State of Iowa

1962

THIRTY-FOURTH BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

FOR THE

BIENNIAL PERIOD ENDING DECEMBER 31, 1962

EVAN HULTMAN
Attorney General

Published by the
STATE OF IOWA
Des Moines

ATTORNEYS GENERAL OF IOWA

1853-1962

NAME	HOME COUNTY	SERVED YEARS
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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
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Leo A. Hoegh	Lucas	1953-1954
Dayton Countryman	Story	1954-1956
Norman A. Erbe	Boone	1956-1960
Evan Hultman	Black Hawk	1960-1962

PERSONNEL OF THE DEPARTMENT OF JUSTICE*

EVAN HULTMAN ..... Attorney General
B. July 15, 1925, Albia, Iowa; B.A., J.D., S.U.I.; married, 3 children; Inf. Cmdr., WW II; J.A.G. Staff, 103d Inf.; Black Hawk Co. Atty., 2 terms; elected Atty. Gen. 1960, 1962; Exec. Comm., Nat'l. Ass'n. Attys. Gen., 1961.

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COLLEEN SHEARER ..... Secretary
LOIS AUSTIN ..... Secretary
BARBARA LEHMAN ..... Secretary
HELEN CEASER ..... Secretary
MADGE HILL ..... Secretary

*As of December 31, 1962

REPORT OF THE ATTORNEY GENERAL

December 31, 1962

Honorable Norman A. Erbe
Governor of the State of Iowa
Statehouse

Dear Governor Erbe:

In compliance with section 17.6 of the 1962 Code of Iowa, I hereby submit the biennial report of the Attorney General covering the period beginning January 1, 1961 and ending December 31, 1962.

During the biennium, as a part of the duties of this office, this department represented the State of Iowa in litigation arising from the legislative redistricting of the Iowa Senate by the 59th General Assembly. The redistricting act was attacked as being in violation of both the Iowa and the United States Constitutions. The Iowa Supreme Court sustained the act in its entirety in *Selzer v. Synhorst,* 253 Iowa 936, 113 N. W. 2d 724. Shortly after this decision, the United States Supreme Court, in an historic decision, *Baker v. Carr,* 369 U. S. 233, ruled that the federal courts have jurisdiction to hear cases challenging the constitutionality of apportionment of state legislatures. Thereafter, a case entitled *Davis v. Synhorst* was filed in the United States District Court attacking the apportionment of the Iowa General Assembly. This department is now defending this suit in the federal court.

The new charitable trust registration act went into effect July 4, 1959. Since that date, this office has maintained a charitable trust register of all charitable trusts in Iowa within the purview of the act, and has reviewed the annual report filed by each trust. There are now 358 charitable trusts registered, with a total valuation of $43,559,324.48. In addition to its supervisory activities, the legality of charitable trusts has been asserted when they have been attacked in the courts. The most prominent case in this area during the biennium was *Eckles v. Lounsberry,* 253 Iowa 172, 111 N.W. 2d 638, in which William E. Hawks devised approximately $230,000 to the Iowa State Public School Fund to be used to promote instruction in vocal music and proper development of the lungs of children attending kindergarten, first and second grades in the schools of the State of Iowa. This office succeeded in upholding the validity of this devise as a charitable trust, both in the district court and in the Supreme Court.

During the biennium, eight estates were escheated to the State of Iowa, while one estate was refunded to a person proving heirship. One case in the area of escheat was decided by the Iowa Supreme Court, which held that the State of Iowa was entitled to the

proceeds of the estate. *In re Estate of Welter,* 253 Iowa 87, 111 N. W. 2d 282.

The Department of Justice has participated in and disposed of 108 criminal appeals to the Supreme Court of Iowa from the district and municipal courts of the State. Of these appeals, 75 convictions were affirmed, 7 were reversed, and 26 were dismissed. In addition to criminal appeals, the Department participated in 100 habeas corpus proceedings brought by inmates of Iowa penal institutions. Of these cases, 44 were appeals to the Supreme Court of Iowa, 18 were cases initiated in the United States District Court, 2 were appeals to the United States Court of Appeals, and 36 were appeals to the Supreme Court of the United States. The State successfully prosecuted a certiorari case to the Supreme Court of Iowa, in which it was held that a defendant in a criminal case may not take discovery depositions of witnesses for the State. *State v. District Court of Delaware County,* 253 Iowa 903, 114 N. W. 2d 317. Two appeals from adverse decisions in habeas corpus cases were also taken by the Department, and were successfully prosecuted in the Supreme Court of Iowa.

A number of prosecutions were made for the Department of Agriculture for the violation of statutes dealing with the protection of consumers. The Board of Control was represented in several matters, the most important being the purchase of a new prison honor farm at Newton, Iowa, and the sale of the Clive prison honor farm.

An opportunity to develop outdoor recreational areas to meet the steadily increasing public demand arose by virtue of the taming of the Missouri River by the Corps of Engineers. A project to develop 25 areas along the river was begun by the State Conservation Commission. These areas, most of which were already owned by the State of Iowa, offered a unique chance to develop recreational areas without having to incur the expense of acquisition from private owners. However, some of these potential sites were being claimed by Iowa and Nebraska riparian owners, which necessitated the instituting of quiet title actions to establish clear ownership in the State of Iowa. Laying the foundation for successful acquisition of these recreational sites was the case of *State v. Raymond,* 119 N. W. 2d 135. This decision of the Iowa Supreme Court announced the principle of law which will govern pending quiet title actions having a total recreational value to Iowans of two and a half million dollars.

The State Department of Public Instruction had favorable determinations with respect to their rules and regulations in three different district court cases. The significance of these cases was to uphold the authority of the Department to withhold state aid from school districts which did not meet the standards as established by the State Department of Public Instruction. There is now pending before the Supreme Court of Iowa an appeal questioning the constitutionality of the statute which enables the State Board of Public Instruction to withhold state aid.

The State Board of Social Welfare was represented by this office in numerous actions concerning the administration of property and the settlement of estates. These included 13 foreclosure actions, 24 partition actions, 12 quiet title actions, 33 objections to final reports, and several miscellaneous actions pertaining to estate matters. Two cases pending before the Iowa Supreme Court were concluded, and two out-of-state partition cases were successfully terminated. In addition, the Attorney General's office has assisted in cases involving uniform reciprocal enforcement of support in cooperation with county attorneys throughout the state. This office also represented the Board in four formal hearings held before the Board during the biennium and assisted on 62 appeals from decisions of the county boards of social welfare. During the biennium, 571 estates were opened and 671 were closed in the year 1961, with 896 pending as of January 1, 1962; in 1962 there were 617 estates opened and 582 closed, with 931 pending as of January 1, 1963.

The Iowa Reciprocity Board administers the licensing of truck fleets operating in the State of Iowa. Near the end of the biennium, the Attorney General's office, representing the Reciprocity Board, instituted actions against three trucking firms for the payment of license fees aggregating approximately a quarter of a million dollars. These cases, which are currently in litigation, are significant to the State not only from the standpoint of the monetary amounts involved, but also to determine the administration of many licensing agreements made by the Board between Iowa and other states.

In the area of Public Safety, the Attorney General's office represented the Department of Public Safety in numerous cases involving the suspension or revocation of drivers' licenses. Three cases were heard by the Iowa Supreme Court involving the Department, which established the proper administrative procedure for the suspension and revocation of licenses.

The Department of Health was represented in 21 hearings involving pollution of waters of the state. In eight cases, an injunction was sought against nursing or custodial homes operating without a license, and one revocation of a custodial home license was sought. The protection of the public was furthered by this Department through the institution of ten cases seeking an injunction from practicing dentistry without a license, two for revocation of medical licenses, one for revocation of an optician's license and one for revocation of a cosmetology school license. A hearing regarding a mortician's license resulted in a one-year suspension, and a refusal by the Department of Health to issue a barber college license was upheld by the State district court.

The Gas Tax Division of the State Treasurer's office was represented in six district court actions involving gas taxes and penalties. In *State v. Hawkeye Oil Co., Inc.,* 253 Iowa 148, 110 N. W. 2d 641, the State recovered a judgment for $47,328.28 against the defendant company and a judgment of $35,209.70 against the individual

defendant. Of these judgments, a little over $65,000 was collected, including approximately $1,500 in court costs. This case, being one of first impression, construed the trust provisions of section 324.72. In another case, *Miller Oil Co. v. Treasurer of State,* 252 Iowa 1058, 109 N. W. 2d 610, section 324.60 was construed for the first time. This section establishes the deadline for the time for filing of reports by mail.

The Iowa Development Commission was given opinions and approvals on 18 contracts involving federal funds for assistance to cities, towns and counties in the State of Iowa. In addition, 85 opinions on abstracts of title have been given to the State Conservation Commission.

In the past two years, 361 general claims and 67 highway claims have been processed by the Attorney General's office and submitted to the State Appeal Board and the 59th General Assembly. This represents an increase of 101 claims over the previous session. Numerous workmen's compensation cases were tried before the Iowa Industrial Commissioner and the courts of Iowa by this office. The State was also represented in federal condemnation actions, bankruptcies, title actions, and miscellaneous proceedings.

On January 1, 1961, there were 102 primary highway condemnation appeal cases pending in the district courts of Iowa. During the biennium, 572 condemnations were processed under the supervision of the special assistant attorney general assigned to the Highway Commission. From these, 151 were appealed to the district courts of Iowa, making a total of 253 appeals during the biennium. Of these, 166 were disposed of, 58 by trial, 76 by settlement, and 32 by dismissal, leaving 87 primary road condemnation appeal cases pending as of December 31, 1962. In addition, 106 other highway litigation cases were pending during the biennium with dispositions made of 67, thereby leaving 39 such cases pending as of December 31, 1962. During the same period, 38 cases were on appeal to the Supreme Court of Iowa, with dispositions made of 28, leaving 10 cases still pending in that court as of December 31, 1962.

Perhaps the most significant case for the Highway Commission was *Iowa Power & Light Co. v. Iowa State Highway Commission,* 117 N. W. 2d 425 (1962). The Iowa Supreme Court here declared that utility facilities may not be constructed along controlled access interstate highways without the consent of the Highway Commission, which has sole jurisdiction over the construction, maintenance and regulation of these highways.

EMINENT DOMAIN IN IOWA, orginally published by the Attorney General's office in March of 1960, was revised and republished during 1962. The office also edited and made available for distribution IOWA LAWS PERTAINING TO HIGHWAY ADMINISTRATION.

In the following pages of this report, the staff opinions by this

office which were deemed of sufficient general interest are published in full. In addition, the headnotes for letter opinions of this office have been printed following the staff opinions of the subject matter to which they pertain.

Respectfully submitted,
EVAN HULTMAN
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*As of December 31, 1962

THE

OFFICIAL OPINIONS

OF THE

ATTORNEY GENERAL

FOR

BIENNIAL PERIOD

1961-1962

CONTENTS

CHAPTER 1

AGRICULTURE

STAFF OPINIONS

LETTER OPINIONS

1.1

AGRICULTURE: Brucellosis eradication—§§164.16, 164.17, 1962 Code. Department of Agriculture has authority to issue quarantine order on all breeding cattle except official vaccinates under an area plan lawfully adopted pursuant to §164.17, 1962 Code.

June 27, 1962

Honorable L. B. Liddy
Secretary of Agriculture
LOCAL

Dear Mr. Liddy:

In yours of recent date you requested an opinion on the following question:

Does the Department of Agriculture have authority under Chapter 164, *Eradication of Bang's Disease,* to issue a quarantine order on herds of cattle producers who are not willing to co-operate in the area plan nor willing to submit their herds for brucellosis testing?

I direct your attention to the following sections of Chapter 164:

"164.16 Issuance of quarantine orders. The department may issue any quarantine orders deemed necessary for the control and eradication of Bang's disease and the proper enforcement of this chapter."

"164.17 Co-operation with local or federal authorities—petition by owners. * * *

"Whenever petitions signed by seventy-five percent of the resident owners of *breeding* cattle residing in a county representing seventy-five percent or more of the *breeding* cattle therein owned by residents of that area, as disclosed by the last assessment rolls of such area, shall be presented to the department asking that *all breeding cattle herds in said county be tested for brucellosis,* the department is hereby authorized to make such tests without expense to the owners, to the extent of the funds available therefor. * * * The provisions of this subsection do not apply to herds composed entirely of official vaccinates." (Emphasis supplied)

Section 164.17 provides a method whereby the producers in an area can, through collective effort, control the spread of brucellosis. The clear intent of the statute is to preclude the infection of many cattle by the movement of an infected few. It provides that if 75% of the producers with 75% of the breeding cattle want to enter into an area plan under §164.17, then the Department of Agriculture can enter upon any farm in that area for the purposes of testing. Refusal to allow testing would be sufficient grounds in most cases for the Department to issue a quarantine order pursuant to §164.16 in

order to prevent movement of the suspect cattle. The issuance of such an order is at the discretion of the Secretary of Agriculture or his designate.

In summary, the Department is authorized to issue a quarantine order as it deems necessary on *all* breeding cattle within a given area, except official vaccinates, assuming the area has lawfully adopted the "area plan" pursuant to §164.17.

1.2

AGRICULTURE: Hotels, restaurants, food establishments—vending machines—§§170.1, 170.2, 1962 Code. Vending machines *per se* cannot be licensed. The area where vending machines are located can be required to obtain a food establishment license subject to certain statutory exceptions.

July 12, 1962

Honorable L. B. Liddy
Secretary of Agriculture
LOCAL

Dear Mr. Liddy:

In yours of recent date you requested an opinion on the following situation:

"Vending machines dispensing foods are being installed in Iowa in increasing numbers and we feel they should be inspected and licensed under our food establishment and restaurant laws.

"These machines dispense such items as fresh fruit, sandwiches, bakery goods, ice cream, hot soup and many kinds of beverages such as coffee, milk and pop. Many of these foods are perishable and must be kept either hot or cold.

"*First* question is: Can we license a vending machine?

"*Second*: If so, which license—a $3.00 Food Establishment license or a Restaurant license costing $3.00 plus the $15.00 inspection fee?

"*Third*: If we cannot license each individual vending machine—can we license the room in which it is installed as a Food-Establishment?

"*Fourth*: Could we license the room in which it is installed as a Restaurant—which would require the inspection fee of $15.00 in addition to the license?"

(1) There is no statutory provision for licensing of vending machines as such.

(2) A reply to this question is unnecessary in view of (1) above.

(3) Your attention is directed to the following provisions of Chapter 170, *Hotels, Restaurants, and Food Establishments*:

"170.1 Definitions. For the purpose of this chapter:

"6. 'Food establishment' shall include any building, room, basement, or other place, used as a bakery, confectionery, cannery, packinghouse, slaughterhouse, dairy, creamery, cheese factory, restaurant or hotel kitchen, retail grocery, meat market, vehicles used for delivering and selling foods directly to the consumer or vehicles displaying and selling food for delivery at a future date, or other place in which food is kept, produced, prepared, or distributed for commercial purposes."

"170.2 License required. No person shall maintain a food establishment until he has obtained a license from the department of agriculture. How-

ever, cigar stores, drug stores, egg, cream or poultry buying stations, or any other establishment selling or offering for sale only candy, gum or similar products, schools selling or offering for sale refreshments at athletic contests, band festivals, or similar events, and children selling or offering for sale kool-ade, lemonade or other soft drinks, and candy, gum or similar products on lawns, curbings, sidewalks, or any other property shall not be required to obtain a license. * * *"

Assuming that that which is being dispensed is "food" as defined in §170.1, and is not within the exemption of §170.2, the room or area where vending machines are located must be licensed. Certainly the broad language of §170.1(6) which states "... or other place in which food is kept, produced, prepared, or distributed for commercial purposes" covers vending-machine locations. It should be noted that under present law each vending machine itself is not licensed but the general area in which they are located is licensed. Thus, for example, a room with ten machines pays the same $3.00 fee as a room with three machines. The extent of the area involved, or what constitutes a room, is a factual determination to be made by the Department of Agriculture.

(4) Whether in addition to the food establishment license a restaurant fee can be assessed is a question largely factual in nature and, therefore, does not present a legal question upon which this office can pass. See generally §170.1(4); 1934 *O.A.G.* 558; 1944 *O.A.G.* 71.

Therefore, you are advised that vending machines *per se* cannot be licensed and that the area where vending machines are located can be required to obtain a food establishment license subject to certain statutory exceptions.

1.3

AGRICULTURE: Importation of cattle—bovine tuberculosis—§§163.1, 163.11, 163.18, 163.19, 165.36, 1958 Code. The circumstances under which cattle may be imported into Iowa are controlled by §165.36 insofar as it conflicts with §163.11. Section 165.36 permits importation of cattle from any modified accredited area without proof of any testing in the state of origin, subject to certain limitations.

May 8, 1962

M. E. Pomeroy, D.V.M., Chief
Division of Animal Industry
Department of Agriculture
LOCAL

Dear Doctor:

In yours of February 21, 1962, you inquired as to the following:

"We find it necessary to request from your office an opinion in connection with the tuberculin test requirements for the movement of dairy and breeding cattle into the State of Iowa.

"On January 29, 1960 the Secretary of the Iowa Department of Agriculture, Mr. Clyde Spry, promulgated and adopted, effective on that date, rules and regulations governing the importation of livestock into Iowa. Under these rules and regulations dairy and breeding cattle may be imported into the State of Iowa from a Tuberculosis Modified Accredited area if they originate from:

"1. Tuberculosis accredited herds, showing date of last test and herd accreditation number.

"2. Tuberculosis negative herds tested within the previous twelve (12) months.

"3. Cattle not meeting requirements outlined in paragraphs 1 and 2 are required to be tested negative within thirty (30) days prior to entry.

"4. No test on calves under six (6) months.

"The rules and regulations were written 'Pursuant to the authority invested in the Department of Agriculture of the State of Iowa by the provisions of Chapter 163, Code of Iowa 1958'. . . . Therefore, we request an opinion from your office as to whether our regulations take precedence over Chapter 165.36. If Chapter 165.36 takes precedence over the regulations, we would like an interpretation of that paragraph."

You are advised that the pertinent Code provisions are as follows:

"163.1 Powers of department. In the enforcement of this chapter (entitled, Infectious and Contagious Diseases Among Animals) the department of agriculture shall have power to:

"1. Make all necessary rules for the suppression and prevention of infectious and contagious diseases among animals within the state."

"163.11 Imported animals. No person shall bring into this state, except to public livestock markets where federal inspection of livestock is maintained, any animal for work, breeding, or dairy purposes, unless such animal has been examined and found free from all contagious or infectious diseases."

"165.36 Importation of cattle. No dairy or breeding cattle shall be shipped, driven on foot, or transported, into the state of Iowa, except upon one of the following conditions:

"1. That such cattle come from a herd which has been officially accredited as a tuberculosis-free accredited herd by the state from which such cattle come or by the department of agriculture of the United States; or

"2. That such cattle come from an area officially declared as a modified accredited area by such state or the department of agriculture of the United States, and the herd from which they originate, if previously infected, has passed two tests free from tuberculosis; or

"3. That such cattle are brought into the state of Iowa under quarantine to be tuberculin tested for tuberculosis and fully examined in not less than sixty days nor more than ninety days, such test to be applied by a veterinarian accredited by the department of agriculture of the state of Iowa and at the expense of the owners. Such cattle brought in under quarantine shall be accompanied by an official certificate issued by a veterinarian accredited by the state from which the cattle come or by the department of agriculture of the United States showing them to be free from tuberculosis. The quarantine thus provided for shall be established by the department of agriculture of the state of Iowa and shall not be released until the examination has been made and such cattle found free from tuberculosis."

Chapter 163 is a general statute dealing with the function of the Department of Agriculture in the broad field of infectious and contagious diseases among animals. Chapters 164 through 167 are concerned with specific areas such as Bang's Disease, Bovine Tuberculosis, Hog Cholera, and Dead Animals. Although §163.2 defines contagious and infectious diseases to include tuberculosis, the eradication of that disease in cattle is the subject of extensive statutory law in Chapter 165.

The pertinent paragraph of §163.11 quoted above governing the importation of animals was enacted in 1919. Chapter 287, Acts 38th G.A. Section 165.36, "Importation of Cattle", was enacted in 1929. Chapter 74, Acts 43rd G.A. If these two conflict, the special statute, §165.36, will control the general provision, §163.11. *Shelby County Myrtle Memorial Hospital v. Harrison County,* 249 Iowa 146, 152, 153, 86 N.W. 2d 104, 108, 109 (1957) and citations.

Section 163.11 prohibits importation of *animals* unless they have been examined and found free of all infectious or contagious disease. Section 165.36 allows importation of *dairy or breeding cattle* if:

1. They come from an accredited herd, *or*
2. They come from a modified accredited area, *or*
3. They come from a herd which has passed two tests free from the disease of tuberculosis if previously infected, *or*
4. Circumstances are such, they are imported under quarantine.

The rules and regulations quoted in your letter are set out in 1962 I.D.R., at pages 26-27. They require cattle entering from a modified accredited area to be from an accredited herd tested within the previous twelve (12) months. If such a rule were held valid, it would nullify the second alternative above in §165.36. Rules cannot be adopted that are at variance with statutory provisions or that amend or nullify legislative intent. *Bruce Motor Freight, Inc. v. Lauterbach,* 247 Iowa 956, 77 N.W. 2d 613 (1956) and citations. "The specific controls the general. The two statutes must be read as if they were one. ... Any other construction violates the rule that nothing enacted shall, if it may be avoided, be made ineffective or useless." *Great Western Accident Ins. Co. v. Martin,* 183 Iowa 1009, 166 N.W. 705 (1918).

At the present time, the entire United States is a modified accredited area. Thus, under §165.36(2) any person may import any cattle for breeding or dairy purposes without any prior test or examination for tuberculosis if the herd of origin has not been previously infected. This does not prevent the Department from inspecting the cattle as they enter the state and quarantining them. It does mean that any cattle from a modified accredited area and not from a previously infected herd, cannot be required to have a certificate or other indicia of testing for tuberculosis done in the state of origin.

This interpretation does not nullify the other provisions of §165.36. In the event an area ceases to be accredited, cattle for dairy and breeding purposes can still be imported if the *herd* from which they originate is officially accredited as a tuberculosis-free *herd.* Similarly, if the herd of origin has been previously infected, the cattle being imported must be accompanied by some proof that the herd of origin has passed two tests free from tuberculosis. If the cattle do not originate from an accredited *herd,* or an accredited *area,* or from a previously infected herd which has passed two tests free from tuberculosis, they can only be admitted to Iowa under quarantine.

All of the above is in no way meant to nullify the provisions of §§163.18 and 163.19 providing penalties for importing infected cattle with the knowledge that they are so infected.

Therefore, you are advised that §165.36 takes precedence over §163.11 and any rules and regulations promulgated pursuant thereto insofar as they conflict. Also, at the present time, §165.36 permits the importation of cattle from any modified accredited area without proof of any testing in the state of origin, subject to the provisions above.

1.4

AGRICULTURE: Weights and measures—§215.18, 1958 Code. §215.18 does *not* make it mandatory for the Secretary of Agriculture to adhere to the specifications and tolerances of the U. S. Bureau of Standards in establishing specifications and tolerances for the State of Iowa for weights and measures and weighing and measuring devices.

February 21, 1961

Honorable Clyde Spry
Secretary of Agriculture
BUILDING

Dear Sir:

In your letter of January 17, 1961, you request an opinion on the following question:

> "Does Section 215.18, 1958 Code of Iowa, make it mandatory upon the Secretary of Agriculture to adhere to the specifications and tolerances of the United States Bureau of Standards in establishing specifications and tolerances for the State of Iowa for weights and measures and weighing and measuring devices?"

The answer to your question is in the negative. Section 215.18 is merely directory and does not make it mandatory for the Secretary of Agriculture to adhere to the specifications and tolerances of the U.S. Bureau of Standards in establishing specifications and tolerances for the State of Iowa for weights and measures and weighing and measuring devices.

Section 215.18 is as follows:

> "The secretary of agriculture may after consultation and with the advice of U. S. bureau of standards establish specifications and tolerances for weights and measures and weighing and measuring devices, and said specifications and tolerances shall be legal specifications and tolerances in this state, and shall be observed in all inspections and tests."

A construction of §215.18 which would require the Secretary to adhere to the specifications and tolerances of the U. S. Bureau of Standards would make said section unconstitutional under Article III, Legislative Department, §1 of the Constitution of the State of Iowa as an improper delegation of legislative power. Any amendments to the federal standards by the United States government would necessarily change the Iowa standards. The federal government would, in effect, be usurping the functions of the Iowa legislature. The principle is firmly established that a state legislature has no power to delegate any of its legislative powers to any outside agency such as the Congress of the United States (11 *Am. Jur.* 219).

A state legislature does not invalidly delegate its legislative authority by adopting the law or rule of Congress, if such law is already in existence or operative (11 *Am. Jur.* 219). If the legislature had added a date to §215.18 so that the specifications and tolerances of the U. S. Bureau of Standards were adopted as they existed on a particular prior date, a construction which would make said section mandatory would at least not render it unconstitutional, since future amendments by the federal government would not affect the state standards unless and until they were adopted by the state legislature.

Where a statute is fairly open to two constructions, one of which will render it constitutional, and the other of doubtful constitutionality, or unconstitutional, the construction upon which the statute may be upheld should be adopted (*Eysink v. Board of Supervisors of Jasper County,* 296 N.W. 376, 229 Iowa 1240). A statute will, if possible, be so construed as to render it valid (*Ketcham v. State of Iowa,* 41 F. 2d 38 (Iowa); *Seleine v. Wisner,* 206 N.W. 130, 200 Iowa 1389; *Camaras v. Sioux City,* 184 N.W. 821, 192 Iowa 372).

The language employed in §215.18 supports the conclusion that the section is merely directory and not mandatory. The section states that "the secretary of agriculture *may* after *consultation* and with the *advice* of the U. S. Bureau of Standards establish specifications and tolerances . . ." (Emphasis supplied). Webster's New International Dictionary defines "consult" as "to seek the opinion or advice of another" and gives as synonyms of "consultation": interview, conference, deliberation, and discussion. "Advice" is defined as "recommendation regarding a decision or course of conduct", and the synonyms listed are: opinion, recommendation, instruction, suggestion. From this, it would appear that the words used in §215.18 are words of *guidance*. A fair construction would indicate that the Secretary should look to the federal standards for assistance in setting up his own, but that he may deviate from these federal standards where he finds it necessary or desirable.

1.5

Food establishments, meat products—§170.27, 1958 Code. "Meat products" defined not to include fish. §170.27 pertains to display physically located within the public easement or thoroughfare and not to displays on private property. (Oakley to Wood, Hamilton Co. Atty., 5/8/62) #62-5-4

1.6

Mink ranches—§159.2(1), 1958 Code. Persons engaged in the production of domesticated fur-bearing animals can be "farmers" for the purpose of county zoning, if their operation is sufficiently extensive. (Wright to Sersland, St. Rep., 4/4/61) #61-4-6

1.7

Sale of raw milk—§192.10, 1958 Code. Raw milk other than Grade "A" may be sold, but only by the producers and outside of a city or town. (Wright to Spry, Secy. of Agr., 5/23/61) #61-5-14

1.8

Veterinary medicine—§166.16(5), 1958 Code. Paragraph "e" of §1, Ch. 143, Acts 58th G.A. (§230.24, 1962 Code), provides that when the supervisor of the Iowa veterinary medicine diagnostic laboratory determines that an outbreak of hog cholera requires the use of virulent blood or virus, the Department of Agriculture is required to forthwith approve the sale of virulent blood or virus to those persons entitled to use said virulent blood or virus, including those persons who are holders of valid unrevoked written permits to administer the same. (Strauss to Paul, St. Rep., 4/27/61) #61-4-27

1.9

Weights and measures—§214.6, 1958 Code. Individual possessing weighmaster certificate issued pursuant to §214.6 may print "state certified weightmaster" on his weight tickets. (Oakley to Damron, Dept. of Agr., 3/30/62) #62-3-9

CHAPTER 2

BANKS AND BANKING

STAFF OPINIONS

LETTER OPINIONS

2.1

BANKS AND BANKING: Assessment of liability—§528.128, 1958 Code; Art. VIII, §9, Iowa Constitution. The assessment liability of banking corporation stockholders is as prescribed in §528.128. Section 528.128 does not conflict with Art. VIII, §9, providing for double liability of stockholders since this provision applies only to "banks of issue" which no longer exist.

February 7, 1961

Honorable William S. Lynes
House of Representatives
State of Iowa
L O C A L

Dear Mr. Lynes:

This is in response to your letter of January 31, 1961, in which you set forth the following:

"There seems to be considerable question in the minds of holders of bank stock as to their liability for double assessment under our present laws.

As I understand it, the Constitution provides for this double assessment and any change in this would require a constitutional amendment. However, we find in Chapter 528.128 of the Code, under Assessment limitations, the matter of stockholder assessment reverses those liabilities as set out by the Constitution under Article VIII, Section 9, and Article VIII, Section 12.

I am not an attorney but I am wondering if the amendment by an act of the Legislature alone is sufficient to overcome the provisions as set out in the Constitution. An interpretation by your department is respectfully requested."

Article VIII, §9 of the Constitution of Iowa, provides:

"*Stockholders' responsibility.* Sec. 9. Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors, over and above the amount of stock by him or her held, to an amount equal to his or her respective shares so held for all of its liabilities, accruing while he or she remains such stockholder."
Further, it is provided at §528.128, 1958 Code:

"*Assessment limitations.* Persons becoming holders of stock, either common or preferred, of either a state bank, savings bank or trust company, now organized or hereafter organized, under the laws of this state, and who acquire such stock after December 1, 1933, shall not be held liable to assessment on such stock or to pay any penalty for refusal to pay any assessment on such stock; nor shall such persons be liable to the creditors of any such corporation because of ownership of such stock, nor may any action be maintained against any such person to enforce liability because of the ownership of such stock. * * *"

The Iowa Supreme Court has repeatedly held that the Constitutional provision set forth above applies only to "banks of issue." *Allen v. Clayton,* 63 Iowa 11 (1884); *Leach v. Arthur Sav. Bank,* 203 Iowa 1052 (1927); *Andrew v. City Commercial Sav. Bank,* 205 Iowa 42 (1928); *Andrew v. American Sav. Bank,* 217 Iowa 447 (1934). We quote from the *Allen* case at page 21:

> "... The words, 'banking corporations,' used in section 9 mean banks of issue, and not those of discount or deposit; and that, if this be doubtful, then the legislative and practical contemporaneous construction of the Constitution leaves no room for doubt in this respect."

The Court, in the *Allen case,* further defines a "bank of issue" at page 10 as:

> "This means full or unlimited banking power; that is, the power to issue bills to circulate as money, and also the power to discount bills and receive deposits."

Acts authorizing "banks of issue" were repealed in their entirety by Chapter 25, Acts 13th G.A., in 1870, and presently existing state banks are not "banks of issue." *Andrew v. American Sav. Bank, supra.*

There is thus no question of "constitutional double-liability" imposed upon the shareholders of bank stock. The present assessment statute, §528.128, *supra,* was passed by the 45th Ex. G.A. in 1934, Chapter 119, providing a method for relieving extra assessments arising out of bank ownership after December 1, 1933.

Consequently, the liability of state bank, savings bank or trust company stockholders is as prescribed in §528.128, *supra,* for stock held after December 1, 1933, and for liabilities accruing after that date. This is, of course, subject to the corporation having exempted its stockholders and their private property in accordance with §528.127(4), 1958 Code.

2.2

BANKS AND BANKING: Legal investments—§§403A.12, 526.25(4), 1962 Code. Bonds issued under the Public Housing Act of 1937 are not legal investments for Iowa banks and trust companies unless they are Iowa bonds issued under the authority of §403A.12.

July 25,1962

Mr. Clay W. Stafford, Supt.,
Department of Banking
500 Central National Bldg.
Des Moines, Iowa

Dear Mr. Stafford:

By letter dated March 26, 1962, you have requested an opinion of this office on facts substantially as follows:

> Are public housing agency bonds issued under the provisions of the United States Public Housing Act of 1937 a legal investment for banks and trust companies chartered under the laws of the State of Iowa?

An opinion of this office issued July 11, 1959 dealt with a problem which arose with reference to similar bonds issued under the Public Housing Act of 1949. In that opinion we stated the following:

> "The United States Public Housing Act of 1949 (P.L. 171-81st Congress, approved July 15, 1949) provides for public housing agencies to be created under a State Housing Authority. A public housing agency is a governmental entity or public body, excluding the Public Housing Administration, which is authorized to engage in the development of low

rent housing or slum clearance. Such agencies are organized by cities and other political subdivisions under a state housing authority law. Each local housing agency will issue bonds which will be obligations of the local issuing agency. The bonds will be secured by the income of the local agency. The Public Housing Administration is authorized to make commitments to the local agency for an annual contribution in such sums as are necessary to meet principal and interest obligations of the bonds after the income of the agency has first been applied. In carrying out the development of low rent housing or slum clearance, loans will be made to private concerns who will engage in such projects.

* * *

"Your attention is invited to the prohibiting nature of the pertinent Iowa statute relating to investments by banks and trust companies. The statute prohibits investments except as expressly authorized. Examination of the seven categories of investments set forth in Section 526.25 of the Code, supra, discloses no category within which public housing agency bonds are included. A superficial reading of subparagraph 7 may lead to a first impression that such bonds may qualify under that subparagraph. However, it is to be noted that the bonds are not bonds secured by mortgage or trust deed insured by the Federal Housing Administrator nor are they debentures issued by the Federal Housing Administrator. Of course the bonds cannot be classed as securities issued by national mortgage associations or similar credit institutions."

The essential factor in the present question is that the Public Housing Act of 1949 was merely an amendment to the provisions of the Act of 1937 and these amendments, along with the original Act, are now found in 42 U.S.C., §§1401-1435. In particular, §§1409 and 1410(a), (b), and (c) are relevant provisions in regard to financing and the qualities of the bonds. These latter sections were not affected by the 1949 amendment. Neither the bonds issued under the 1949 amendment, referred to in 1952 *O.A.G.* 45, nor the bonds issued under the 1937 Act, were secured by "mortgage or trust deed insured by the federal housing administrator" nor were either of them "debentures issued by the federal housing administrator". These bonds are issued by local public agencies and secured by a first pledge only.

I direct your attention, however, to Chapter 215, Acts 59th G.A., now §403A.12, 1962 Code, which authorizes municipalities in Iowa to issue bonds in conjunction with low-rent housing projects. Undoubtedly, such bonds issued by Iowa municipalities would be legal investments under §526.25(4) of the Code, but the bonds in question are not Iowa bonds.

It is my opinion, therefore, that the opinion of this office found at 1952 *O.A.G.* 45 is controlling and that the bonds issued under the Public Housing Act of 1935 are not legal investments for banks and trust companies chartered under the laws of the State of Iowa.

2.3

BANKS AND BANKING: Money orders—H.F. 536, Acts 59th G.A., relating to the sale of checks, money orders and other written instruments for the transmission or payment of money, is applicable to savings and loan associations.

June 27, 1961

AUDITOR OF STATE
Statehouse
LOCAL

George T. Carson, Supervisor
Savings and Loan Department

Dear Mr. Carson:

This will acknowledge receipt of yours of June 7, 1961, in which you submitted the following:

"This Department has received a request for an official interpretation of House File No. 536, particularly as to whether or not savings and loan associations are included in the enactment.

"Specifically the question is, do the provisions of House File No. 536, which becomes law July 4, 1961, apply to savings and loan associations.

"We will greatly appreciate consideration of the question and your ruling thereon at your earliest convenience.

"A copy of the Act is enclosed."

The general enacting provision of the foregoing-numbered House File 536 is §1 thereof as follows:

"Section 1. No person shall engage in the business of selling written investments for the transmission or payment of money, whether in the form of checks, drafts, money orders, travelers checks or otherwise, unless such person's net worth is at all times at least twenty-five thousand dollars ($25,000), as shown by financial statements satisfactory to the superintendent of banking and such person has deposited and at all times keeps on deposit with the superintendent of banking fifty thousand dollars ($50,000) in cash or securities satisfactory to the superintendent of banking. However, the superintendent of banking may at his option accept a surety bond in the sum of fifty thousand dollars ($50,000) in the form satisfactory to him and issued by a surety company acceptable to him in lieu of such deposit. Such deposit or bond shall be for the protection of purchasers or holders of instruments sold by such person and the superintendent or any aggrieved party may enforce claims on such instruments against such deposit or bond. Simultaneously with the making of such deposit or delivery of such bond and annually thereafter each such person shall pay to the superintendent of banking an annual fee of one hundred dollars ($100)."

