individuals *who have been given such notice* and who are already in a county, to acquire legal settlement within a specific amount of time and if so, what period must elapse before they may gain legal settlement?

"(2) In the alternative, does the fact that an individual *has had notice to depart* prior to the enactment of the recent bill permanently prevent such person from acquiring legal settlement in that county?"

We are also in receipt of a communication from Mr. Emery L. Goodenberger, Madison County Attorney, in which he asks the question:

"Does a person *served with notice to depart under the old statute,* acquire legal settlement in the county serving the notice, assuming he has continuously lived in such county for more than one year prior to July 4th of this year?"

Senate File 34, adopted by the 58th General Assembly, approved March 31, 1959, and effective July 4, 1959, made the following revisions to chapter 252, Code of 1958, (Support of the poor).

Sections 252.20 and 252.21 providing for "Notice to Depart" and "Service of Notice" were repealed.

Said Act struck from the Code subparagraphs one (1) and two (2) of section 252.16 (Settlement—how acquired) and enacted in lieu thereof the following provisions:

"Section 252.16 Settlement—how acquired. A legal settlement in this state may be acquired as follows:

1. Any person continuously residing in any county in this state for a period of one year acquires a settlement in that county.

2. Any person having acquired a settlement in any county of this state shall not acquire a settlement in any other county until such person shall have continuously resided in said county for a period of one year.

" * * * * "

In the construction and application of these revisions to chapter 252, it will be necessary to determine whether the legislature intended the revisions to be retroactive or prospective.

We are confronted with the further problem of accrued rights, viz., the rights of any county which has served notice to depart, and we are certain that many have, for the reason that by the service of notices to depart, a county prevents such individuals from becoming county charges, thus presumably resulting in a tax saving. On the other hand, there are, no doubt, instances in which individuals have filed with the county board of supervisors their affidavits stating that such person or persons are no longer paupers and intend to acquire settlement in that county under the provisions of the old law, section 252.16(1) now revised, and effective on July 4, 1959. These are all substantial rights which can be effected by the revisions under consideration.

In this connection, we must advert to the provisions of section 4.1 (Rules of Construction) Code of 1958, which provide:

"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.

"1. Repeal—effect of. The repeal of a statute does not revive a statute previously repealed, *nor affect any right which has accrued, any duty imposed, any penalty incurred, or any proceeding commenced, under or by virtue of the statute repealed.*"

Senate File 34 repealed sections 252.20 and 252.21 pertaining to the service of notices to depart and under the above rule of construction, any rights accrued prior to the effective date of the new law, to wit, July 4, 1959 are not affected thereby. The new Act is silent as to any such pending matters. We believe this is indicative that the law is intended to be prospective only.

It is a general rule of construction that statutes are to be construed as having a prospective operation only, unless the purpose and intention of the legislature to give them a retrospective effect is clearly expressed in the Act, or necessarily implied therefrom. In cases of doubt, the statute is held to be prospective only. (Thomas v. Disbrow, 208 Iowa 873, 876; citing *Bartruff v. Remey,* 15 Iowa 257; *Knowlton v. Rodenbaugh,* 40 Iowa 114; *State ex rel. Shaver v. Iowa Tel. Co.,* 175 Iowa 607, 624; *Foster & Son v. Bellows,* 284 Iowa 1052)

Therefore, in the construction and application of Senate File 34, it is our considered opinion that:

(1) In the case of those persons who have been served with "notice to depart" and who are residing in such county, such person cannot acquire legal settlement therein until they have resided continuously in said county for at least one year after July 4, 1959, irrespective of the time such person has lived in said county prior to July 4, 1959. (See *Opinions, A.G.* 1940, pp. 316, 605, *A.G.,* 1938, p. 869)

(2) The fact that an individual has had "Notice to Depart" prior to the enactment of Senate File 34, Acts of the 58th G.A., will not prevent such person from acquiring a legal settlement in that county after July 4, 1959.

(3) In the case of one *not* served with notice to depart, such person who has resided continuously in any county for a period of at least one year, whether prior or subsequent to July 4, 1959, with a present good faith intention of making that his home, acquires a legal settlement. (See *OAG* 1932, p. 165; *Cass Co. v. Audubon Co.,* 221 Iowa 1037, 266 N.W. 293)

N. B. The present law requires residence for a period of two years, but it is our opinion that when the new law takes effect such period is then shortened to one year. The manner by which a person acquires legal settlement is merely procedural and can be changed at any time by an act of the legislature (See *OAG* 1942, p. 178)

(4) In the case of a person who has been served with a "Notice to Depart" and such person thereafter filed with the board of supervisors

his affidavit that he was no longer a pauper and intended to acquire settlement in that county, and thereafter no *new* "Notice to Depart" was served on him, such person acquires a legal settlement as soon as he completes one year of continuous residence in the county after July 4, 1959, or if such person has completed two years of continuous residency prior to July 4, 1959. (See *OAG*, 1938, p. 857)

23.5 January 6, 1960

WELFARE: County detention homes—The state board of social welfare has authority to designate and approve county detention homes which meet their standards, but the court has discretion in committing children to homes thus designated.

Mrs. Irene M. Smith, Chairman, State Board of Social Welfare: Your letter of January 4, 1960 reads as follows:

"Please give us further clarification of the Attorney General's opinion dated September 5, 1958, with respect to the meaning of the words 'designate and approve' as used in Section 232.37 and Section 235.3, Code of Iowa, 1958. The opinion does give some interpretation of the power of the State Board of Social Welfare with respect to this designation and approval, but it does not indicate what happens or whether or not we have the authority to disapprove.

"There is now in operation a County Detention Home which we cannot approve. What effect does the disapproval have upon the operation of the Home or on the control of the Home by the Board of Supervisors? Should we notify the various Judges in that area of our disapproval of the Home?

"We will appreciate your opinion on this matter."

The power to "designate and approve" the county institutions to which neglected, dependent, and delinquent children may be committed is found in section 232.37, Code of Iowa, 1958, which states:

"The State Board shall designate and approve the institutions to which such children may be legally committed and shall have supervision and right of visitation and inspection at all times over all such institutions."

The reference to "such children" in this section relates to children referred to in chapter 232, that is, neglected, dependent and delinquent children.

The word "institutions" as used in this section is defined by section 232.4 as "any corporation which includes in its purposes the care or disposition of children coming within the meaning of this chapter." Detention homes and schools as authorized by section 232.35 are included in this definition of institutions.

Section 235.3, subsection 5, Code of Iowa, 1958, is so similar in phraseology and effect, that it must be considered as a reiteration or a repetition of this prior section.

Subsection 4 of section 232.21 provides that the court, as one of the alternative commitments of neglected, dependent, or delinquent children, may commit these children to institutions in this state. The extent of the power and authority of the state board of social welfare in this area

must be determined by an examination of these foregoing statutes. If possible, these statutes must be given such construction as will allow them to harmonize with each other. *Andrew vs. Iowa State Bank of Osceola*, 250 N.W. 492, 216 Iowa 1170.

A careful reading of section 232.21, subsection 4, indicates that the court may commit any neglected, dependent or delinquent child to "*any* institution in the State, incorporated and maintained for the purpose of caring for such children." It is clear that this section does not limit the commitment of children to those homes "designated and approved" by the state board of social welfare, but provides that the court may commit these children to any institution in the state.

If possible, section 232.37 must be construed to harmonize with this section, and upon examination, it can be easily done. The section reads:

"The state board of social welfare shall designate and approve the institutions to which such children *may* be legally committed * * * " (Emphasis supplied.)

It is a well-settled rule that the word "may" when used in the statute is permissive only and operates to confer discretion, unless the contrary is clearly indicated by the context of the statute. *Betchel vs. Board of Supervisors*, 251 N.W. 633, 217 Iowa 251, at page 254, and numerous cases cited therein.

Therefore, by this interpretation, the courts cannot be required to commit children to a county institution "designated and approved" by the state board of social welfare, but it is within their discretion to do so. This is in accordance with the general consensus that while there may be a blending of powers in certain respects among the legislative, executive and judicial branches of government, the safety of our system of government depends in no small degree upon the strict observance of the independence of these departments. The United States supreme court has laid down the rule that each of the three departments of government should be kept completely independent of the others, so that the acts of each shall not be controlled by, or subjected to, directly or indirectly, the coercive influence of either of the others. 11 *Am. Jur.*, 182, page 880, and cases cited therein.

The question then arises, what is the purpose of section 232.37, and what are the powers or duties of the state board of social welfare under this section? Examining the pertinent definitions of the specific duties of the state board, as designated in this area, *Webster's New International Dictionary, Second Edition,* defines "designate" as:

"1. To mark out, and make known; to point out; to name; indicate; show; to distinguish by marks or description; to specify; * * *"

and "approve" as:

"3. To sanction officially; to ratify; confirm; * * *."

It is incumbent, therefore, under the above definition of the terms, on the state board to make known, indicate, and specify those institutions which they sanction officially as meeting the standards for placement of children committed to institutions under chapter 232.

The effect of the designation and approval of the county detention homes and schools by the state board is to place the courts and the public

on notice of those detention facilities which are sanctioned by persons presumably qualified to make such determination. Such facilities would meet the standards which are considered necessary to properly provide for the care and management of the home and the planning and supervision of the children in accordance with the special knowledge and skills provided by the department in the fields of health, education and welfare. This is apparently the intention of the legislature in enacting the section in question.

23.6 February 1, 1960

WELFARE: A.D.C. supplemented—Aid to dependent children may be supplemented by county funds in those areas where the needs are not met by the aid to dependent children program. Honorably discharged indigent veterans have the privilege of applying for soldiers relief before applying for relief from the county poor fund.

Mr. C. J. Anderson, Howard County Attorney: This is to acknowledge receipt of your letter of December 12, 1959, which states:

"I would appreciate an answer to the following question:

"A husband and wife with children under eighteen years of age, all of whom are included in an eligible ADC group, request the Soldiers Relief Fund to help with hospitalization expense.

"Is this available to them from the Soldiers Relief Poor Fund or must they resort to the County Poor Fund for hospitalization?

"I am aware of the opinion of July 10th, 1947, and of the ruling on Page 49 of the 1948 Report of Attorney General, but cannot satisfy myself with the answers therein included."

Your question involves a more basic issue than that to which you refer, that is, can there be any supplementation from either soldiers relief or the county poor fund without reducing or affecting the grant of aid to dependent children. The answer to this question must be determined before your question can be properly answered.

Paragraph 2 of section 239.5 states:

"The county board shall, on the basis of actual need, fix the amount of assistance necessary for any dependent child, subject to the approval of the state department, with due regard to the necessary expenditures of the family and the conditions existing in each case, taking into consideration any other income or resources of any child claiming assistance under this chapter and any private resources found to be available to such child. Such assistance when granted, shall be sufficient, when added to all other income and support available to the child, to provide such child with a reasonable subsistence compatible with decency and health."

You refer to the opinion reported in 1948 *OAG*, page 49, which interprets section 239.5 and states in part that if a person applies for aid to dependent children on behalf of a child and begins receiving such aid, it is presumed that the grant of aid to dependent children will provide for all of their needs and that they are not eligible for soldiers relief or relief from the county poor fund while receiving such aid. However, considering paragraph 2 of section 239.5 carefully, it is clear that the legislature did not intend that the aid to dependent children program

should be exclusive and provide for all of the possible needs of the family, thus foreclosing the possibility of supplementing with other funds, including those funds available from soldiers relief and poor relief. Directing your attention to the paragraph to examine its parts, it is noted that the first paragraph states:

"The county board shall, on the *basis* of actual need, fix the amount of assistance necessary for any dependent child, * * * "

Webster's New International Dictionary, Second Edition, has defined term "basis" as:

"1. The bottom of anything considered as a foundation for the parts above; the base; * * * 5. The ground work; the first or fundamental principle."