An exception to this general enacting provision is contained in §3 of the same numbered file, which provides as follows:

"Sec. 3 Nothing in this Act shall apply to corporations organized under the general banking laws of this state or of the United States or any department or agency thereof, or to private banks of this state, or to the receipt of money by an incorporated telegraph company at any office or agency thereof for immediate transmission by telegraph."

As related to the foregoing statutes, Chapter 338, §19(10), Laws 58th G.A., among other powers, states with respect to savings and loan associations:

"An association may also handle travelers checks and money orders."

The foregoing provision conferring such power upon savings and loan associations brings those associations within the terms of the quoted general enacting clause, and they are controlled by House File 536 unless they are excepted therefrom under the provisions of §3 of that Act, likewise hereinbefore quoted.

It is the rule that "a court cannot read into a statute an exception not found therein." And "Where a statutory proviso creates a special exception, those who claim the exception must establish it as being within the words as well as the reason thereof." *Hawkeye Portland Cement Co. v. Chicago, R. I. & P. Ry. Co.,* 198 Iowa 1250, 201 N.W. 16.

Applying the foregoing rule to the exception provided in §3 of the Act results in the conclusion that savings and loan associations are not included persons within its terms. Therefore, I am of the opinion that House File 536, Acts 59th G.A., is applicable to savings and loan associations.

Note is taken of the provisions of Chapter 338, §69(3), Acts 58th G.A., in which it is stated:

> "3. Chapter controlling. Insofar as the provisions of this chapter are inconsistent with the provisions of any other law affecting savings association the provisions of this chapter shall control."

but I find no inconsistency between the provisions of Chapter 338, Acts 58th G.A., and House File 536, Acts of the 59th G.A.

2.4

BANKS AND BANKING: State Sinking Fund—§§453.1, 454.1, 528.51, 1958 Code. Office established under §528.51 is not a bank under §453.1 and is not a depository secured by the State Sinking Fund authorized by §454.1.

March 29, 1962

Mr. J. T. Snyder
Buena Vista County Attorney
Storm Lake, Iowa

Dear Mr. Snyder:

Reference is herein made to yours of the 14th, inst., in which you submitted the following:

> "Opinion is requested relative to the following, which involves an official depository named by Buena Vista County.
>
> "The question is whether the State Sinking Fund, under Chapter 454, is effective to protect the individual members of the Board of Supervisors in the event of loss on a deposit placed with an official branch of a bank in this County, which office has been designated as an official depository under Chapter 453. The deposit limits set by the Board of Supervisors are as follows: $350,000 for the main bank and $350,000 for the office of the main bank.
>
> "I'd appreciate also your opinion as to whether each account is protected by the Federal Deposit Insurance Corporation insurance, or whether the two deposits are protected only to the extent of the initial $10,000 of deposit insurance."

Section 453.1 requires the county treasurer to deposit county funds in his hands in such banks as are approved by the board of supervisors, and the term "bank" as used in that statute is defined as follows:

> "The term 'bank' shall embrace any corporation, firm, or individual engaged in a general banking business."

From your statement, this requirement was met by your board of supervisors designating an office of a banking institution as an approved bank for the deposit of county money. The State Sinking Fund authorized by §454.1, Code of 1958, was designed to:

> "secure the payment of their deposits to state, county, township, municipal, and school corporations having public funds deposited in any bank in this state, when such deposits have been made by authority of and in conformity with the direction of the local governing council or board which is by law charged with the duty of selecting depository banks for said funds."

However, by statute, an office established by any banking institution is not a bank. According to §528.51, Code of Iowa,

"No banking institution shall open or maintain any branch bank. However, as may be authorized by and subject to the jurisdiction of the banking department any banking institution may establish an office for the sole and only purpose of receiving deposits and paying checks and performing such other clerical and routine duties not inconsistent with this section. . . ."

Thus, under the foregoing statutes, an office established under the terms of §528.51 is not a bank under the terms of §453.1, and, therefore, is not eligible to be designated as a depository within the State Sinking Fund provided by Chapter 454, Code of 1958.

2.5

Blanket surety bond for examiners and employees—§§524.8, 524.9, 1962 Code. The Banking Department can secure a corporate surety bond offering a blanket coverage for all bank examiners and employees as enumerated in Chs. 256 and 257, 59th G.A. and can pay the premium for a three-year term in a single payment. (Bump to Stafford, Supt. of Banking, 9/12/61) #61-9-5

2.6

Credit Unions—§§533.9, 533.17, 1958 Code. (1) The board of directors of a credit union cannot delegate authority to one of its members or to a committee to act upon applications for membership in the corporation. (2) A credit union cannot deduct patronage dividends or refunds of interest received on loans to members from gross income or gross earnings prior to computation of legal reserve requirements. (Bump to Stafford, Dept. of Banking, 8/4/61) #61-8-5

2.7

Redemption of real estate mortgages—§628.26, 1962 Code. The shortened period of redemption available in real estate mortgages must be agreed upon in the mortgage instrument, but it is not necessary that an election between the longer redemption period or the shortened redemption period with mortgagees' waiver of rights to deficiency judgment be made until time of foreclosure action. (Bump to O'Malley, St. Sen., 8/24/61) #61-8-29

2.8

Setoffs of deposit accounts—A bank may set off deposit accounts against notes of a depositor if that indebtedness has matured or if the depositor is insolvent unless the deposit is for a special purpose and the bank knows of this purpose. (Bump to Stafford, Dept. of Banking, 4/5/62) #62-4-1

CHAPTER 3

CITIES AND TOWNS

STAFF OPINIONS

LETTER OPINIONS

3.1

CITIES AND TOWNS: Auditor's plats and proprietor's plats—§§409.1, 409.14, 409.27, 409.28, 1962 Code. (1) An original proprietor's plat must be prepared by an original owner who subdivides any tract or parcel of land into three or more parts for the purpose of laying out a town or city or a part or addition thereof. (2) Auditor's plats can be prepared and filed where the original proprietor fails to do so, but only in towns of less than 12,000 population not having a plan commission.

December 21, 1962

Mr. Walter P. Williams
Acting Director
Iowa Development Commission
200 Jewett Building
Des Moines 9, Iowa

Dear Mr. Williams:

This is in reply to your letter of recent date in which you have raised questions in regard to plats under Chapter 409 of the Code as follows:

"1. The question that arises from 409.1 is: Who is the original owner that files a plat?

"2. The question that arises from 409.27 is: Can the 'plat by auditor', in communities of less than 12,000 circumvent Section 409.14?" Section 409.1 of the Code of Iowa in part provides:

"Subdivisions or additions. Every original proprietor of any tract or parcel of land, who has subdivided, or shall hereafter subdivide the same into three or more parts, for the purpose of laying out a town or city, or addition thereto, or part thereof, or suburban lots, . . . "

It is clear from this section that the only original owners required to file plats are those who subdivide any parcel or tract of land they may own into three or more parts and then only if they do so for the purpose of laying out a town or city or a part or addition of a town or city or suburban lots. For example, if A owns a parcel of land and conveys a part of it to B, then conveys the remaining part to C, who conveys a portion of the part he receives to D, there is no requirement that a plat be filed because no one proprietor

has subdivided into three or more parts, although the parcel as originally owned by A is now three separate tracts.

Section 409.14 in part provides:

"No county auditor or recorder shall hereafter file or record, nor permit to be filed or recorded, any plat ... within a city ... of any size having a plan commission organized under the provisions of chapter 373. ... "

Section 409.27 provides that the county auditor shall, for towns of less than 12,000 and after certain statutory procedures are followed, file a plat when the original proprietor has failed to do so. It is clear that the auditor can only do so when the town is less than 12,000 population. If such towns do not have a plan commission, then §409.14 is not applicable at all, and in such cases §409.28 states that the auditor's plat has the same effect as if executed, acknowledged, and recorded by the owners; that is, the same effect as if there had been full compliance with §409.1-12.

In a city or town with less than 12,000 population having a plan commission, the auditor is required to file and receive approval of the plat as specified in §409.14. In such cases the auditor will be able to prepare the plat under §409.27, but will not be able to file it under §409.28 until the plan commission has approved it under §409.14.

In summary, an original owner required to file a plat is one who subdivides his own land into three or more parcels for the purpose of laying out a town or city or a plat or addition thereto or a suburb thereof. Section 409.27 provides an independent filing procedure in some cases, but such procedure cannot circumvent the requirements of §409.14 when those requirements are applicable.

3.2

CITIES AND TOWNS: Authority of fence viewers—§§359.24, 359.25, 1958 Code. The fence viewers have no authority in cities and towns, and where a city is one of the parties to the controversy and it being also the fence viewer, the controversy should be determined by the parties themselves.

April 13, 1962

Mr. Gordon L. Winkel
Kossuth County Attorney
Algona, Iowa

Dear Mr. Winkel:

Reference is herein made to your letter in which you submitted the following:

"I would like to request an Attorney General opinion on the powers of the fence viewers under chapter 113 of the Code of Iowa. The problem stated simply is whether or not the township trustees have authority to determine a line fence dispute between property belonging to a town or municipality and adjoining property belonging to a party who lives within an adjoining township.

"The facts stated in more detail are as follows. The city of Algona owns a small piece of ground and the outside border of said ground is the city limit boundary. Directly adjacent to this city property and city limit line is a piece of property owned by a person whose property is situated within an adjoining township of the county. The land owner has requested that the city maintain a reasonable portion of the line fence. The land owner keeps livestock on his property and, therefore, it

is necessary for his property to be enclosed by adequate fences. The city has refused to be responsible for any portion of this line or partition fence.

"Under these facts, do the township trustees have authority to meet and determine the line fence controversy and require the city of Algona to maintain a portion thereof?

"In the event that the township trustees have no such authority, can the adjoining land owner require the city council to act as fence viewers and determine the line fence controversy?"

(1) Fence viewers have no authority in cities and towns. The powers of township trustees, including those of fence viewers, are transferred to cities and towns, and where the township boundary and the city boundary coincide, the office of township clerk and trustee are abolished and their duties are transferred to the city council. See §§359.24 and 359.25 and 1928 O.A.G. 208. In 1934 O.A.G. 397, it was stated:

"There is nothing in Chapter 88 which limits the jurisdiction of fence viewers to that part of their township which lies outside of cities and towns. It would not be assumed that township trustees as fence viewers have any authority to compel the construction of a fence between adjoining owners of property in the business district of a city or town. If they have jurisdiction with reference to fences in the outlying portion of a city, they have the same jurisdiction in all other parts of it. Section 5744 gives cities and towns the power to restrain and prohibit the use of barbed wire to enclose land within the corporation and to restrain and prohibit the running at large of cattle, horses, swine, sheep and other animals and fowl within the limits of such corporation.

"While the statutes might be more specific in regard to the territorial jurisdiction of the fence viewers, we believe they have no jurisdiction in cities and towns and that the city and town officers and the courts have exclusive jurisdiction within such corporate limits."

(2) Insofar as your question (2) is concerned, it appearing that the city council is itself not only the fence viewer, but also agent of the city owning the property, and as the situation is one between the council as fence viewer and the adjoining owner, it would seem that the parties in their respective capacities should determine this controversy.

3.3

CITIES AND TOWNS: City ordinance—§321.236, 1962 Code. A section of a city ordinance purporting to incorporate the Iowa statutory law of the road in its entirety, but providing for a variation in penalty for violation thereof is invalid under §321.236 as being inconsistent with state law.

July 5, 1962

Mr. Robert A. Maddocks
Wright County Attorney
Clarion, Iowa

Dear Mr. Maddocks:

This is in response to your recent inquiry in which you set for the following:

"The Mayor of the City of Eagle Grove began making his regular quarterly reports to Wright County this year. The Mayor included in these reports motor vehicle cases that were brought in the name of City of Eagle Grove vs. the defendant. However, the information charged the defendant of violation of Ordinance No. 160, Section 8 and Iowa Code

Section 321..... Ordinance No. 160, Section 8 reads 'Required obedience to provisions of the Ordinance and State law. Failure of any person to abide by the provisions of this ordinance and the Iowa Statutory Law relating to motor vehicles and the statutory law of the road is a violation of this ordinance.' After several such quarterly reports had been filed with the Wright County Auditor and a check for the traffic fines collected paid to the Wright County Treasurer, the City of Eagle Grove now desires to amend and correct each of the previous quarterly reports, stating that the cases in the quarterly report were violations of the City Ordinance erroneously included in said report. Further, that the funds paid were paid through error and said City of Eagle Grove is entitled to a refund.

"1. Were these cases properly includable in the quarterly report filed by the Mayor with Wright County?

"2. In the event No. 1, supra is answered in the negative may Wright County legally refund the funds paid by mistake, or must the City of Eagle Grove accept the report and correct their mistakes in future quarterly reports?"

In relation to this problem, §321.236, 1962 Code, in pertinent part, provides:

"Local authorities shall have no power to enact, enforce, or maintain any ordinance . . . in any way in conflict with, contrary to or inconsistent with the provision of this Chapter, and no such ordinance . . . of said local authorities heretofore or hereafter enacted shall have any force or effect. . . ."

The law is well established that a municipality, when not expressly prohibited, has the power to enact an ordinance dealing with the same subject matter as that dealt with by state law, *Des Moines v. Reiter,* 251 Iowa 1206, 102 N.W. 2d 363 (1960); *Des Moines v. Rosenberg,* 243 Iowa 262, 51 N.W. 2d 450 (1962); *Neola v. Reichart,* 131 Iowa 492, 109 N.W. 5 (1906); *Bloomfield v. Trimble,* 54 Iowa 399, 6 N.W. 586 (1880). However, under §321.236, for §8 of this ordinance to be effective, it must be consistent with the state law it seeks to implement. In relation to the motor vehicle laws, when a difference in penalty exisits between the ordinance and corresponding state statutes, the ordinance is inconsistent and therefore void. 1939 *O.A.G.* 309; 1911-12 *O.A.G.* 372.

Here there can be no question that a variation in penalty exists when an ordinance purports to embody the entire Iowa statutory law relating to motor vehicles with all its varying penalty provision.

The invalidity of §8 is not fatal to the entire ordinance, however. Section 8 is not so inseparably connected to the remainder of the ordinance as to render the whole invalid, *Massey v. Des Moines,* 239 Iowa 527, 31 N.W. 2d 875 (1948); *Ebert v. Short,* 199 Iowa 147, 201 N.W. 793 (1925); *Davenport Gas & Electric Co. v. Davenport,* 124 Iowa 22, 98 N.W. 892 (1904).

Thus, the only penalties which could validly be collected were those for violations of state law, the proceeds of which must be paid to the county for the benefit of the school fund. Section 666.6, 1962 Code; Constitution of Iowa, Art. IX, §4; Art. XII, §4; *Platteville v. Bell,* 43 Wis. 488 (1878); 1919-20 *O.A.G.* 796.

3.4

CITIES AND TOWNS: Civil service promotional examination—§§365.10 and 70.1, 1958 Code. City firemen taking promotional examination for civil service purposes are not entitled to soldiers preference under §70.1.

December 14, 1961

Honorable Cleve L. Carnahan
State Representative
Wapello County
R. R. #4
Ottumwa, Iowa

Dear Mr. Carnahan:

This is in response to your letter of November 28, 1961, in which you set forth the following:

"There is a *promotional examination* for city firemen to be given and the question is, which section of the Iowa Code applies.

"Chapter 70 under Soldiers Preference, or Chapter 365.10, as amended."

As you are aware, §365.10 was amended by Chapter 274, §1, of the 58th G. A., and now reads as follows:

"365.10 Preferences. In all examinations and appointments under the provisions of this chapter, *other than promotions,* honorably discharged men and women from the military or naval forces . . . who are citizens and residents of this state, shall be given the preference, if otherwise qualified. * * *" (emphasis added)

The only change effected by this amendment was the addition of the underscored words expressly deleting promotional examinations from the preference qualification of the civil service statute.

Section 70.1, Iowa Code 1958, dealing expressly with soldiers preference in public employment, presently provides that:

"70.1 . . . honorably discharged men and women from the military or naval forces . . . shall be entitled to preference in . . . promotion over other applicants of no greater qualification. * * *"

With relation to public employees covered by civil service, these sections dealing with promotional examinations are apparently in conflict. The later-enacted and amended §365.10 is a special statute and is controlling over the general soldiers preference law. *Andreano v. Elder Gunter et al.,* 110 N.W. 2d 649.

Consequently, it is the opinion of this Department that no preference can be given city firemen in promotional examinations because of their veteran status.

3.5

CITIES AND TOWNS: Contracts between benefited fire districts—§§357A.-11, 359. 42, 359.43, 1962 Code. Township fire district has power to contract with benefited fire district to furnish services and to perform any act or enter any contract allowed by §359.42.

August 6, 1962

Mr. William L. Matthews
Louisa County Attorney
Wapello, Iowa

Dear Mr. Matthews:

This will acknowledge receipt of your recent letter in which you request an opinion in reference to §359.42 of the 1962 Code as follows:

"My question involves a construction of this statute. May a town-

ship adjoining a benefited fire district, authorize said fire district to provide services within the township which already has an established district, and as compensation therefor pay a percentage of the tax money collected in the district by means of the general fire levy?"
Section 359.42 provides:

"Authorization. The township trustees of any township may purchase, own, rent, or maintain fire apparatus or equipment and provide housing for same and furnish services in the extinguishing of fires within the state or outside of the territorial jurisdiction and boundary limits of the state of Iowa, independently or jointly with any adjoining township or townships, likewise authorized as herein provided, or with any city or town or benefited fire districts, within the state or outside of the territorial jurisdiction and boundary limits of the state of Iowa."

This section was amended to read as it presently does by the 59th G.A., Ch. 194, §3. Before that enactment, township fire districts were limited to furnishing services *"in said township"* or *"independently or jointly with any adjoining township or townships, likewise authorized as herein provided, or with any city or town likewise authorized as herein provided, or with any city or town . . ."* This provision clearly did not authorize cooperation with benefited fire districts formed under Chapter 357A of the Code. Chapter 194 of the 59th G.A. repealed the words "in said township" and enacted in their place the words *"within the state or outside of the territorial jurisdiction and boundary limits of the State of Iowa."* The words *"or benefited fire districts"* were also added as entities with which the township fire districts might co-operate. (All emphasis added).

Section 357A.11 provides in part:

"Powers of trustees. The trustees may purchase, own, rent or maintain fire apparatus or equipment within the state or outside of the territorial jurisdiction and boundary limits of the state of Iowa and provide housing for same and furnish services in the extinguishing of fires within the state or outside of the territorial jurisdiction and boundary limits of the state of Iowa . . ."

Section 357A.11 was likewise amended by Ch. 194 of the 59th G.A. to extend the powers of the benefited fire districts from authority "in said benefited fire district" to "within the state or outside of the territorial jurisdiction and boundary limits of the state of Iowa."

Chapter 194 of the 59th G.A. expresses a clear intent on the part of the legislature to authorize co-operation between benefited fire districts organized under Chapter 357A and township fire districts organized under §359.42. The reason for such an enactment may have arisen from the fact that there is no statutory authority for the dissolution of township districts unless completely absorbed by a benefited fire district and that its authority to levy taxes under §359.43 continues until it is so completely absorbed. This situation was pointed out by several prior opinions of this office. (Strauss to Matthews, Louisa Co. Atty., 10/10/61; 1958 *O.A.G.* 316). In another relevant situation, it was indicated that, under the law then existing, portions of a township might be too small to be able to form an independent benefited fire district and that possibly no surrounding district would have authority to enter into contracts to furnish protection to the residents as individuals. (Abels to Carlson, Clinton County Attorney, 11/24/69).

An opinion of this office in 1940 *O.A.G.* 338 held that a contract entered into by the township trustees with an adjoining city or town, whereby the city or town owns the equipment and the township pays a certain amount per year rent for the use of the equipment when needed, is a valid contract. This is apparently the situation contemplated in the present request with the

exception that the contract would be between the township and a benefited fire district.

In summary, the township fire district has the power under §359.42 to ". . . rent . . . fire apparatus or equipment . . . independently or jointly with any . . . benefited fire districts, within the state or outside of the territorial jurisdiction and boundary limits of the state of Iowa." Under §357A.11, the benefited fire district has the power to " . . . furnish services in the extinguishing of fires within the state or outside of the territorial jurisdiction and boundary of the limits of the state of Iowa." As indicated above, the power of the trustees to levy the tax under §359.43, once authorized by the people of the township by an election held under §359.44, that an affirmative vote by the people, unless specifically limited, authorizes the township trustees to perform any act or enter into any contract allowed by §359.42.

In conclusion, it is our opinion that a valid contract can be made on the facts presented.

3.6

CITIES AND TOWNS: Hospital expenses for permanently incapacitated firemen and policemen—§§410.18, 411.6(5), 1958 Code. A fireman or policeman may recover medical expenses for treatment of disease incurred while in the performance of his duties under §410.18, even though he is receiving a retirement benefit under Ch. 411. The fact of the incurring of disease while in the performance of duty must be proven by the person seeking the benefit of §410.18.

April 12, 1962

Honorable Richard C. Turner
State Senator
123 Pearl Street
Council Bluffs, Iowa

Dear Senator Turner:

This is to acknowledge receipt of your letter of January 22, 1962, wherein you request an opinion on the following:

> "Is a policeman or fireman who has been totally and permanently incapacitated for duty as the natural and proximate result of a heart disease or any disease of the lungs or respiratory tract which has been presumed to have been contracted while on duty as a result of strain or the inhalation of noxious fumes, poison or gases, and who has been granted a pension pursuant to §411.6(5), entitled to the payment of hospital, nursing and medical attention expenses incurred, as provided for in §410.18, Code of Iowa, 1958?"

Section 411.6(5), as amended by Chapter 293, Acts 58th G.A., provides the following:

> "Disease *under this section* shall mean heart disease or any disease of the lungs or respiratory tract and shall be *presumed* to have been contracted while on active duty as a result of strain or the inhalation of noxious fumes, poison, or gases." (Emphasis added)

It is clear that the legislature intended that the presumption concerning contraction while on active duty indulged under §411.6(5) would be applicable only to that section by the use of the phrase "under this section." Thus, this presumption cannot be carried over into §410.18.

Section 410.18, provides in pertinent part as follows:

> "Cities and towns shall provide hospital, nursing, and medical atten-

tion for the members of the police and fire departments of such cities, when *injured while in the performance of their duties* as members of such department, . . ." (Emphasis added)

The Iowa Court has held that the word "injured" may be interpreted to include "disease." *Jacques v. Farmers Lumber & Supply Co.,* 242 Iowa 548, 552 (1951). Thus, a fireman or policeman under §410.18 may recover medical expenses for the treatment of *disease* incurred while in the performance of his duties, even though he is presently receiving a retirement benefit under Chapter 411. However, since the presumption regarding heart and lung ailments in §411.6(5) is not available under §410.18, the fact of the incurring of these ailments *while in the performance of duty* must be proved by the person seeking the benefits of §410.18.

3.7

CITIES AND TOWNS: Leases, property tax exemption—§427.1(2), 1958 Code. A city as lessee, having agreed in a lease to pay taxes levied against the property leased, is not entitled to assert exemption.

April 4, 1961

Mr. Glen M. McGee
Mills County Attorney
Glenwood, Iowa

Dear Mr. McGee:

This will acknowledge receipt of your letter of March 9, 1961, in which you state the following:

"The City of Glenwood has leased one city lot adjoining and owned by the Assembly of God Church. The lot is used by the City for free off-street parking. The County Assessor is taxing this lot against the City. The lease provides that the City will pay any taxes on this property.

"The question is: is this real estate exempt from taxation to the City of Glenwood?"

This does not appear to be a question of exemption from taxation to the City of Glenwood. Obviously, under the facts, the property owned by the Assembly of God Church is not exempt from taxation. As between the levying body and the church, the levy is made against the church, and the taxes due from it to the taxing body. There is no privity between the levying body and the city. The situation appears to be merely a contractual obligation with the church for the city to pay the taxes levied on the real estate. The tax is not levied upon the leasehold. The situation as described does not come within the exemption statute, §427.1(2), 1958 Code.

84 C.J.S., Taxation, par. 61b, states as to this kind of situation the following:

"Between Private Persons

"In the absence of a statute providing otherwise, contracts between private persons with respect to taxes may be binding as between them and given effect according to their terms, but such contracts do not affect the right of the state unless it is in privity thereto.

"Assessors are not obliged to inquire into private contracts between parties, with respect to taxes, when assessing property. In the absence of a statute providing otherwise, such contracts may be binding as between the parties, and given effect according to their terms, but such contracts do not affect the right of the sovereign or the state, unless it is in privity thereto, except in so far as the matter may be governed by statute."

3.8

CITIES AND TOWNS: Legal fees on auditor's plats—§§336.2(7), 409.27, 409.29, 1962 Code. Legal fees for legal advice or opinion are not a properly chargeable cost and expense under §409.29 in preparation of an auditor's plat.

November 30, 1962

Mr. Edward F. Samore
Woodbury County Attorney
204 Courthouse
Sioux City, Iowa

Dear Mr. Samore:

This is in response to your recent letter, in which you set forth the following:

"Section 409.29 of the 1962 Code of Iowa provides for payment of costs and expenses of an Auditor's Plat by the Board of Supervisors, and subsequently assess pro rata upon the several subdivisions of said tract so subdivided. In view of the extensive and technical requirements of Sections 409.27 through 409.32, they do not determine whether legal fees are to be considered as costs and expenses which may be allowed by the Board of Supervisors and assessed against the tract of land so divided.

"Your opinion is requested as to whether or not legal fees are to be considered as part of the costs and expenses."

As indicated in your letter, it is not clear in §409.29 whether legal fees would be a properly chargeable "cost and expense" of an auditor's plat. However, nowhere in Chapter 409 is the auditor given authority to employ an attorney to assist in the preparation of a plat. Consequently, any legal advice required by the auditor would necessarily have to be furnished by the county attorney, pursuant to §336.2, which provides:

"It shall be the duty of the county attorney to:

"* * *

"7. Give advice or his opinion in writing, without compensation, to . . . county officers . . . when requested so to do . . ."

In the formulation of an auditor's plat pursuant to §409.27, attorneys' fees are not properly chargeable costs or expenses if the fees are for legal advice or opinion. We make no comment regarding extraordinary services which are not indicated to be present here.

3.9

CITIES AND TOWNS: Libraries—§387.1, 1958 Code. City council may rent space for library purposes and execute a lease beyond the term of the council, provided such lease is for a reasonable length of time.

April 28, 1961

Miss Ernestine Grafton, Director
State Traveling Library
Historical Building
LOCAL

Dear Miss Grafton:

Reference is made to your letter of March 17, in which you stated the following:

"Mr. Dan A. Williams, Director, Public Library of Des Moines has asked me to seek counsel of you on a legal matter which would be an interpretation of the Code Section 378 as well as the general laws of Iowa.

"Here is Mr. Williams' question: 'May a City or Town enter into a lease for a building to be used for a Public Library and if so, what term of years may said lease cover? For example, 3, 5, 10 or 15 years?' "

Section 378.1, Code 1958, provides:

"*Formation—maintenance.* Cities and towns may provide for the formation and maintenance of free public libraries open to the use of all inhabitants under proper regulations, and may purchase, erect, or rent buildings or rooms suitable for this purpose and provide for the compensation of necessary employees."

Under the above section, a city has the authority to perform a function of providing free public libraries for its inhabitants and may enter such a contract to rent suitable space for this purpose. There is a distinction drawn between types of contracts executed by a municipal council based upon the subject matter of the contract. This distinction is clearly drawn in 37 *Am. Jur.,* Municipal corporations, §66, page 679.

"Where the contract involved relates to governmental or legislative functions of the council, or involves a matter of discretion to be exercised by the council unless the statute conferring power to contract clearly authorizes the council to make a contract extending beyond its own term, no power of the council so to do exists, since the power conferred upon municipal councils to exercise legislative or governmental functions is conferred to be exercised as often as may be found needful or politic, and the council presently holding such powers is vested with no discretion to circumscribe or limit or diminish their efficiency, but must transmit them unimpaired to their successors. But in the exercise of the business powers of a municipal corporation, the municipality and its officers are controlled by no such rule, and they may lawfully exercise these powers in the same way, and in their exercise the municipality will be governed by the same rules which control a private individual or a business corporation under like circumstances."

The establishment of a free public library comes within the latter category. *Kerr v. Pratt Free Library of Baltimore,* 54 F. Supp. 514. The lease could be executed for property from others beyond the term of the council. *Ambrozich v. Eveleth,* 200 Minn. 473, 274 N.W. 635, 112 A.L.R. 269.

These principles have been recognized by the Supreme Court of Iowa in the case of *City of Des Moines v. City of West Des Moines,* 239 Iowa 1, 30 N.W. 2d 500. In the Des Moines case, *supra,* the Court refused to determine what length the term of lease should be. However, as a general rule, a lease of the kind as set out in your letter should be reasonable in the length of time for which it is extended. 149 A.L.R. 339.

Thus, in answer to your questions, the city council does have the authority to lease property for library purposes beyond the term of the council. However, the term of years the lease may cover is a fact question which we must decline to answer.

3.10

CITIES AND TOWNS: Ordinance regulating discrimination in private housing—§§366.1, 368.2, Ch. 413, 1958 Code. A city does not have authority to enact an ordinance prohibiting discrimination in private housing without express statutory enabling legislation.

July 24, 1961

Honorable William F. Denman
State Representative
619 Savings and Loan Building
Des Moines 9, Iowa

Dear Mr. Denman:

This letter is in response to your recent inquiry in which you set forth the following:

"The Commission on Human Rights of the City of Des Moines has adopted a resolution urging the City Council to adopt an ordinance covering the subject of housing and sale of real property and specifically ... (defining discrimination in housing, prohibiting said discrimination, and providing subpoena power to Commission on Human Rights and providing penalties) ..."

"The contents of the foregoing resolution have been under study by the Council and Legal Department of the City of Des Moines and such study has revealed that throughout the United States, Fair Housing legislation had been adopted as of April 30, 1960, in seven states as applicable to private housing *by act of the legislature.* They are, Colorado, Connecticut, Massachusetts, Minnesota, New York, Oregon and Pennsylvania.

"As of the same date, thirty-two cities in states having such enabling legislation had adopted Fair Housing ordinances *applicable to public housing* but only two of them, New York and Pittsburg, extended the prohibition of such ordinances to *private* real estate sales, rentals, or financing.

"Thus, the question arises whether under Iowa laws, cities and towns have power to adopt ordinances regulating the sale, rental and financing of real estate in the absence of express enabling legislation by the General Assembly or adoption of a Home Rule amendment to the Constitution of Iowa.

"This existence of such power in the absence of express enabling legislation appears in doubt by reason of frequently announced rule that cities and towns are creatures of statute with only those powers expressly conferred by statute or reasonably and necessarily implied as incident to exercise an expressly conferred power. In this connection see the decision of the Supreme Court in the case of *Gritton v. City of Des Moines* and cases cited therein.

"Further doubt as to the power of Iowa cities and towns to adopt such an ordinance may exist in the fact that Chapter 368 and other sections of the Code of Iowa and particularly Sections 368.6, 368.7 and 368.8 expressly enumerate certain activities which a city or town may regulate or prohibit. Under the rule of statutory construction *expressio unius est exclusio alterius* doubt as to the existence of the power in question arises which should be resolved by an Attorney General's opinion."

The main subject matter of the proposed ordinance deals with discrimination in private housing. Consequently, it must be determined whether the Code of Iowa contains any controlling provisions on the matter.

A careful analysis of Chapter 413 (Cities and Towns—Housing Law) Code of Iowa, 1958, which sets forth in detail those provisions relating to housing (including the color of basement walls, see §413.64), reveals that no reference has been made to discrimination in housing. It must then be determined whether there exists any other statutory authorization under which a city might enact such a proposed ordinance.

The general powers of cities and towns are set forth in §366.1 and in Chapter 368, Iowa Code 1958. Section 366.1 provides:

"366.1 *Power to pass.* Municipal corporations shall have power to

make and publish, from time to time, ordinances, not inconsistent with the laws of the state, for carrying into effect or discharging the powers and duties conferred by this title, and such as shall seem necessary and proper to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort, and convenience of such corporations and the inhabitants thereof, and to enforce obedience to such ordinances by fine not exceeding one hundred dollars, or by imprisonment not exceeding thirty days."

This seemingly broad grant of power has been construed narrowly on repeated occasions by the Iowa Supreme Court. In *Dotson v. City of Ames,* 251 Iowa 467 (1960), the Court said at page 470:

"It is elementary that municipalities have only those powers expressly given them, those which arise from fair implication and those necessary to carry out powers expressly or impliedly granted. Stoner McCray System v. City of Des Moines, 247 Iowa 1313, 1322, 78 N.W. 2d 843, 849, 58 A. L. R. 2d 1304. It is also well settled that grants of power to municipalities are strictly construed against the authority claimed, and in case of reasonable doubt must be denied. City of Mason City v. Zerble, 250 Iowa 102, 108, 93 N. W. 2d 813, 816."

Specific delegations of power to cities and towns are set forth in Chapter 368, but the power to legislate on the matter of the "sale, rental, leasing or financing" of private housing is not one of those delegated powers. Cities and towns are also granted such other powers "... as are incident to municipal corporations of like character, not inconsistent with the statutes of the state, for the protection of their property and inhabitants, and the preservation of peace and good order therein ..." §368.2. However, we do not find that the exercise of this power would be "necessarily or fairly implied in or incident to the powers expressly granted." *Gritton v. City of Des Moines,* 247 Iowa 326, 331 (1955). As was said in the *Dotson* case, *supra,* at page 471:

"... The express mention of one thing implies the exclusion of the others. The Latin phrase is 'expressio unius est exclusio alterius.' Thus the legislative intent is expressed by omission as well as by inclusion."

By comparison, those cities, New York and Pittsburgh, which have enacted ordinances applicable to *private housing,* have done so under grants of power essentially different than those powers granted to Iowa cities and towns. For example the New York City ordinance, Local Laws of New York City, No. 80, 1957, was enacted under the following provision:

"§27. *Extent of legislative power.* Any enumeration of powers in this chapter shall not be held to limit the legislative power of the council except as in this charter specifically provided."

See also: *Constitution of New York,* Art. IX, §§6 and 12; and *New York City Home Rule Law,* §11. The ordinance in question was upheld in *Martin v. New York City,* 22 Misc. 2d 389, 201 N.Y.S. 2d 111 (1960). (As amended 1959, P.L. 478, §1.) (This ordinance apparently has not been tested in court and was not enacted under a Home Rule Charter.)

Neither Chapter 413, relating to housing, nor the general powers set forth in Chapter 368 constitute sufficient basis for the enactment of the proposed ordinance. It is the opinion of this office that the City of Des Moines cannot enact an ordinance relating to matters of discrimination in the sale, rental, leasing or financing of private property without express statutory enabling legislation. (With relation to *public housing,* see HF 187, *Laws of Iowa,* 59th General Assembly, 1961.)

3.11

CITIES AND TOWNS: Parking meter violations—§§367.5, 390.7, 1958

Code. Parking meter violations are enforcible in mayor's court even though city council hires "meter men" who are not under the supervision of the Mayor or police department.

May 5, 1961

Mr. James Van Ginkel
Cass County Attorney
Atlantic State Bank Building
Atlantic, Iowa

Dear Mr. Van Ginkel:

This is in response to your letter of March 1, 1961, in which you enclose copies of a parking meter ordinance of the City of Atlantic and a motion to dismiss and a court order filed in Mayor's Court before Howard Lundberg, Mayor of the City of Atlantic, Iowa. In your letter you set forth the following question:

> "The City has two men who are hired by the City Council of Atlantic and who are under the jurisdiction of the City Council who check the parking meters around the city for possible violation. If they find a car parked in a parking meter stall and the meter has expired they thereupon issue a ticket which is in the form of an envelope with the information as to the licence number, make and model of car and upon that envelope it states that if the violator pays 10¢ within 3 days of the violation that he has then fullfilled his obligation and nothing further will take place. It further states that if the 10¢ is not paid within 3 days then the violator must pay $1.00 for the alleged violation. The usual procedure is to wait a week or two for the violator to pay the 10¢ fine and if he does not then a letter is sent out by these meter men to the violator advising him that he now owes a dollar and that he should pay it at the city hall in Atlantic.
>
> ... The real point seems to be as to whether or not the parking meters can be under the jurisdiction of the City Council and the employees who are hired by the council and then enforce the parking meter ordinance in the Mayors court or whether the parking meter men must be under the police department before the ordinance can be enforced in the Mayor's Court?"

As you are undoubtedly aware, a question substantially similar to the above was presented to the Iowa Court in the case of *City of Des Moines v. Reiter,* 251 Iowa 1206, 102 N.W. 2d 363. In the *Reiter* case it was alleged that the city had no authority to hire "meter maids" to observe parking violations and to summon violators into court. In this case at page 366 the Court said.