The legislature does not state that the amount of assistance shall be the actual need, but has directed that the county board use actual need as the foundation or the fundamental principle for fixing the amount of assistance for any dependent child.

The proper interpretation of a given statute may be determined by its legislative history. *Des Moines City Railway Company vs. City of Des Moines,* 216 N.W. 284, 205 Iowa 495. Looking into the history of the enactment of this section, it is noted that the aid to dependent children program came into being by the Acts of the 50th General Assembly, chapter 30. This Act, at the same time, repealed the old "Widows Pension Law" which arbitrarily placed the $2.50 weekly limitation on the amount available for each child of a widow defined under that chapter. It is apparent that the legislative intent in doing away with the arbitrary amount for each child, at the same time it enacted the new ADC program, was to provide assistance for these children, using actual need as a basis for determination rather than the unreasonable and unrealistic limitation of the widows pension law.

By the same reasoning, it is clear by the phrase, "with due regard to necessary expenditures of the family," the legislature did not intend that the amount of the grant necessarily cover all of the actual expenditures, but that the state board take into consideration these expenditures in arriving at the amount of the grant. The legislature in enacting section 239.5, recognized the possibility that there would be periods of time when they would be unable to provide sufficient appropriations to meet the total need of children eligible under this program throughout the state, and so indicated by the terminology it used. The state board of social welfare, under this section, can meet the needs so far as possible so long as it is "on the *basis* of actual need" and "with due regard to necessary expenditures and conditions existing in each case."

The state board of social welfare by rules and regulations (1958 *IDR,* pages 396-397) has established certain essential needs for all individuals which will be included as requirements in all ADC assistance plans. They also recognize certain other needs which may be given special consideration under unusual circumstances and have enumerated them under the designation, Group #2, on page 397 of the 1958 *IDR.* However, the department, by the same rules and regulations, (*IDR* January 1959, Supplement, page 16) while recognizing the existence of hospital expense, has determined that the ADC program cannot, within the present program and the funds available, provide for the payment of hospitalization

services as a part of the aid to dependent children assistance grant. The adoption of these rules and regulations by the state board is within the purview of section 234.6 when it states that the state board shall "formulate and make such rules and regulations as may be necessary" to administer the aid to dependent children program.

This interpretation does not conflict with that portion of the opinion reported in 1948 *OAG*, p. 49, relating to the supplement of aid to dependent children funds when considered in the light of the actual situation. The pertinent portion of that opinion stated that aid to dependent children recipients "were not also entitled to receive such additional aid under chapter 250 of the 1946 Code of Iowa, for it is presumed that the aid to dependent children relief as now provided for by law, would care for all their needs." It was a fact at that time that the aid to dependent children program was being administered to meet all of the needs under the standards established by the state board of social welfare. Since no apparent need existed to be supplemented from other funds, the statement was correct at that time. However, from September, 1948, to February, 1951, and from August, 1954, to the present date, it has been impossible, within the appropriated funds, to meet the total needs of an aid to dependent children recipient. Thus, after payment from the aid to dependent children funds, the need often still exists, and the expression in the former opinion is not now an accurate statement, and when considered in the light of the present actual situation, cannot be considered to preclude the possibility of meeting this need from soldiers relief or poor relief.

The conclusion is that aid to dependent children, since it does not now meet total need, may be supplemented without reducing the grant, in those areas where the need, although it is recognized and considered, cannot be, or is not met by this aid to dependent children program.

The question which you raise involves the determination of the priority of the fund from which this hospitalization expense is to be paid. Support of the poor is designed to care for "poor persons." "Poor persons" is defined by this section as those who have no property, exempt or otherwise, and are unable, because of physical or mental disability, to earn a living by labor. The word "poor" has also been defined as practically synonymous with "destitute," denoting extreme want and helplessness. *Polk County v. Owen*, 187 Iowa 220, 174 N.W. 99.

The chapter providing for relief of soldiers, sailors and marines was adopted for the purpose of preventing service men who have been honorably discharged, from being classified as paupers or poor persons when in need of public funds. This chapter was enacted to provide some advantage to those persons who gave of their time and service to the protection of our country. (See 1919-1920 *OAG* 700; 1932 *OAG*, 192.) It is the privilege, therefore, of an honorably-discharged service man or his family to apply for relief from the soldiers relief fund rather than the poor relief fund to avoid the stigma of the designation as a pauper or poor person.

1940 *OAG* 206, has clearly indicated that soldiers relief includes not only the furnishing of food, clothing and shelter, but also expenses incidental to medical care and hospitalization.

It must be recognized that the determination of eligibility for assistance from the soldiers relief fund is made by the soldiers relief com-

mission. Public support is a moral rather than a mandatory obligation of the government. There is no common law duty to provide support. *Collins v. State Board of Social Welfare,* 248 Iowa 369, 81 N.W. 2d 4. Therefore, there is no right to relief from this office, and if it is the determination of the commission that the applicant is not eligible under their standards of need, the person, although he is an honorably-discharged veteran, has no alternative but to apply to the overseer of the poor for poor relief.

23.7 June 14, 1960

WELFARE: Insane liens—Must be indexed on or before July 4, 1960, under Code section 230.25, as amended by the 58th G. A.

Mr. James H. Cothern, Clarke County Attorney: Receipt is acknowledged of your letter of April 26 as follows:

"The Auditor of Clarke County, Iowa, has requested me to obtain from you an opinion regarding Iowa Code Sec. 230.25, as amended by the 58th General Assemby. The section in question reads as follows:

"230.25 *Liens of assistance.* Any assistance furnished under this chapter shall be and constitute a lien on any real estate owned by the person committed to such institution or owned by either the husband or the wife of such person. Such lien shall be effective against the real estate owned by the husband or wife of such person only in the event that the name of the husband or the wife of such person is indexed by the auditor. No lien imposed by this statute against any real estate of a husband or wife of such person prior to the effective date of this Act shall be effective against the property of such husband or wife unless prior to July 4, 1960, the name of such husband or wife of such person shall be indexed.

"The problem, it appears, involves this question:

"Is the Auditor of Clarke County required to index all liens of assistance to insane persons from the commencement of the existing records of assistance given to insane persons?

"If your opinion is in the negative with regard to the above question, please advise me concerning your opinion as to what point in the past records this indexing should commence.

"I will appreciate your assistance on this problem."

All after the first sentence of the statute quoted in your letter was added by amendment.

A lien is a chose in action. In other words, it is personal property and, were it owned by a private citizen, probably could not constitutionally be impaired by the amendment in question.

However, the liens imposed by the statute are public property and, as such, within the prerogative of the legislature to give away upon failure of a certain condition, such as indexing by a given date.

In the case of *State ex rel Board of Pharmacy Examiners v. McEwen,* 250 Iowa 721, 96 N.W. 2d 189, the supreme court of Iowa held an

amendment to a statute will be construed as though such amendment was a part of the statute when originally enacted.

For this reason, it appears essential that all such liens running in favor of the county must be indexed in time or lost.

Since the probability of successful enforcement of a lien would depend upon the equitable doctrine of laches rather than upon any statute of limitations, it would be my advice that indexing should be commenced with the most recent lien and proceed backward from that point, either to the commencement of existing records or as far back as is possible within the time remaining and with personnel available.

23.8 June 16, 1960

WELFARE: Power to license children's boarding homes—Institutions or homes to which commitments are made under authority of section 232.21 are not subject to license as a children's boarding home by reason of such commitment.

Mrs. Irene M. Smith, Chairman, State Board of Social Welfare: This is in reference to your letter of May 18, 1960 which states in part:

"On numerous occasions the question has arisen as to whether or not the judges of the juvenile courts or their probation officers are bound by the provisions of Chapter 237, Children's Boarding Homes, in placing more than two children under the age of 14 years in a boarding home with persons unrelated to them at the expense of a county. The authority used by the juvenile court is found in Section 232.21, Code of Iowa, 'Alternative Commitments.' It may or may not be in conflict with the children's boarding home statute.

"We would like to refer the following question for a formal opinion: Do the provisions of Chapter 237, Children's Boarding Homes, apply to the juvenile court in carrying out the alternative commitments allowed in Section 232.21, Code of Iowa?"

Referring to section 232.21, relating to the alternative commitments which may be made by the juvenile courts, there appear to be three situations which might be affected by the provisions of chapter 237. The problem might arise when more than two children are committed to:

1. An institution.

2. A probation officer or other discreet person.

3. A suitable family home.

Section 237.2, Code of Iowa, 1958, states:

" 'Children's Boarding Home' defined. Any person who receives for care and treatment or has in his custody at any time more than two children under the age of fourteen years unattended by parent or guardian, for the purpose of providing them with food, care, and lodging, except children related to him by blood or marriage, and except children received by him with the intent of adopting them into his own family, shall be deemed to maintain a children's boarding home. This definition shall not include any person who, without compensation, is caring for children for a temporary period."

and section 237.8 states:

"License essential. No person shall receive a child for care in any such home or solicit or receive funds for its support unless it has an unrevoked license issued by the state board of social welfare within twelve months preceding to conduct such home."

In determining the proper interpretation and construction of statutes, it is necessary to determine the legislative intent. Considerations must be given to the purpose of the legislation and the language used. *Long v. Northrup,* 225 Iowa 132, 279 N.W. 104. Statutes must be construed to harmonize with each other as far as reasonably possible. *Andrew v. Iowa State Bank of Osceola,* 216 Iowa 1170; 250 N.W. 492.

The state board of social welfare with regard to institutions to which neglected, dependent and delinquent children may be committed, has been given the responsibility of designating and approving institutions to which such commitments may be made. Section 232.37 states:

"Approval of institutions. The state board of social welfare shall designate and approve the institutions to which such children may be legally committed and shall have supervision and right of visitation and inspection at all times over all such institutions."

It has been determined that the phrase "designate and approve" as used in section 232.37 does not in itself imply the authority to "license" such institutions. 1958 *O. A. G.* 327. The effect of such designation and approval has been discussed and interpreted by attorney general's opinion dated January 6, 1960, directed to Mrs. Irene M. Smith, chairman of the state board of social welfare. This opinion also indicates that the juvenile courts are not bound to commit children only to institutions which are designated and approved by the state board of social welfare.

By chapter 235, the duty of the state board to designate and approve county and private institutions has been clearly distinguished from the responsibility and authority of the state board of social welfare to license private boarding homes. In establishing the duties of the state board of social welfare in this area, the legislature by section 235.3, subsection 5, requires the state board to:

"Designate and approve the private and county institutions within the state to which neglected, dependent and delinquent children may be legally committed and to have supervision of the care of children committed thereto, and the right of visitation and inspection of said institutions at all times."

and by subsection 8, to:

"License and inspect * * * private boarding homes for children * * * ; make such reports regarding the same and revoke such licenses."

The sejunction of these two functions of the state board of social welfare in this area by the legislature indicates separate and distinct responsibility with regard to county and private institutions and with regard to private boarding homes.

Probation officers are appointed and employed by the juvenile court and serve at the will and pleasure of said court. See sections 231.8, 231.10, and 231.11. If chapter 237 were to apply to the juvenile courts and to probation officers, it would place these courts in an impossible

position when reference is made to the penalty provisions of this chapter. Section 237.16 states:

"Penalty—injunction. Every person who violates any of the provisions of this chapter or who intentionally shall make any false statements or reports to the state board of social welfare with reference to the matters contained herein, shall be guilty of a misdemeanor. Any person who fails to comply with the provisions of this chapter may be restrained by temporary injunction from operating or maintaining a children's boarding home until they have complied with the provisions of this chapter."