> "We perceive no good reason why municipalities may not relieve regular members of the police department from such duties and employ so-called meter maids therefor. This involves merely the manner or means of the City's exercise of power rather than the existence of the power."

Jurisdiction over the operation of parking meters is statutorily vested in the city council. §390.7, Iowa Code. There are many other areas in municipal government where ordinances are promulgated over which the Mayor, as presiding officer in Mayor's Court, or the police department as such do not have the initial enforcement responsibility. See, for example, Ch. 413, Housing Law, and Ch. 414, Municipal Zoning. It is nevertheless the duty of the Mayor, as presiding officer in Mayor's Court, to hear the prosecution of any ordinance violations in these areas, §367.5, Iowa Code, and this reasoning applies equally to parking meter ordinance violations.

3.12

CITIES AND TOWNS: Publication of notice—§368A.3(3), 1958 Code.

Clerks of municipal corporations having a population of less than 150,000 are required, for publication in a newspaper of general circulation in the city or town, to make a condensed statement of the proceedings of the council immediately after a regular or special meeting thereof. Approval of the minutes of such meeting is not a prerequisite to the performance of this duty by said clerks.

April 7, 1961

Mr. S. E. Tennant
Iowa Printing Board
Statehouse
LOCAL

Dear Mr. Tennant:

This will acknowledge receipt of your letter of March 17, 1961, in which you state the following:

"The State Printing Board would appreciate having a section of the Code cleared up in regard to the publishing of City Council Proceedings.

"Field representatives from the *State Auditor's* office have informed some of the city clerks that the minutes of their meetings should not be published until they have approval of the City Council. Since the council meets regularly once a month—this means a month delay.

"The Superintendent of Printing fails to read Section 368A—Part 3 in the same manner as the Field Representatives.

"What we would like determined in this paragraph is the word 'immediately' where it reads that the City Clerk must publish the proceedings 'immediately after each meeting.'

"A ruling on this point would clear the atmosphere for the State Printing Board office."

Interpretation of the statute in question, being §368A.3(3), the portion of which under consideration is:

"*The Clerk.* In all municipal corporations the clerk shall perform the following duties:

"1. * * *

2. * * *

3. Immediately following a regular or special meeting of the city or town council, the clerk shall prepare a condensed statement of the proceedings of said council, including the total expenditure from each municipal fund, and cause the same to be published in a newspaper of general circulation in the city or town. Said statement shall include a list of all claims allowed and a summary of all receipts * * * "

was made in *The Clerk's Manual,* issued by the institute of Public Affairs of the State University of Iowa, in terms as follows:

"An accurate record of all proceedings and all rules and ordinances adopted by the council must be made by the clerk. The clerk is the custodian of such records; they must be open to the public at all times.

"Publication of Proceedings. Immediately after a regular or special meeting of the city or town council, the clerk must prepare a condensed statement of the proceedings of the council and have it published in a newspaper of general circulation in the city or town. The publication

requirement is mandatory; failure to comply with this requirement constitutes a misdemeanor.

"The contents of the condensed statement are stipulated in the Code: it must include (1) a statement of the total expenditures authorized from each municipal fund: (2) a list of all claims allowed; and (3) a summary of all receipts. (Sec. 368A.3(3).

As will be noted, no provision, express or implied, imposes upon the clerk the duty of having the minutes approved prior to publication. Requiring prior approval of the minutes would constitute legislation by interpretation. See the case of *Hindman v. Reaser,* 240 Iowa 1375, where, quoting from 82 *C.J.S.,* Statutes, §312, it is stated:

"The courts must construe statutes as they find them and are not to amend or change them under the guise of construction."

Publication in the manner and time specified in the foregoing statute is a mandatory requirement.

3.13

CITIES AND TOWNS: Removal of police officers—§§66.1, 365.18, 365.19, 1958 Code. An independent action will lie in the district court under Ch. 66, 1958 Code, to remove a police officer with civil service status, although power of removal is also conferred upon municipalities by the civil service statute.

April 26, 1961

Honorable William Denman
State Representative, Polk County
House of Representatives
L O C A L

Dear Mr. Denman:

This will acknowledge receipt of your recent communication, in which you submit the following question:

"Will an independent action lie under Chapter 66 of the Code to remove a police officer with Civil Service status?"

Chapter 66 of the 1958 Code of Iowa provides a method for the removal of nonimpeachable public officers by the district court. Section 66.1 provides:

"Any appointive or elective officer, except such as may be removed only by impeachment, holding any public office in the state or in any division or municipality thereof, may be removed from office by the district court for any of the following reasons:

1. For willful or habitual neglect or refusal to perform the duties of his office.

2. For willful misconduct or maladministration in office.

3. For corruption.

4. For extortion.

5. For conviction of a felony.

6. For intoxication, or upon conviction of being intoxicated."

The statute then provides for the filing of a petition, notice to the accused, and hearing before the district court. The court, after hearing testimony and

receiving evidence, may then enter judgment of removal or dismiss the petition.

By the clear weight of authority, a policeman would be a public officer within the meaning of Chapter 66. See *State v. Spaulding,* 102 Iowa 639, 72 N.W. 288. It should be noted that when this statute was first enacted, it was specifically restricted to executive and law enforcement officers.

Chapter 78, §1, Laws of the 33rd G.A., in pertinent part provided:

> *"Officers subject to removal—causes.* Any county attorney, sheriff, mayor, police officer, marshal or constable shall be removed from office by the district court or judge upon charges made in writing and hearing thereunder for the following causes: ..."

Other officers were added by subsequent amendments and the section was finally extended to include "any appointive or elective officer." Acts of the Extra Session of the 40th G.A., H F 34.

Section 365.18 provides:

> "No person holding civil service rights as provided in this chapter shall be removed, demoted or suspended *arbitrarily,* except as otherwise provided in this chapter, but may be removed, demoted or suspended after a hearing by a majority vote of the civil service commission, for neglect of duty, disobedience, misconduct, or failure to properly perform his duties." (Emphasis added)

The sections following §365.18 clearly indicate that it is concerned with arbitrary or peremptory removal of a civil service employee by a superior. This represents the interpretation of the Supreme Court of Iowa, as reflected in *Anderson v. Civil Service Commission,* 227 Iowa 1164, 290 N.W. 493, at page 1168 of the Iowa Report:

> "Neither the Civil Service Statute nor the Soldiers Preference Law was intended as a cloak or shield to cover misconduct, incompetency or failure to perform official duties, but such laws were certainly intended to provide some protection and safeguard *against arbitrary action of superior* officers in removing or discharging such employees for reasons other than those named in the statutes." (Emphasis added.)

It is a well-known rule of statutory construction that statutes which relate to the same subject matter are "in *pari materia*" and should be construed together, and effect should be given to them all, even though they contain no reference to one another and were passed at different times. See *Fitzgerald v. State,* 220 Iowa 547, 260 N.W. 681. Chapter 66 and Chapter 365 must be considered in *pari materia* insofar as they relate to the removal of public officers. In construing these statutes together, it seems clear that a public officer with civil service status would have the right to invoke the statutory procedure for appeal to the civil service commission when removed, demoted or suspended arbitrarily by a superior officer. There is nothing in Chapter 365, however, which would prevent removal of such public officer by the district court pursuant to the provisions of Chapter 66. In our opinion, removal by the district court after the required notice and hearing is not the arbitrary or peremptory removal against which the civil service law was intended for protection.

The State is charged with the duty of enforcing all laws designed for the public welfare, and its obligation to the people cannot be surrendered or contracted away. See *Schneiders v. Inc. Town of Pocahontas,* 213 Iowa 807, 234 N.W. 207. Essential to the complete performance of this duty is control and authority over all officers who are charged with enforcement of the laws. This control must necessarily include the power of removal for official misconduct,

a surrender of which would disable the State from performing fully its obligation to the people.

In §365.18, the legislature conferred upon a municipal body the power to remove municipal officers and employees for the causes enumerated therein. It does not necessarily follow that the power so conferred is exclusive. "Statutes which deprive a court of jurisdiction are strictly construed and when jurisdiction is once granted it will not be deemed taken away by a similar jurisdiction being given to another tribunal." Horack, *Sutherland Statutory Construction*, 3rd Ed., Vol. 3, §6803, pp. 327-28. Chapter 66 of the Code confers jurisdiction upon district courts of the State of Iowa to remove public officers who are guilty of official misconduct. In our opinion, this jurisdiction was not taken away by the similar power conferred upon municipalities by the civil service statute.

3.14

CITIES AND TOWNS: Sand and gravel permits—Riverfront improvement commission has authority to regulate and impose conditions upon removal of sand and gravel from a river bed within the corporate limits of the municipality; State Conservation Commission, as owner in fee, is entitled to specify, collect and retain royalties charged to the commercial operators removing sand and gravel.

October 16, 1962

Mr. Glen G. Powers, Director
State Conservation Commission
East 7th and Court
L O C A L

Dear Mr. Powers:

We have your recent letter in which you request the opinion of this office in regard to the following questions concerning the jurisdiction of the State Conservation Commission and Riverfront improvement Commission:

> "1. Which commission is to regulate and impose conditions upon the removal of sand and gravel from a river bed within the corporate limits of a municipality?
>
> "2. Which commission is entitled to specify, collect and retain the royalties or fees charged to commercial operators in connection with the removal of sand and gravel from a river bed within the corporate limits of a municipality?"

These questions have been impliedly dealt with in a recent opinion of this office dated July 3, 1962, a copy of which is attached for your information. Under this opinion and the opinion contained in 1948 *O.A.G.* 250, municipalities with riverfront improvement commissions have control of the bed and banks of such part of a stream as is located within the limits of a municipality. Therefore, despite the fact that permits must be obtained from both the riverfront improvement commission and the State Conservation Commission before sand and gravel can be removed from the bed of such a stream, in our opinion the municipality only is authorized to regulate and impose conditions upon the removal of sand and gravel from the river bed.

Under the opinion of 1948, *supra*, however, the State remains the owner in fee of the bed and banks of said river until such time as they are conveyed to the municipality. Therefore, in our opinion, the State Conservation Commission is entitled to specify, collect and retain the royalties or fees charged to the commercial operators in connection with sand and gravel removal from the bed of the stream.

3.15

CITIES AND TOWNS: Street improvement—Chapter 209, 59th G.A., §§314.5, 391.2, 1962 Code. Town is not authorized to let a contract for town and county work with town to be reimbursed by county.

May 31, 1962

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

Attention: George R. Larson, Assistant County Attorney

Dear Sir:

We have your recent letter in which you ask the following:

"The Town of Roland and Story County have agreed to improve South Street in the Town of Roland from its intersection with Main Street to the East corporate limits of said town. Story County proposes to pay for the 24' center pavement and the Town of Roland proposes to pay for the curb and gutter and intermediate pavement between the road and curb. The county will be using county funds for this improvement and not farm to market funds and the Town of Roland will pay its share of the cost of the improvement through special assessments and general obligation bonds.

"Now, the Story County Board of Supervisors wish to know if the applicable law would prohibit the entire contract for said improvement to be let by the Town of Roland with a specific agreement that Story County would reimburse the Town of Roland for the county's share of such improvement."

Section 314.5 of the Iowa Code of 1958 provides:

"The board or commission in control of any secondary road ... is authorized, subject to the approval of the council ... to construct, reconstruct, improve, repair, and maintain any road or street which is an extension of such road within any town or city, provided that this authority shall not apply to the extensions of secondary roads located in cities over twenty-five hundred population, where the houses or business houses average less than two hundred feet apart."

As the street which your question concerns is an extension of a secondary road, the board of supervisors under authority of §314.5 may undertake the 24-foot center paving project if the town complies with the provisions of that section.

Section 391.2, as amended, provides in part:

"Cities shall have power:

"1. to improve any street by grading, parking, curbing, paving, oiling, oiling and graveling, chloriding, graveling, macadamizing, use of shale or other surfacing material, or guttering the same or any part thereof ...".

Under authority of this section the Town of Roland may properly undertake that part of the project in question involving the curb and gutter and intermediate pavement between the road and curb.

Section 391.2 was amended by Chapter 209, Acts 59th G.A. by the addition of the following:

"... and cities of less than 5000 population may contract with adjoining cities or with counties in which they are located for such street construc-

tion and maintenance, cost to be paid by the municipalities for which the work is done."

In our opinion, Chapter 209, 59th G.A., authorizes an agreement between a town of under five thousand population and its county whereby the town may have the advantages of county facilities and services regarding the street improvements authorized by §391.2. It cannot properly be interpreted, however, as otherwise broadening or expanding the statutory powers of either towns or counties. The county may undertake part of the work within its authority and the city part of the work within its authority, and by reason of Chapter 209, 59th G.A., the county can by agreement let the contract for the town in conjunction with the county contract so as to accomplish the improvement as a joint undertaking. There is, however, in our opinion, no authority for a letting of both the town and county contracts by the town alone, the agreement between the town and county providing for reimbursement by the county.

3.16

CITIES AND TOWNS: Subdivision plats—§§409.9, 409.14, 1958 Code. Ch. 220, 59th G.A., amending §409.14, gives cities more authority over specified items in said section within one-mile limit of city, but does not affect requirements of §409.9. However, §409.9, which requires that abstract of title, title opinion, and certified statements accompany *every plat,* applies within the one-mile limit.

July 25, 1961

Mr. Peter J. Peters
Pottawattamie County Attorney
Council Bluffs, Iowa

Dear Mr. Peters:

This is in response to your recent inquiry in which you set forth the following:

"I have had a request from my County Recorder for an interpretation of Section 409.14 Code of Iowa 1958 as amended. A plat has been given to her for filing which is within one mile of the city limits of Council Bluffs. The plat has been approved by the City Council and the City Planning Commission of Council Bluffs but does not have accompanied with it a complete Abstract of Title and an opinion from an Attorney at Law showing that the fee title is in the proprietor and a certificate from the Treasurer, the Recorder and the Clerk of the District Court as required by section 409.9 Code of Iowa, 1958.

"Would you please advise whether in your opinion under the existing law Section 409.9 is applicable within one mile of the limits of a town or city in addition to the approval of the City Council and the City planning Commission."

As you are aware, the first paragraph of §409.14, 1958 Code, provides:

"*Approval condition to filing and recording.* No county auditor or recorder shall hereafter file or record, nor permit to be filed or recorded, any plat purporting to lay out or subdivide any tract of land into lots and blocks within any city having a population by the latest federal census of twenty-five thousand or over, or, except as hereinafter provided, *within one mile of the limits of such city,* unless such plat has been first filed with and approved by the council of such city as provided in section 409.7 . . ." (emphasis added)

The amendment to the above section made by Chapter 220, Laws 59th G.A., strikes from paragraph 4 of the above partially-quoted section the fol-

lowing: "as to plats of land lying within the corporate limits." The pertinent part of §409.14, as amended, now reads:

> "... the city council may require as a condition of approval of such plats that the owner of the land bring all streets to a grade acceptable to the council, and comply with such other reasonable requirements ..."

A careful analysis indicates that Chapter 220, 59th G. A., does not affect the requirements of §409.9, *supra.* The obvious effect of the amendment is to give the city council authority over additional matters within the one-mile limit over which it formerly had authority only within the city limits.

However, further examination of the statute leads us to the conclusion that the abstract of title, opinion and certified statements required under §409.9 should be required within the one-mile limit as well as within the city limits as prescribed in §409.14. This conclusion is based upon the inclusive language of §409.9 ("... Every plat shall be accompanied by a complete abstract of title ...") and by the jurisdictional statement in the fourth paragraph of §409.14, which provides:

> "Said plats shall be examined by such city council ... with a view to ascertaining whether the same conform to the statutes relating to plats within the city limits and *within the limits prescribed by this section* ..."

Thus, it is our opinion that §409.9 is applicable within the one-mile limit and the specified items should be required prior to the recording of the plat.

3.17

CITIES AND TOWNS: Time certificates of deposits—§§452.10, 454.2, 1958 Code. Public monies invested in time certificates of deposit do not constitute deposits within the terms of the sinking fund statute and therefore are not protected by it.

May 18, 1961

Honorable M. L. Abrahamson
Treasurer of State
Building

Dear Mr. Abrahamson:

This will acknowledge receipt of your letter of April 12, 1961, in which you state:

> "We respectfully request your written opinion on the authority of a City, Town or Municipally owned Utilities to purchase Time Certificates of Deposit and whether or not such Time Certificates are covered by the State Sinking Fund for Public Deposits.
>
> "These funds do not come from tax receipts but are invested for short periods until such time as obligations of interest and principal accrue."

The purpose of the state sinking fund, outlined in Code §454.2:

> "The purpose of said fund shall be to secure the payment of their deposits to state, county, township, municipal, and school corporations having public funds deposited in any bank in this state, when such deposits have been made by authority of and in conformity with the direction of the local governing council or board which is by law charged with the duty of selecting depository banks for said funds.",

is to secure the payment of public deposits including state, county, township, etc., when such deposits have been made by authority of and in conformity with the direction of the local governing council or board which has the duty of selecting the depository bank. This is clearly the purpose of the fund,

to secure the payment of deposits made by state, county, township, municipal and school corporations.

The duty of making such deposits is imposed upon the treasurer of state and of each county, city, town, and school corporation, and each township clerk and other public officials, by the terms of Code §453.1, which provides as follows:

> "453.1 Deposits in general. The treasurer of state, and of each county, city, town, and school corporation and each township clerk and each county recorder, auditor, sheriff, each clerk and bailiff of the municipal court, and clerk of the district court, and each secretary of a school board shall deposit all funds in their hands in such banks as are first approved by the executive council, board of supervisors, city or town council, board of school directors, or township trustees, respectively. However, the treasurer of state shall invest or deposit as provided in section 452.10 any of the public funds not currently needed for operating expenses. The term 'bank' shall embrace any corporation, firm, or individual engaged in a general banking business."

Thus, the duty of the treasurer of state is to deposit public funds in an accredited bank, or to invest funds not needed currently for operating expenses. This investment duty is imposed by §452.10, providing as follows:

> " * * * the treasurer of state shall invest, unless otherwise provided, any of the public funds not currently needed for operating expenses in United States Government bonds and certificates, providing suitable issues are available; or make time deposits of such funds in banks as provided in chapter 453 and receive time certificates of deposit therefor. * * * "

Thus the statute distinguishes between deposits of funds not currently needed, and funds otherwise in his hands not available for current purposes. Such funds are to be invested in government bonds and certificates, or the treasurer shall make time deposits and secure certificates therefor. Such certificates of deposit are investments.

In the case of *In Re Guardianship of Fahlin,* 218 Iowa 121, 124, the Court addressing itself to this problem stated:

> "The crux of this whole controversy turns upon the question of whether this certificate was a deposit, or a loan, or an investment, in the light of the fact that no order of court was ever issued authorizing the guardian to make such deposition of the ward's funds.
>
> "It is sometimes difficult to determine whether a transaction should be called a deposit or a loan. The two, however, are not the same, and are not so considered by any one in business, or the ordinary affairs of life. Certainly, the thousands who daily deliver money to banks for safekeeping and return in corresponding currency, do not regard the transaction as a loan, nor do they so speak of it. A deposit is for the benefit of the depositor; a loan for the benefit of the borrower. It is true the deposit may also benefit the depositary; but such is not the primary object of the transaction. When the deposit is made for a fixed period, during which the depositor has no right to demand a return of the money, the transaction may be regarded as, in all substantial respects, a loan; but herein lies an essential distinction between a loan and a general deposit. In the former, the person receiving the money agrees to return it at a future fixed date; in the latter, at any time it is demanded. If it is agreed that the money shall remain for a fixed period, there is a loan and not a deposit. We concede that this marks the distinction between a loan and a deposit under the circumstances involved in this case.

"In State v. Corning State Savings Bank, 136 Iowa 79, loc. cit. 83, 113 N.W. 500, 502, we used as a part of the basis of that opinion the following quoted from in re Law's Estate, 144 Pa. 499, 22 A. 831, 14 L.R.A. 103:

'Deposit is where a sum of money is left with a banker for safe-keeping, subject to order, and payable, not in the specific money deposited, but in an equal sum. It may or may not bear interest, according to the agreement. While the relation between the depositor and his banker is that of debtor and creditor simply, the transaction cannot, in any proper sense, be regarded as a loan unless the mony is left not for safe-keeping, but for a fixed period, at interest, in which case the transaction assumes the characteristics of a loan.'

Citing State v. McFetridge, 84 Wis. 473, 54 N.W. 1, 11, 998, 20 L.R.A. 223.

"The last case cited further says:

'The retention by the treasurer of substantial control over the funds in the one case, and his loss of such control in the other, mark the leading distinction between a mere deposit of the funds and an "investment" thereof, as those terms are used in statutes.' "

And in the case of *In Re Estate of Moylan,* 219 Iowa 620, 627, it is said:

"The question as to whether a particular transaction between fiduciary and a bank by which the fiduciary leaves funds in the bank is a mere deposit or an investment, as distinguished from a mere deposit, has frequently been before this court. If an investment, it is, of course, controlled by the provisions of Code, section 12772. This court has held, however, through a long line of decisions, that the placing of funds in a bank by a fiduciary for convenience to be paid out on the order of the fiduciary or returned to him on demand is not an investment.

Officer v. Officer, 120 Iowa 389, 94 N.W. 947, 98 AM. St. Rep. 365;

In re Estate of Workman, 196 Iowa 1108, 196 N.W. 35;

Andrew v. Sac County State Bank, 205 Iowa 1248, 218 N.W. 24.

"On the other hand, it has held the placing of funds by a fiduciary on time deposit at interest, where the funds cannot be withdrawn until the expiration of a fixed period of time, is an investment and is governed by the above-cited Code section.

In re Fahlin's Guardianship, 218 Iowa 121, 254 N.W. 296.

"The question as to whether the fund is to draw interest is not controlling. The absolute right to withdraw the fund on demand seems to be the controlling consideration. In re Fahlin's Guardianship. supra. The deposit of funds in a savings bank at interest under an arrangement by which the bank could require sixty days' notice, before the fund could be withdrawn, has been held to be an investment and subject to the provisions of the statute.

Andrew v. Iowa Savings Bank of Ft. Dodge, 214 Iowa 105, 241 N.W. 412."

Therefore, by reason of the foregoing, I am of the opinion that public monies invested in time certificates of deposit do not constitute deposits within the terms of the sinking fund statute, and therefore are not protected by it.

3.18

CITIES AND TOWNS: Transfer of funds—§§24.9, 24.22, 404.5(4), 1958 Code. Pursuant to the terms of §404.5(4), transfers from one functional fund to another requires an amendment to the current budget showing the proposed transfer in the manner set forth in Ch. 24 and specifically in accordance with the provisions of §§24.9 and 24.22.

January 31, 1962

Mr. Marvin R. Selden, Jr.
Comptroller
LOCAL

Dear Mr. Selden:

This will acknowledge receipt of yours of the 9th, inst., in which you submitted the following:

> "There seems to be differences of opinion regarding the transfer of money from one functional fund to another in cities and towns. This office feels that under Section 404.4 of the 58th General Assembly that the law states that the municipal corporation should, when adopting their budget, anticipate any contemplated transfers of funds.
>
> "Therefore, we feel that a transfer from one functional fund to another would not automatically carry with it a transfer of the budget. It the municipal corporation exceeds the adopted expenditures in a functional fund, we believe the budget should be amended before we can approve either a temporary or permanent transfer under Section 24.22 of the 58th General Assembly."

Under the provisions of §404.5(4), 1958 Code, transfers from one functional fund of municipalities to the other is provided in specific terms of that section as follows:

> "404.5 Flexibility provisions. Municipal corporations may fit their income to their needs in the following ways:
>
> . . .
>
> "4. By transfers from one functional fund to another in the manner provided by Chapter 24, or by creating an emergency fund in the manner provided by that chapter."

By the terms of this statute, the provisions of Chapter 24 are by the reference therein incorporated in the provisions of §404.5(4). In *Sutherland Statutory Construction,* 3d Ed., §§5207 and 5208 it is provided:

> "5207. Statutes adopting other statutes by reference. A statute may refer to another statute and incorporate part of it by reference. The constitutional provision that no law shall be revised or amended by mere reference to its title is sometimes used to attack these statutes. Reference statutes are not considered amendatory, however, but complete in themselves, so that the constitutional objection is met.
>
> "There are two general types of reference statutes: statutes of specific reference and statutes of general reference. A statute of specific reference, as its name implies, refers specifically to a particular statute by its title or section number. A general reference statute refers to the law on the subject generally. An example of this type of reference is a provision that contracts made under the statute are to be let 'in the manner now provided by law.' "
>
> "5208. Construction of reference statutes. A statute of specific reference incorporates the provisions referred to from the statute as of the time of adoption without subsequent amendments, unless the legislature

has expressly or by strong implication shown its intention to incorporate subsequent amendments with the statute. In the absence of such intention subsequent amendment of the referred statute will have no effect on the reference statute. Similarly, repeal of the statute referred to will have no effect on the reference statute unless the reference statute is repealed by implication with the referred statute. In a statute of specific reference only the appropriate parts of the statute referred to are taken. When the reference is made to a specific section of a statute, that part of the statute is taken as though written into the reference statute.

"A statute which refers to the law of a subject generally adopts the law on the subject as of the time the law is invoked. This will include all the amendments and modifications of the law subsequent to the time the reference statute was enacted."

Under the foregoing rule, the adoption by reference is not limited to any particular section of Chapter 24, but includes the whole of the chapter so far as applicable. In that view, not only §24.22 to which we referred, providing as follows:

"24.22 Transfer of active funds—poor fund. Upon the approval of the state board, it shall be lawful to make temporary or permanent transfers of money from one fund of the municipality to another fund thereof; but in no event shall there be transferred for any purpose any of the funds collected and received for the construction and maintenance of secondary roads. The certifying board or levying board, as the case may be, shall provide that money temporarily transferred shall be returned to the fund from which it was transferred within such time and upon such conditions as the state board shall determine, provided that it shall not be necessary to return to the emergency fund, or to any other fund no longer required, any money transferred therefrom to any other fund. No transfer shall be made to a poor fund unless there is a shortage in said fund after the maximum permissible levy has been made for said fund."

but also the provisions of §24.9, which, so far as is applicable, being the following:

"24.9 Filing estimates—notice of hearing—amendments.

. . .

"Budget estimates adopted and certified in accordance with this chapter may be amended and increased as the need arises to permit appropriation and expenditure during the fiscal year covered by such budget of unexpended cash balances on hand at the close of the preceding fiscal year and which cash balances had not been estimated and appropriated for expenditure during the fiscal year of the budget sought to be amended, and also to permit appropriation and expenditure during the fiscal year covered by such budget of amounts of cash anticipated to be available during such year from sources other than taxation and which had not been estimated and appropriated for expenditure during the fiscal year of the budget sought to be amended. Such amendments to budget estimates may be considered and adopted at any time during the fiscal year covered by the budget sought to be amended, by filing such amendments and upon publishing the same and giving notice of the public hearing thereon in the manner required in this section. Within twenty days of the decision or order of the certifying or levying board, such proposed amendment of the budget shall be subject to protest, hearing on such protest, appeal to the state appeal board and review by such body, all in accordance with the provisions of sections 24.27 to 24.32, inclusive, so far as applicable. Amendments to budget estimates accepted or issued under the provisions of this section shall not be considered as within the provisions of section 24.14."

Thus, as a result of this statutory situation, the transfer from one functional fund to another requires an amendment to the current budget showing the proposed transfer, subject to approval thereof, in the manner set forth in §24.9.

3.19

CITIES AND TOWNS: Volunteer firemen—§§321.1(2), 321.1(26), 321.495, Ch. 517A, 1958 Code. A municipality is obligated to defend and/or indemnify volunteer firement when a suit is brought against them for damages arising out of accidents occurring while proceeding to fires notwithstanding the fact that they may be driving their own personal motor vehicles. Section 321.1(26) defining emergency vehicles does not limit this obligation.

February 19, 1962

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

Dear Mr. Nelson:

This is to acknowledge receipt of your recent opinion request wherein you have submitted the following:

> "Section 321.495 of the 1958 Code of Iowa imposes upon a municipality the obligation to defend, in the name and behalf of, the members of the police and/or fire departments in any suits brought against them to enforce a claim for bodily injuries, death or property damage arising out of and resulting from their operation of motor or other vehicles while in the performance of their duties etc.
>
> "In the event a member of a voluntary fire department should be driving his own personal vehicle to the scene of a fire, and should be named as defendant in an action resulting from damages as the result of an accident, would the fireman then be entitled to the protection of the provisions of Section 321.495?
>
> "Or is his right limited by the provisions of Section 321.1(26) of the 1958 Code?"

The legislature, in selecting the language to be employed in §321.495, chose to adopt the phrase "motor or other vehicle" and did not limit nor define such phrase further in this section. The legislature, being its own lexicographer, saw fit to define "motor vehicle" in §321.1(2), wherein said section provides:

> " 'Motor vehicle' means every vehicle which is selfpropelled but not including vehicles known as trackless trolleys which are propelled by electric power obtained from overhead trolley wires, but not operated upon rails. The terms 'car' or 'automobile' shall be synonymous with the term 'motor vehicle'."

Although the headnotes employed by the Code Editor in §321.495 contain the word "emergency" in reference to vehicles, such language was not employed by the legislature when it adopted the body of the statute in question. It is a well-recognized rule of law, as well as of construction, that headnotes do not constitute any portion of the law, nor are they to be given any weight in ascertaining the legislative intent. *Monona County v. Waples,* 226 Iowa 1281, 286 N. W. 461 (1939), and *State v. Chenoweth,* 226 Iowa 217, 284 N. W. 110 (1939).

Thus, the words "motor or other vehicle" used in §321.495, without further limiting words or language, will necessarily be given the meaning as set forth

in §321.1(26). This latter section, without question, clearly and plainly includes a personal automobile or car.

The question necessarily arises as to whether a member of a *volunteer fire department* would be considered a member of a *fire department* for the purposes of §321.495. The noun (fire department) has been defined, and we believe correctly so, as including an unincorporated volunteer fire department in the case of *Rudolph Volunteer Fire Department vs. Town of Rudolph,* 260 Wis. 362, 50 N. W. 2d 915, 917.

From the language of the statute itself, the obligation of the municipality to defend such suits or to indemnify a resultant claim, is imposed only when such suit or claim arises out of or results from their operation of "motor or other vehicles *while in the performance of their duties.*" (Emphasis supplied)

Thus, to answer the question at bar, it must be determined as to whether proceeding to a fire in a personal motor vehicle constitutes the performance of one of a volunteer fireman's duties as contemplated by §321.495.

The very nature of the occupation of a fireman exposes him to hazards and unusual risks, not only in actual firefighting, but in going to and returning from a fire, for he must proceed to the scene with great celerity to quell the risk of property and person being devastated by the ravages of fire. We believe that a fireman is engaged in the performance of one of his duties when he is proceeding to the scene of a fire in response to a call even though he may select the route and mode of conveyance. Support of this position is found in *Behr v. Soth,* 170 Minn. 278, 212 N. W. 461 (1927), wherein the court announced at page 462:

> "Having assumed such risks and burdens (as a fireman) the moment he responded to the fire alarm the law also clothed him with the benefits which are also incident to his employment. How was he to go? No conveyance was provided. Again duty commanded, as an incident of his employment to choose a method that would promptly bring him to a fire. None can claim that he did not choose wisely. He did the natural and ordinary thing." (By driving his personal car from his home)

It is, therefore, the opinion of this department that a volunteer fireman proceeding to a fire in his personal motor vehicle is entitled to the protection of §321.495, and §321.1(26), defining "authorized emergency vehicles" does not limit this entitlement.

It should also be noted that Chapter 517A, as amended, authorizes the purchase of liability, personal injury and property damage insurance by a municipal corporation for its employees including volunteer firemen while in the performance of any or all of their duties.

3.20

Annexation, levying body—1. Where annexation to a town has been completed, the proper levying body is the town to which such property has been annexed. 2. The assessor has the power and the duty to determine in the first instance whether property in the city is or is not being used for agricultural purposes. (Strauss to Hasbrouck, Guthrie Co. Atty., 8/14/61) #61-8-15

3.21

Annexation effect upon private utility franchise—§§386.1, 489.8, 489.22, 1958 Code; Art. 1, §21, Const. of Iowa. Annexation of territory presently served by private electric utility does not invalidate franchise and annexing city does not have right to oust utility company, but city can extend its own utility

facilities along same highways in order to serve same patrons being served by prior utility company. After annexation, private utility subject to control and regulation by both state and annexing city. (Bump to Watts, Adams Co. Atty., 8/17/61) #61-8-27

3.22

Authority to enter into agreement—§358B.3, 1962 Code. There is no authority in the City of Newton to enter into any agreement with the board of trustees of the county library district to be included in a county library district under the provisions of §358B.3. (Strauss to Salisbury, Jasper Co. Atty., 5/17/62) #62-5-5

3.23

Change of name—§§362.39, 362.40, 362.41, 1958 Code. Under Section 362.40, the change in name has no effect upon the official records of a town. (Bump to Roggensack, Clayton Co. Atty., 4/11/61) #61-4-11

3.24

Contracts between town and county—Ch's. 23, 391, §573.2, 1958 Code. Within the terms of Chapter 209, 59th G. A., (§391.2, 1962 Code), a town may contract with a county in such manner as to benefit from the use of county equipment and personnel and facilities of the county engineer's office regarding street improvements under §391.2. Requirements of Chapter 391 must be complied with under the terms of such agreement. Unnecessary duplication between Chapters 23 and 391 could be avoided, and the two chapters are to be read together so as to give effect to the provisions of both. (Keyes to Smith, O'Brien Co. Atty., 4/18/62) #62-4-6

3.25

Fire department—§410.19, 1958 Code. Regulations requiring off-duty firemen to be available for call to duty are reasonable and not in conflict with §410.19. Firemen are not entitled to overtime pay while on call under said regulations. (Bump to Prine, St. Rep.; 11/1/61) #61-11-1

3.26

Incompatibility, highway commissioner and city board assessment member—There is no statutory prohibition, incompatibility, or conflict of interests involved in holding the offices of highway commissioner and member of city board of assessment and review at the same time. (Strauss to Nazette, Linn Co. Atty., 8/7/61) #61-8-7

3.27

Licensing and regulation of mobile home parks—Ch. 135D, 1958 Code. Municipal corporations have no licensing power under Chapter 135D, but may regulate the operation of mobile home parks within the scope of their police power. (Creger to Freed, St. Rep., 3/9/61) #61-3-6

3.28

Park board—§278.1(2), 1958 Code. The park board of the City of Clinton, Iowa has the power to exchange certain real estate which it owns for certain property which the Clinton Community School District owns, and such exchange is not within the provisions of §278.1(2). (Strauss to Shaff, St. Sen., 2/21/61) #61-2-10

3.29

Public utilities funds—§§398.9, 453.1, 1954 Code. Proceeds from services rendered by the Atlantic Municipal Utilities, deposited under §453.1, Code 1954, constitute a public fund, and when placed in a savings account, subject to withdrawal at any time, is a deposit and not a loan or investment and is subject to the provisions of the state sinking fund law. (Strauss to Dayton, Deputy St. Treas., 6/5/61) #61-6-1

CHAPTER 4

CONSERVATION

STAFF OPINIONS

LETTER OPINIONS

4.1

CONSERVATION: Boating regulations—§§106.9(6), 106.12, 106.13, 1962 Code. Term "on board" used in §106.9(6) with regard to use of life preservers applies to vessels or boats rather than water skiers behind such boats. §106.13 provides penalty for violation of provisions of Chapter 106, thereby making §106.9(6) a criminal statute.

December 21, 1962

Mr. Simon W. Rasche, Jr.
Clinton County Attorney
Clinton, Iowa

Dear Mr. Rasche:

We have your letter requesting the opinion of this office in regard to the following:

"Section 106.9(6) states as follows, to wit:

" 'Every vessel shall carry at least one life preserver, life belt, ring buoy, or other device of the sort prescribed by the regulations of the Commission for each person *on board,* so placed as to be readily accessible'.

"Does the language as used in that Section, in reference to the term 'on board', apply to a water skier who is skiing 75 feet behind the boat?

"I also request an Attorney General's ruling as to whether or not Section 106.9(6) of the 1962 Code of Iowa is a criminal action?"

Confining the meaning of the word "vessel" to boats for purposes of this opinion, §106.9(6) *supra* requires only that life perservers be kept on board the boat. We find nowhere in Chapter 106 any requirement that they be worn. Your attention is directed to §106.12 which provides:

"No person shall operate any vessel, or manipulate any water skis, surfboard or similar device in a careless, reckless or negligent manner so as to endanger the life, limb or property of any persons. * * * "

In a proper factual situation, it would appear that this section, rather than 106.9(6), would be applicable.