If this section were to apply to probation officers when they have committed to them more than two persons at one time, it would place the courts in a position of enforcing the penalty against itself, which, of course, cannot be considered the intent of the legislature. It will be presumed that the legislature did not intend to give a meaning to a statute which would lead to absurb consequences. *State vs. McGraw*, 191 Iowa 1090, 183 N.W. 593; *State vs. Gish*, 168 Iowa 70 (pages 78 and 79); *Trainer vs. Kossuth County*, 199 Iowa 55, 201, N.W. 66.

The remaining question then is the determination of whether a "suitable home" when receiving more than two children under commitment from the juvenile court by section 232.21 must receive a license from the state board of social welfare under chapter 237. The most conclusive indication that chapter 237 does not apply to this situation or to the situations above referred to, is that by section 232.22, such persons or institutions to which commitments are made, become the legal guardian of the person of such child. Section 237.2 specifically excludes from the definition of children's boarding home, persons having in their custody more than two children when such children are attended by a guardian.

The issue involved in your inquiry relates to the broad and fundamental concept of the separation of powers of the three branches of governments. To this point, I reiterate the statement made in an opinion from this office dated January 6, 1960 directed to Irene M. Smith, chairman of the state board of social welfare, in which is stated:

" * * * while there may be a blending of powers in certain respects among the legislative, executive and judicial branches of government, the safety of our system of government depends in no small degree upon the strict observance of the independence of these departments. The United States supreme court has laid down the rule that each of the three departments of government should be kept completely independent of the others, so that the acts of each shall not be controlled by, or subjected to, directly or indirectly, the coercive influence of either of the others. 11 Am. Jur., 182, page 880, and cases cited therein."

The principle that the three branches of government are independent of each other and not subject to the control of one another has been jealously guarded and protected, and an effort to require a license from the courts, their probation officers or the homes or institutions to which commitments are made under section 232.21 would be an attempt to coerce the judicial department to accept the mandate of an administrative body of the executive branch of government in violation of this fundamental doctrine.

You are advised that it is the opinion of this office that persons, homes or institutions to which commitments are made under authority of section 232.21, Code of Iowa, 1958, are not subject to license as a children's

boarding home from the state board of social welfare by reason of such commitments. These same homes or institutions, however, may be required to be licensed under chapter 237 if they receive into their custody more than two children at one time for food, care and lodging other than by commitment from the juvenile court.

23.9 June 28, 1960

WELFARE: County relief—The procedure combining the offices of director of social welfare with the overseer of the poor under chapter 353, Laws of the 58th G. A., does not repeal the method whereby the board of supervisors may request the county board of social welfare to administer county relief funds under section 251.4(3). The statutes are compatible and operate as alternative procedures.

Mrs. Irene M. Smith, Chairman, State Board of Social Welfare: This is to acknowledge receipt of the following request for an opinion of this office.

"Under Chapter 251, Emergency Relief Administration, Section 251.4, Duties of the County Board of Social Welfare:

"The county board in addition to all of the powers and duties given it by law, shall have the following duties: 'at the request of the county board of supervisors, administer county relief funds.'

"By resolution, sixty-five county boards of supervisors have given this responsibility as provided in this Chapter to their respective county boards of social welfare which have administered the responsibilities placed upon the boards of supervisors by Chapter 252 of the Iowa Code.

"Chapter 253, Acts of 58th General Assembly, County Offices Combined, Senate File 346, An Act to Permit the Combining of the Duties of Certain County Officers and Employees.

"SECTION 1. The duties of two (2) or more of the following county officers and employees may be combined by the methods provided in this Act: * * *

"SECTION 2. The board of supervisors of any county shall, upon petition of electors equal in number to twenty-five (25) per cent of the votes cast for any county office receiving the greatest number of votes at the last preceding general election filed with the county auditor, call an election for the purpose of voting on a proposal or proposals for combining the duties of any officers or employees designated in section one (1) of this Act. If the petition contains more than one (1) proposal for combining such duties, each proposal shall be listed on the ballot as a separate issue. If the majority of the votes cast be in favor of a proposal, the board of supervisors shall take all steps necessary to combine the duties as specified in the petition.

"Included in the list of Section 1, Chapter 253, are *director of social welfare* and the *overseer of the poor.*

"Chapter 253, (Laws of the 58th G. A.) COUNTY OFFICES COMBINED, does not repeal or refer to the above provision in the 1958 Code, Chapter 251, EMERGENCY RELIEF ADMINISTRATION, and appears to provide a dual method of combining the offices of the overseer of the poor and the county director of social welfare.

"Since there are apparently two methods by which the duties of the county board of social welfare and the county board of supervisors pertaining to the support of the poor can be combined, are we correct in assuming that both methods continue to be in effect?"

Chapter 253, Laws of the 58th General Assembly, contains no express repeal of section 251.4, Code of Iowa, 1958. The question then is whether the section is repealed by implication by the passage of chapter 253, supra. From the first reported opinion in Iowa on this subject, the courts have avoided the repeal of a statute by implication whenever possible. In *Hummer vs. Hummer*, 1851, 3 Greene 42, it is stated:

"Courts of law will, if possible, so construe statutes as to give them effect where they relate to the same subject matter. It is also a rule well established, that repeals by implication of law are not to be favored. Goddard v. Boston, 24 Pick 299; Lake v. Brookline, 20 Pick 407; Haynes v. Jenks, 2 Pick R. 172. And also that 'two affirmative statutes bearing on the same subject, the latter does not repeal the former, if both may exist together.' 4 Gilman 221; 9 Cow. R. 437. 'Both must stand together if possible.'"

and a further expression from the case of *Ament vs. Humphrey*, 1851, 3 Greene 255, which states:

"A law is not necessarily repealed because the subject matter is covered by a subsequent statute, unless there is an express repealing clause referring to the antecedent law, or unless there is a manifest inconsistency in the provisions of the two. The rule is well settled, that if both can remain without conflict, both should be enforced."