In regard to your second inquiry, Iowa Code §106.13 provides:

"Any person violating any of the provisions of this chapter, for which another penalty is not otherwise specifically provided, shall, upon conviction or a plea of guilty, be fined not to exceed one hundred dollars or be imprisoned in the county jail not to exceed thirty days.",

thus making §106.9(6) a criminal statute.

4.2

CONSERVATION: Commercial fishing—§§109.106, 109.107, 1958 Code. Ox-bow or cut-off lakes located on abandoned Missouri River channels are inland waters of the State, not part of the Missouri River, and commercial fishing gear cannot be used therein.

May 3, 1962

State Conservation Commission
East 7th and Court
Des Moines, Iowa

Attention: K. M. Madden, Superintendent of Fisheries

Gentlemen:

We have your letter of March 5, 1962 in which you request the opinion of this office in regard to the following questions:

"1. Are cut-off lakes located on old river channel beds with continuous impervious or semi-pervious permanent dikes to hold out Missouri River channel flows except abnormal floods considered inland waters or a part of the Missouri River?

"2. Are cut-off lakes located on old river channel beds with protective semi-pervious or impervious dikes except for small openings to the flowing river channel Missouri River or inland waters?

"3. Can the Commission, under Section 109.6 or any other section of the Iowa Code, post or by administrative order prohibit the taking of channel catfish and bullheads with commercial fishing gear from (1) or (2) above?

"4. Can the Commission, under 109.6 or any other section of the Iowa Code, post or by administrative order, prohibit or regulate the use of trammel nets by requiring the operator to be in attendance and remove game fish at frequent intervals with no harm to game fish?"

Iowa Code §109.107 (1958), as amended by Chapter 127, Laws 58th G. A., provides:

"It shall be lawful to use seines, dip nets, trammel nets, gill nets, basket traps, hoop nets, wing nets, pound, fyke and trap nets and trot lines in the Missouri River or Mississippi River, except as hereinafter provided . . . in such manner and for the taking of such species of fish as are permitted by law."

Further, §109.106, as amended by Chapter 127, Laws 58th G. A., provides:

"It shall be unlawful except as otherwise provided for any person to use any trot line, wooden basket trap, net or any seine in taking fish other than in the lawful taking of minnows."

We find no provision in the Code authorizing the use of trammel nets or other commercial fishing gear in areas other than the Mississippi and Missouri Rivers and therefore, in our opinion, the use of such devices is limited to such rivers and is not authorized in the inland waters of the state.

The "cut-off lakes" referred to in your questions one and two are archaic channels of the Missouri River which have been abandoned by the river as the result of natural avulsion or other water activity, and in some cases as the result of man-made channel improvements. While most of these cut-off lakes, or ox-bows, are supplied with water by the Missouri River, they no longer possess any identity in fact with the river and are, indeed, inland lakes which are supplied with water in the same manner as are other inland lakes. The fact that an ox-bow may be in close proximity to the presently existing Missouri River does not, in our opinion, prevent its characterization as "inland".

The Supreme Court of Iowa has, on at least one occasion, ruled on the permissibility of commercial fishing in such an area. In *Little v. Green,* 144 Iowa 492, 123 N.W. 367 (1909), defendants, who were fish and game wardens, destroyed plaintiff's net which he was using in an area known as "Running Slough". A plat included in the opinion indicates that the slough is attached at both ends to the Mississippi River and that Mississippi water flows through it. In holding, in effect, that the slough was not a part of the Mississippi River so as to form part of the common boundary between Iowa and Illinois, the Court said, at 144 Iowa 498:

> "What is meant when we speak of the river as a 'common boundary' of the two states? Do we mean the body of the great stream which constitutes the common highway of commerce of which Justice Wright speaks in the *Gilbert* case, the navigable stream where the citizens of the two states and of other states meet and come in contact, and cross and re-cross each other's paths in the pursuit of their several lines of business and pleasure? Or do we mean not only this well-defined and unmistakable stream, but include therewith also all the interlacing unnavigable water belts, streams and streamlets which, in the level alluvial bottom lands through which the river flows, emerge here and there from such main body, make their way inland for greater or less distances, and then perhaps reunite with the navigable waters of the river further down its course? In our judgment these minor waters, which constitute no part of the navigable stream, . . ."

In *State v. Haug,* 95 Iowa 413 (1895), defendant was convicted for seining fish from Big Lake, which is a body of water connected to and supplied by the Mississippi River. It is wholly within the State of Iowa. The only question was whether Big Lake constituted a part of the river. In holding in the negative, the Court said, at 95 Iowa 419:

> "The 'Mississippi River' referred to in the statute is the river as usually referred to. It means that body of water which forms the eastern boundary of the state, and from the wording of certain sections of the Act, it is manifest that it was not intended to embrace within the words 'Mississippi River' waters entirely within the state, though having connection with said boundary stream."

It is therefore our opinion that seines, trammel nets and other commercial fishing gear may not be legally used on ox-bow lakes along the Missouri River, whether or not said lakes have any present connection with the river.

4.3

CONSERVATION: County conservation board—§111A.7, 1962 Code. County conservation board may not contribute money to a fund to pay the cost of preliminary engineering studies when such studies are sponsored by private citizens as opposed to public agencies or governmental subdivisions.

December 27, 1962

Mr. Richard G. Davidson
Page County Attorney
Clarinda, Iowa

Dear Mr. Davidson:

We have your letter requesting the opinion of this office in regard to the following:

"Where a group of private citizens, desiring the creation of state-owned artificial lake within an Iowa County, contemplate raising funds in total amount of $5,000 to pay cost of preliminary engineering studies, such funds to be raised by private subscription, may an existing county conservation board contribute to such fund from tax levy monies in its hands?" Iowa Code §111A.7 (1962) provides:

"Joint operations. Any county conservation board may cooperate with the federal government or the state government or any department or agency thereof to carry out the purposes and provisions of this chapter. Any county conservation board may join with any other county board or county boards to carry out the provisions of this chapter, and to that end may enter into agreement with each other and may do any and all things necessary or convenient to aid and to co-operate in carrying out the provisions of the chapter. Any city, town, village or school district may aid and co-operate with any county conservation board or any combination thereof in equipping, operating and maintaining any parks, preserves, parkways, playgrounds, recreation centers, and conservation areas, and for providing, conducting and supervising programs of activities, and may appropriate money for such purposes. The state conservation commission, county engineer, county agricultural agent, and other county officials shall render such assistance as shall not interfere with their regular employment. The board of supervisors is authorized to make available to the use of the county conservation board, county-owned equipment and operators and any county-owned materials it deems advisable."

Please note that nothing in this section authorizes co-operation with groups of private citizens, nor do we find such authority in any other section of Chapter 111A. In the absence of statutory authority, a county conservation board may not, in our opinion, contribute money to a fund to pay the cost of preliminary engineering studies and the like, when such studies are sponsored by private citizens as opposed to public agencies or governmental subdivisions.

4.4

CONSERVATION: County conservation board—§§111A.4(2), 332.1, 1962 Code. 1. There is no specific or implied statutory authority for reimbursement from the funds of the county conservation board of volunteers who were called by the sheriff to aid in locating the body of a drowned person. 2. Land acquired by county conservation board for use as park or preserve should be conveyed to county, rather than to county conservation board, under §332.1.

December 4, 1962

Mr. Robert D. Prichard
Monona County Attorney
Onawa, Iowa

Dear Mr. Prichard:

We are in receipt of your recent letter in which you request the opinion of this office in regard to the following:

"1. Recently a resident of the county drowned in the Missouri River. Numerous citizens spent considerable time and money aiding in the search

for the body. The search was made at the call of, and under the direction of the sheriff. However, the budget of the sheriff's office will not permit him to reimburse these volunteers. The question has been raised whether or not the County Conservation Board, which does have some available money, has the authority to expend its funds for this purpose. There is no specific authority, naturally, but one of the purposes of the Board as set forth in section 111A.1 is to 'promote and preserve the health and general welfare of the people ... and to cultivate good citizenship by providing adequate programs of public recreation.'

"2. A couple of land owners are willing to convey to the Board an 80 acre tract for use as a park or preserve. Assuming this acquisition meets with the approval of the state conservation commission (111A.4)(3), am I correct in my understanding that the grantee in any such conveyance should be 'Monona County, Iowa', rather than the 'Monona County Conservation Board'?"

(1) It has frequently been held that public bodies and agencies are creatures of statute and have only those powers expressly or impliedly vested in them by statute. *Gritton v. City of Des Moines,* 247 Iowa 326, 73 N. W. 2d 813. We find no specific or implied authority for the reimbursement of volunteers in the situation presented by your first question from funds of the county conservation board. Therefore, your first question is answered in the negative.

(2) Your attention is directed to Iowa Code §111A.4(2), which provides as follows:

"The county conservation board shall have the custody, control and management of all real and personal property heretofore or hereafter acquired by the county for public parks, preserves, parkways, playgrounds, recreation centers, county forests, county wildlife areas, and other county conservation and recreation purposes and is authorized and empowered:

* * *

"2. To acquire *in the name of the county by gift,* purchase, lease, agreement or otherwise, in fee or with conditions, suitable real estate ... " (Emphasis supplied).

Counties are authorized to take title to property by Iowa Code §332.1, which provides as follows:

"Each county is a body corporate for civil and political purposes, may sue and be sued, must have a seal, may acquire and hold property, make all contracts necessary for the control, management, and improvement or disposition thereof, and do such other acts and exercise such other powers as are authorized by law."

Therefore, in our opinion, any conveyance of real estate for county conservation purposes should be to Monona County, Iowa rather than to the Monona County Conservation Board.

4.5

CONSERVATION: County funds—§§74.14, 111A.6, 1958 Code. Revenue collected in addition to the amount budgeted may not be used in the budget year. The limitation provided by §111A.6 must be read in connection with the foregoing budget requirement, and as between such budget requirement and §111A.6, the terms of the budget shall prevail.

March 21, 1961

Mr. Thomas E. Tucker
Deputy Lee County Attorney
516 Seventh Street
Fort Madison, Iowa

Dear Mr. Tucker:

Reference is herein made to yours of March 2, 1961, which states the following:

"My question concerns Chapter 111 of the 1958 Code of Iowa and more specifically Code Section 111A.6, funds—tax levy—gifts.

'Upon the adoption of any county of the provisions of this Chapter, the County Board of Supervisors of such county may by resolution appropriate an amount of money from the general fund of the county for the payment of expenses incurred by the County Conservation Board in carrying out its powers and duties, and it may levy, or cause to be levied, an annual tax, in addition to all other taxes, of not less than 1/4 mill, or more than 1 mill, on the dollar of the assessed valuation of all real and personal property subject to taxation within such county, which tax shall be collected by the County Treasurer as other taxes are collected, and shall be paid into a separate and distinct fund to be known as the County Conservation Fund, to be paid out upon the warrants drawn by the County Auditor upon requisition of the County Conservation Board for the payment of expenses incurred in carrying out the powers and duties of said Conservation Board. The County Conservation Board shall have no power or authority to contract any debt or obligation in any year in excess of the monies in the hands of the County Treasurer immediately available for such purposes. Gifts, contributions and bequests of money and all rent, licenses, fees and charges and other revenue or money received or collected by the Board shall be deposited in the County Conservation Fund to be used for the purchase of land, property and equipment and the payment of expenses incurred in carrying out the activities of the board, except that monies given, bequeathed or contributed upon specified trust shall be held and applied in accordance with the trust specified.'

"In the event the County Conservation Board should expend the amount budgeted by the Board of Supervisors but has in the same year collected revenue from rent, licenses, or fees, may the County Auditor pay out a greater amount than has been budgeted by the Board of Supervisors on the strength of the amount of revenue that has been collected throughout the year and deposited in the County Conservation Board fund? Is this additional amount of revenue that has been collected considered, 'moneys in the hands of the County Treasurer immediately available for such purposes'?

"The County Auditor, of course, hesitates to pay out more than has been allowed in the budget since Code section 343.10 makes him personally liable for any excess which he authorizes in any one year:

'343.10 Expenditures Confined to Receipts. It shall be unlawful for any county or for any officer thereof, to allow any claim, or to issue any warrant, or to enter into any contract, which will result, during said year, in an expenditure from any county fund in excess of the amount equal to the collectable revenues in said fund for said year, plus any unexpected balance in said fund for any previous years. Any officer allowing a claim, issuing a warrant, or making a contract contrary to the provisions of this section shall be held personally liable for the payment of the claim or warrant, or the performance of the contract.'

"This, of course applies to the members of the Conservation Board also, I should think. Though 343.10 prohibits expenditure of county funds in excess of an amount equal to the collectable revenues, which might include the rentals and fees in question, Section 344.10 provides:

'Expenditures exceeding appropriation. It shall be unlawful for any county official, the expenditures of whose office comes under the provisions of this chapter, to authorize the expenditure of a sum for his department larger than the amount which has been appropriated by the county Board of Supervisors.

'Any county official in charge of any department or office who violates this law shall be guilty of a misdemeanor and shall be punished accordingly.'

"In the light of these three Code Sections the question seems to boil down to: May the revenue collected by the Conservation Board in any one year be used in that year to defray expenses in addition to their budget set for that year, or must the revenues collected by the Conservation Board in any one year be used to support the budget approved by the Board of Supervisors in the following year? Does that part of Section 111A.6 which says, '... The County Conservation Board shall have no power or authority to contract any debt or obligation in any year in excess of the monies in the hands of the County Treasurer immediately available for such purposes.', mean the amount budgeted plus the amount received in that year from rent, licenses, fees and charges or does this sentence limit the expenditures only to the amount budgeted with the intention the collection of additional revenue will be used the following year to support that year's budget?"

The county conservation board is a county agency controlled in its expenditures not only by the county budget law but by §24.14, 1958 Code. This section provides the following:

"Tax limited. No greater tax than that so entered upon the record shall be levied or collected for the municipality proposing such tax for the purpose or purposes indicated; and thereafter no greater expenditure of public money shall be made for any specific purpose than the amount estimated and appropriated therefor, except as provided in sections 24.6, 24.15, and subsection 4 of section 343.11. All budgets set up in accordance with the statutes shall take such funds (allocations made by sections 123.50 and 324.78) into account, and all such funds, regardless of their source, shall be considered in preparing the budget, all as is provided in this chapter."

The applicability of this section arises from the fact that the expenditures are made from a specific levy for a specific purpose made by the board of supervisors. This statute was interpreted by opinion of this department appearing in 1940 *O.A.G.*, 392, 394, where it was stated:

"While in your third question two queries are presented, yet they are in fact one. The unappropriated road funds referred to therein would include additional receipts, that is, receipts over and above what was estimated in the budget, and if the comptroller could approve a 'transfer of unappropriated road funds,' it would be approving not the transfer of funds, but the use of additional receipts going into the fund. There is no provision in Chapter 24 of the Code, the local budget law, permitting the use of receipts additional to those estimated as contained in the final budget as approved, and if this were permitted it would undoubtedly fly in the face of the local budget law, and particularly the provisions of Section 380 of the Code, which provides inter alia,

' * * * and thereafter no greater expenditure of public money

shall be made for any specific purpose than the amount estimated and appropriated therefor, except as provided in Sections 373, 381, and Paragraph 4 of Section 5259.'

"The use of additional receipts does not come within any of the exceptions made in the above quoted section. Such use would undoubtedly result in an increase in the total expenditure of the county over and above the total provided for in the finally approved budget, and at least in this respect would be contrary to the finding of the Iowa court in *Clark vs. City of Des Moines,* 22 Iowa 317, 267 N.W. 97.

"It is, therefore, our conclusion that your third question is to be answered entirely in the negative."

Therefore, in answer to your two questions, I advise:

1. That the revenue collected in addition to the amount budgeted may not be used in the budget year.

2. That the limitation provided by Code §111A.6, quoted in your letter, must be read in connection with the foregoing budget requirement, and as between such budget requirement and §111A.6, the term of the budget shall prevail.

4.6

CONSERVATION: Expenditures for radio equipment—§§80.9, 111A.4, 111A.5, 1958 Code. County conservation board may not expend funds on two-way radio equipment to equip a state conservation vehicle.

March 27, 1962

Honorable Harold O. Fischer
State Representative, Grundy County
Wellsburg, Iowa

Dear Mr. Fischer:

We have your letter of January 5, 1962, in which you request the opinion of this office in regard to the following:

"Can a county conservation board organized under Chapter 111A of the 1958 Code of Iowa 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 cooperation with the county conservation board in the performance of their conservation program under Chapter 111A.5, Code of 1958?"

Section 111A.5 1958 Code, provides, in part:

"The county conservation board may make . . . rules and regulations for the protection, regulation and control of all parks, preserves, parkways, playgrounds, recreation centers, and other property under its control. No rules or regulations adopted shall be contrary to or inconsistent with, the laws of the state of Iowa . . . The board may designate the executive officer and such employees as he may designate as police officers who shall have all the powers conferred by law on police officers, peace officers, or sheriffs in the enforcement of the laws of the state of Iowa and the apprehension of violators thereof."

In addition, §111A.4 sets out the powers and duties of county conservation boards in detail. Despite the police powers created by §111A.5 *supra,* we found no language in these sections giving county conservation boards the power to expend funds for the purposes referred to in your letter. The Supreme

Court of Iowa has often held that governmental agencies have only those powers which are expressly granted by the legislature, or which can be fairly implied, or those which are essential and not merely convenient to its declared objects and purposes. See, for example, *Gritton v. City of Des Moines,* 247 Iowa 326, 73 N.W. 2d 813 (1955).

In the absence of express authority, then, the power must be fairly implied or essential to the operation of the governmental agency in question. In our opinion the power to expend funds for the above purpose falls into neither category.

Your attention is directed to Iowa Code §80.9(2) (e), which authorizes the Department of Public Safety:

> "To operate such radio broadcasting stations as may be necessary in order to disseminate information which will make possible the speedy apprehension of lawbreakers, as well as such other information as may be necessary in connection with the duties of this office."

We find no provision anywhere in the Code of Iowa which would authorize county conservation boards, in conjunction with the State Conservation Commission, to make expenditures to enter into the field of radio communication. Under the doctrine of statutory construction that express mention of one item by the legislature automatically excludes all items not mentioned (see *Archer v. Board of Education,* 251 Iowa 1077, 104 N.W. 2d 621 (1960); *Dotson v. City of Ames,* 251 Iowa 467, 101 N.W. 2d 711 (1960)), such expenditures to the county conservation board would, in our opinion, be improper. By authorizing one governmental agency to expend funds to engage in radio broadcasting activities, the legislature manifested its intention that no further similar authorizations should be implied.

Your attention is further directed to 1960 *O.A.G.* 38, holding that 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.

For these reasons, it is our opinion that a county conservation board may not expend funds on two-way radio equipment to equip a state conservation vehicle.

4.7

CONSERVATION: Fish and game—§109.2, 109.26, 1958 Code. Fish in private ponds may be taken commercially with consent of owners of ponds, even if fish are harvested by means of a device which would be illegal if used in public waters.

April 12, 1961

Mr. James B. Jenkins
Monroe County Attorney
Albia, Iowa

Dear Sir:

We are in receipt of your letter of March 18, 1961, in which you request the opinion of this office in regard to property rights to fish maintained in private farm ponds. You state that an individual wishes to take fish from such ponds on a commercial basis by means of an electrical shocking device which stuns the fish, thus allowing the larger ones to be taken without killing all the smaller fish in the pond, the owners of the ponds to receive fifty percent of the profits.

In our opinion, the proposed commercial venture is lawful, so long as the fish are taken from privately-owned waters with the consent of the owners thereof, and so long as such waters are not stocked by overflow from public

waters. In this connection, your attention is directed to the following sections of the Iowa Code:

"109.2 The title and ownership of all ... fish ... in any public waters of the state, and in all ponds ... or other land and waters adjacent to any public waters stocked with fish by overflow of public waters ... are hereby declared to be in the state, except as otherwise in this chapter provided."

"109.78 No private water may be stocked by the (State Conservation) Commission unless the owner agrees that such waters shall be open to the public for fishing except that the Commission may ... provide a breeding stock of fish for privately owned farm ponds at the request of the owner."

"109.26 It shall be unlawful, except as otherwise provided, to use on or in the waters of the state any ... net, seine, poisonous or stupifying substances ... or electricity in taking or attempting to take any fish ..."

While the state retains title to fish in the public waters of the state, and also those in waters adjacent to public waters stocked with fish by reason of the overflow of those waters, this assertion of ownership does not apply to fish in private waters not stocked by overflow. Thus owners of farm ponds have absolute ownership of the fish in these ponds and may dispose of them as they wish. The fact that breeding stock for these ponds might be provided by the State Conservation Commission does not, in our opinion, change the result. The state reserves no ownership in the breeding stock nor its progeny, and cannot control the disposition thereof. The result is not changed by the fact that the fish are to be taken by means of an electrical device which would be illegal if used in public waters. See 1930 *O.A.G.* 128, holding that the owner of a private preserve may spear fish in such preserve, even though spears may not lawfully be used in public waters; 1902 *O.A.G.* 183, in accord as to the use of seines in private waters. See also, *State v. Zellmer,* 202 Iowa 638, 210 N.W. 744 (1926).

4.8

CONSERVATION: Fish and game—§109.120, 1958 Code. Use of aircraft in locating or driving game to certain areas where hunters lie in wait is not prohibited by §109.120 so long as actual killing or wounding of the wild life does not take place from within such aircraft, and so long as the driving of the animal is not so extreme as to directly cause its death or injury.

March 1, 1962

Mr. Edward N. Wehr
Assistant Scott County Attorney
Scott County Courthouse
Davenport, Iowa

Dear Mr. Wehr:

We have your letter of February 13, 1962, in which you state:

"We are wondering whether the following are prohibited under section 109.120:

"(1) The use of an airplane in 'locating' an animal, fowl or fish, when the actual killing is done after the plane has landed and the occupants have removed themselves from the airplane.

"(2) The use of an airplane in driving animals, such as foxes, to an area where hunters on the ground can shoot the same."

Section 109.120, 1958 Code, provides as follows:

"Prohibited acts. It shall be unlawful for any person to intentionally kill, wound or attempt to kill or wound any animal, fowl or fish from or with an aircraft in flight. Any person who violates the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not to exceed one hundred dollars, or by a term not to exceed thirty days in the county jail."

The language of the statute itself limits the offense to the intentional killing or wounding of wild life, or the attempt to kill or wound wild life, from or with an aircraft in flight. Thus, a person may not use an airplane to run an animal to death by exhaustion or to attempt to do so, since this would be a clear violation of the terms of the statute. The conduct referred to in your letter is, however, not prohibited by the terms of §109.120, *supra,* and in the light of the authorities holding that criminal statutes are to be strictly construed and will not embrace cases not within the letter of the law (see, for example, *Masteller v. Board of Control of State Institutions,* 251 Iowa 234, 100 N.W. 2d 111 (1960) and *State v. Andrews,* 167 Iowa 273, 149 N.W. 245 (1914)), it is the opinion of this office that the use of an aircraft in locating an animal, fowl or fish, or in driving animals to areas where hunters lie in wait, is not prohibited under present Iowa law, so long as the actual killing of the wild life does not take place from within an aircraft in flight, and so long as the driving of the animal is not so extreme as to directly cause its death or injury.

4.9

CONSERVATION: Flowage easements—§§306.9, 332.3, 467B.1, 467B.3, 1962 Code. Board of supervisors has no statutory authority to make conveyance for flowage easements over county-owned property.

December 26, 1962

Mr. Norman R. Hays, Jr.
Marion County Attorney
Knoxville, Iowa

Dear Mr. Hays:

We have your recent letter in which you request the opinion of this office in regard to the following:

"The Marion County Board of Supervisors is presently negotiating with representatives of the Rock Island District, United States Army Engineers, concerning about 77 miles of Marion County secondary roads which will be affected by the Red Rock Reservoir. These roads will be removed, altered or rearranged at federal expense.

"The County has tentatively agreed to abandon about 42 miles of such roads, retain about 29 miles in their existing location, and raise or relocate about 6 miles. For the roads being retained, the Corps of Engineers has requested flowage easements from Marion County of those portions of the roadways lying below elevation 783.0 feet mean sea level.

"The proposed flowage easements would convey to the United States:

The perpetual right, power, privilege and easement to overflow, flood and submerge said roadways and facilities thereon as required in connection with the operation and maintenance of the Red Rock Reservoir project.

"I would very much appreciate your opinion as to whether the Marion County Board of Supervisors has statutory authority to convey such flowage easements to the United States."

It has frequently been held that any branch of government is a creature

of statute and therefore has only those powers which are conferred upon it by statute, either expressly or impliedly. See *Hilgers v. Woodbury County,* 200 Iowa 1318, 206 N. W. 660 (1928); *In re Frentress' Estate,* 249 Iowa 783, 89 N. W. 2d 367 (1958).

Iowa Code §332.3, being the section setting out the general powers of the board of supervisors, fails to provide any explicit statutory authority for the granting of easements of any kind. Subsections 13 and 17 thereof respectively provide as follows:

"The board of supervisors at any regular meeting shall have power:

"13. When any real estate, buildings, or other property are no longer needed for the purposes for which the same were acquired by the county, to convert the same to other county purposes or to sell or lease the same at a fair valuation.

" * * *

"17. To lease or sell real estate owned by the county and not needed for county purposes."

While the board does have, under these subsections, the express power to sell or lease county property not needed for county purposes, this power does not, in our opinion, imply the power to grant easements.

Iowa Code Chapter 467B contemplates cooperation between the federal and local governments in establishing and maintaining flood control systems. Section 467B.1 provides as follows:

"Whenever any county, soil conservation district, subdistrict of a soil conservation district, political subdivision of the state, or other local agency shall engage or participate in any project for flood or erosion control, flood prevention, or the conservation, development, utilization, and disposal of water, in co-operation with the federal government, or any department or agency thereof, the counties in which said project shall be carried on shall have the jurisdiction, power, and authority through the board of supervisors to construct, operate and maintain said project on lands under the control or jurisdiction of the county whenever dedicated to county use, or to furnish financial and other assistance in connection with said projects. Such flood, soil erosion control, and watershed improvement projects shall be presumed to be for the protection of public roads and lands, and for the protection of the public health, sanitation, safety, and general welfare."

and section 467B.3, in connection therewith, provides:

"The counties and soil conservation districts, subdistricts of soil conservation districts concerned, shall advise and consult with each other, upon the request of either party or any affected landowners, and shall be authorized to co-operate with each other or with other state subdivisions, or instrumentalities, and affected landowners, as well as with the federal government or any department or agency thereof, to construct, operate, and maintain suitable projects for flood or soil erosion control, flood prevention, or the conservation, development, utilization, and disposal of water on public roads or other public lands or other land granted county use."

While both these sections contemplate co-operation with the federal government, neither section authorizes the conveyance of any interest in real estate or any easement to the United States government. The statutory power to furnish "financial or other assistance" does not, in our opinion, carry with it the power to grant easements when such power is not given to the board of supervisors generally under Chapter 332.

Your letter states that the county has tentatively agreed to "abandon" certain roads in connection with the proposed reservoir project. While we find no statutory authority for the abandonment of county property, Chapter 306 establishes the procedure for the vacation of secondary roads within the jurisdiction of the county boards of supervisors. At least one section under this chapter contemplates the sale of property in connection with the vacation of roads. See §306.9. But once again, the power to sell does not, in the opinion of this office, imply the power to grant easements. Further, it has been held that the inclusion of one power in a statute excludes all powers not expressly mentioned. *Archer v. Bd. of Education,* 251 Iowa 1077, 104 N. W. 2d 621 (1960); *Dotson v. City of Ames,* 251 Iowa 467, 101 N. W. 2d 711 (1960).

For the above reasons, it is our opinion that the Marion County Board of Supervisors has no statutory authority to make a conveyance for flowage easements over county-owned property.

4.10

CONSERVATION: Hunting licenses—§110.1, 1962 Code. "Special deer hunting license is supplementary to requirement for general hunting license, and persons wishing to hunt deer in Iowa must obtain special deer hunting license in addition to a general hunting license.

December 14, 1962

Mr. Glen G. Powers, Director
State Conservation Commission
East 7th and Court
Des Moines 8, Iowa

Dear Mr. Powers:

We are in receipt of your opinion request in regard to the following:

"Is a hunter, who is not qualified under license exceptions listed in Section 110.17, who holds a valid 'special deer hunting license' issued under Section 110.1, required to also hold a valid 'hunting license' issued under provision of Section 110.1 in order to legally hunt deer in Iowa?"

Iowa Code §110.1 provides in part:

"Licenses. Except as otherwise provided in this chapter, no person shall fish, trap, hunt, pursue, catch, kill or take in any manner, or use or have possession of, or sell or transport all or any portion of any wild animal, bird, game or fish, the protection and regulation of which is desirable for the conservation of the resources of the state, without first procuring a license or certificate to do so and the payment of a fee as follows:

" * * *

"Hunting licenses:

All persons legal residents of the state, except otherwise provided $2.50

" * * *

"*Special* deer hunting license:

All persons legal residents of the state .....$10.00"

(Italics supplied)

The requirement that persons desiring to hunt deer purchase special licenses deals with a special circumstance and is thus, of law, a special statute. *State*

ex rel. Weede v. Iowa Southern Utilities Co., 231 Iowa 784, 2 N. W. 2d 372 (1942). While it is generally held that a special statute takes preference over and controls a general statute (in this case that portion of §110.1 requiring ordinary hunting licenses) *Ervin v. Triplett,* 236 Iowa 272, 18 N. W. 2d (1945), it is also held that special and general statutes must be construed together if possible, in order that neither statute should be made ineffective unless necessary. *Great Western Accident Ins. Co. v. Martin,* 183 Iowa 1009, 166 N. W. 705 (1918). Further, when two statutes cover in whole or in part the same matter and are not irreconcilable, effect will be given to both. *Iowa Farm Serum Co. v. Bd. of Pharmacy Exam.*, 240 Iowa 734, 35 N. W. 2d 848 (1949); *Hummer v. Hummer,* 3 Greene 42 (1851).

In our opinion, these authorities require that both of the above-quoted portions of §110.1 be given effect, making the requirement for a special deer hunting license supplementary to the requirement for general hunting licenses, and therefore, persons wishing to hunt deer in the State of Iowa must obtain a special deer hunting license in addition to a general hunting license.

4.11

CONSERVATION: Jurisdiction of lagoons—§§106.2(4), (8), (12), 1962 Code. Lagoons connected to Lake Okoboji are "waters under the jurisdiction of the Conservation Commission" as defined in §106.2(4) and navigation regulations, boating equipment requirements, and fish and game regulations of the Commission apply to and may be enforced in such waters.

October 2, 1962

Mr. Jack H. Bedell
Dickinson County Attorney
Spirit Lake, Iowa

Dear Mr. Bedell:

We have your recent letter in which you request the opinion of this office in regard to the following question:

"Whether or not the various lagoons connected to Lake West Okoboji are such waters as come under the jurisdiction of the Conservation Commission of the State of Iowa, that is whether or not the water navigation regulations, including boat equipment requirements, as well as the fish and game regulations of the Conservation Commission apply to these waters.

"By way of explanation, I wish to point out that these lagoon waters are navigable by boat from West Okoboji Lake directly into the lagoons within the definition as set out in Section 106.2, subsection 8 of the 1962 Code of Iowa. In many instances the lagoons will run as deep as 10 to 15 feet, and at the opening into West Okoboji Lake they are a minimum of 3 feet in depth. There are no locks between the lagoons and the lake.

"I refer you specifically to Section 106.2, subsection 4, and wish to explain that this question is prompted by a justice of the peace questioning the jurisdiction of the Conservation Commission in making arrests under the equipment and navigation laws on operators of boats within the lagoon area.

"The land on all sides of the lagoon is owned by private parties, and the canals and lagoons were dug privately. However, the water flows freely from the natural lake into and out of the lagoons and canals. The marine life from Lake West Okoboji is free to maneuver from the lake itself into these lagoons and canals except that on isolated occasions the Conservation Commission has installed fish traps at the openings.

"It is my personal opinion that these waters are under the jurisdiction of the State Conservation Commission and that the navigation and boating regulations do apply to these areas, but I desire your official opinion so that this matter might be clarified insofar as the enforcement of these regulations is concerned."

Your attention is directed to Iowa Code §106.2(4), which provides as follows:

"4. 'Waters of this state under the jurisdiction of the state conservation commission' means any navigable waters within the territorial limits of this state, and the marginal river areas adjacent to this state, exempting only farm ponds, privately owned lakes and waters specifically delegated to local authorities."

Under §106.2(8), 'navigable waters' is defined as:

"all lakes, rivers and streams, which can support a vessel capable of carrying one or more persons during a total of six months period in one out of every ten years."

Therefore, in our opinion, the lagoons referred to in your letter are waters of the state under the jurisdiction of the State Conservation Commission within the meaning of §106.2(4) supra, and are not privately owned lakes within the meaning of §106.2(12), which provides:

"12. 'Privately owned lakes' means any lake, located within the boundaries of this state and not subject to federal control covering navigation owned by an individual, group of individuals or a non-profit corporation and which is not open to the use of the general public but is used exclusively by the owners and their personal guests."

As these lagoons are defined in your letter, they are under the foregoing rules of law a portion of Lake Okoboji, even though they originally may have been privately constructed. Therefore, in our opinion, water navigation regulations, boating equipment requirements, and the fish and game regulations of the State Conservation Commission, apply to and may be enforced in these waters.

4.12

CONSERVATION: Maintenance of river patrol—§§106.2(4), 106.2(8), 106.3, 111A.5, Code 1962. County conservation board may not expend funds for the purpose of maintaining a river patrol, whether or not the funds are paid to a municipal riverfront improvement commission. Jurisdiction over water safety is vested exclusively in State Conservation Commission in those waters not specifically delegated to local authorities.

December 28, 1962

Mr. William C. Ball
Black Hawk County Attorney
Suite 201, First National Building
Waterloo, Iowa

Dear Mr. Ball:

We have your letter requesting the opinion of this office in regard to the following:

"May the Black Hawk County Conservation Board use funds from its budget for the purpose of maintaining a River Patrol within Black Hawk County on the Cedar River. Said funds to be paid directly to the Waterloo River Front Commission for expenditures for this purpose?"

Your attention is directed to Iowa Code Chapter 106 (1962), which contains statutes establishing boating and water safety regulations. In particular,

Iowa Code §106.3 provides:

"The state conservation commission is hereby vested with the power and is charged with the duty of observing, administering and enforcing the provisions of this chapter.

"The state conservation commission is hereby authorized to adopt, promulgate and enforce such rules and regulations as may be necessary to carry out the provisions of this chapter."

and 106.2(4) and (8) respectively provide:

" 'Waters of this state under the jurisdiction of the state conservation commission' means any navigable waters within the territorial limits of this state, and the marginal river areas adjacent to this state, exempting only farm ponds, privately owned lakes and waters specifically delegated to local authorities."

" 'Navigable waters' means all lakes, rivers and streams, which can support a vessel capable of carrying one or more persons during a total of six months period in one out of every ten years."

Under these sections, it is clear that police power in water safety matters is vested in the State Conservation Commission, except in those waters "specifically delegated to local authorities". While riverfront improvement commissions have authority to promulgate and enforce water safety regulations within municipal limits, this authority was specifically delegated by the legislature (see Staff to Powers, 7/3/62) and we find no such delegation in Chapter 111A, dealing with county conservation boards.

Although §111A.5 provides:

"The county conservation board may make, alter, amend or repeal rules and regulations for the protection, regulation and control of all parks, preserves, parkways, playgrounds, recreation centers, and other property under its control. * * * "

it also states that "no rules or regulations adopted shall be contrary to, or inconsistent with, the laws of the State of Iowa." In the absence of evidence that jurisdiction over the Cedar River in Black Hawk County could be and has been delegated to the county conservation board, it is our opinion that the county conservation board may not expend funds for the purpose of maintaining a river patrol, whether or not the funds are paid to a municipal riverfront improvement commission.

4.13

CONSERVATION: Management agreements—§§111.4(2) (4), 111.27, 1962 Code. 1. State may enter into management agreements with counties in regard to park lands, but not in regard to lands obtained through expenditure of fish and game funds. 2. Management agreements are subject to the approval of the Executive Council.

December 20, 1962

Mr. Glen G. Powers, Director
State Conservation Commission
East 7th and Court
Des Moines 8, Iowa

Dear Mr. Powers:

We have your letter in which you request the opinion of this office in regard to the following:

"The State Conservation Commission requests an opinion as to whether it may legally enter into an agreement for a stated number of years with a County Conservation Board for the maintenance and management of state-owned areas by a County Conservation Board under the purview of Chapter 111A, Code of 1962, and more specifically Section 111A.4(2).