This attitude by the courts has been retained since the above reported cases, and prevails to this date. Reference is made to the recent case of *Board of Trustees of Farmers Drainage District vs. Iowa National Resources Council*, 247 Iowa 1244, 78 N. W. 2d 970; in which it states:

"Courts do not favor and will not uphold repeals by implication unless the intent to repeal clearly and unmistakably appears from the language and such a holding is absolutely necessary. The general rule is that if by any fair and reasonable construction two statutes dealing with the same subject matter may be reconciled both shall stand. (Citing cases.)

"The rule that Courts do not favor repeals by implication has special application to important public statutes of long standing."

See also *Robbins v. Beatty*, 246 Iowa 80, 67 N. W. 2d, 12; *Perry Savings Bank v. Fitzgerald*, 167 Iowa 446, 149 N. W. 497; *DeShaw v. South Fork Township School District of Delaware Co.*, 231 Iowa 27, 300 N. W. 650.

A determination must, therefore, be made whether there is an inconsistency between the two statutes which is irreconcilable. It is the opinion of this office that these two statutes can be reconciled and will stand together. Section 251.4(3) gives the board of supervisors the power to place upon the county board of social welfare the duty of administering the county relief funds. This action can be accomplished by resolution of the board of supervisors and is within the discretion of the board to so do. See 1940 *Opinions of Attorney General*, 301, at page 302.

The procedure for combining county offices under chapter 253, Laws of the 58th General Assembly, is also permissive. Section 1 states:

"The duties of two or more of the following county officers and employees *may* be combined by the methods provided in this act." (Emphasis supplied.)

(We must presume that the legislature intended that the term "county officers or employees" refers to officers and employees located in the county, as the director of social welfare is a state employee.) The word "may" is permissive and operates to confer discretion. *Bechtel v. Board of Supervisors*, 217 Iowa 251, 251 N. W. 633. By the use of the term "may", it is clear that the legislature did not intend that the procedure under chapter 253 be an exclusive method of combining duties or functions of various offices located in the county, but was a means provided for the electors to combine offices if they desire.

Once the procedure under chapter 253 has been initiated by the proper number of electors, the board of supervisors has no discretion, but is required to follow through with the mandatory requirements of the statute. Section 2 of the Act states:

"The board of supervisors of any county *shall*, upon petition of electors * * * call an election for the purpose of voting on a proposal or proposals for combining the duties of any officers or employees designated in section 1 of this Act." (Emphasis supplied.)

and a further quotation from Section 2, which states:

"If the majority of the votes cast be in favor of a proposal, the board of supervisors *shall* take all steps necessary to combine the duties as specified in the petition." (Emphasis supplied.)

When the word "shall" is used in a statute directing a public body to do certain acts, it denotes mandatory duty and operates to exclude discretion. *Hansen vs. Henderson*, 244 Iowa 650, 56 N. W. 2d 59.

It must be pointed out, however, that the county director is an employee of the state board of social welfare. His duties are controlled and regulated by the state board. See *Hjerleid vs. State*, 1941, 229 Iowa 818, 295 N. W. 139. Therefore, as a prerequisite to the operation of chapter 253, supra, to combine the duties of a county officer with the county director, thereby conferring new duties upon the county director as an employee of the state board, it is necessary that there be express consent and approval from the state board of social welfare.

Those offices combined under chapter 253, supra, are separated by the procedure prescribed by section 8 of the Act which requires that they be separated by petition and vote in a manner provided in section 2 of the Act.

When the authority is given to the county board of social welfare by resolution of the board of supervisors under section 251.4 to administer county relief fund, this authority may be taken away by the procedure under which it was given by the board of supervisors.

The conclusion is that with the consent of the state board of social welfare, the office of the county director of social welfare may be combined with the overseer of the poor under chapter 253, Laws of the 58th General Assembly and the duties and functions of each are conducted by one person employed under the provisions of Code Chapter 234 as required by section 7 of the Act.

An alternative procedure may be followed under section 251.4 whereby the county relief funds may be administered by the county board of social welfare at the request of the board of supervisors. Under this instance, the office of the overseer of the poor, or county relief director, as it is sometimes referred to, is eliminated and the program is solely under the administration of the county board of social welfare.

There is no repeal of Code section 251.4(3) express or implied, by chapter 253, Laws of the 58th General Assembly.

23.10 August 1, 1960

OLD AGE ASSISTANCE: County relief—Supplementation—Supplementation of old age assistance from county relief funds is limited to expenditures for fuel, dental, nursing, osteopathic, chiropractic, medical and surgical assistance.

Mr. Ray Hanrahan, Polk County Attorney: This will acknowledge receipt of your inquiry which states as follows:

"We have received the following communication from the Chairman of the Board of Supervisors:

'In preparing the 1961 budget we have been requested by the Nursing Home Association to include funds to supplement old age pensioners who are confined in nursing homes.

'It is my understanding that the state allows two dollars per point for all additional services that are given to a patient who is confined to his bed. However, they have been unable to pay the two dollars, just giving one dollar. Now, they request that we allow fifty cents per point in addition to what the state allows, stating that the majority of the counties in Iowa now do this. However, the question arises in our minds, is it legal for counties to supplement old age assistance and we are, therefore, requesting your office to obtain an attorney general opinion as to whether or not it is legal.' "

In answer to this inquiry, I refer you to the first paragraph of section 249.29, Code of Iowa, 1958, which states:

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

It is the opinion of this office that this section is clear and unambiguous and thus not subject to the statutory construction. *Hindman vs. Reaser*, 246 Iowa 1375, 72 N. W. 2d 559, states:

"The only legitimate purpose of statutory construction is to ascertain the legislative intent. And when the language of the statute is so clear, certain and free from ambiguity and obscurity that its meaning is evident from a mere reading, then the canons of statutory construction are unnecessary, because there is no need of construction."

Supplementation of old age assistance from county relief funds is limited to expenditures for those items specifically enumerated in section 249.29, that is, fuel, dental, nursing, osteopathic, chiropractic, medical and surgical assistance.

The nursing home association in requesting the 50 cents per point on the county poor fund should be aware that such additional services must be limited to those items specifically designated or the supplementation will affect the old age assistance grant.