"The Commission also requests your opinion if Chapter 111A, or any other section of the Iowa Code, requires approval of the State Executive Council of management agreements entered into by the State Conservation Commission under the authority of Chapter 111A."

1. Iowa Code section 111A.4(2) provides in part as follows:

"2. To acquire in the name of the county by gift, purchase, lease, agreement or otherwise ... suitable real estate ... for public parks, preserves, parkways, playgrounds, recreation centers, forests, wildlife and other conservation purposes. ... "

Section 111A.4(4) provides:

"4. To plan, develop, preserve, administer and maintain all such areas, places and facilities, and construct, reconstruct, alter and renew buildings and other structures, and equip and maintain the same."

Thus counties have authority to acquire real estate by agreement for a period of years and to equip and maintain the same. The question remains as to the power of the State to enter into such agreements with the county.

Iowa Code §111.27 provides as follows:

"Management by municipalities. The commission may, subject to the approval of the executive council, enter into an agreement or arrangement with the board of supervisors of any county or the council of any city or town whereby such county, city, or town shall undertake the care and maintenance of any *state park*. Counties, cities, and towns are authorized to maintain such *parks* and to pay the expense thereof from the general fund of such county, city or town as the case may be." (Italics supplied)

In our opinion, as to park lands the State and the county may enter into a legal and valid management agreement. Section 111.27, *supra,* however, is by its own language limited to park lands and does not apply to lands acquired with fish and game funds, i.e., fishing access areas. Therefore, in our opinion, further legislation is necessary in order to authorize a state-county maintenance agreement in regard to fish and game areas.

2. In regard to your second question, your attention is directed to the language of Iowa Code §111.27, *supra,* which specifically requires that management agreements be approved by the Executive Council.

4.14

CONSERVATION: Parks—§111.42, Code 1962. Bows and arrows are weapons within the meaning of §111.42 and the use thereof is prohibited in all state parks and preserves.

September 28, 1962

Mr. Glen G. Powers, Director
State Conservation Commission
East 7th and Court
LOCAL

Dear Mr. Powers:

We have your recent letter in which you request the opinion of this office in regard to the following:

"We have received a request from the Sue Bowman Club, an organization of archers, that wishes to set up an archery range in Stone Park, a state park just north of Sioux City. Section 111.42 of the Code of Iowa regarding firearms, states, 'The use by the public of firearms, fireworks, explosives and weapons of all kinds is prohibited in all state parks and preserves.' We have assumed in the past that the bow and arrow was considered a weapon, however, in view of this most recent request we believe that we should request an opinion from your office as to whether a bow and arrow is considered a weapon under this section of the law. We would appreciate it very much if you would give us an interpretation of this matter for reference in dealing with requests by archers and clubs for use of state parks as an archery range."

Iowa Code §111.42 (1962) provides as follows:

"111.42 Firearms, etc. The use by the public of firearms, fireworks, explosives and weapons of all kinds is prohibited in all state parks and preserves."

In our opinion, bows and arrows are weapons within the meaning of this section and use thereof in state parks is therefore prohibited by law.

4.15

CONSERVATION: Riverfront improvement commission — §§106.2(4), 106.17, 111.18, 372.8, 372.9, 372.15, 1962 Code. Sand and gravel may not be removed from the bed or banks of a meandered river inside a city having a riverfront improvement commission without first securing permits from both the city and the State Conservation Commission. Channel improvement and flood control matters are within the exclusive jurisdiction of the riverfront improvement commission in areas under the jurisdiction of such a commission, subject to approval by the Natural Resources Council. Riverfront improvement commissions have exclusive jurisdiction to promulgate boating safety regulations and §106.17 in regard to conflicts with state provisions is inapplicable.

July 3, 1962

Mr. Glen G. Powers, Director
State Conservation Commission
East 7th and Court
LOCAL

Dear Mr. Powers:

We have your letter requesting the opinion of this office in regard to the following questions:

"What is the extent of the jurisdiction of the State Conservation Commission to regulate sand and gravel removal in the City of Cedar Rapids, Iowa in relation to that of the Cedar Rapids Riverfront Improvement Commission?

"What are the respective powers of the State Conservation Commission and the Riverfront Improvement Commission in regard to flood control, maintenance of the channel and the promulgation of boating safety regulations?"

In regard to your first question, your attention is directed to a prior opinion of this office holding that sand and gravel may not be removed from the bed or banks of a meandered river inside a city having a riverfront improvement commission without first securing permits from both the city and the State Conservation Commission. 1948 *O.A.G.* 250. A copy of this opinion is attached for your information.

Your second question deals with the respective powers of the State Conservation Commission and the riverfront improvement commission in regard to (a) flood control and channel maintenance, and (b) promulgation of boating safety regulations: police power.

(a) Flood control and channel maintenance.

Your attention is diercted to Iowa Code §111.18, which provides as follows:

"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 exercise of this jurisdiction shall be subject to the approval of the Iowa natural resources council in matters relating to or in any manner affecting flood control. The commission, 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 chapter relative to public parks shall apply thereto."

While the Conservation Commission has jurisdiction therefor, this jurisdiction is not untrammeled, and the Commission has no express powers in regard to channel maintenance and flood control.

On the other hand, §§372.8 and 372.9 confer the following powers upon the riverfront improvement commission:

"Said commission may redeem lands between the meandered lines of any such meandered stream; redeem lands acquired by it in the channel of any stream that is not meandered; construct, regulate, and maintain dams across such stream; provide for and protect, by secure walls or banks, a channel adequate to carry flood waters of a volume equal to all reasonable expectations, based on past experience and the area drained by such stream, according to expert authority; . . ."

"Said commission may adopt plans, profiles, and specifications for the improvement of the said river channel and banks, and the reclaiming of lands between the meandered lines of any such meandered stream within such city, or within the channel of any stream that is acquired by the commission pursuant to section 372.7, and the construction of dams; but before the beginning of the execution of the same, such plans, profiles, and specifications shall be approved by the Iowa natural resources council."

Although still subject to approval by the Natural Resources Council, the powers are express powers, while the Conservation Commission has no such express powers. It is a fundamental rule of statutory construction that express mention of one thing in a statute implies exclusion of others. *Archer v. Board of Education,* 251 Iowa 1077, 104 N.W. 2d 621 (1961). The express grant of power to the riverfront improvement commission and the absence of such powers in the Conservation Commission indicates, in our opinion, the intent of the legislature that channel improvement and flood control matters are within the exclusive jurisdiction of the riverfront improvement commission in areas under the jurisdiction of such a commission, subject, of course, to the approval of the Natural Resources Council.

(b) Promulgation of boating safety regulations: police power.

Chapter 106 of the Code vests in the State Conservation Commission the power to control water navigation within the "waters of the state under the jurisdiction of the state conservation commission."

Section 106.2(4) provides:

"As used in this chapter, unless the context clearly requires a different meaning:

"4. 'Waters of this state under the jurisdiction of the state conserva-

tion commission' means any navigable waters within the territorial limits of this state, and the marginal river areas adjacent to this state, exempting only farm ponds, privately owned lakes and *waters specifically delegated to local authorities.*" (Emphasis supplied)

Therefore, if waters of the Cedar River within the corporate limits of the City of Cedar Rapids are "waters specifically delegated to local authorities", then the State Conservation Commission has no jurisdiction to enforce water navigation regulations therein.

Your attention is directed to §372.15, which provides:

"Said commission shall have power, in and over the bed and banks of such river as specified, to construct and regulate the use of wharves, landing places, bathhouses, boathouses, and other suitable structures *and shall have exclusive jurisdiction over the water of such stream, within the corporate limits of such city* and may maintain said stream in a suitable condition for boating, skating, and other public amusements and purposes." (Emphasis supplied)

This section, in our opinion, vests exclusive jurisdiction in the riverfront improvement commission to promulgate boating safety regulations to the exclusion of the State Conservation Commission. Therefore, the riverfront improvement commission has exclusive jurisdiction over the waters of the Cedar River for purposes of promulgating boating safety regulations.

The language of Section 106.17 that "ordinances and local law shall be operative only so long as they are not inconsistent with the provisions of this chapter or the rules and regulations adopted by the commission" is, in our opinion, inapplicable, since waters within the jurisdiction of riverfront improvement commissions are expressly removed from the operation of Chapter 106 by §§106.2(4) and 372.15, *supra.*

4.16

CONSERVATION: Soil conservation districts—§§467A.2, 467A.7, 1962 Code. Soil conservation districts have no power to construct a building to house federal and state governmental agencies.

October 1, 1962

Mr. William H. Greiner, Director
State Soil Conservation Committee
Statehouse
LOCAL

Dear Mr. Greiner:

We have your recent letter requesting the opinion of this office in regard to the following questions:

"1. May a soil conservation district construct a building to house federal and state governmental agencies?

"2. May the building be constructed on leased ground?

"3. May space in such building be leased to private farm organizations, and must income tax be paid on rentals received therefrom?"

Iowa Code §467A.7 enumerates the powers of soil conservation districts and commissioners. Subsection 5 thereof provides:

"A soil conservation district organized under the provisions of this chapter shall have the following powers, in addition to others granted in other sections of this chapter: * * *

"5. To obtain options upon and to acquire, by purchase, exchange, lease, gift, grant, bequest, devise or otherwise, any property, real or personal, or rights or interests therein; to maintain, administer, and improve any properties acquired, to receive income from such properties and to expend such income in carrying out the purposes and provisions of this chapter; and to sell, lease or otherwise dispose of any of its property or interests therein in furtherance of the purposes and provisions of this chapter." Iowa Code §467A.2 provides:

"It is hereby declared to be the policy of the legislature to provide for the restoration and conservation of the soil and soil resources of this state and for the control and prevention of soil erosion and for the prevention of erosion, floodwater, and sediment damages, and thereby to preserve natural resources, control floods, prevent impairment of dams and reservoirs, assist and maintain the navigability of rivers and harbors, preserve wild life, protect the tax base, protect public lands, and promote the health, safety, and public welfare of the people of this state."

In our opinion, the powers enumerated under §467A.7, *supra,* can be properly exercised only in carrying out and implementing the policies enunciated in §467A.2. The construction of offices for governmental agencies is not directed toward the fulfillment of these policies, even though the proposed project may have income-producing aspects. Further, the file of correspondence you have forwarded in relation to the proposed project indicates that the district proposes to borrow money at interest for the construction of the building. We find no statutory authority, either express or implied, for such a transaction.

Since your first question is answered in the negative, questions two and three are not answered.

4.17

CONSERVATION: State Conservation Director—§§107.11, 107.13, 107.16, 107.23, 1958 Code. State Conservation Director may, in the exercise of sound discretion, determine what assistants are necessary to carry out statutory duties of State Conservation Commission.

February 23, 1962

Mr. Marvin R. Selden, Jr.
State Comptroller
Statehouse
LOCAL

Dear Mr. Selden:

We have your letter of February 2, 1962, in which you state:

"I call your attention to Section 107.13 of the Code of Iowa, 1958, as amended by the 58th General Assembly.

"'107.13. Officers and employees—salaries. Said director shall, with the consent of the commission and at such salary as the commission shall fix, employ such assistants, including a professionally trained state forester of recognized standing, as may be necessary to carry out the duties imposed by this chapter on the commission; also and under the same conditions, said director shall appoint such officers as may be necessary to enforce the laws, rules, and regulations, the enforcement of which are herein imposed on said commission. Said officers shall be known . . . "

"Your attention is also called to Section 107.16, Code of Iowa, 1958.

"'107.16. Removal. The appointees and employees aforesaid may

be removed by the said director at any time subject to the approval of the commission.'

"This office hereby requests the Attorney General's office to define the term 'employ such assistants'; more specifically, whether office, clerical, division chiefs, superintendents and field workers would be encompassed by this terminology, or does it include only the specifically mentioned assistants (Section 107.21, Code of Iowa, 1958) of Lands and Waters, Fish and Game, and Administration, and the state forester."

Under §107.13, *supra,* the director shall employ such assistants as may be necessary to carry out the duties imposed on the Commission by statute. These duties are set out generally in §107.23, which provides as follows:

"General duties. It shall be the duty of the commission to protect, propagate, increase and preserve the fish, game, fur-bearing animals and protected birds of the state and to enforce by proper actions and proceedings the laws, rules, and regulations relating thereto. The commission shall collect, classify, and preserve all statistics, data, and information as in its opinion shall tend to promote the objects of this chapter, shall conduct research in improved conservation methods and disseminate information to residents of Iowa in conservation matters.

"Upon the issuance of such data and information in printed form to private individuals, groups or clubs, the commission shall be entitled to charge therefor the actual cost of printing and publication as determined by the state printer."

The qualifications and duties of the Conservation Director are set out in §107.11, which provides:

"Conservation director. The commission shall employ an administrative head who shall be known as state conservation director and be responsible to the commission for the execution of its policies. He shall be a person of executive ability and possess special knowledge relative to the duties herein imposed on the commission."

The director, with his special knowledge, should be in the best position to determine what assistants are necessary to carry out the statutory duties of the State Conservation Commission, and he should be at liberty to exercise his sound discretion in this regard, subject to the approval of the Commission.

Therefore, it is our opinion that office and clerical personnel as well as division chiefs, superintendents, and field workers would be encompassed by the language of §107.13, *supra,* if the State Conservation Director, in the exercise of his sound discretion, determines in fact that such assistants are necessary for the execution of statutorily imposed duties.

4.18

CONSERVATION: Tax levy—§111A.6, Code 1958. County boards of supervisors have no authority to levy an annual tax of less than one-fourth mill.

April 23, 1962

Mr. Robert A. Maddocks
Wright County Attorney
Clarion, Iowa

Dear Mr. Maddocks:

We have your letter of March 29, 1962 in which you request the opinion of this office in regard to the following:

"Does the county board of supervisors have the legal authority to levy an annual tax in amount of less than 1/4 mill but more than no mills?"

Your attention is directed to Iowa Code §111A.6, which provides in part as follows:

"The county board of supervisors ... may by resolution appropriate an amount of money from the general fund of the county for the payment of expenses incurred by the county conservation board ... and it may levy or cause to be levied an annual tax, in addition to all other taxes, of not less than one-fourth mill or more than one mill on the dollar of the assessed valuation of all real and personal property subject to taxation within such county ... "

Thus by its own terms the statute expressly prohibits a levy of less than one-fourth mill. It is a fundamental rule of statutory construction that the language of a statute should be given its plain and ordinary meaning unless the context of the statute shows a different legislative intent. *In re Klug's Estate,* 251 Iowa 1128, 104 N.W. 2d 600 (1960); *Cook v. Bornholdt,* 250 Iowa 696, 95 N.W. 2d 749 (1959).

There is certainly nothing in the language of §111A.6 to indicate that anything other than the plain and ordinary meaning of "not less than one-fourth mill" was intended by the legislature. Your inquiry is therefore answered in the negative.

4.19

CONSERVATION: Title change for conservation officers—§107.13, 1962 Code. No authority in Code to change title of conservation officers under jurisdiction of Division of Lands and Waters to "State Park Rangers"; legislation necessary to effect such change.

December 26, 1962

Mr. William Boswell, Jr.
Administrative Assistant
State Conservation Commission
LOCAL

Dear Mr. Boswell:

We have your letter of September 13, 1962, in which you request the opinion of this office in regard to the following:

"1. Is formal legislation needed to change the name of Lands and Waters Conservation Officers to another such at State Park Rangers?

"2. Is formal legislation needed to provide authority for disciplinary measures involving salary suspensions against State Conservation Officers?"

1. Your attention is directed to Iowa Code §107.13, which provides in part as follows:

"*Officers and employees—salaries.* Said director shall, with the consent of the commission and at such salary as the commission shall fix, employ such assistants, including a professionally trained state forester of recognized standing, as may be necessary to carry out the duties imposed by this chapter on the commission; also and under the same conditions, said director shall appoint such officers as may be necessary to enforce the laws, rules, and regulations, the enforcement of which are herein imposed on said commission. *Said officers shall be known as state conservation officers.* * * * " (Italics supplied)

We find no authority in the Code for other titles for conservation officers, and legislation would, in our opinion, be necessary to change the title of conservation officers under the jurisdiction of the Division of Lands and Waters to "State Park Rangers".

2. Your second question involves an administrative matter solely within the discretion of the Commission.

4.20

Deer hunting—H. F. 266 is constitutional. (Craig to Graham, St. Rep., 2/21/61) #61-2-7

4.21

County conservation board—§111A.4(3), 1958 Code. Only final plans, and not preliminary and intermediate plans, are required to be submitted to the State Conservation Commission for approval. (Craig to Dietz, St. Rep., 2/8/61) #61-2-2

4.22

County conservation board—§§111A.6, 471.4, 1958 Code. Condemnation of land by county for conservation purposes under H. F. 153 would require approval of county conservation board, State Conservation Commission and county board of supervisors. (Creger to Rapson, St. Rep., 4/4/61) #61-4-5

4.23

County conservation board—§111A.4(3), 1958 Code. Particular option to purchase real property not contractually binding upon county conservation board unless they choose to exercise the option. (Craig to Sindlinger, Ass't. Black Hawk Co. Atty., 4/4/61) #61-4-3

4.24

Domestic animal fund—Ch. 352. 1962 Code of Iowa. The domestic animal fund created by Ch. 352 is not available to an owner of domestic animals or fowls injured or killed by foxes. (Bump to Smith, O'Brien Co. Atty., 8/10/62) #62-8-3

4.25

Domestic animal fund—Ch. 352. 1962 Code. The board of supervisors has no jurisdiction of a claim filed against the Domestic Animal Fund lacking the verified signature of the claimant and the affidavit of two witnesses, and the filing of an amended claim more than two years later verified by the claimant and by two witnesses would not confer jurisdiction. (Strauss to Wenger, Fremont Co. Atty., 10/18/62) #62-10-3

4.26

Expenditure of appropriated funds—§4, Ch. 24, Acts 59th G. A.; §6, Ch. 28, Acts 58th G. A. Executive Council approval not necessary for the expenditure of funds appropriated under §4, Ch. 24, Acts 59th G.A. and §6, Ch. 28, Acts 58th G.A., when such approval is not required by said acts. (Creger to Powers, Dir., Cons. Comm., 2/26/62) #62-2-5

4.27

Fee fishing—§109.85, 1958 Code. Conservation Commission cannot establish fee fishing operations under present law. (Creger to Madden, Cons. Comm., 4/13/62) #62-4-3

4.28

Operation of airport in state park—§107.24, 1958 Code; §111.32, 1962 Code. State Conservation Commission cannot enter into a management agreement authorizing a municipality to operate an airport on a portion of a state park. (Creger to Cons. Comm., 11/1/61) #61-11-3

4.29

Outboard motors—§106.16, 1958 Code. Boat is equipped with motor when motor is mounted on a boat ready for use. (Creger to Mitchell, Cons. Comm., 4/20/61) #61-4-16

4.30

Soil conservation districts—Ch. 467A, 467B, 1958 Code. Chapters 467A and 467B, providing for maintenance programs for watershed districts, do not require that all portions of a watershed lying in more than one county be protected in accordance with the provisions of one uniform chapter. (Creger to Greiner, Soil Cons. Comm., 5/24/61) #61-5-22

4.31

Use of sea planes—§§106.15, 111.35, 1958 Code. Conservation Commission has power to regulate the use of sea planes upon waters under the jurisdiction of the Commission. (Creger to Cons. Comm., 11/1/61) #61-11-4

4.32

Watercraft, fire extinguishers required—§106.9, 1962 Code. Sec. 10(f)(7), Ch. 87, Acts 59th G. A., requires that every motor boat be equipped with fire extinguishers, and the State Conservation Commission cannot exempt by regulation any class or classes of boats from the fire extinguisher requirement. (Creger to Powers, Cons. Comm., 9/6/61) #61-9-4

CHAPTER 5

CONSTITUTIONAL LAW

STAFF OPINIONS

LETTER OPINIONS

5.1

CONSTITUTIONAL LAW: Judicial amendment—Art. X, §1, 1962 Amendment, Constitution of Iowa; §§6.8, 605.1, 684.17, 1962 Code. The 1962 Judicial Amendment to the Iowa Constitution becomes effective on June 25, 1962, the date upon which the State Convassing Board declared the result of the special election; and increased compensation for all judges, as provided in §§605.1, 684.17 of the 1962 Code is effective from said date. The supplying of any funds in appropriation to meet a deficiency in the salary commitments for such judges is properly a matter for action by the Budget and Financial Control Committee. The Comptroller is a proper official to make request for such deficiency fund to the Budget and Financial Control Committee.

June 28, 1962

Mr. Marvin Selden
Comptroller
State of Iowa
L O C A L

Dear Mr. Selden:

This will acknowledge your recent letter, in which you submitted:

"On June 4, 1962 an election was held by the people of Iowa in which they approved a constitutional amendment relating to the selection of District and Supreme Court Judges in Iowa. This change is generally referred to as the 'Judicial Reform Act.' The official canvass of this vote is to be concluded by approximately June 25th.

"The appropriation Act of the 59th General Assembly provides for salaries of $14,000.00 per year instead of the previous $12,500.00 for District Court Judges, and $16,000.00 per year instead of $14,500.00 for the Supreme Court Judges, which increases were effective upon the individual judge's election to office. Our estimates are that these increases, if effective the date of canvass of the vote, will necessitate an additional sum of money of approximately $160,000.00 for District Judges, and $25,000.00 for Supreme Court Judges for the balance of the biennium, or $185,000.00 total.

"Due to the passage of this constitutional amendment, we respectfully request the following opinions:

"(1) On what date does this amendment become effective and the change in salary take place?

"(2) What is the rate of pay the District and Supreme Court Judges are entitled to subsequent to such effective date?

"(3) If the answer to the first question above concludes that we are

to pay at the increased rate provided in the appropriation Acts of the 59th General Assembly, and thus not have an appropriation sufficient to meet this rate of pay, is this anticipated expenditure properly a matter for action by the Budget and Financial Control Committee?

"(4) Who, or which department, should make the request to the Budget and Financial Control Committee for the additional funds required?"

(1) In answer to your question No. 1, the effective date of the amendment is the date upon which the State Canvassing Board declared the result of the special election upon this amendment. The reason is that Article X, §1 of the Constitution, after providing the procedure to follow in presenting amendments to the Constitution to the people, provides in pertinent part, the following:

"* * * if the people shall approve and ratify such amendment or amendments, by a majority of the electors qualified to vote for members of the General Assembly, voting thereon, such amendment or amendments shall become a part of the Constitution of this State."

The legislature has supplemented the foregoing provision by §6.8, Code of 1962, as follows:

"6.8 Canvass—declaration of result—record. The judges of election, county boards of canvassers, and other election officials shall canvass the vote on any constitutional amendment or public measure, and make return thereof, in the same manner as required by law for the canvass and return of the vote for public officers. The board of state canvassers shall canvass such returns, declare the result and enter the same of record, immediately following and in connection with the proofs of publication of such amendment or measure, in the book kept for that purpose by the secretary of state."

Thus, pursuant to the Constitution and the statute, the affirmative vote upon the amendment operated to make the amendment part of the Constitution, although §6.8 postponed its effective date to the conclusion of the canvass. This date is now recorded as June 25, 1962. This appears to be the legislative intent since Chapter 296, Acts of the 59th General Assembly provided with respect thereto that:

"SEC. 6. This Act shall take effect if the amendment to the Constitution of the State of Iowa proposed in Senate Joint Resolution fourteen (14) of the Fifty-ninth (59th) General Assembly is approved by the people, and upon completion of the canvass of the ballots cast at the special election at which it is so approved."

This conclusion has the support of the case of *State v. Kyle,* 65 S.W. 763, 765, (Mo., 1901) wherein the Supreme Court of Missouri considered a Missouri Constitutional provision providing in substantially like terms the method of amending its Constitution. The last line of such provision stated:

"... if a majority of the qualified voters of the State, voting for and against any one of said amendments, shall vote for such amendment, the same shall be deemed and taken to have been ratified by the people, and shall be valid and binding, to all intents and purposes, as a part of this Constitution ..."

That state's statutory provision in connection with the submission of the proposed amendment provided:

"If, upon such return so made (by the several county clerks) to the secretary of state, it is found that there is a majority of the qualified

voters of the state voting for and against any one of said amendments in favor of such amendments, same shall be deemed, and taken to have been ratified by the people, and the secretary of state shall certify the result of such vote to the governor. He shall, thereupon, without unnecessary delay, issue his proclamation, declaring such amendment ratified by a majority of the qualified voters of such state and valid and binding to all intents and purposes as a part of the constitution of the state of Missouri."

The Supreme Court of Missouri considered the constitutional provisions of other states which incorporated the amendment as part of the Constitution upon favorable voting of the electorate, and still other states having, as does Iowa, a statutory provision supplementing the Constitution with respect to the canvass of votes and the result thereof. After analyzing cases from these states, the Court stated:

"The deduction to be drawn from these authorities is that the amendment in question became a part of the constitution of this state when adopted by the vote of the people at the election held on the 8th day of November, 1900, and took effect and went into operation upon the canvass of the vote on the 19th day of December next thereafter, and not before."

For like authority see the cases cited in the *Kyle* opinion, and *Girdner v. Bryan,* Mo., 67 S.W. 699; *Kelly-Goodfellow Shoe Co. v. Sally,* Mo., 89 S.W. 889; *Opinion of the Justices,* Ala., 36 So. 2d 499; *Reade v. City of Durham,* N.C., 92 S.E. 712 and *City of Bessemer v. Birmingham Electric Co.,* Ala., 40 So. 2d 193.

The constitutional amendment became effective on June 25, 1962 and change of salary of both Justices of the Supreme Court and Judges of the District Court took place from that date.

(2) In answer to question No. 2, the Legislature enacted Chapter 296, 59th G. A., with the contingent adoption of the Judicial Amendment in mind. This chapter, being expressly operative if the judicial amendment be adopted by the electorate, repealed or amended the separate statutes relating to the nomination and election of judges. Thus, §§39.11, 39.14, 43.97(6), 49.41 and all of the sections in Chapter 46, except §46.18, 1958 Code of Iowa, were repealed, and §§43.97(4), 44.14 and 49.42 were amended, eliminating reference to the judicial convention and the "election" of judges.

In addition, the 58th G. A., in connection with its appropriation to provide for the compensation of Judges of the Supreme Court, enacted the following restraint upon the payment thereof to those Judges of the Supreme Court whose terms existed at that time:

"Secion 684.17, Code 1958, is amended by ... substituting in lieu thereof the words 'fourteen thousand five hundred dollars per year, provided that the compensation of judges during the terms existing at the time of the passage of this Act shall be at the rate of twelve thousand dollars per year until the *end of said existing terms.*'" (Ch 1, §32, 58th G.A.) (Emphasis added).

Concerning the compensation of district judges, the 58th G. A. stated in §42, Chapter 1, in connection with the appropriation:

"Section ... (605.1), Code 1958, is amended ... substituting in lieu thereof the words 'twelve thousand five hundred dollars per year, provided that the compensation of judges during the terms existing at the time of the passage of this Act shall be at the rate of ten thousand dollars per year until the end of said existing terms.'"

With knowledge of its effect upon the judicial amendment, the 59th G.A. amended §32 of Chapter 1, 58th G.A., by striking the heretofore-quoted provisions and inserting in lieu thereof the words "sixteen thousand dollars per year". Similarly, §42 of Chapter 1, 58th G.A., was amended by striking the word "twelve" from line eighteen thereof, and the part of said section hereinabove exhibited denying its use for the compensation of judges during the existing term, and inserted in lieu thereof the words "fourteen thousand dollars per year".

By these acts, the 59th G.A. expressly and, insofar as the compensation of judges is concerned, impliedly correlated §684.17 and §605.1, 1958 Code, with the provisions of the constitutional amendment then proposed, but excepted from such correlation the words "hereafter elected" as they appear in §684.17.

There are two reasons why such language may not be interpreted as a restriction upon the time the increased compensation to Supreme Court Judges is available. First, there is obvious conflict between the plain intent of the constitutional amendment to relieve such judges from the prohibition against accepting any increase during their terms and the postponement of receiving the increase if the words "hereafter elected" are to be interpreted as postponement of its availability until there is a subsequent election. In other words, by removing from the Constitution and the statute the restriction with respect to the availability of an increase to judges occupying office under existing terms, a construction is plainly required that the Constitution prevails as between the Constitution with the amendment incorporated and the statute interpreted to postpone availability of an increase in salary until the term of judges has expired.

Second, the words "hereafter elected" have had statutory existence since enactment of the section in 1941 by the 25th G.A., and doubtless had reference to the type of election then existing. This was the general election at which judges were elected upon a partisan basis. These same words have remained in such statute continuously since such time. With such general election having its partisan aspects attaching to the meaning of such words, there is no basis for inferring a legislative intent to convert such meaning to the judicial election provided by the constitutional amendment. Such judicial election is clearly not an election of that kind. On the contrary, it is a method by which judges are retained in their judgeship and not elected thereto, their only competition in such election being their own judicial record.

In this situation, while the courts will interpret a statute to give force and effect to all of its terms if such construction can be legitimately found, we are of the opinion that such construction upon the record herein disclosed cannot be legitimately found. Compare: *Leversee v. Reynolds,* 13 Iowa 310. To give force and effect to all of §684.17 leads to the anomalous result that seventy-five district court judges would be entitled to the new salary of $14,000.00 per year, while six Supreme Court judges would receive $12,000.00 per year or $2,000.00 per year less than the judges of the district court, and three justices of the Supreme Court would only receive $500.00 more than a judge of the district court.

On the other hand, the following rule appearing in *Sutherland Statutory Construction,* 3rd Edition, Vol. 2, is applicable:

> "A majority of the cases permit the elimination or disregarding of words in a statute in order to carry out the legislative intent.
>
> "As in all other cases, words may be eliminated only when such action is consistent with the legislative intent. Courts permit the elimination of words for one or more of the following reasons: where the word is found in the statute due to the inadvertence of the legislature or reviser, or where it is necessary to give the act meaning, effect, or intelligibility, or

where it is apparent from the context of the act that the word is surplusage, or where the maintenance of the word would lead to an absurdity or irrationality, or where the use of the word was a mere inaccuracy, or clearly apparent mishap, or was obviously erroneously inserted, or where the use of the word is the result of a typographical or clerical error, or where it is necessary to avoid inconsistencies and to make the provisions of act harmonize, or where the words of the statute fail to have any useful purpose or are entirely foreign to the subject matter of the enactment, or where it is apparent from the caption of the act or body of the bill that the word is surplusage."

The rate of pay to which the justices of the Supreme Court are entitled is $16,000.00 per annum. The rate of pay of judges of the district court is $14,000.00 per annum. This compensation is to begin on the effective date of the constitutional amendment.

(3) In answer to your question No. 3, the situation described is properly a matter for consideration and action by the Budget and Financial Control Committee. However, it is to be noted that it is the sole province of the Budget and Financial Control Committee to determine from the facts presented to it whether or not the request constitutes a contingency within the meaning of Chapter 51, Acts 59th G.A. The finding of such committee as to whether it does constitute a contingency is binding upon the State Comptroller. See 1948 *O.A.G.* 245 and 1948 *O.A.G.* 246.

(4) In answer to question No. 4, although other executive agencies and departments and the judicial branch of the government may make the request for additional funds, the Comptroller, who will be required to honor a requisition for these salaries, is a proper official to make the request to the Budget and Financial Control Committee.

5.2

CONSTITUTIONAL LAW: Public safety, H. F. 41—§§321.177, 321.178, 321.180, 321.194, Code 1958. Requirement that all persons under 18 complete drivers education in order to be eligible for drivers license is constitutional.

February 6, 1961

Honorable LeRoy Chalupa
State Representative, Jefferson County
Fifty-Ninth General Assembly
LOCAL

Dear Mr. Chalupa:

This will acknowledge receipt of your recent opinion request, in which you ask for an opinion as to the constitutionality of House File 41.

The explanation of House File 41 states that it is, "An Act to require the successful completion of a driver education course before a license to operate a motor vehicle may be issued to any person under eighteen (18) years of age."

House File 41 raises the age at which an Iowa operator's license may be issued from sixteen years to eighteen years, under §321.177, 1958 Code of Iowa, unless the individual involved has successfully completed an approved driver education course, in which case a license can be issued to a person sixteen years of age. §§321.177, 321.178, 321.180 and 321.194 are also amended to require any individual under eighteen years of age to successfully complete an approved driver education course in order to obtain driving privileges.

Section 321.180 is amended by House File 41 to allow any person over twenty-five years of age who possesses a valid license to operate a motor vehicle, or an instructor in an approved driver education course to accompany a person operating a vehicle under a temporary instruction permit. There appears to be no question about this provision.

The question is whether the provision that a person who has attained sixteen years of age but has not attained eighteen years of age may obtain a license only if that person has successfully completed an approved driver education course.

The Iowa Supreme Court has stated that a license to operate a motor vehicle is a privilege, not a right. *Doyle v. Kahl,* 242 Iowa 153, 158, 46 N.W. 2d 52, 55. This holding was affirmed in *Spurbeck v. Statton,* 252 Iowa 279, 289, 106 N.W. 2d 660, where the Iowa Supreme Court stated that "We have held that a driver's license is not a right, but a privilege." At page 290 the Court further stated that, "The giving ... of licenses to operate motor vehicles on the public highways is clearly within police power of the state."

The police power of a state includes the power to regulate health, morals, and education, and to promote good order, if such regulation is reasonable. *Benschooter v. Hakes,* 232 Iowa 1354, 8 N.W. 2d 481.

Several other jurisdictions, including Connecticut, §14-36, General Statutes of Connecticut; Michigan, §9.2511, Michigan Stat. Ann.; and Ohio, §4507.10-(D), Baldwin's Ohio Revised Code, require drivers under the age of eighteen to complete a driver's education course in order to be eligible for a license. The reasonableness of these statutes has not been challenged in their highest courts.

House File 41 places persons between the ages of sixteen and eighteen in a special classification, for the purposes of obtaining the privilege of operating motor vehicles. This does not necessarily make it unconstitutional. In *Iowa Motor Vehicle Association v. Board of Railroad Commissioners,* 207 Iowa 461, 221 N.W. 364, which was affirmed by the United States Supreme Court at 280 U. S. 529, which arose under what is now Chapter 321, 1958 Code of Iowa, the Iowa Court stated, at page 470 of 207 Iowa:

> "The Courts will assume that the legislative arm of the government considered the interest of the whole people in enacting a statute providing for a classification, and it is also a well settled principle that a court will not declare a law unconstitutional in whole or in part, unless it is clearly, plainly, and palpably of that character."

Therefore, based on the above authority, it is my opinion that House File 41 is constitutional.

5.3

CONSTITUTIONAL LAW: Reapportionment of senate—Constitution of Iowa, Art. III, §34. There is a duty to reapportion the senate which is mandatory under Art. III, Sec. 34, Constitution of Iowa.

April 12, 1961

Senator C. M. Vance, Chairman
Legislative Redistricting Committee
LOCAL

Dear Senator Vance:

A few days ago you orally proposed a constitutional question concerning the following proposition:

Is it mandatory or merely permissive that the Legislature at the 1961 session reapportion the representation in the Senate of the General Assembly of Iowa?

On that occasion I expressed an oral opinion to the effect that the Constitution of the State of Iowa required reapportionment of the Senate at this session and I herein submit the written opinion as per your subsequent request.

Section 34 of Article III of the Constitution of the State of Iowa in its original form and through subsequent amendments has placed a clear duty on the legislature by the people of the State of Iowa to apportion the senate on the basis of population at "the next session following each United States census." The original section 34 stated as follows:

"Section 34. The number of Senators shall, at the next session following each period of making such enumeration, and the next session following each United States census, be fixed by law, and apportioned among the several counties, according to the number of white inhabitants in each."

The above section has been amended three times as follows:

1. In 1868 it was amended by striking the word "white" therefrom.

2. In 1904 this section was repealed and a substitute adopted in lieu thereof which reads as follows: Section 34. The Senate shall be composed of fifty members to be elected from the several senatorial districts, established by law and at the next session of the general assembly held following the taking of the state and national census, they shall be apportioned among the several counties or districts of the state, according to population as shown by the last preceding census.

3. In 1928 the 1904 section above was amended by striking the period (.) at the end of the article and inserting the following: ", but no county shall be entitled to more than one (1) senator."

Section 34 of Article III as amended presently reads as follows:

Section 34. The Senate shall be composed of fifty members to be elected from the several senatorial districts, established by law and at the next session of the general assembly held following the taking of the state and national census, they shall be apportioned among the several counties or districts of the state, according to population as shown by the last preceding census, but no county shall be entitled to more than one (1) senator.