23.11 August 6, 1960

LICENSED CHILD PLACING: Importation of children—Adoption—

1. An out-of-state agency may assign, relinquish or transfer children for adoption if it has the consent of the state board under sec. 238.33. This "consent" is their license within the meaning and requirement of sec. 238.26.

2. The consent of the out-of-state agency is valid for the purposes of sec. 600.3 if the release to the agency was in accordance with the statute on child placing.

Mr. L. L. Caffrey, Chairman, State Board of Social Welfare: Your inquiry to this office requests an opinion on the following questions:

1. Can a children's agency authorized by another state to place children for adoption, place children in Iowa homes for this purpose within the provisions of Chapter 238 covering "importation of children" and without violating Section 238.26, "Relinquishment of Rights and Duties" of the same chapter, or the provisions of Chapter 600?

2. Can an out-of-state agency placing children for adoption with Iowa couples give a valid release for the adoption of such children?

I. With the influx of foreign-born children for adoption in the United States and the establishment of organizations for the purpose of placing these children for adoption in the several States of the Union, it becomes important to determine whether or not the State of Iowa, within the framework of its present laws, may accept these children for adoption into private homes in this state. Statutes having beneficial purposes should be liberally construed and have the benefit of any reasonable presumption. *Thomas vs. State,* 241 Iowa 1072, 44 N. W. 2d, 410.

One of the first things that should be made apparent is the distinction between the type of activity affected by section 238.26 on child placing and the adoption statutes. This distinction is explained by an opinion dated November 27, 1925 and reported in 1925-1926 *OAG* 213. The question therein was whether or not the enactment of section 8 relating to the regulation of child-placing agencies modified chapter 473 concerning the adoption of children. It was concluded therein that it did not.

The pertinent quotation from the opinion is as follows:

"The provisions of section 8, quoted herein, cannot be construed to modify the law relating to the adoption of children, authorized in the provisions of chapter 473, Code, 1924. The provisions of chapter 473, supra, deal with the direct adoption of children from those primarily responsible for them and without the use of an intermediate or intervening agency such as the child-placing agencies referred to in chapter 80, Laws of the 41st General Assembly. The provisions of these two chapters are separate and distinct and the intention to modify the provisions of chapter 473 through the enactment of chapter 80, Laws of the 41st

General Assembly, must be clearly evident or necessarily implied from the terms of the last-named chapter."

The section 8 referred to in the quotation is now reported at section 238.25 through section 238.29 of the Code of Iowa, 1958 and is in essentially the same form and substance as originally enacted. Chapter 473 referred to in the quotation was the adoption statute in force as of that date. The present adoption statute appearing at chapter 600, Code of Iowa, 1958 was substituted for chapter 473 by House File 218, passed by the 40th General Assembly in Extra Session.

Section 238.26 states:

"Relinquishment of rights and duties. No person may assign, relinquish, or otherwise transfer to another his rights, or duties with respect to the permanent care or custody of a child under fourteen years of age unless specifically authorized or required so to do by an order or decree of court, or unless the parent or parents sign a written release attested by two witnesses, of the permanent care and custody of the child to an agency licensed by the state board of social welfare."

1925-1926 *OAG* 213, at page 215, indicates that the word "person" used in this instance refers to child-placing agency. Since the limitation imposed by this statute appears to be unequivocal, an assignment, relinquishment or transfer by a child-placing agency must be within the framework of this law to be legal in Iowa.

The statutes relating to the importation of children by an out-of-state agency is found at section 238.33 and is as follows:

"Importation of children. No agency shall bring into the state any child for the purpose of placing him out or procuring his adoption without first obtaining the consent of the state board of social welfare, and such agency shall conform to the rules of the state board."

This statute was enacted at the same time as section 238.26 and it is apparent that at the time of the enactment, the legislature intended to provide a procedure whereby out-of-state agencies could bring children into this state for the purpose of adoption. The statute implies that when consent is obtained from the state board, the out-of-state agency is authorized to bring the child into the state "for the purpose of * * * procuring his adoption * * *." The question then is, how does this section correspond with section 238.26 which requires that any person (meaning child-placing agency) which assigns, relinquishes or transfers a child must be licensed by the state board.

When an apparent ambiguity exists between two statutes, one may invoke the rules of statutory construction to reach a reasonable conclusion. *Palmer vs. State Board of Assessment and Review,* 226 Iowa 92, 283 N. W. 415. Consideration must be given to the purpose of the legislation and the language used. *Long vs. Northup,* 225 Iowa 132, 279 N. W. 104. The primary object is to determine the legislative intent

Examining the word "license," as used in section 238.26, its general usage relates to the formal issuance of a document on paper which grants authority to do a certain act. However, it cannot be ignored that the term "license" also includes "permission" or "consent" to do an act. *Websters New International Dictionary, 2nd Edition,* defines "license" as:

"Authority or liberty given to do or forbear any act; permission to do something (specified); especially, a formal permission from the proper authorities to perform certain acts or to carry on a certain business which without such permission, would be illegal; * * *."

When license is considered in this sense, no ambiguity exists, as section 238.33 requires the "consent" of the state board before an out-of-state agency may bring a child in for adoption. The consent of the state board is their "license" without the meaning and requirement of section 238.26. This is the apparent intent of the legislature.

Therefore, in answer to your first question, an out-of-state agency is authorized to place children in homes in Iowa for the purpose of adoption if they have the consent of the state board in accordance with section 238.33.

II. Referring to question No. 2 of your inquiry, I assume that by the term "release," you mean consent necessary by section 600.3, Code of Iowa, 1958. The applicable portion of this section is as follows:

"If the child has been given by written release to a licensed child welfare agency in accordance with the statute on child placing, the consent of the agency to whom the release was made shall be necessary."

By the conclusion reached to question No. 1, the out-of-state agency can be a licensed child-placing agency within the meaning of section 238.26. Whether such consent given by the agency can be valid depends on whether the release to the agency was "in accordance with the statute on child placing," as required by section 600.3. The person or persons who must sign such release and their authority with regard to it is determined by sections 238.27 and 238.28. The formal requirements of the release are: (1) that it is written; and (2) that it is attested by two persons.