Section 34 of Article III of the Constitution of the State of Iowa leaves no question to interpretation that the people of Iowa through its Constitution placed an unqualified duty of apportionment by the General Assembly of senatorial districts at this session among the several counties or districts according to population as shown by the last preceding census with no county entitled to more than one senator. This is not only the duty of the legislature but the clear mandate of the people of the State of Iowa as expressed in the fundamental law derived from the people.

This provision like all others of our Constitution is far more than a "directory admonition" (1913-1914 *O.A.G.* 82); it is in fact a mandate "binding upon all people and on the Legislature . . .". *Smith v. Thompson,* 219 Iowa 888. The Supreme Court of Iowa in this case at page 904 plainly set forth the relationship of the legislature to the Constitution in these words: "This Court has held consistently that the provisions of the Constitution are mandatory and binding upon the Legislature . . .".

The Supreme Court of the State of New Jersey on June 6, 1960, in the case of *Asbury Park Press, Inc. v. Woolley,* 161A. 2d 705, in a case brought

by taxpayers, concerning the same basic issue of reapportionment and the interpretation of a similar article of the Constitution of the State of New Jersey which states:

> "The present apportionment shall continue until the next census of the United States shall have been taken. Apportionment of the members of the General Assembly shall be made by the legislature at the first session after the next and every subsequent census . . .",

exercised jurisdiction on the grounds that where, by reason of passage of time and changing conditions, the reapportionment statute no longer served its original purpose of securing to the voter the full constitutional value of his franchise, and the legislative branch failed to take appropriate restorative action, the hearing of taxpayers' action challenging the validity of the statute was not only within the ambit of constitutional authority of the Court, but represented one of the court's duties as well. The Court stated that the "*duty* (emphasis supplied) is legislative in nature and is committed by the Constitution to the Legislature." The Court posited that the right of equal representation was a constitutional right which was absolute.

"It is one of which he (the citizen) cannot be deprived, either deliberately or by inaction on the part of a Legislature. Inaction which causes an apportionment act to have unequal and arbitrary effects throughout the State is just as much a denial of equality as if a positive statute had been passed to accomplish the result. In our view, such deprivation not only offends against the State Constitution but may very well deny equal protection of the laws in violation of the 14th Amendment of the United States Constitution."

The Supreme Court of the State of New Jersey in this recent case withheld decision on the merits in order to enable the Legislature to have opportunity to consider adoption of a reapportionment act when 1960 Census figures became available.

The Supreme Court of Michigan in the case of *Scholle v. Hare*, 104 N.W. 2d 63, on June 6, 1960, in a related case but not one specifically of "apportionment", nevertheless concerned itself with lengthy discussion of the general problem of malapportionment. Justice Cavanagh posited,

"There exists at the present time a legislative body charged by the constitution . . . with the *duty* (emphasis supplied) to rearrange senatorial districts and reapportion the legislature. This it can do. We must assume when its legal and constitutional duty is pointed out to it, the legislature will carry out its responsibility in this regard without any need for compulsion. It is not to be presumed that the legislature would refuse to take such action as is necessary to comply with its duty under the State Constitution. We do not believe it would deliberately fail to perform its duty. Experience teaches us that legislatures so acted in Michigan, Minnesota, and Hawaii following court decision."

The United States District Court set out this unquestioned constitutional duty on the part of the legislature referred to above, in the case of *McGraw v. Donovan,* 163 F. Supp. 184, on July 10, 1958. The United States District Court for the Third Division of Minnesota sitting as a three-judge court based jurisdiction on the claim by citizens and voters that failure by the State of Minnesota Legislature to reapportion legislative districts deprived them of rights guaranteed by the 14th Amendment to the Constitution of the United States.

The Federal Court, in citing the provisions of the State Constitution, stated:

> "Here it is the unmistakable *duty* (emphasis supplied) of the State Legislature to reapportion itself periodically in accordance with recent population changes."

The Federal Court in this instance, as is customary in cases involving failure of legislative action based upon a constitutional duty, deferred their decision to afford the Minnesota Legislature full opportunity to "heed the Constitutional mandate to redistrict."

The voice of the people of the State of Iowa as set out in Section 34 of Article III of the Constitution of the State of Iowa is a constitutional mandate to its duly elected representatives to redistrict the Senate at this session of the General Assembly.

5.4

CONSTITUTIONAL LAW: Reapportionment of senate—Constitution of Iowa, Art. III §34. The re-enactment of present Senatorial Districts as required in Art. III, Sec. 34, Constitution of Iowa would be unconstitutional because of existing inequalities.

April 13, 1961

Senator C. M. Vance, Chairman
Legislative Redistricting Committee
LOCAL

Dear Senator Vance:

Pursuant to my written opinion dated April 12, 1961 and the subject contained therein you proposed the following additional constitutional question and requested a written opinion:

> Would re-enactment of present senatorial districts or minor adjustments constitute compliance with Section 34, Article III of the Iowa Constitution by the General Assembly?

The official 1960 Census in comparison with that of 1950 indicates a population growth of 136,464 in the State of Iowa since the 1950 Census and major population changes within individual counties. These facts, when viewed in light of the Constitutional mandate of Section 34, Article III of the Iowa Constitution, indicate a necessity for action by the General Assembly in this 1961 session.

There is no legal precedent in the State of Iowa, but the courts in other jurisdictions have generally ruled that the primary requirement of constitutional reapportionment provisions is that of *equality* (emphasis supplied) among the districts. The goal of equality is limited only by any additional specific constitutional mandates. Under the present Iowa Constitution the substance of these limitations is briefly as follows:

1. A county may not be divided.

   Sec. 37, Art. III.

2. Counties must be contiguous.

   Sec. 37, Art. III.

3. A county may have no more than one senator.

   Sec. 34, Art. III.

4. Fifty senatorial districts.

   Sec. 34, Art. III.

Mere re-enactment of existing senatorial districts or minor adjustments which did not correct any existing inequalities of apportionment would not constitute compliance with the Constitution of the State of Iowa and in my opinion could be held unconstitutional, as was the case in Nebraska, Wisconsin and Indiana under similar instances. *Rogers v. Morgan,* 127 Neb. 456, 256 N.W. 1; *State ex. rel. Lamb v. Cunningham,* 83 Wis. 90, 53 N.W. 35; *Brooks v. State, ex. rel. Singer,* 162 Ind. 568, 70 N.E. 980.

5.5

Amendment—Art. III, §2, Const. of Iowa. H. J. R. 22, providing for annual sessions of the General Assembly, does not deprive the General Assembly in its biennial session from exercising all of its constitutional powers, including those conferred by H.J.R. 22. (Strauss to Smith, St. Rep., 4/4/61) #61-4-6

CHAPTER 6

CORPORATIONS

STAFF OPINIONS

LETTER OPINIONS

6.1

CORPORATIONS: Right of building and loan associations to establish branch offices—Ch. 534, 1962 Code. Building and loan associations organized under the provisions of Chapter 534 have no express authority to establish branch offices nor will such power be implied from the requirement that the articles of incorporation of the corporation shall name its principal place of business.

June 4, 1962

Honorable C. B. Akers
Auditor of State
L O C A L

Attention: George T. Carson, Supervisor Savings and Loan Department

Dear Mr. Akers:

This will acknowledge receipt of yours of the 12th, inst., in which you submitted, in essence, the following:

Are savings and loan associations permitted to have branch offices under Iowa law?

This Department previously, on the 22nd day of June, 1954, issued its opinion denying to building and loan associations the power to establish branch offices under the then existing laws governing the organization and operations of such organizations. The statute there under consideration, and under which the referred-to opinion was issued, was repealed by the 58th G.A. under Chapter 338, 58th G.A. and Chapter 534, 1962 Code, enacted in lieu thereof.

It is to be noted that express authority to establish such branch offices was not granted in either the repealed act or its substitute, now Chapter 534 of the 1962 Code. So that if the power exists, it arises out of implied powers of such organization.

Claim is now made that such implied power arises out of the following statutory requirement to be shown in Articles of Incorporation of such association, §534.3(2b), to wit: "The name of the association and its principal place of business". However, before such association may operate such Articles of Incorporation are required to be presented to the Auditor of State, and by him submitted to the Executive Council for its approval. Section 534.3(3), 1962 Code, provides the following specifics to be determined by the Council in reaching its approval decision, to wit:

"3. Approval of articles—certificate of authority.

"a. The proposed articles of incorporation for any proposed new association, together with proposed bylaws, shall be presented to the auditor of

state and by him submitted to the state executive council and if it finds that they are in conformity with the law and based upon a plan equitable in all respects to its member, and further finds from the best sources at its command and from such investigation as it may deem necessary, that the proposed incorporators are persons of good character, ability and responsibility; that a reasonable necessity exists for such new institution in the community to be served; that it can be established and operated without undue injury to existing local thrift and home financing institutions and that the proposed name of such institution is not similar to that of any other association operating in the same community and is not misleading or deceitful, the executive council shall attach thereto its certificate of approval and enter its approval of record, and thereupon such articles of incorporation shall be recorded in the office of the secretary of state and in the office of the recorder of the county in which the association's principal place of business is to be situated and then be filed in the office of the auditor of state who shall at that time issue a certificate authorizing the association to transact business as a building and loan or savings and loan association."

Thus, the situation presented by these statutory directions to the Council requires, among other mandatory duties, that it find: (1) That the Articles are in conformity with law. * * * (2) "That a reasonable necessity exists for such new institution in the community to be served; that it can be established and operated without undue injury to existing local thrift and home finance institutions."

With respect to these directions, it is clear (1) that the Council cannot find such Articles conform to the law if they include expressly the power to establish branch offices; (2) that if by implication the words describing the "principal place of business" include the power to establish branch offices, then the Council has only the power to find with respect to the principal place of business "that a reasonable necessity exists for such new institution in the community to be served; that it can be established and operated without undue injury to existing local thrift and home finance institutions" and the Council would have no authority to make a like finding with respect to any branch offices that may be established; (3) that the fact that the Council possesses no such power is evidence of the legislative intent that these associations have no authority to establish branch offices.

In connection with these conclusions, it is to be borne in mind generally with respect to building and loan associations that the legislature:

"... may, in the exercise of the police power, regulate and control the carrying on of business which may be injurious to the public if not properly conducted or may prohibit a business which is essentially injurious to the public, cannot be questioned". (*Brady v. Mattern,* 125 Iowa 158, 162)

and with respect to interpretation of statutes governing building and loan associations, it was said in the case of *Ehrhart v. Preferred Building & Loan Associations, Inc.,* 145 Atlantic 202, the following:

"(4) The special privileges given by the statutes to associations of this character have always been strictly construed. Speaking of one of these privileges this court said in *Birmingham v. Md. Land & Permanent Homestead Association,* 45 Md. 541, 544:

'The privilege thus granted is a very unusual and extraordinary one and no contract should be brought within its operation unless made and executed in strict conformity with the very terms of the law. Clearly no latitude or liberality of construction should be indulged in, in order to extend the operation and effect of such a provision, but on the contrary,

its extraordinary character, * * * justly subjects it to a rigid and strict construction.' "

6.2

Perpetual care cemetery—§§566A.1, 566A.3, 1962 Code. A cemetery association incorporated under Ch. 504, operating a perpetual care cemetery, is included within the provisions of Ch. 566A and must establish a minimum perpetual care and maintenance guarantee fund of $25,000 in cash as required by §566A.3. (Bump to Schroeder, Jackson Co. Atty., 7/17/62) #62-7-1

CHAPTER 7

COUNTIES AND COUNTY OFFICERS

STAFF OPINIONS

LETTER OPINIONS

7.1

COUNTIES AND COUNTY OFFICERS: Assessor examination—§§441.5, 441.8, 441.10, 1962 Code. A prospective vacancy in the office of assessor of a non-immediate nature does not permit holding an immediate examination by the examining board. An examination for deputy assessor may not be deemed an examination for assessor because the examinations differ.

August 3, 1962

Mr. T. C. Strack
Grundy County Attorney
Grundy Center, Iowa

Dear Mr. Strack:

In answer to yours of the 26th of March, 1962, in which you state the following:

"The County Conference Board of Grundy County, Iowa has asked me to obtain an Attorney General's Opinion from you in connection with the holding of examinations for Assessor.

"Is it possible for the Examining Board to hold an examination for the office of County Assessor when there is no vacancy in the office of County Assessor but when a vacancy probably will occur within two years following the examination?

"In the event your answer to the question submitted is that it is not possible to hold such an examination, then is it possible to hold an examination for the office of Deputy Assessor and have the examination be the same as that for the Assessor?"

Section 441.8 provides for the reappointment of an incumbent assessor to a new term. It also provides that if the incumbent is not reappointed a new examination shall be held not less than sixty days before expiration of the term. Thus, such examination is conditioned upon a failure to reappoint.

The same section also provides that *in the event* of removal, resignation, death, or removal from the county, selection of an assessor to serve out the unexpired term shall be made from the certified candidate list. If no list is in effect, a new examination shall occur for the purpose of compiling a new list. Until the vacancy is filled the chief deputy or auditor shall so act.

Section 441.5 relates to the examination of applicants. Although no date or time period is specifically provided as to when the examinations are given, the language of the section tends to indicate that such examinations are to occur just prior to necessary appointments. This view is supported by the fact that the testing processes are limited in time extending toward an appointment date—i.e., written report to be submitted within fifteen days from date of examination to board, board to meet within seven days to make appointment. Although those qualified by the State Tax Commission shall remain eligible for appointment for a period of two years, further examinations, if any, by the examining board are apparently not undertaken until the need for appointment is present.

Thus, due to the general language of the chapter and the "in the event of the removal, resignation, death, or removal from the county" provision found in §441.8, it would appear that a "prospective" vacancy of a non-immediate nature does not require or authorize action for the holding of an immediate examination by the examining board. Section 441.8 specifically provides methods for handling temporary vacancies, i.e. selection from existing lists or preparation of a new list if necessary; but such action apparently is to occur after the vacancy. Thus, seemingly, an earlier action by the Board would be unwarranted.

In answer to your second question, it may be noted by reference to §441.10 that the conference board is vested with a discretionary power regarding the time of examinations for *deputy assessors.* However, it should be pointed out that even though the examining procedure for deputies is the same as for assessors, the examinations in themselves differ, as the examination for the former given by the State Tax Commission shall relate "to the qualifications for the duties of the position of deputy assessor" (§441.10). Consequently, it is the opinion of this office that the examining procedure for the selection of an assessor may not in any manner be circumvented by use of examination methods authorized solely for the appointment of deputies.

It should be observed that in case of temporary vacancies, the chief deputy shall act as assessor (§441.8).

7.2

COUNTIES AND COUNTY OFFICERS: Auditing funds—§§11.6, 11.21, 1958 Code. Audits by the Auditor of State of Broadlawns Hospital, a county unit, and the county board of education are payable by the county hospital trustees and the county board of education from their respective funds as the case may be.

May 23, 1961

Mr. Harry Perkins
Polk County Attorney
Room 406 Courthouse
Des Moines, Iowa

Mr. C. L. Becker, Assistant County Attorney

Dear Mr. Becker:

This will acknowledge receipt of your letter of March 24, 1961, which states the following:

> "Our Board of Supervisors has requested that we obtain an Attorney-General's opinion as to who is liable for audits made of the Broadlawns Hospital and the County School Board.
>
> "Broadlawns Hospital is an independent taxing body existing and operating under Chapter 348 of the 1958 Code of Iowa which provides for the consolidation of city and county hospital services and the greater portion of the patients at Broadlawns are, of course, residents of the City of Des Moines.
>
> "We are of the opinion that both of these bodies should pay for their own audits. We would appreciate receiving your opinion.
>
> "Sections 11.20 and 11.21 and Section 24.2, paragraphs 1, 2, and 3 of the 1958 Code of Iowa appear to be the applicable sections determining this question."

From the opinion appearing in 1940 *O.A.G.* 312, with respect to the auditing duty of the Auditor of State, we quote:

> "In our opinion it was the intent of the framers of the Constitution and of the legislature in enacting the laws and providing for the functioning of the Auditor of State, that the Auditor of State should audit the accounts of all public officers and public bodies unless specific exception was made."

It appearing that neither the county hospital trustees nor the county board of education is excepted from the Auditor's duty, they are deemed to be within

the area of duty of the Auditor in respect to making audits of their respective accounts. In fact the financial transactions and condition of the county hospital trustees and the county board of education are financial transactions and condition of the county within the terms of §11.6, Code 1958, providing as follows:

"11.6 Examination of counties. The financial condition and transactions of all counties shall be examined once each year by the auditor of state."

Both of these bodies being certifying bodies, and having control of their own funds, the applicability of the provisions of §11.21 with respect to payment to the Auditor of State by the governing officers of the county school board or county hospital trustees, when examined, would, to be consistent with the 1940 opinion herein quoted, require payment therefor from the funds of the county hospital trustees or the county board of education. Both of these funds are independent of any control by the board of supervisors.

7.3

COUNTIES AND COUNTY OFFICERS: Auditor—A county auditor, in the issuance of county warrants, acts in a ministerial capacity, and is entitled to immunity from liability in the issuance of such warrants where he acts in good faith within the scope of his authority.

May 18, 1961

Mr. Stanley R. Simpson
Boone County Attorney
913 Eighth Street
Boone, Iowa

Dear Mr. Simpson:

This will acknowledge receipt of yours, in which you state the following:

"This office requests your opinion on the following legal proposition:

"1. The Boone County Board of Supervisors have entered into contracts and made building improvements at the Boone County Home in excess of $2,000.00, as provided in Sec. 332.7, Code of Iowa 1958.

"2. The Board failed to give public notice for the advertisement of bids as required in Section 332.7 and 332.8 of the Code.

"3. The County Auditor has been advised by this office that the Board's action was illegal in this building proposal.

"Question (1): Is the County Auditor within his rights to refuse issuance of warrants for payments of said claims when approved and submitted to his office when having knowledge that the Board's action was illegal?

"Question (2): Would the County Auditor be personally liable for the issuance of said warrants for payment of claims when he has knowledge of the Board's illegal action?"

1. In answer to your Question No. 1, I am of the opinion that your county auditor would not be within his rights to refuse the issuance of warrants for the payment of the claims when approved and authorized by the board of supervisors, even though he possessed knowledge of the action of the board in making the contract without advertising for bids. My reason for this conclusion is found in an opinion of this office, appearing in 1950 *O.A.G.* 199, where it was said, in quoting from the case of *Harrison County v. Ogden,* 165 Iowa 340, the following:

" 'The county auditor is but a ministerial officer in the matter of issuing warrants on the county treasury. He acts under the direction of the board in this matter. Without the sanction of the board, he has no authority to issue a warrant upon the treasury for the payment of money for any purpose, and the only authority for the treasurer to pay money out of the treasury is upon the warrant so issued. Of course, our statute makes some exceptions in regard to payment of county money without the action of the board (for instance jury fees), but this is the general rule.' ";

and supplemented by:

"It would seem therefore that a county warrant is not a negotiable instrument and is subject to all defenses existing in the county; that the county auditor acts as a ministerial officer in a matter of issuing county warrants; that the duty and power of the county treasurer is to honor a county warrant, which issuance has been authorized by the board of supervisors or by the statute. * * * "

Refusing to issue the warrants would, in my opinion, enlarge the authority of the county auditor to include judicial as well as ministerial duties.

2. In answer to your Question No. 2, I am of the opinion that issuance of the warrants by the county auditor, in the foregoing situation, together with this opinion, would grant him immunity from personal liability for the issuance of the said warrants. Quoting from 67 *C.J.S.* at page 417, it is said:

"As a general rule and apart from statute, public officers, when acting in good faith within the scope of their authority, are not liable in private actions, and the application of this rule of immunity cannot be avoided by allegations that the officer involved was acting or is being sued in his personal capacity. Mistakes of judgment, or improper construction of the law defining his duties, by a public officer acting in the discharge of his official duties do not give rise to a personal action against him, although some individual may suffer loss as a result thereof."

Among the authorities cited in support of the foregoing is the case of *New Amsterdam Casualty Co. v. Albia State Bank,* 214 Iowa 541, 242 N.W. 538, where it is said:

"Public officers, when acting in good faith within the scope of their authority, are not liable in private actions."

7.4

COUNTIES AND COUNTY OFFICERS: Auditor—§§409.14, 409.31, 1962 Code. A county auditor making a plat for the purposes of taxation under §409.31 must have the approval of the city council and city plan commission only when the land platted is within a city having a population of over twelve thousand inhabitants.

November 26, 1962

Mr. David J. Butler
Cerro Gordo County Attorney
Box 1166
Mason City, Iowa

Dear Mr. Butler:

This is in response to your recent inquiry in which you set forth the following:

"I respectfully request an opinion on the question of whether the County Auditor is required to present an Auditor's Plat made under

Section 409.31 of the Code of Iowa to the City Council of Mason City, Iowa, and to the City Plan Commission where the property being platted lies outside of the city limits of Mason City, but within one mile of the limits of said city. There clearly is no requirement in Section 409.31 that the Auditor present this plat for approval because the land being platted is not within the city limits of a town; however, the question has arisen as to whether or not Section 409.14 which requires that before any plat shall be filed by the County Auditor if the land being platted is within one mile of the limits of a city the said plat must first be filed with and approved by the Council of such city and approved by the City Plan Commission. Do you feel this section is all inclusive and covers the filing of an Auditor's Plat prepared under Section 409.31?"

In pertinent part, §409.14, 1962 Code of Iowa, provides:

"No county auditor ... shall hereafter file or record, nor permit to be filed or recorded, *any plat purporting to lay out or subdivide any tract of land into lots and blocks* within any city having a population ... of twenty-five thousand or over, or within a city of any size having a plan commission ... or, except as hereinafter provided, within one mile of the limits of such city, unless such plat has been first filed with and approved by the council of such city as provided in section 409.7, and by the city plan commission as required by law in cities where such commission exists." (Emphasis added)

Section 409.31, 1962 Code, provides:

"Whenever a congressional subdivision of land of one hundred sixty acres or less, or any lot or subdivision, is owned by two or more persons in severalty, and the description of one or more of the different parts or parcels thereof cannot, in the judgment of the county auditor, be made sufficiently certain and accurate for the purposes of assessment and taxation without noting the metes and bounds of the same, he shall cause to be made and recorded in his office and the office of the county recorder a plat of such tract or lot with its several subdivisions, including and replatting in such plat such other plats or parts thereof included within the same lot or congressional subdivision of land as may seem to him to be required in accordance with the provisions of this chapter, proceeding as directed in sections 409.27 to 409.30, inclusive, and all of their provisions shall govern. No such plat of land in cities having a population of over twelve thousand by the latest federal census shall be so filed and recorded unless and until the same shall have been approved by the council of such city, and by the city plan commission as required by law in such cities where such commissioner exists."

Section 409.31 does not authorize the county auditor to make plats "purporting to lay out or subdivide any tract into lots and blocks" as required for the application of §409.14. Instead, it allows the county auditor to plat a tract *or* lot with its several subdivisions only when they are owned by two or more persons in severalty and such a plat is necessary for proper assessment and taxation.

Thus, a county auditor making a plat under the authority of §409.31 must have the approval of the city council and city plan commission only when the land platted is *within* a city having a population of over twelve thousand inhabitants.

7.5

COUNTIES AND COUNTY OFFICERS: Authority of county conference board to employ and make contract for more than one year—§441.50, 1962 Code. A county conference board is authorized to employ appraisers or other

technical help to assist in the valuation of property and to make a contract for such service extending over a period of more than one year.

July 18, 1962

Mr. Harry Perkins
Polk County Attorney
Room 406 Court House
Des Moines, Iowa

Dear Mr. Perkins:

Reference is herein made to yours of recent date with accompanying letter of V. L. Browner, City Assessor, involving the power of the county conference board to employ appraisers or other technical help to assist in the valuation of property, and particularly whether a contract of employment of such person may cover a period of more than one year.

I am of the opinion that §441.50, which provides that such county conference board may employ such person, places no limitation upon the duration of the contract. Impliedly it authorizes a contract for such service that would cover a period of more than one year. While it is true that official administrative bodies, in respect to certain matters, do not have the power to make contracts that would extend beyond the terms of office of the members of such boards, I am of the opinion that such a question does not arise here. The county conference board is a continuing body made up by operation of law of mayors of all the incorporated cities and towns in the county where property is assessed by the county assessor, members of the county board of education as now or hereafter constituted, and members of the county board of supervisors. While the terms of the persons holding such office may be limited and the personnel of the conference board changed by reason thereof, obviously the terms of such members would have no effect upon the continuity of the official body designated as the county conference board. I find no other express or implied bar to the making of the contract for more than one year.

Confirmation of this conclusion is found in the provisions of §441.50, as follows:

"Appraisers employed. The conference board shall have power to employ appraisers or other technical or expert help to assist in the valuation of property, the cost thereof to be paid in the same manner as other expenses of the assessor's office. The conference board may certify for levy annually an amount not to exceed one and one-half mills upon all taxable property for the purpose of establishing a special appraiser's fund, to be used only for such purposes. From time to time the conference board may direct the transfer of any unexpended balance in the special appraiser's fund to the assessment expense fund."

Power to certify for a levy annually, as above provided, includes the power to certify the levy for a period of three years. See *Chappell v. Board of Directors of Independent School District of City of Keokuk,* 241 Iowa 230, 39 N.W. 2d 628. Providing for the cost of appraisement by such levy evidences a legislative intent of authority to enter into such an undertaking.

7.6

COUNTIES AND COUNTY OFFICERS: Board of supervisors, county attorney—§§230.27, 340.10, 1958 Code. Board of supervisors may hire counsel to collect claims arising under §230.27, if county attorney has been directed to proceed with collection and has, for any reason, failed to do so.

June 7, 1961

Mr. Gordon L. Madson
Calhoun County Attorney
Rockwell City, Iowa

Dear Mr. Madson:

We have your letter of May 15, 1961, in which you request the opinion of this office in regard to whether the board of supervisors may lawfully contract for the collection of claims arising under Iowa Code Chapter 230 (1958).

Iowa Code §230.27 (1958) provides:

"It shall be the duty of the board of supervisors to collect said claims and direct the county attorney to proceed with the collection of said claims as a part of the duties of his office."

Under this section, the collection of these claims is clearly the responsibility of the county attorney, assuming he has been directed to do so by the board of supervisors. The Attorney General of Iowa, however, has ruled that other counsel may be employed to collect claims if the county attorney fails, or for some reason is unable, to discharge his duty. See 1940 *O.A.G.* 251.

Thus, sufficient authority exists for the board of supervisors to execute a contract for the collection of the above claims if, and only if, the county attorney has been directed to proceed with collection and has, for any reason, failed to do so. The amount and method of compensation of the assistant is, in our opinion, largely a matter for the discretion of the board of supervisors. If, however, such assistant occupies the formal position of Assistant County Attorney, his compensation is fixed by statute. See Iowa Code §340.10 (1958).

7.7

COUNTIES AND COUNTY OFFICERS: Board of supervisors—§§455.135, 455.160, 1962 Code. 1. County board of supervisors may cause removal of obstructions from drainage ditch. 2. Removal of obstructions is the duty of the board of supervisors, and may be enforced by mandamus. 3. Failure of board to remove obstructions is nonfeasance for which the board would not be liable.

December 28, 1962

Mr. J. W. Ritchie
Warren County Attorney
Indianola, Iowa

Dear Mr. Ritchie:

We have your letter requesting the opinion of this office in regard to the following:

"Several years ago a drainage district was formed in this county for the purpose of straightening a river in order to prevent floods. No trustees have been selected and the Board of Supervisors have supervision of the drainage district in that no Board of Trustees were provided for. Presently the channel of the old river has been blocked which causes water to accumulate and flood the land of adjoining owners. May the Board of Supervisors under the provisions of Section 455.148 and other applicable statutes cause the obstruction in the old channel removed? May the Board of Supervisors order the landowner whose actions have caused the channel to fill to remove the obstruction, and if he fails to do so, make the repairs and cause the costs to be collected as taxes as provided by Section 455.160? Further, if the Board of Supervisors fails to cause the

obstruction to be removed, will the Board be liable in damages to the owners whose property has been flooded as a result of the obstruction?" Your attention is directed to the following sections of the Code of Iowa:

"455.135 *Repair.*

1. When any levee or drainage district shall have been established and the improvement constructed, the same shall be at all times under the supervision of the board of supervisors except as otherwise provided for control and management by a board of trustees and it shall be the duty of the board to keep the same in repair. The board at any time on its own motion, without notice, may order done whatever is necessary to restore or maintain a drainage or levee improvement in its original efficiency or capacity, and for that purpose may remove silt and debris, repair any damaged structures, remove weeds and other vegetable growth, and whatever else may be needed to restore or maintain such efficiency or capacity. * * * "

"455.160 *Obstructing or damaging.* Any person or persons willfully diverting, obstructing, impeding, or filling up, without legal authority, any ditch, drain, or watercourse or breaking down or injuring any levee or the bank of any settling basin, established, constructed, and maintained under any provision of law, or obstructing, or engaging in travel or agricultural practices upon the improvement or rights of way of a levee or drainage district which the governing body thereof has, by resolution, determined to be injurious to such improvement or to interfere with its proper preservation, operation or maintenance, and has prohibited, shall be deemed guilty of a misdemeanor and punished accordingly and any such unlawful act as above described is hereby declared to be a nuisance and may be abated as such.

"Said governing body shall also have the power to repair any ditch, drain or watercourse, or any levee or bank of any settling basin damaged by any person or persons in violation of the resolution of said governing body, after three days notice to such person or persons to make such repair, in the event that there is a failure to do so, and the expense thereof shall be assessed to such person or persons and shall be certified and collected as other taxes."

Thus, by the plain language of the statutes quoted, the board of supervisors may cause the removal of channel obstructions, or may compel the landowner whose actions caused the obstruction to remove the same, or if he fails to do so, assess against him the cost of such removal.

As to the liability of the board to landowners for damages caused by the obstruction, note that removal of obstructions "shall be the duty of the board". §455.135, *supra*; *Haugen v. Humboldt-Kossuth Joint Drainage Dist. No. 2,* 231 Iowa 288, 1 N. W. 2d 242 (1942). It is clear that this duty may be enforced by mandamus if the factual situation warrants. *Board of Trustees of Farmers Drainage District v. Iowa Natural Resources Council,* 247 Iowa 1244, 78 N. W. 2d 798 (1956).

It has, however, been held that the board of supervisors is not liable for nonfeasance in the exercise of governmental functions. *Genkinger v. Jefferson County,* 250 Iowa 118, 93 N. W. 2d 130 (1958). The maintenance of drainage improvements is, in our opinion, a governmental function. Nonfeasance has been defined as "the omission of an act which a person ought to do". *State v. Carter,* 200 Md. 255, 89 A. 2d 586. It has been held that the failure of a city to repair a sidewalk after knowledge of its defective condition is nonfeasance, *Carr v. Kansas City,* 87 F. 1, as is the failure of county employees to post signs and barricades at a "T" intersection where there was a deep ditch, *Genkinger v. Jefferson County, supra.*

In the light of these authorities, failure of the board of supervisors to remove obstructions from drainage canals is, in our opinion, nonfeasance for which the board would not be liable.

7.8

COUNTIES AND COUNTY OFFICERS: Board of supervisors—§§28A.7, 332.3, 1962 Code. Civil defense trust fund not authorized by §28A.7.

December 27, 1962

Mr. Peter J. Peters
Pottawattamie County Attorney
Courthouse
Council Bluffs, Iowa

Dear Mr. Peters:

We have your recent opinion request in regard to the following:

"Our Budget for 1963 has already been submitted by the Board and no appropriations were made for Civil Defense. My Board would like to know if under Section 28A they are permitted to withdraw funds from the General Fund and set up a Trust Fund for Civil Defense.

"Can they continue to withdraw from the General Funds and place said funds in a special trust fund for purposes of carrying out a Civil Defense Program, until they submit a new Budget in 1964, at which time they will include appropriations for Civil Defense."

Iowa Code §28A.7 provides as follows:

"County boards of supervisors, city or town councils and school boards are hereby authorized to co-operate with the administration to carry out the provisions of this chapter, and may appropriate and expend public funds therefor."

While this section authorizes the appropriation and expenditure of funds in cooperation with the Iowa Civil Defense Administration, we find no authorization for the creation of a civil defense trust fund either under the provisions of Iowa Code Chapter 28A or section 332.3. Therefore, in our opinion, your question must be answered in the negative.

7.9

COUNTIES AND COUNTY OFFICERS: Board of supervisors, secondary road fund appropriation—§314.5, Ch. 309, 310, 1962 Code. Board may improve secondary road extension lying entirely in city if Code requirements are met. Present board's act cannot bind future boards to appropriate for or maintain same project.

July 27, 1962

Mr. Stanley Simpson
Boone County Attorney
913 Eighth Street
Boone, Iowa

Dear Mr. Simpson:

This will acknowledge receipt of your recent request for a written opinion wherein you state the following, concerning action taken by the Boone County Board of Supervisors December 29, 1961:

"The following motion shows the action taken:

'Moved by Charles Ball, seconded by Glenn Lehman, that $10,-000.00 of Secondary Road Funds be appropriated for the Linn Street paving project in the city of Boone, Iowa. Motion carried.'

"1. Is it legal for the Board of Supervisors to pledge Secondary Road Funds to the City of Boone, Iowa, to help pave a street lying entirely within the city limits of Boone, Iowa, pursuant to Chapter 309, Code of Iowa?

"2. Is it legal for the Board of Supervisors to obligate the future Board of Supervisors to make a pledge of funds not provided for in the official budget?"

Section 314.5 of the Iowa Code of 1962 provides in part as follows:

"The board or commission in control of any secondary road or any primary road is authorized, subject to approval of the council, to eliminate danger at railroad crossings and to construct, reconstruct, improve, repair and maintain any road or street *which is an extension* of such road within any town or city. Provided, that this authority shall not apply to the extensions of secondary roads located in cities over twenty-five hundred population, where the houses or business houses average less than two hundred feet apart. * * *" (Emphasis added)

1. Chapter 309, Code of 1962, contains no authority for the appropriation of funds by a county for purposes of improving secondary road extensions. Such authority is provided, under certain circumstances, by §314.5 of the Code. However, in asking "Is it legal for the Board of Supervisors to pledge secondary road funds *to the City of Boone* . . .", you seem to contemplate an aspect of the proposal not indicated by the motion as quoted in your letter. By reason of §314.5 the county is authorized to undertake the improvement of a secondary road extension. Section 314.5 does not, however, provide authority for the county to turn secondary road funds over to a city to be used by the city in improving a secondary road extension. If Linn Street is to be improved as a secondary road extension, the improvement involving secondary road funds of the county, in our opinion the project must be undertaken under authority of §314.5, Code of 1962, and in conformity with Chapters 309 or 310.

2. Regarding the question whether a board of supervisors may obligate future boards to make a pledge of funds, you are referred to 20 *C.J.S.*, Counties, §176, wherein the general rule is stated as follows:

"Although it has been held in some cases that the contract of a county board may be valid and binding, even though performance of some part may be impossible until after the expiration of the term of the majority of the board as it then existed, yet the rule is that contracts extending beyond the term of the existing board and the employment of the agents or servants of the county for such a period, which tie the hands of the succeeding board and deprive it of its proper powers, are void as contrary to public policy, at least in the absence of a showing of necessity of good faith and public interest. * * *"

Regarding appropriations by counties, we again cite the general rule from *C.J.S., supra,* §235, page 1118, as follows:

"* * * It is the duty of the county board . . . to make specific appropriations for the several objects for which the county has to provide . . . It cannot bind itself to make appropriations for future years, however, nor can it make appropriations for payments covering a period extending

beyond the end of the fiscal year; and in the absence of statutes requiring otherwise it need not designate the fund out of which the appropriation is payable. * * *" (See cases cited therein).

The Attorney General has considered the powers of boards of supervisors in binding future boards in an opinion found in 1936 *O.A.G.* 217, at 218, in the following words:

"... our Supreme Court in the case of *Palo Alto County v. Ulrich*, 199 Iowa 1, held that the Board of Supervisors is a continuous body and while in that case, the court only went so far as to say that a designation of a depository was binding upon future board until revoked, but did not state to what extent the future board would be bound in a contract such as you have inquired about, yet the Supreme Court of Indiana in *Jessup v. Hinchman*, 133 N.E. 853, states that as a general rule, contracts entered into by the Board of Supervisors and extending beyond their terms of office is (sic) legal if entered into in good faith. This rule, we believe, is also the law of this state ..."

However, no board of supervisors can legally act in such a manner as to preclude any future board from any of its rights or prerogatives under the statutes. Such action would be *ultra vires* and against public policy. 1922 *O.A.G.* 224.

Further, our Supreme Court, in the case of *Hahn v. Clayton, et al.*, 218 Iowa 543, at page 550, has stated:

"* * * In view of the express provision of the statute authorizing the board to employ a county engineer and fix the term of his employment at not to exceed three years, and, in view of the holding of this court in *Consolidated School District of Glidden v. Griffin*, supra, (201 Iowa 63, 206 N.W. 86), we hold that, in the instant case, the action of the board at its December meeting in 1933 in appointing the appellant as county engineer was pursuant to authority given to it by the statute, and that such appointment was valid."

The effect of the cited holding is that a board of supervisors may, when acting within its proper scope of statutory authority, make its actions felt beyond the tenure of the members comprising that specific board. Whether or not actions of a board will bind future boards further depends upon the statutory authority for such action and upon the existence of good faith and public interest. 20 *C.J.S.*, §176, *supra*; 1936 *O.A.G.*, *supra*.

It is, therefore, our opinion that the Board of Supervisors of Boone County may legally undertake the improvement of a secondary road extension lying entirely within the City of Boone, provided the requirements of §314.5, Code of 1962, are met, (i.e., that in cities of over 2500 population the houses or business houses on the extension average more than 200' apart); and it is further our opinion that a board of supervisors may in the good faith construction of such improvement in the public interest enter into a contract which will bind future boards of supervisors, provided, however, that such action may not in any way deprive a future board of any of its statutory rights or prerogatives. A decision by the present board of supervisors to improve a secondary road extension in a city of the county, although in our opinion valid and binding under §314.5, Code of 1962, cannot bind future boards to make appropriations for the same project; nor can it bind a future board regarding maintenance of such road extension.

7.10

COUNTIES AND COUNTY OFFICERS: Board of supervisors' selection of official newspaper; §618.3, 1958 Code. A newspaper that has not been

published regularly due to contingencies beyond its control is not within the class of newspapers eligible for selection as an official newspaper.

February 23, 1962

Mr. Edward F. Samore
Woodbury County Attorney
204 Court House
Sioux City, Iowa

Dear Mr. Samore:

This will acknowledge your letter of February 12, 1962, in which you submitted the following:

> "Section 349.1 of the 1958 Code of Iowa (as amended) requires selection by the Board of Supervisors of the newspaper in which the official procedures shall be published for the ensuing year. Section 618.3 of the said Code, defines newspaper, and states that it (ie: newspaper) shall be one 'of general circulation that has been established, published regularly and mailed through the post office of current entry for more than two years . . .'
>
> "Your opinion is respectfully requested as to whether or not such a newspaper, heretofore eligible for such designation loses such eligibility or designation when it fails to publish as few as five weekly publications during the year prior to its present application for designation as a publication for official proceedings, when its failure to publish was caused by fire or other unavoidable casualty."

It appears from the foregoing that the regular publication of the newspaper in question has been interrupted by reason of circumstances beyond its control. Section 349.1, Code of 1958, confers upon the board of supervisors the duty of selecting newspapers in which its official proceedings shall be published. Newspapers that are eligible to be selected for publications are defined by §618.3 as follows:

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

Such statute contains no authority in the board of supervisors to suspend the operation of this statute, and I am of the opinion that the failure of the papers to be published regularly excludes it from the class of newspapers eligible for selection as official newspapers within the terms of the foregoing statute. Acceptance by the board of such newspaper as within the eligible class would constitute the exercise by the board of legislative power not conferred upon it. The rule pertinent to that situation is expressed in 50 *Am. Jur.* Statutes, §512, p. 524, as follows:

> "512. Generally.—The operation of a statute may be duly suspended by the legislature. Indeed, a valid suspension of a statute must rest upon legislative action; it may not be effected by judicial act, or in any other way. However, the suspension of a statute may be based upon some condition, contingency, exigency, or state of facts declared by the legislative enactment to be sufficient to warrant the suspension by an executive or administrative body whose duty it is to execute or administer the law suspended."

and the rule is also expressed in the following language from the case of *Winslow v. Fleischner,* 228 Pac. 101, 34 A.L.R. 826, 829:

"The suspension of a statute is a legislative act, unless based upon some condition, contingency, exigency, or state of facts, declared by the legislative enactment to be sufficient to warrant the suspension by an executive or administrative body whose duty it is to execute or administer the law suspended."

I am therefore of the opinion that the newspaper in question loses its eligibility for designation as an official county newspaper because it has not been regularly published. This accords with the conclusion of official opinion issued July 27, 1961 to S. E. Tennant, Superintendent of Printing. Letter opinion #61-2-12, issued February 2, 1961, is hereby withdrawn.

7.11

COUNTIES AND COUNTY OFFICERS: Charge by recorder for certified copies—§§79.3, 556.20, 1962 Code. The county recorder shall make the applicable charge provided for in §79.3, where such official issues a certified copy of an instrument, and no specific fee is provided therefor.

July 30, 1962

Mr. Mervin J. Flander
Bremer County Attorney
Waverly, Iowa

Dear Mr. Flander:

This is to acknowledge receipt of your letter of July 11, 1962, wherein you request as follows:

"Section 556.20 specifically provides a charge to be collected by a County Recorder for a certified copy of Chattel Mortgages and Conditional Sales Contracts. A question has arisen as to what charge a County Recorder should make for certified copies of recorded instruments other than Chattel Mortgages and Conditional Sales Contracts. Your opinion is requested as to whether or not Section 79.3 prescribes set fees in all instances not specifically provided for in other statutes."

Section 79.3 of the Iowa Code (1962) provides:

"General fees. Any officer legally called on to perform any of the following services, in cases where no fees have been fixed therefor, shall be entitled to receive:

"1. For drawing and certifying an affidavit, or giving a certificate not attached to any other writing, twenty-five cents.

"2. For affixing his official seal to any paper, whether the certificate be under seal or not, thirty-five cents.

"3. For making out a transcript of any public papers or records under his control for the use of a private person or corporation, or recording articles of incorporation, for every one hundred words, ten cents."

The fees provided by §556.20 are expressly limited to documents filed under Chapter 556 of the Code. If a fee is to be charged for certified copies of other instruments, authority to do so must be found in the Code. *Sprout v. Kelly,* 37 Iowa 44 (1873). Section 79.3 does not provide that a recorder is entitled to a fee for every service he renders, but it does provide for a fee in every instance which may be fitted into one of the subsections of §79.3. I draw this distinction in view of the wording of the question you submitted.

Similar situations have been before this department on prior occasions. In an opinion found in 1940 *O.A.G.* 440, it was held that present §79.3 applied to the Department of History and Archives in issuing certified copies of family records, and that a fee of 25 cents should be charged in accordance with §79.3(1). In 1940 *O.A.G.* 313, it was held that a county treasurer should charge 25 cents for issuance of a tax certificate to accompany the final report of the fiduciary of an estate. In 1928 *O.A.G.* 360, it was held that a clerk should charge 35 cents for issuing a certified copy of a decree of adoption. A more recent opinion (1958 *O.A.G.* 91, #57-7-7) has held that the recorder should charge the applicable fee under §79.3 for all certified copies except those specifically exempt. The most recent opinion on the subject dealt with discharge papers filed in the recorder's office and held that a charge should be made for copies obtained for all purposes except those specifically exempt (1958 *O.A.G.* 91, #58-6-23).

In view of the above decisions of this department, it is my opinion that the applicable charge under §79.3 should be made whenever a certified copy is issued and there is no specific fee provided therefor.

7.12

COUNTIES AND COUNTY OFFICERS: Civil defense appropriations— §7, Ch. 82, Acts 58th G.A. (§28A.7, 1962 Code). County boards of supervisors may not appropriate funds to purchase equipment at request of county Red Cross chapter in absence of request of Iowa Civil Defense Administration.

May 24, 1961

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

Dear Mr. Leir:

We are in receipt of your letter of April 26, 1961, in which you state:

"As you are aware, Chapter 82 of the Laws of the 58th General Assembly passed an Act creating the Civil Defense Administration for the State of Iowa. Section 7 of this Chapter provides that County Boards of Supervisors are authorized to cooperate with the Administration to carry out the provisions of the Act and that they may appropriate and expend public funds therefor.

"The Scott County Chapter of the American Red Cross is attempting to secure a portable hospital to be stored in Scott County. The purpose of this hospital, of course, would be to provide hospital facilities in this area in the event of disaster striking here, either natural or man made. In connection with the securing of this emergency hospital the Scott County Chapter of the American Red Cross has asked Scott County to appropriate funds which would be used to provide storage space for the hospital and also to provide light, fixtures, hose, tables, chairs, etc. It is understood that this hospital is secured from the United States Department of Health, Education and Welfare and is operated under its direction as well as under the direction of the office of Civil Defense Mobilization.

"It would be appreciated if your office would render an opinion as to whether or not Chapter 82 referred to above authorizes Scott County to appropriate funds as requested from it by the Scott County Chapter of the American Red Cross."

Section 7 of Chapter 82, Acts 58th G.A., provides as follows:

"County boards of supervisors, city or town councils and school boards

are hereby authorized to cooperate with the administration to carry out the provisions of this Act, and may appropriate and expend public funds therefor."

In our opinion, this section does not authorize the county to make appropriations of the nature suggested in your letter. Under §7 of the Act, county authorities are authorized to cooperate with the Iowa Civil Defense Administration and appropriate and expend money to this end. The Iowa Civil Defense Administration, by the terms of §1 of the Act, "shall be responsible for the administration of civil defense matters in the State of Iowa. The administration shall direct its services in the event of major man-made disasters or in the event of natural disasters including, but not limited to, hurricanes, tornadoes, windstorms or floods."

Although the statement of policy contained in §3 of the Act suggests a liberal construction of the Act, we find no statutory provision creating a relation between the Iowa Civil Defense Administration and the American Red Cross which would justify the appropriation of funds as requested by the American Red Cross, since, by the terms of your letter, the Iowa Civil Defense Administration has made no request for such an appropriation.

We must, therefore, answer your inquiry in the negative.

7.13

COUNTIES AND COUNTY OFFICERS: Civil defense—§§28A.7, 344.3, 1962 Code. Board of supervisors may not appropriate moneys from contingent fund to promote civil defense in the county.

December 27, 1962

Mr. T. K. Ford
Des Moines County Attorney
220 Tama Building
Burlington, Iowa

Dear Mr. Ford:

We have your letter requesting the opinion of this office in regard to the following:

"In view of Chapter 82, Section 7, Laws of the 58th General Assembly (now Iowa Code section 28A.7 (1962)), we wonder if it is legal to appropriate the sum of $1,000.00 from Des Moines County's contingent fund of $10,000.00 to help promote civil defense in Des Moines County.

"The $10,000.00 contingent fund, of course, is in the general fund. Also, we want to point out that there has been no money budgeted for 1962 (the year in which this appropriation might be made) for this proposed expenditure."

Section 28A.7 (1962), provides as follows:

"County boards of supervisors, city or town councils and school boards are hereby authorized to co-operate with the administration to carry out the provisions of this chapter, and may appropriate and expend public funds therefor."

In addition, your attention is directed to §344.3, which provides:

"Contingent fund. The board of supervisors may also appropriate *to a contingent account for one or each of the county funds,* a sum which may be spent for purposes which cannot be anticipated at the beginning

of the year, but said contingent appropriation together with other appropriations shall not exceed the anticipated revenues." (Emphasis supplied)

Thus, under §28A.7, money may be appropriated and expended by the county board of supervisors in cooperation with the Iowa Civil Defense Administration. However, your request contemplates that appropriation be made to the contingent fund. Under §344.3, *supra,* contingent accounts may exist only for "one or each of the county funds" already in existence. We find no provision in the Code for a county civil defense fund, and must therefore answer your inquiry in the negative.

7.14

COUNTIES AND COUNTY OFFICERS: Civil defense—§§28A.7, 332.3, 1962 Code. §28A.7 authorizes county board of supervisors to appropriate and expend public funds for civil defense projects only when such projects are carried on in cooperation with the Iowa Civil Defense Administration; civil defense expenditures should be made from the general fund.

December 28, 1962

Mr. John W. Shafer
Allamakee County Attorney
Waukon, Iowa

Dear Mr. Shafer:

We have your letter in which you request the opinion of this office in regard to the following:

"1. Under Section 332.3 or any other pertinent authority, what if any authority does the County Board of Supervisors have to make expenditures for Civil Defense?

"2. If there is authority for such expenditures, should they be made from the general fund or from some other designated fund?"

1. It has frequently been held that a public body has no powers other than those expressly or impliedly granted. *Gritton v. City of Des Moines,* 247 Iowa 326, 73 N. W. 2d 813. Iowa Code §332.3 (1962) contains no authority, either express or implied, for expenditure of county board funds for civil defense purposes. However, §28A.7 provides as follows:

"County boards of supervisors, city or town councils and school boards are hereby authorized to co-operate with the administration to carry out the provisions of this chapter, and may appropriate and expend public funds therefor."

Therefore, in our opinion, the county board of supervisors may, under the provisions of §28A.7, appropriate and expend county funds for civil defense projects only when those projects are carried on in cooperation with the Iowa Civil Defense Administration.

2. In reply to your second question, we find no provision in the Code for a county civil defense fund, and therefore civil defense expenditures, if any, should be made from the general fund.

7.15

COUNTIES AND COUNTY OFFICERS: Civil defense director—Ch. 82, Acts 58th G.A. (§28A.7, 1962 Code), §§332.3(10), 332.9, 332.10, 1958

Code. (1) The county board of supervisors is authorized to fix the compensation of the county civil defense director and to use public money in payment thereof; and (2) authorized to include such civil defense director within the terms of §332.9 and §332.10, and to accord to him the benefit of such other services as are generally conferred otherwise upon county officers.

January 31, 1962

Mr. H. K. Roggensack
Clayton County Attorney
Elkader, Iowa

Dear Mr. Roggensack:

This will acknowledge receipt of yours of the 22nd, inst., in which you submitted the following:

"Our Board of Supervisors has appointed a County Civil Defense Administrator who seems to be active and we have some problems arising in regard to his activities. * * *

"1. Can the Board set a salary for the County Administrator and pay him from public funds?

"2. Can they allow claims for the expenses of his office, such as mileage, stationery, postage, office rent, stenographic help, etc.?"

Chapter 82, Acts 58th G.A., designated as the Civil Defense Act, does not expressly provide answer to your questions. However, by inference from its express terms, the intention of the legislature may be found. Insofar as such Act involves the board of supervisors, §7 thereof provides the following:

"Sec. 7. County boards of supervisors, city or town councils and school boards are hereby authorized to cooperate with the administration to carry out the provisions of this Act and may appropriate and expend public funds therefor."

Note that the power of such board is to cooperate with the administration to carry out the provisions of this Act and to appropriate and expend public funds therefor. Applying legislative direction contained in §3 of the Act that it "shall be construed liberally so as to effect the maximum cooperation of the administration and coordination of its affairs with agencies and persons acting under the provisions of said civil defense Act of 1950 and other public laws," it appears that the legislature included within the meaning of "cooperation" the use of public money by such board for civil defense. While it does not define specifically the authorized use of the money, in the aspect of this generalization I am of the opinion that, (1) as far as compensation of such director is concerned, the board of supervisors would be within its powers conferred by §332.3(10), 1958 Code, providing as follows:

"10. To fix the compensation for all services of county and township officers not otherwise provided by law, and to provide for the payment of the same."

and, (2) insofar as expenses are concerned, to enlarge the general powers of the board of supervisors to the extent of including the defense director within the terms of §332.9 and §332.10, and the benefit of such other services as are conferred generally upon other county officers.

By reason of the foregoing, I am of the opinion that, (1) the board can set the salary for a county civil defense administrator, authorizing payment therefor out of public funds and, (2) that the board can allow claims for the expenses of the office.

7.16

COUNTIES AND COUNTY OFFICERS: Compensation of deputy county officials and clerks—§340.2, 1962 Code. Board of supervisors may change compensation of above officials during the latter's term of office.

August 2, 1962

Mr. T. C. Strack
Grundy County Attorney
Grundy Center, Iowa

Dear Mr. Strack:

This is in reference to yours in which you submitted the following:

"We are writing to ask for an official opinion from your office in connection with the salaries of deputy county officials and clerks in our county offices.

"Does the Board of Supervisors have the power to change the salaries of such deputies and clerks at any time, even though no change is made in the persons employed as deputies and clerks?"

(1) Insofar as the compensation of clerks and assistants is concerned, I note that §340.2, 1962 Code of Iowa, provides:

"The board of supervisors shall fix all compensation for extra help and clerks."

On the basis of the following rule set forth in 1940 *O.A.G.* 475, a copy of which is hereto attached, to wit:

"It is the general rule that where the power to fix the compensation of a public officer has been delegated to a county board, in the absence of any constitutional or statutory provision, the compensation of such officers may be changed during the term of office. Iowa City vs. Foster, 10 Iowa 189; State vs. Hill, 32 Minn. 275; 20 N.W. 196; Yuma County vs. Sturges, 15 Ariz. 538; 140 P. 504; 46 C.J. 1020; 22 R.C.L. 553.",

I am of the opinion that this power includes the power in the board of supervisors to change the compensation of clerks and assistants from time to time. While the rule there stated concerns the compensation of officers, it is undoubtedly equally applicable to the power of the board over the compensation of clerks and assistants.

(2) Insofar as the compensation of deputies is concerned, I am of the opinion that said opinion, which bears this headnote:

"Board of supervisors has authority to either increase or decrease the salaries of deputy officers and clerks for the second year of a two-year term, even though such salaries were fixed by the board for the period of time of their appointment.",

is controlling. While there have been some changes in the statute pertinent to the compensation of deputy county officers, the statutes controlling the conclusions reached therein are unchanged, and that opinion is now confirmed.

7.17

COUNTIES AND COUNTY OFFICERS: Compensation of deputy sheriffs—§§340.8, 340.16, 1962 Code. The authority to fix the compensation of deputy sheriffs rests in the board of supervisors, and such compensation is

made from county funds. There is no authority for the board of supervisors receiving reimbursement thereof.

December 5, 1962

Mr. J. W. Ritchie
Warren County Attorney
Indianola, Iowa

Dear Mr. Ritchie:

Reference is herein made to your recent letter, in which you submitted the following:

"Greenwood Raceways, Inc. of Des Moines has recently received permission to construct a 3 mile race track on a 300 acre tract near Liberty Center, in Warren County. They plan to run two race meets each year with an estimated attendance of at least 30,000 people on the largest day. This of course will create a considerable problem in policing during the 2 day racing session twice a year.

"I am requesting an opinion on the following question: Can a county sheriff appoint, and the board of supervisors approve, any number of deputy sheriffs to act at the direction of the sheriff, receive compensation from county funds, and be placed under workers compensation, when the cost incidental to their employment shall at a later time be repaid to the county by the firm whose property they were protecting during the time of their employment?"

(1) It seems sufficient to answer the foregoing request that the board of supervisors, being an administrative body of specific powers, and such incidental powers required to effectuate the express powers, has exhausted its powers over the compensation of a deputy sheriff when it has fixed such compensation in accordance with §340.8, Code of Iowa, providing as follows:

"340.8 Deputy sheriff. Each deputy sheriff shall receive as his annual salary as follows:

"1. The first deputy sheriff, and the second such deputy if a second deputy sheriff is required, shall receive an annual salary of not more than eighty-five percent of the amount of the salary of the sheriff, as fixed by the board of supervisors.

"2. All other deputy sheriffs shall receive an annual salary as fixed by the board of supervisors, but not to exceed the salaries of the first or second deputies. * * * "

No statutory authority exists for the board of supervisors to accept reimbursement for the compensation payment so made to the deputy sheriff. Lacking that power to accept, such power of acceptance of reimbursement does not exist.

(2) In another aspect of this situation, the right to accept such reimbursement to the county cannot survive the following rule of law; 43 *American Jurisprudence,* Public Office, §389, states:

"Since compensation of public officers is generally payable under public revenue, the payment must be made only as authorized by law and by the officer or official charged with the duty of making it."

In Iowa, this rule is in the form of a statute, being §340.16, referring to the salaries of county officers, including deputy sheriffs, which states:

"The salaries fixed by the foregoing sections of this chapter shall be paid out of the general fund of the county."

In the situation presented, these salaries in fact will be paid by the Greenwood Raceways, a private corporation, and in contravention of the statute which requires such salaries to be paid out of the general fund of the county.

While there is lack of precedent of this situation, fixing and payment of salaries of public officials is solely a legislative provision. As pertinent is the following from the case of *Lemper v. City of Dubuque,* 237 Iowa 1109, 1116:

" 'This court has repeatedly recognized that the amount of compensation and the time or times for payment thereof for a public officer are not determined from the contract of employment but solely from the legislative provisions applicable to the payment of such compensation. (Citing decisions.) * * * We have held that a contract, which contemplates the payment of more salary than that specified by law, is against public policy. Dodson v. McCurnin, 178 Iowa 1211, 160 N.W. 927, L.R.A. 1917C, 1084. We have also held that a contract, which contemplates the payment of less salary than the law specifies, it likewise contrary to public policy. Bodenhofer v. Hogan, 142 Iowa 321, 120 N.W. 659, 134 Am. St. Rep. 418, 19 Ann. Cas. 1073. In the case of Johnson County Sav. Bank v. Creston, 212 Iowa 929, 933, 231 N.W. 705, 707, 84 A.L.R. 926, we state: "It is a general principle that a municipal contract entered into in violation of a mandatory statute, or a contract in opposition to public policy is not merely voidable but void. (Coggeshall v. Des Moines, 78 Iowa 235) * * *"' "

By reason of the foregoing, I would advise that a contract or arrangement covering the repayment of statutory compensation to county employees is unauthorized and unlawful.

7.18

COUNTIES AND COUNTY OFFICERS: County claims against estate— §1, Ch. 258, Act. 58th G.A. (Ch. 339, 1962 Code). A county has no statutory authority to file a claim against the estate of a decedent for reimbursement of the fees and expenses which it has paid to its county medical examiner under the provisions of subsection 5, §1, Ch. 258, Acts 58th G.A.

June 27, 1961

Mr. G. A. Cady
Franklin County Attorney
Hampton, Iowa

Dear Mr. Cady:

This will acknowledge receipt of your letter of June 16, 1961, in which you submitted the following:

"I hereby request an official opinion from your office concerning Chapter 258 of the Laws of the 58th General Assembly.

"Subsection 5 of Section 1 provides that the County Medical Examiner shall be paid a fee of $15.00 plus his actual expenses, to be paid by the county for which he is appointed. I would like to know whether or not the county can then file a claim against the estate of the decedent for said fees.

"Under the prior statute, 340.19, which has been repealed, the county is expressly authorized to file said claim against the decedent's estate, but there is no provision in the present statute authorizing the county to

do this. I would like to know whether or not the county can file this claim against the decedent's estate."

The statute to which you refer is part of subsection 5, §1, Chapter 258, Acts 58th G.A., which states specifically the following:

"5. Upon receipt of such notice the county medical examiner shall take charge of the dead body, make inquiries regarding the cause and manner of death, reduce his findings to writing on forms provided by the commissioner of public health for such purpose, and deliver the original of such form to the county attorney, retaining one copy for his own use, and forwarding another copy to the criminal investigation division of the state department of public safety.

"For each such preliminary investigation, including the making of the required reports, the county medical examiner shall receive a fee of fifteen dollars ($15.00), plus his actual expenses, to be paid by the county for which he is appointed."

There is no authority in the foregoing for collecting any such expenditures by filing a claim against the estate of the decedent involved. Under such rules as stated in the case of *Moulton v. Iowa Employment Security Commission,* 34 N.W. 2d 211,

"The Court can neither add words to the statute nor eliminate them. * * * This court is not at liberty to read into the statute provisions which the legislature did not see fit to incorporate, nor may it enlarge the scope of its provisions by an unwarranted interpretation of the language used."

and the following in the case of *Hindmann v. Reaser,* 246 Iowa 1375:

"This court must construe statutes as it finds them and cannot amend or change them under guise of construction."

and the following from the case of *Eittreim v. State Beer Permit Board,* 243 Iowa 1148:

"A court may not read into a statute, by interpretation, provisions not covered by particular legislation."

a provision for such filing and claiming, in the estate of the said decedent, may not be supplied.

And answer to the problem, as related to §340.19, now repealed, to which you refer, if it has any relationship, is to be found in the statement from the case of *Andrew v. American Savings Bank,* 217 Iowa 447, 452, that:

"Ordinarily a change in the language of a statute indicates an intention to change its meaning."

In view of the foregoing, I am of the opinion that the intention of the legislature was to impose the liability for the payment of the fifteen dollars set forth in the exhibited statute, on the county, with no authority to reimburse itself from the estate of the decedent.

7.19

COUNTIES AND COUNTY OFFICERS: County fund for mental health —§230.24, 1958 Code. Funds obtained by additional tax levy authorized by second paragraph of §230.24 must be earmarked and used by board of supervisors for mental health center purposes only.

April 12, 1961

Mr. Thomas E. Tucker
Deputy Lee County Attorney
516 Seventh Street
Fort Madison, Iowa

Dear Sir:

We are in receipt of your letter of March 14, 1961, in which you state:

"My question concerns Section 230.24 of the 1958 Code of Iowa, and more specifically the last sentence thereof:

"The Board of Supervisors shall, annually, levy a tax of 3/8 mill or less, as may be necessary, for the purpose of raising a fund for the support of such mentally ill persons as are cared for and supported by the county in the County Home, or elsewhere outside of any state hospital for the mentally ill, which shall be known as the county fund for mental health, and shall be used for no other purpose than the support of such mentally ill persons and for the purpose of making such additions and improvements as may be necessary to properly care for such patients as are ordered committed to the County Home.

"The County Board of Supervisors are authorized to expend from the county fund for mental health as provided in this section, funds for psychiatric examination and treatment of persons in need thereof in each county where they have facilities available for such treatment, and any county not having such facilities may contract through its Board of Supervisors with any other county, which has facilities for psychiatric examination and treatment, for the use thereof. ANY COUNTY NOW OR HEREAFTER EXPENDING FUNDS FROM THE COUNTY FUND FOR MENTAL HEALTH FOR THE PSYCHIATRIC EXAMINATION AND TREATMENT OF PERSONS IN A COMMUNITY MENTAL HEALTH CENTER MAY LEVY AN ADDITIONAL TAX OF NOT TO EXCEED 3/8 MILL.

"Must funds, obtained by the additional levy authorized in the last sentence of this provision be used solely for the community mental health centers or may these funds be allocated by the Board of Supervisors in the same manner and for the same purposes as the revenue raised by the original levy as provided in the first paragraph of this section.

"If these funds may be allocated as in paragraph one, is the distribution of funds solely within the discretion of the Board, subject to the limitations of Section 230.24?"

In our opinion, the fund created by the additional 3/8 mill levy must be earmarked and used by the board of supervisors for mental health center purposes only. From this, it follows that the additional levy can, therefore, be made only if there is a community mental health center in existence, or if there is a contract in existence between a privately-owned mental health facility and the county which authorizes the use of the private facility for community purposes.

Thus, the purpose of the act is to insure that funds will be available for examination and treatment of persons in community health centers without depleting the county fund for mental health for purposes other than those for which it was originally intended.

7.20

COUNTIES AND COUNTY OFFICERS: County hospital—§§347.13, 347.14, 1962 Code. There is no authority in county hospital trustees to lease as lessor any space in the county hospital to private parties.

November 30, 1962

Mr. G. A. Cady
Franklin County Attorney
Hampton, Iowa

Dear Mr. Cady:

Reference is herein made to yours of the 16th inst. in which you submitted the following:

"I do hereby request an official opinion from your office relative to the following factual situation:

"At the November 1962 General Election, the voters of Franklin County voted to have the Lutheran Hospital facilities, which are located in Hampton, transferred to the county to establish a County Public Hospital, all of which was pursuant to the provisions of Chapter 347 of the 1962 Code of Iowa.

"At the present time the hospital has leased certain space to private parties for a clinic, and the question has now been brought up as to whether or not the trustees of the County Hospital have the authority under Chaper 347 to lease said space to private parties.

"I would appreciate it if you would advise me relative to this matter as soon as possible."

There is no express power vested in the hospital trustees to lease space in the county hospital to private parties or for a private purpose. The powers of the county hospital trustees are expressly authorized by §§347.13 and 347.14 of the 1962 Code of Iowa, and do not include any power for such trustees to lease as lessor any of the county hospital property for private use.

While precedent is lacking to support a negative answer in the foregoing statutory situation as far as county hospitals are concerned, so far as leasing space in a county court house under the same statutory situation, this Department, in 1956 *O.A.G.* 202, addressed itself to this question and stated the following:

"However, in an opinion appearing at page 269 of the 1940 Report of the Attorney General it is stated that such power to manage does not include the power to lease county property. Also see Hilgers v. Woodbury County, 200 Iowa 1318, 206 N.W. 660, State ex rel Wadsworth v. Board of Supervisors of Linn Co., 232 Iowa 1092, 6 N.W. 2d 877, and 1932 Report of the Attorney General, page 112, all to the effect that the power to lease does not exist in the absence of express statutory authorization.

"Although said authorities all are concerned with the specific problem of leasing a portion of the courthouse to a private party, the rule stated therein appears as a denial of the power to lease public property without express authorization and does not appear to depend on the nature of the property or status of the lessee. Thus, in the Hilgers case, the Court said:

" 'Counties are recognized as quasi corporations, and it is universally held that the board of supervisors of a county has only such powers as

are expressly conferred by statute, or necessarily implied from the power so conferred. There is no provision in the statute ... conferring upon the board of supervisors any power to rent any portion of the court houses or any other public property for private use. The language of the statute cannot be extended by fair construction to confer such power upon the board of supervisors. Nor is the power ... to be implied from the power granted to the board of supervisors to have general management and care of the county property. ..."

Support for a negative answer to your question is found in *Hilgers v. Woodbury County,* 200 Iowa 1318, as follows:

"The authorities are not uniform on the question of the right of public officials to rent a portion of a public building for a private use, but we are satisfied that the greater weight of authority and the better reasoning are to the effect that the board of supervisors has no power to use a courthouse or any portion of it, in the absence of a legislative grant of such power. The question, under statutes somewhat similar to ours, is quite fully discussed in State ex rel. Scott v. Hart, 144 Ind. 107 (33 L.R.A. 118). See, also, Spencer v. Joint Sch. Dist., 15 Kan. 259; Gottlieb-Knabe & Co. v. Macklin, 109 Md. 429 (71 Atl. 949, 31 L.R.A. (N.S. 580); Franklin County v. Gills & Johnson, 96 Va. 330 (31 S. E. 507); Miller v. Porter, 8 B. Mon. (Ky.) 282; Thompson v. Probert, 2 Bush (Ky.) 144, Borough of Henderson v. County of Sibley, 28 Minn. 515; Crump v. Board of Supervisors, 52 Miss. 107; Scofield v. Eighth Sch. Dist., 27 Conn. 499; White v. Town of Stamford, 37 Conn. 578; Roper v. McWhorter, 77 Va. 214; Town of Decatur v. DeKalb County, 130 Ga. 483; County of Alleghany v. Parrish, 93 Va. 615 (25 S. E. 882)."

By reason of the foregoing, there appears to be neither express nor implied power in the county hospital trustees to lease space in the county hospital to private parties.

7.21

COUNTIES AND COUNTY OFFICERS: Duty of county auditor to make entry in transfer book—§558.57, 1962 Code. The County Auditor exercising ministerial duties has no power to refuse to make an entry in its transfer book, nor require an affidavit of the prior death of a joint tenant of the property being deeded, as a condition to making such transfer entry.

July 30, 1962

Mr. Gordon L. Winkel
Kossuth County Attorney
Box 405
Algona, Iowa

Dear Mr. Winkel:

This is in response to your letter of June 22, 1962, in which you submitted the following:

"Occasionally the Kossuth County Recorder will receive a deed to be recorded wherein the grantor is a certain person. The grantor may be referred to as 'a widow', 'a widower', 'an unremarried widow', 'an unremarried widower', or there may be no designation whatsoever. In one case where we feel a problem exists, the grantor is a surviving joint owner of the property since the property was held with full right of survivorship and not as a tenancy in common.

"The Recorder records the deeds and sends them to the Auditor's office for the purpose of having the title changes recorded in his Plat Book

as well as on his Plat. The County Auditor then makes up his tax list from the deeds received from the Recorder.

"In the past its has been the custom of the County Auditor to refuse to change his records when such a deed is received for the reason that he has nothing on which he can reasonably conclude that the joint owner who apparently is deceased is in fact deceased. It has been his practice in those situations to ask that an Affidavit be recorded indicating that the deceased joint owner has in fact died prior to the execution of the deed by the surviving joint owner.

"A similar problem exists when the property is subject to a life estate and the tenant dies. In this situation the Auditor has been requiring that an affidavit be filed showing the life tenant's death before he will change the record in his office."

"Would you kindly consider these facts and indicate whether or not: (1) The County Auditor can refuse under these circumstances to change his records by use of such a deed, and (2) Whether or not under these circumstances the County Auditor can require that an affidavit be filed indicating the previous death of the other joint owner, or the life tenant before changing his Plat records and tax lists accordingly."

The statute under which this question arises is §558.57, Code of 1962, providing the following:

"Entry on auditor's transfer books. The recorder shall not record any deed or other instrument unconditionally conveying real estate until the proper entries have been made upon the transfer books in the auditor's office, and indorsement made upon the deed or other instrument properly dated and officially signed, in substantially the following form:

"Entered upon transfer books and for taxation this _____ day of _____, 19____. My fee 50¢ paid by recorder."

The duty of the county auditor under that Act is the making of certain entries upon the transfer book before recording of the deed. This statute prescribing the auditor's duty is clear and unambiguous, and specific in its terms, and may not be extended to include other duties. The county auditor, exercising ministerial duties, may not refuse to make the entry in his book under the circumstances stated, nor can he require an affidavit to be filed testifying to the prior death of the other joint tenant or of the life tenant of the property being deeded as a condition. He has fulfilled his duty when he does what the statute prescribes.

It is interesting to note that requiring the aid of an affidavit testifying to the death of a joint tenant is a proper and needed requirement where marketable title is involved in a land title examination. See *Land Title Examination Standards,* page 30 of Supplement to Volume 36, 1C(a).

7.22

COUNTIES AND COUNTY OFFICERS: Clerk of court, duties re issuance of marriage license—§§596.1 and 596.7, 1958 Code; §1, Ch. 278, Laws 59th G.A. (§595.4, 1962 Code). Under said statutes, there is no restriction for the issuance of a marriage license because a period of 25 days elapsed between the date of health certificate and date applicant called to receive license.

May 7, 1962

Mr. Joseph H. Sams
Mitchell County Attorney
Osage, Iowa

Dear Mr. Sams:

We have your favor of recent date, requesting opinion of this office, which reads as follows:

"FACTS: Application for marriage license filed on 'X' date; Health certificates dated seven days prior to 'X' were filed with the application. Applicant returned to clerk's office to pick up the license seventeen days after application, which time was twenty-five days after date of health certificate.

"QUESTION: Shall the license be issued within twenty days of the date of the health certificate or within twenty days after the filing date of the application, regardless of the certificate's being more than twenty days old?"

Upon the filing of an application for a marriage license, a period of three days must elapse before the license can be issued (§1, Chapter 278, Laws 59th G.A.) (See also *O.A.G.* 6-27-61). With said application there must be filed a health certificate of an examination by a duly licensed physician as to existence of or freedom from syphilis, taken within twenty days prior to such application (§596.1). Under the facts stated, the applicant has met these requirements. The applicant is entitled to the issuance of a marriage license. Having received the license, if the marriage is not solemnized within twenty days following the issuance thereof, the license shall become void (§596.7).

In answer to your question, there is nothing in the law that precludes the issuance of the license simply because a period of twenty-five dayes has elapsed between the date of the health certificate and the time the applicant called to receive the license.

7.23

COUNTIES AND COUNTY OFFICERS: County attorney, conflict of interest—§336.5, 1958 Code. County attorney cannot represent private citizen in civil action subsequent to criminal prosecution based on the same facts, if both filed in same county in which he is county attorney.

April 26, 1962

Mr. William J. O'Connell
Buchanan County Attorney
Security Bank Building
Independence, Iowa

Dear Mr. O'Connell:

In yours of March 19, 1962, you requested an opinion on the following:

" 'A' is the operator of an auto which strikes the rear of 'B' auto. An investigating officer files a misdemeanor charge against 'A' in Justice Court and 'A' enters a plea of guilty. An occupant of 'B' auto subsequently attempts to retain the County Attorney, as a private practicing attorney, to represent the occupant in his claim against 'A' for personal injuries arising out of the same facts which gave rise to the prosecution and plea.

"1. Is the County Attorney barred by §336.5, Code 1958, from being engaged as a private attorney in a civil action based on the same set of

facts which gave rise to a criminal prosecution in the county where such county attorney holds office?