23.12

Auditors as employees—The employment of a professional pharmacist to audit drug bills under the medical and remedial care program does not constitute such auditor as employee of the state under the provisions of secs. 234.12 and 234.13 of the Code of Iowa, 1958. (Bianco to Getscher, Fremont Co. Atty., 3/31/59) #59-4-4

23.13

Care of children—State funds appropriated for child welfare services may only be used for the payment of supervisory services as defined in Code ch. 235 and to contribute to the proportionate share of the administrative expenses of the state department. (Peterson to Smith, Chm., Bd. of Soc. Welfare, 6/17/60) #60-6-28

23.14

County board, reimbursement of expenses—County has no authority to reimburse county board member for expenses incurred as president of northwest chapter of Iowa welfare association. (Peterson to Cooper, Buena Vista Co. Atty., 12/18/59) #59-12-18

23.15

County claim for relief furnished—Code sec. 252.13 is the only statutory provision whereby a county may obtain reimbursement for relief fur-

nished under Code ch. 252. (Abels to Greenfield, Guthrie Co. Atty., 6/15/30) #60-6-23

23.16

County liens—Assistance furnished under Code secs. 227.16 to 227.18 is not basis for a lien under sec. 230.25, but may be otherwise claimed by the county. (Abels to Oeth, Dubuque Co. Atty., 8/2/60) #60-8-3

23.17

County relief—Applicant for poor relief who is qualified as a poor person within the terms of sec. 252.1, Code 1958, is entitled to relief irrespective of the cause of the improvidence, including unemployment by reason of the applicant being on strike. Such fact may be an element in determining whether the applicant is a statutory poor person. (Erbe to Leir, Scott Co. Atty., 1/5/59) #59-1-24

23.18

Hospital bills—County supervisors may limit amount of relief to be furnished for hospitalization of the indigent. (Abels to Sacks, Pottawattamie Co. Atty., 4/6/60) #60-4-7

23.19

Legal settlement—A mental incompetent with settlement in Iowa does not lose it by absence from the state for more than one year. (Abels to Flander, Bremer Co. Atty., 6/21/60) #60-6-31

23.20

Legal settlement—A minor who attains majority and continuously resides in a county, as a permanent place of abode, without any present intention of removing therefrom, and who has not been served with a notice to depart within two years after attaining majority, establishes a legal settlement in such county; notwithstanding that the parents of said minor were served with notice to depart during the time of the minority of such child. (Bianco to Flander, Bremer Co. Atty., 2/24/59) #59-2-23

23.21

Legal settlement—County relief—Payment of relief does not create a permanent disability to acquiring legal settlement in a new county; settlement may be acquired in the new county by continuously residing in such county for one year without receiving relief. (Peterson to Smith, Bd. of Soc. Welfare, 3/9/60) #60-3-11

23.22

Legal settlement—Parents of an adult recipient of blind assistance do not come within the application of the provisions of sec. 252.16(8), Code of Iowa, 1958. (Peterson to Forsyth, Emmet Co. Atty., 2/19/60) #60-2-26

23.23

Legal settlement—The court, when committing a child to the permanent care and custody of a child agency under section 338.26, Code 1958, establishes the legal settlement of that child in the county of original

jurisdiction. (Rehmann to O'Connell, Buchanan Co. Atty., 11/30/60) #60-12-14

23.24

Legal settlement—The payment of relief does not create a permanent disability to acquiring legal settlement in a new county. Settlement may be acquired in the new county by continuously residing in such county for one year without receiving relief. (Peterson to Smith, Chm., Bd. of Soc. Welfare, 3/9/60) #60-6-1

23.25

Legal settlement—Under Code sec. 230.6 as made applicable to patients in the Woodward hospital by Code sec. 223.7 determination of legal settlement is for the board of control. (Abels to Barewald, Rel. Dir., 9/16/59) #59-9-21

23.26

Legal settlement—Under Code sec. 230.1, a married woman whose husband has changed his legal settlement during her confinement, retains the settlement existing at the time of her admission thereto, when she is dischargd as "not cured". (Neely to Parsons, Bd. of Control, 2/1/60) #60-2-6

23.27

Neglected, dependent and delinquent children —

1. Expenses of a delinquent child placed in other than a state institution should be paid from the county poor fund.

2. All of the rules that apply to delinquent children do not apply to dependent or neglected children.

3. Only the board of supervisors, not the overseer of the poor or county director of welfare, may determine amount of expenses. (Craig to Martin, Keokuk Co. Atty., 9/7/60) #60-9-10

23.28

Settlement—County relief—Under Code sec. 252.16, one who receives relief *before* residing in a county one year does not acquire settlement but retains his old settlement for so long as he continues to receive relief. The county of residence may recover from the county of settlement the amount of relief furnished. (Abels to Cady, Franklin Co. Atty., 2/17/60) #60-2-24

23.29

Soldiers relief—A nonmilitary husband of an indigent wife who served in the military forces is not entitled to the benefits provided by chapter 250, Code 1958. (Strauss to Pappas, Cerro Gordo Co. Atty., 10/27/60) #60-10-17

23.30

Soldier's relief—Soldier's relief provided by ch. 250, Code 1958, available to minor children not over 18 years of age means minors attaining that age on their anniversary date. A minor of 18 years and 1 day is not entitled to relief. (Strauss to Bonus Board, 2/3/60) #60-2-11

23.21

Unemployment benefits—Effect of sec. 96.5(5) as amended by S. F. 420, 57th G. A. upon supplemental unemployment benefit clause in contracts between employer-employee. (Strauss to Mincks, Sen., 4/17/59) #59-4-21

INDEX

COURTS

CRIMINAL LAW

STATUTE OF LIMITATIONS

STATUTES CONSTRUED

STRIKERS' RELIEF

TAVERNS

TAXATION