"2. What effect, if any, would the Justice's entry of the County Attorney's name on the criminal case docket have in this matter?"

Section 336.5, 1958 Code, reads in part:

"336.5 County attorney—prohibitions—disqualified assistants. No county attorney shall ... be directly or indirectly engaged as an attorney or otherwise for any party other than the state or county in any action or proceeding pending or arising in his county, based upon substantially the same facts upon which a prosecution or proceeding has been commenced or prosecuted by him in the name of the county or state; ..."

The legislative intent clearly appears to completely separate the official duties of the county attorney from any private gain. This legislative policy is so clearly in the public interest that the statute should be restricted by technical arguments of interpretation but should be construed so as to accomplish to the full its beneficent purpose. *Callahan v. Jones, et al.,* 200 Wash. 241, 93 P. 2d 326 (1939).

"The principle was long ago laid down that no man can serve two masters. It is not consistent with the public interest that a prosecuting officer may secure personal gain as the result either of the conviction or acquittal of one charged with infraction of the law, or in connection with the filing of any charge. Neither should the power of the state be used to discover facts or evidence which might result in private profit to the official vested by law with authority to use such power. The very appearance of evil in connection with the administration of public office must be avoided." Id. at 330.

The Iowa courts have not passed directly on this point, but see *Bellison v. Apland,* 115 Iowa 599, 89 N.W. 22 (1902) and *Snyder v. Tribune Co.,* 161 Iowa 671, 143 N.W. 519 (1913).

Canon #5 of the *Canons of Professional Ethics* places a high and exacting standard on public prosecutors. The case law indicates this should not be clouded by technical distinctions such as docket entries, pleas of guilty, technical appearances, or unusual construction of statutes. *State ex rel. Newby, et al. v. Anderson,* 164 N.W. 619 (1917) (not officially reported); cf. *State v. Jensen,* 178 Iowa 1098, 160 N.W. 832 (1917); 1 *Iowa L. Bull.* 95, 96; *People ex rel. Hutchison v. Hickman,* 294 Ill. 471, 128 N.E. 484, 486; 42 *Am. Jur.* 253; 27 *C.J.S.* 620.

In summary, the county attorney in question is barred from accepting the civil suit regardless of whether he actively prosecuted the criminal case based on the same facts or not.

A response to your second question is unnecessary in view of the above.

7.24

COUNTIES AND COUNTY OFFICERS: County board of education—§273.18(9), 1958 Code. The County Board of Education is under no obligation to pay for the cost of publications distributed to it. Its obligation to pay is subject to its discretion respecting such distribution.

February 1, 1962

Mr. Paul D. Strand
Winneshiek County Attorney
Decorah, Iowa

Dear Mr. Strand:

Reference is herein made to yours of the 9th, ult., in which you submitted the following:

"Please find enclosed a pamphlet which has been submitted to the Winneshiek County Board of Education for distribution. This material and other material is being submitted and has been submitted by the Iowa Association of County Superintendents for distribution. The cost of distribution and the cost for the pamphlet is then turned in as a claim to the Winneshiek County Board and I am to assume that the Iowa Association of County Superintendents is sending this pamphlet and other so-called educational material to other boards in the state.

"The precise question is whether or not the county board must pay for the cost of these publications? It would seem to me that since the Board has not in fact requested these pamphlets that it would not be a legitimate claim and should not be paid.

There is no obligation upon the county board of education to pay for the cost of these publications. It would appear that the county board would have discretion as to whether it will or will not pay for such publications and the distribution thereof. It is implied in the provisions of §273.18(9), 1958 Code, providing as follows:

"273.18 Powers and duties of superintendent. The county superintendent shall, under the direction of the board, exercise the following powers and duties:

. . .

"9. Endeavor to promote through meetings and conferences with school officers, teachers, parents and the public generally, and by the distribution of pamphlets and bulletins, an active interest in all desirable types of public school education and to suggest needed changes and improvements in the public schools of the county."

that the county board, through the county superintendent, would have the discretion as to whether this distribution be approved and the costs thereof paid.

7.25

COUNTIES AND COUNTY OFFICERS: County conservation boards—§§24.2(1), 24.2(3), 24.25, 111A.6, 1962 Code. County conservation boards are not certifying boards or municipalities under Code §§24.2(1) and 24.2(3) and need not publish budget and hold hearings pursuant to local budget law. Levy for county conservation board is within discretion of county board of supervisors. County conservation board should follow estimate procedure outlined in §24.25.

June 28, 1962

Mr. Howard D. Hamilton
Webster County Attorney
303 Snell Building
Fort Dodge, Iowa

Dear Mr. Hamilton:

We have your letter of May 9, 1962, in which you request the opinion of this office in regard to the following:

"1. Is the County Conservation Board a 'municipality' as defined by Section 24.2(1) and is the County Conservation Board a certifying board as defined in Section 24.2(3)?

"2. If your answer to the above question is in the affirmative am I correct in assuming that the County Conservation Board must publish

their budget and hold the hearings as provided in Chapter 24 of the 1962 Code of Iowa?

"3. If the answer to question 1 above is in the affirmative is it mandatory for the Board of Supervisors as the levying board to spread the tax rates necessary to produce the amounts required by the County Conservation Board as a certifying board, or does the Board of Supervisors, as the levying board, have the discretion to refuse to levy, by virtue of the word 'may' in Section 111A.6?

"4. If the answer to question 1 above is negative should the County Conservation Board follow the provisions of Section 24.25 for estimates to be submitted by an appointive board (non-certifying board) or what sections or guides are required to be followed by the County Conservation Board to satisfy Chapter 111A.6 in the request or certification for funds?" Iowa Code §§24.2(1), (2) and (3), provide as follows:

"As used in this chapter and unless otherwise required by the context:

"1. The word 'municipality' shall mean the county, city, town, school district, and all other public bodies or corporations that have power to levy or certify a tax or sum of money to be collected by taxation, but shall not include any drainage district, township, or road district.

"2. The words 'levying board' shall mean board of supervisors of the county and any other public body or corporation that has the power to levy a tax.

"3. The words 'certifying board' shall mean any public body which has the power or duty to certify any tax to be levied or sum of money to be collected by taxation."

Iowa Code §111A.6 sets out the powers of the boards of supervisors and county conservation boards in regard to public funds:

"Upon the adoption of any county of the provisions of this chapter, the county board of supervisors of such county may by resolution appropriate an amount of money from the general fund of the county for the payment of expenses incurred by the county conservation board in carrying out its powers and duties, and it may levy or cause to be levied an annual tax, in addition to all other taxes, of not less than one-fourth mill or more than one mill on the dollar of the assessed valuation of all real and personal property subject to taxation within such county, upon proper certification by said county conservation board made pursuant to and in compliance with all of the provisions of chapter 24, . . ."

While this section gives county conservation boards the power to "certify", this power is not, in our opinion, the same power of certification contemplated by §24.2(3), *supra.*

Your attention is directed to the above-quoted portions of §111A.6. Under this section, the board of supervisors "may" levy a tax. The use of the word "may" rather than "shall" indicates the intent of the legislature that the levy be left within the discretion of the board of supervisors. *Deere & Co. v. Derifield,* 110 N.W. 2d 560 (1961); *Hansen v. Henderson,* 244 Iowa 650, 56 N.W. 2d 59 (1953). The action of the county conservation board is thus advisory only and does not constitute a "certification" in the true sense of the word, since the board of supervisors does possess this discretion. In the case of an actual certification, the levying body has no discretion but must levy in accordance with the budget certified to it. See, for example, Iowa Code §§297.5 (purchase of schoolhouse sites by school districts) and 404.3 (municipal revenue).

Further, it has been held that elected officers and bodies only may be tax

certifying bodies, for the reason that the legislature cannot, without the consent of the people, delegate the power of taxation to a body of persons not elected by and immediately responsible to the public. See *State v. The Mayor,* 103 Iowa 76, 72 N.W. 639 (1897).

Therefore, in the opinion of this office, a county conservation board is not a municipality as defined by §24.2(1), nor is it a certifying board as defined in §24.2(3) and therefore need not publish its budget and hold hearings as provided in Chapter 24 of the 1962 Code of Iowa.

In answer to your third question, the word "may" as used in §111A.6 places the levy within the discretion of the board of supervisors.

Since county conservation boards are not tax certifying boards as defined in §24.2(3), they must, in our opinion, follow the procedure set out in §24.25 for "elective or appointive officers or boards, except tax certifying boards as defined in subsection 3 of §24.2."

7.26

COUNTIES AND COUNTY OFFICERS: County hospital, use of funds— §§347.7, 347.14(11), 1962 Code. Surplus monies in the county hospital fund and unappropriated monies in the hospital depreciation fund may be used for construction purposes, without the approving vote of the electors.

August 24, 1962

Mr. Wm. Stuart Charlton
Delaware County Attorney
Manchester, Iowa

Dear Mr. Charlton:

Reference is herein made to yours of June 12, 1962, in which you submitted the following:

"The Delaware County Memorial Hospital, in addition to revenue and expenditures from the appropriations under Chapter 347, has two additional funds in existence.

"(a) Construction Fund: Consisting entirely of funds donated to such institution established under Section 347.7, and return of Hill Burton funds subsequent to completion of one wing addition built solely from funds donated for such specific purpose. Total present funds: $24,282.51.

"(b) Depreciation Fund: Established under 347.14(11) which is the new section added by Chapter 262 of 58th G.A. Present total funds $20,000.00, with another $10,000.00 available for such purposes in current fiscal year.

"The hospital board anticipates expenditures for a furnace building (separate structure) and replacement of existing furnace facilities at a cost of between $28,000 and $32,000.

"The hospital further contemplates an addition to existing building for additional office and administrative personnel and record storage utilization.

"Will you kindly advise by formal opinion as follows:

"(a) May the hospital by appropriate resolution by trustees, without public vote, construct the new building, in either proposed addition,

and/or replace the existing heating facilities from either or both of the aforementioned funds? Assuming in connection with 347.7 fund that none of the gifts are for specified purposes but outright to the hospital or within the discretion of trustees.

"(b) May the funds available under Section 347.14(11) be used for new construction or must such fund be used strictly for replacement of existing facilities, also without public voting on such proposal?"

According to Chapter 347, Code of 1962, there are two funds available to county hospital trustees in the performance of their duties and authority. These are the County Hospital Fund created by §347.7, and the Depreciation Fund created by §347.14(11). What you denominate as the Construction Fund, as other like funds, are merely convenient labels and have no statutory status, and must be deemed part of the County Hospital Fund. What you deem the Construction Fund, according to your letter, consists of gifts, none of which is designated to use for a specific purpose; and not being properly within the meaning of §347.14(11), is to be regarded as part of the County Hospital Fund.

According to the opinion of this department appearing in 1928 *O.A.G.* at page 210:

"A county hospital board may erect a nurses' home without a vote of the people if it has funds available without the issuance of bonds. * * *

"It will therefore be observed that the only propositions required to be submitted to the electors are the one to establish the hospital and the one to issue the bonds."

On the other hand, 1940 *O.A.G.* 101, without reference to the 1928 Opinion, after holding that surplus funds are available for construction purposes, provided the proposition that they could so use the surplus funds only if first submitted to the electors.

However, that opinion is not now controlling, because the provision then existing, insofar as the election holding is concerned, conferring power upon the board of supervisors to expend funds for the erection or the building of an addition or extension to a county hospital, or the remodeling or reconstruction thereof, is no longer a part of §345.1, having been exempted from §345.1 by Chapter 158, §3, 51st G.A. In addition, the statute existing at the time of issuing of such 1940 Opinion, being §347.12, provided that the county hospital funds should be expended by the county hospital trustees under direction of the board of supervisors, upon warrants drawn by the county auditor. This was changed so that now §347.12 provides that such expenditures are made upon requisition of the county hospital trustees without resort to the board of supervisors.

No express substitute for the provision contained in §345.1, conferring power on the board of supervisors to erect, etc., the county hospital, was enacted.

Insofar as elections are concerned, Chapter 347, Code of 1962, confers such powers upon the board of supervisors with regard to the question of the establishment of the hospital and the question of issuing bonds. The only express provision for the exercise of such power by the hospital trustees is that provided by §347.13(12) as follows:

"Submit to the voters at any regular or special election a proposition to sell or lease any sites and buildings, excepting those described in subsection 11 hereof, and upon such proposition being carried by a majority of the total number of votes cast at such election, may proceed to sell such property at either public or private sale, and apply the proceeds only for:

"a. Retirement of bonds issued and outstanding in connection with the purchase of said property so sold;

"b. Further permanent improvements as the board of hospital trustees may determine."

(1) I am of the opinion that the 1940 Opinion is not controlling and that therefore the surplus funds described by you as the Construction Fund are unappropriated funds to be used by the county hospital trustees, as proposed, without submission and authority from the electors, as provided by §347.7.

(2) I am of the opinion that §347.14(11) makes creation of the Depreciation Fund discretionary with the board of trustees, and also grants the board of trustees discretion as to how the fund is to be used. In that aspect, it may be transferred to the hospital fund, and such moneys in the fund can be, at the discretion of the hospital trustees, used for hospital purposes. This fund should be regarded, for the purposes set out in your letter, as an unappropriated fund within the terms of §347.7, and is available without submission to the electors.

7.27

COUNTIES AND COUNTY OFFICERS: Courthouse bonds—§§345.1, 345.12, 1958 Code. Funds raised by bond issue can only be diverted by vote of the people under §345.12. Under §345.1, county can only dispose of and purchase a new site upon a majority of the votes cast and, if approved, then a public sale.

March 21, 1961

Mr. William C. Ball
Black Hawk County Attorney
Suite 201 First National Building
Waterloo, Iowa

Dear Mr. Ball:

This will acknowledge receipt of yours of the 15th inst. in which you submitted the following:

"On June 6, 1960, the following proposition was submitted to the voters of Black Hawk County by the Board of Supervisors of said County:

'Shall the County of Black Hawk, in the State of Iowa, erect and equip a new courthouse in said County and borrow money by the issuance and sale of bonds in an amount not exceeding Two Million Dollars ($2,000,000) to pay the cost of said courthouse, and shall a tax be levied upon all the taxable property within said county from year to year, at a rate not exceeding one mill in any one year, in addition to all other taxes, commencing with the levy for the year 1960, to pay the principal of and interest on said bonds until the same are fully paid?'

"This proposition was approved by more than 60% of the voters of Black Hawk County in said election and subsequently under the guidance of the firm of Chapman and Cutler of Chicago, Illinois, the necessary legal proceedings were completed and the $2,000,000.00 bond issue sold. Black Hawk County now has at its disposal the $2,000,000.00 obtained from the issuance and sale of said bonds.

"A question has now arisen as to the sufficiency and adequacy of the present courthouse site for the erection of a new courthouse, as provided in the question submitted to the voters in the above mentioned proposition. It has been proposed that the county acquire a new site upon which

to construct the new county courthouse. Further, it has been proposed that the funds for the purchase of the new courthouse site be obtained from either the $2,000,000.00 bond issue monies, which are available for erection and equipping of the new courthouse *or* that the present courthouse site be sold and the proceeds of said sale be used for the purchase of a new courthouse site. For purposes of clarity, I divide my request into two divisions:

DIVISION A

"In the event that it was the decision of the Board of Supervisors to use part of the $2,000,000.00 bond issue monies for purchase of a new courthouse site, it would appear that Section 345.12 would provide the only means by which this could be accomplished, since the question submitted to the voters set out the only purposes for which the monies would be used were the erection and equipping of said courthouse.

"My questions in regard to Division A are:

(1) At the present time, are the purposes for which the $2,000,000.00 bond issue monies limited by the wording of the question submitted to the voters; that is, 'for the erection and equipping of a new courthouse in said county'?

(2) If the answer to Question 1, above, is in the affirmative: May the Board of Supervisors, pursuant to Section 345.12 of the Iowa Code, submit at a General or a Special Election (called for that purpose) a question to the voters wherein they ask whether the $2,000,000.00 bond issue monies may be used to erect, equip, *and purchase a site* for a new courthouse in said county and thereby divert and reallocate the $2,000,000.00 bond issue monies from the originally stated purposes set forth in the question submitted to the voters?

(3) In the event the answer to Question 2 above, is in the affirmative: Will a 50% or a 60% vote be required to so divert and reallocate said bond issue monies?

DIVISION B

"In the event it was the decision of the Board of Supervisors that the present courthouse site be sold and the funds obtained by said sale used for the purchase of a new site:

(1) Must the purchase of a new site be submitted as a question to the voters, pursuant to Section 345.1 of the Iowa Code?

(2) If the answer to Question 1, above, is in the affirmative: Would said proposition require a 50% or a 60% approval of the voters?

(3) Would the Board of Supervisors be required to advertise the sale of the present site and sell the same at a public sale or could said sale be accomplished privately?

(4) In the event the sale of the present site were effected by either public or private sale, as in question 3, above, would the proceeds of said sale be placed in the County General Fund?

(5) In the event voters approve said purchase pursuant to B(1) and B(2): Could said monies obtained from the sale of the present site and placed in the County General Fund be used for the purchase of a new site?"

I answer your questions as follows:

1. Answer to your Question (1), Division A, is in the affirmative.
2. Answer to your Question (2), Division A, is in the affirmative.
3. Answer to your Question (3), Division A: The vote required will be a majority of the votes cast.
4. Answer to your Question (1), Division B; is in the affirmative.
5. Answer to your Question (2), Division B: A majority of all persons voting for and against such proposition.
6. Answer to your Question (3), Division B: A public sale is required.
7. Answer to your Question (4), Division B: The proceeds of a sale of the present site must be placed in the County General Fund.
8. Answer to your Question (5), Division B: In the event voters approve said purchase pursuant to Questions B(1) and B(2), the answer is in the affirmative.

7.28

COUNTIES AND COUNTY OFFICERS: Deputy county assessor—Ch. 291, 58th G.A. (§441.17, 1962 Code). Statute prohibits deputy county assessor from holding additional jobs of town clerk and rock checker.

February 19, 1962

Mr. E. L. Carroll
Union County Attorney
Creston, Iowa

Dear Mr. Carroll:

This will acknowledge receipt of yours of the 11th, inst., in which you submitted the following:

> "The County Auditor asks me to request an opinion from the office of the Attorney General as to the legality of the holding here by a man of three positions, rock checker for the County, Deputy Assessor for the County and Town Clerk of one of the towns in Union County. The one man is holding these three positions, all in Union County, Iowa."

It was the view of the Department, under Chapter 441, Code of 1958, now repealed, that a deputy assessor could not occupy both the office of constable and assessor or deputy assessor. A copy of this opinion is hereto attached.

Chapter 291, Acts 58th G.A., repealed Chapter 441, Code of 1958, and was enacted as substitute for such chapter, among others, and provided in §17 thereof, subsection 1, that the assessor "shall 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." This same provision appeared in §441.9(1), Code of 1958. This limitation attaches to the office of assessor, which office will be occupied by the chief deputy assessor in the event of a vacancy therein. See §8, Chapter 291, Acts 58th G.A. Thus, by reason of this potential duty, the chief deputy assessor is bound by the same limitation.

I am of the opinion, therefore, that the deputy county assessor may not be also town clerk and rock checker at the same time.

7.29

COUNTIES AND COUNTY OFFICERS: Destruction of public documents— Ch. 409, 1962 Code. An abstract of title accompanying a plat under Chapter 409, as a public record, may not be destroyed except by legislative authority.

October 22, 1962

Mr. Robert B. Dickey
Lee County Attorney
511 Blondeau Street
Keokuk, Iowa

Dear Mr. Dickey:

Reference is herein made to yours of the 4th, inst., in which you submitted the following:

"Section 409.12 of the Code relating to the platting of city subdivisions provides as follows:

" 'The signed and acknowledged plat and the attorney's opinion, together with the certificates of the clerk, recorder, and treasurer, and the affidavit and bond, if any, together with the certificate of approval of the council, shall be entered of record in the proper record books in the office of the county recorder. When so entered, the plat only shall be entered of record in the office of the county auditor and shall be of no validity until so filed, in both offices.'

"Prior to the acts of the 53rd General Assembly it was provided that a complete abstract of title also be recorded. Section 409.9 of the Code provides

'Every plat shall be accompanied by a complete abstract of title

- - -'

"Is there now any obligation upon the part of the recorder or the City Clerk to file or hold the abstract submitted with the plat?"

There is an obligation upon the recorder or city clerk to file, hold and preserve an abstract of title exhibiting chain of title of the property platted under the provisions of Chapter 409, 1962 Code of Iowa. This obligation arises from the fact that such abstract of title accompanying a plat proposed and filed under that chapter is a public record.

Paragraph 4, page 421, 45 *Am. Jur.*, bearing the title "Records and Recording Laws", states:

"The records of documents affecting the title to property are generally considered to be public records."

And, according to paragraph 5 of that article:

"The public character of records is not ordinarily to be determined by the manner in which they are kept, or by any formal characteristics. The fact that the information contained in original public documents has been or may be found in books wherein it has been classified and arranged for more convenient access does not deprive such public documents of their character. Thus, a stub receipt book in a city treasurer's office which contains the record of canceled certificates of tax sales, the list of lots redeemed from sales for special city taxes, and also the list of lots sold to the city for delinquent taxes and afterward assigned to individuals, are public records within the meaning of a statute which provides for

the inspection of such records, notwithstanding that all data contained in such books are at the convenience of the treasurer, to be entered in record books which are accessible to the public. Likewise, where a public officer has prepared a report based on questionnaires filed in his office, the questionnaires do not thereby lose their character as public documents."

With respect to this specific question submitted, it is said in paragraph 12, page 425, of the same article, the following:

"Public records and documents are the property of the state and not of the individual who happens, at the moment, to have them in his possession; and when they are deposited in the place designated for them by law, there they must remain, and can be removed only under authority of an act of the legislature and in the manner and for the purpose designated by law. The custodian of a public record cannot destroy it, deface it, or give it up without authority from the same source which required it to be made."

Supporting this statement is the following authority (Footnote 7):

"Molineux v. Collins, 177 NY 395, 69 NE 727, 65 LRA 104; People v. Peck, 138 NY 386, 34 NE 347, 20 LRA 381.

"A record made under the direction of a statute is in effect made by the state, and if the state has not authorized the officer to destroy it under any circumstances, not even to relieve a citizen from an unjust reflection on his character, it would be usurpation of power for him to surrender the record, or for the court to direct him to do so. And mandamus will not lie to compel a public official to surrender or destroy a record which his official duty requires him to preserve. Molineux v. Collins, 177 NY 395, 69 NE 727, 65 LRA 104."

In view of the foregoing, I am of the opinion that notwithstanding the fact that an abstract is not to be recorded as part of the platting under Chapter 409, it remains a public document and, lacking legislative sanction, may not be destroyed or otherwise disposed of.

7.30

COUNTIES AND COUNTY OFFICERS: District court bailiffs—§§337.7, 341.1, 1958 Code. The sheriff has the duty of appointing bailiffs to the district court, who shall be regarded as deputy sheriffs, the number to be determined by the district court judge, and the appointees do not require approval by the board of supervisors.

March 2, 1962

Mr. Harry Perkins
Polk County Attorney
Des Moines, Iowa

Dear Mr. Perkins:

This will acknowledge receipt of yours of the 5th, inst., in which you submit the following:

"The Sheriff of Polk County has requested an opinion as to whether or not the County Board of Supervisors has the right to approve or disapprove the employment of District Court Bailiffs.

"We will appreciate having your opinion on this matter at your early convenience."

This presents the question as to whether a bailiff is a deputy sheriff and his appointment subject to approval by the board of supervisors under the provisions of §341.1, Code of 1958. Such section provides the following:

> "341.1 Appointments. Each county auditor, treasurer, recorder, sheriff, county attorney, clerk of the district court, coroner, may, with the approval of the board of supervisors, appoint one or more deputies or assistants, respectively, not holding a county office, for whose acts he shall be responsible. The number of deputies, assistants, and clerks for each office shall be determined by the board of supervisors, and such number together with the approval of each appointment shall be by resolution made of record in the proceedings of such board."

The status of a bailiff of common law is described by the following rules of law in §22 of 14 *Am. Jur.,* Courts:

> "Officers and Attendants of Courts.—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."

and as pertinent to the exercise of the power of approval vested in the board under the provisions of §341.1, Code of 1958, it is said in the case of *Board of County Commissioners of Washoe County v. Devine,* 72 Nev. 57, 294 P. 2d 366, the following:

> "The court or judge has inherent power to secure an attendant for his court, at public expense, if the regular, orderly, statutory methods fail, or if the officials charged by the legislature arbitrarily or capriciously failed or neglected to provide the necessary attendant, whereby the efficient administration of justice is destroyed or seriously impaired, or in the case of an emergency. Merill v. Phelps, 52 Ariz. 526, 84 P. 2d 74; State ex rel. Hillis v. Sullivan, 48 Mont. 320, 137 P. 392; Leahey v. Farrell, 362 Pa. 52, 66 A. 2d 577."

Section 337.7, Code of 1958, is constructed and enacted in conformity with the foregoing rules, and provides:

> "337.7 Bailiffs—appointment—duties. The sheriff shall attend upon the district court of his county, and while it remains in session he shall be allowed the assistance of such number of bailiffs as the judge may direct. They shall be appointed by the sheriff and shall be regarded as deputy sheriffs, for whose acts the sheriff shall be responsible."

Thus, the sheriff has the duty of appointing the bailiffs, the number thereof to be determined by the judge, but such appointee is to be regarded as a deputy sheriff and for whose acts the sheriff is responsible. With the substitution of the word "judge" for "court", this statute in its present form was interpreted by this Department by opinion appearing in 1898 *O.A.G.* 82, with the conclusion that the offices of sheriff and deputy sheriff are incompatible. At page 82 of such Report is a request for an opinion, the pertinent part of which request is so stated:

> "Second. 'Whether a deputy sheriff regularly appointed and acting as such and receiving a salary so fixed as above, when he attends a regular term of court during his term of office, can, in addition to his salary, demand and collect, or be paid compensation as bailiff, whether he has been specifically designated as such or not?' "

and said opinion stated as follows:

"In Bringolf v. Polk County, 41 Iowa 454, the court held that the county must pay a reasonable compensation for their services, and it is there stated that if they perform services for which a fee is allowed by law, they, and not the sheriff, are entitled to the fee, and the amount of fees earned by them must be taken into account by the board of supervisors in fixing the amount of their compensation.

"The sheriff is required to attend court, and for such services he is allowed such salary as the board of supervisors shall determine. (Section 5062, McClain's Code) If the sheriff, attending to other duties, desires the deputy to attend court, he is not attending court as bailiff, but as a deputy sheriff. If a deputy is serving papers or performing other duties, he is not entitled to compensation as a bailiff.

"The spirit of the law and the decision of the Bringolf case leaves no doubt in my mind that one person cannot occupy the office of deputy sheriff and bailiff at one and the same time. The sheriff is not entitled to the fees earned by the bailiff, and I can conceive of no principle of law by which a person receiving a salary as deputy sheriff can also receive a salary for the same time as bailiff. If a bailiff earns fees by performing sheriff's duties and receives the same, the supreme court says: 'Such fees should be taken into account by the board of supervisors in determining the compensation of the bailiff.' "

And in 1898 *O.A.G.* at page 159, there appears an opinion in which the question at issue was this:

" 'Can a deputy sheriff, who receives no compensation from the county, draw his per diem as bailiff of the district court?' "

In answer thereto it was stated:

"Under section 341 of the code it is made the sheriff's duty to attend the district court while it is in session, and he shall be allowed the assistance of such number of bailiffs as the court may direct. The bailiffs shall be appointed by the sheriff and shall be regarded as deputy sheriffs, for whose acts the sheriff shall be responsible.

"In Bringolf v. Polk County, 41 Iowa 545, the supreme court held that if bailiffs are employed in the service of papers in which a fee is allowed by law, they, and not the sheriff are entitled to the fees which must be taken into account in fixing the amount of their compensation. This will prevent the sheriff from performing his duties by the bailiffs paid by the county, and at the same time recovering fees for the services performed by them.

"I do not think that the law contemplates that the county shall pay bailiffs for doing the sheriff's duties. It is the duty of the sheriff, by himself or deputy, to attend the session of the district court, and if the sheriff attends in person and his deputy is engaged in serving subpoenas, writs, and attending to the sheriff's duties proper, I cannot see how he can claim compensation as bailiff.

"If such a claim is made the board of supervisors would be justified in requiring him to make a report of the fees he had earned in serving processes, and taking such fees into account in determining what other, if any, compensation shall be allowed him.

"I think the office of deputy sheriff and bailiff are incompatible, and that no person can fill the two offices at the same time."

The foregoing view of §337.7 remains unchanged and undisturbed through-

out the years, either by statutory amendment or court decision, and appears conclusive of its correctness, and now bears the approval of this Department. This incompatibility is evidenced by the fact that the statute that requires the sheriff's attendance on the district court also confers upon him the power to appoint bailiffs to perform the duty of attendance upon it. Such attendance includes the established custom to preserve order in the court; to attend upon the jury; to open and close the court and to perform such other duties as may be required of him by the judge of the court, thus differentiating the special duties of the bailiff and the general duties of the sheriff.

Therefore, an appointee as bailiff by the sheriff does not require approval by the board of supervisors, even though the board retains the power to fix the reasonable compensation to which bailiffs are entitled. 1946 *O.A.G.* 180. *See also*: Official Opinion issued August 16, 1961 (regarding power of approval over appointment of county employee).

7.31

COUNTY AND COUNTY OFFICERS: Drainage rights—§§309.67, 309.75, 465.1, 465.19, 465.23, 1958 Code. County is under no obligation to repair drainage tile installed by private party across a farm-to-market road. Section 465.19 is not applicable to the county.

March 17, 1961

Mr. Carrol G. Henneberg
Lyon County Attorney
Rock Rapids, Iowa

Dear Mr. Henneberg:

Your letter of February 16, 1961, set out the following facts:

"About five years ago a land owner installed a private drainage tile on his farm which extended across a secondary road, which is now a farm-to-market road. In 1958 this road was regraded and it now appears that the tile was broken or damaged in the ditch of the road. At least water now percolates from the ditch at the spot where the tile is located indicating that the tile is broken or plugged up."

You request an opinion on the following:

1. Whether or not Lyon County, Iowa, is responsible for repairing the tile in the ditch and/or roadway to restore it to operating condition?

2. Whether the County is responsible for the repair of tile lines constructed prior to amendment of Section 465.23 of the Iowa Code by Section 1 of Chapter 233 of the 57th General Assembly?

3. Whether Section 465.19, Iowa Code of 1958, is applicable to the County if it was the County's action of regrading the road that caused the obstruction?

4. Whether Section 465.19, Iowa Code of 1958, is applicable to tile lines?

The answers to the first three questions are all in the negative. The reasons are also essentially related and interdependent.

In regrading a highway the county is performing a governmental and statutory duty as provided for by §309.67, 1958 Code. *Genkinger v. Jefferson County,* 250 Iowa 118, 93 N.W. 2d 130 (1958). While such section specifically provides that the county's officers keep all "culverts" free from obstructions, §309.75 defines "culvert" as excluding "tile crossing the road, or intakes thereto, where such tile are part of a tile line or system designed to aid sub-

surface drainage." It is clear, therefore, that maintenance of tile line is not authorized in connection with highway maintenance by §309.75.

The only other statutory reference as to the county duty as to tile lines in roads is found in §465.23, as amended by §1 of Chapter 313, Acts 58th G.A. Such code section provides for subsequent repair by the county of tile lines installed across highways at its expense. Special emphasis is placed upon the phrase "any subsequent repair thereof" in §465.23 as confining the county's duties to such tile lines as have been required therein to be constructed across highways at its cost. Please see the attached copy of opinion directed to Mr. Russell Newell, Louisa County Attorney, 1960 *O.A.G.* 99, in this regard. Since the tile line in question was not financed by the county, §465.23 is therefore not applicable.

Nor do any rights the abutting landowner may have in the highway create a legal duty as to the repair of the tile line on the part of the county. Any property interest that an abutting landowner has in maintaining tile or water lines near a county road is subject to the right of the county to improve the road for the benefit of the traveling public. 25 *Am. Jur.* 434, 442. Even if a fact question as to negligence in performing such highway work were involved, the principle of county immunity therefrom is well established. *Shirkey v. Keokuk County,* 225 Iowa 1159, 275 N.W. 76, 281 N.W. 837.

Section 465.19 does not apply to the county since under principles of statutory interpretation it is not "any person" as there used. Unless a statute clearly manifests an intent to include governmental bodies they are not included. *DeVotie v. Camerson,* 221 Iowa 354, 265 N.W. 637, 639 (1936). Since this statute imposes punitive damages and could, if applicable, affect the performance of the county's statutory duties, the foregoing rule of interpretation is well founded in public policy.

The answer to Question No. 4 is yes, for the reason that §465.19 clearly refers to §465.1 which specifically mentions "tile ... drain".

7.32

COUNTIES AND COUNTY OFFICERS: Duties of county recorder—§558.57, 1958 Code. (1) It is the duty of the county recorder to send all refiled deeds to the auditor for transfer, as they are instruments unconditionally conveying real estate. (2) Instruments transferring easements need not be sent to the auditor for transfer as they are not instruments unconditionally conveying real estate.

March 29, 1962

Mr. William C. Ball
Black Hawk County Attorney
Suite 201 First National Building
Waterloo, Iowa

Dear Mr. Ball:

Reference is herein made to yours of the 6th, inst., in which you submitted the following:

"Section 558.57 of the 1958 Code of the State of Iowa provides that the recorder shall not record any deed or any other instrument unconditionally conveying real estate until the proper entries have been made upon the transfer book in the Auditor's Office.

"Two questions have arisen in our Recorder's Office and they have been submitted to me for an opinion by our County Recorder, Mrs. Ramona Williams.

"The questions proposed in Mrs. Williams letter would seem to be these, in view of the wording of Section 558.57 of the 1958 Code of the State of Iowa is it necessary for the Recorder's Office to send a refiled deed to the Auditor's Office and collect a transfer fee for the same? And in view of that same Code Section would it be proper for the Recorder's Office to send easements to the Auditor's Office for transfer and collection of a fifty cent fee."

(1) I am of the opinion that under §558.57 of the 1958 Code it is the duty of the recorder to send a refiled deed to the auditor for transfer. Such deed is a deed unconditionally conveying real estate and is no less such deed because it is a re-recording of a previous deed. The recorder performs ministerial duties, and within that area the recorder has no authority to question the refiled deed as not unconditionally transferring real estate.

(2) In answer to your second question, I advise that clearly an instrument transferring an easement is not required to be forwarded to the auditor for transfer. Such instrument conveying an easement is not an instrument unconditionally conveying real estate, and is therefore not within the terms of §558.57 of the 1958 Code. An easement is defined as a liberty, privilege, or advantage in land without profit, existing distinct from the ownership of the soil, and it being a permanent interest in another's land, with right to enter at all times and enjoy it, it must be founded upon an agreement by writing or upon prescription, which is an adverse holding under color of title or claim of right. *Black v. Whitacre,* 206 Iowa 1084, 221 N.W. 825. And in the case of *Dawson v. McKinnon,* 226 Iowa 756, 285 N.W. 258, an easement is held to be a privilege or right, without profit, which the owner of one piece of real estate may have in real estate of another, or conversely, it is service which one tract of land owes to another tract, and land which is entitled to easement or service is called dominant tenement, and land which is burdened with servitude is called servient tenement.

7.33

COUNTIES AND COUNTY OFFICERS: Duty of clerk of court to docket bonds in probate in lien index—§§606.7, 633.43 and 633.44, 1962 Code. There is no duty upon the clerk of court to docket and enter upon the lien index bonds in probate which do not create a lien provided for under §§633.43 and 633.44.

June 22, 1962

Mr. William C. Ball
Black Hawk County Attorney
Suite 201, First National Building
Waterloo, Iowa

Dear Mr. Ball:

Reference is herein made to yours of the 7th, inst., in which you submitted the following:

"Should the Clerk of the District Court docket and enter upon the lien index against the real estate of the persons executing the same, bonds in probate filed in the said Clerk's office?"

Section 606.7, Code of 1962, requires the clerk to keep the record of the district court, consisting of the original petition filed in all proceedings, and among the books required to be kept by the clerk is "One in which an index of all liens shall be kept".

Therefore, if the bonds referred to by you do not create a lien, there is no duty imposed upon the clerk to make a record of such bonds in the lien index.

Assuming that the bonds to which you have reference are those provided for in §633.43 and §633.44, Code of 1962, each section stating the following:

> "633.43 Bond—oath. Every executor or administrator, except as herein otherwise declared, before entering on the discharge of his duties, must give a bond in such penalty as may be required by the court, to be approved by the clerk, conditioned for the faithful discharge of the duties imposed on him by law, according to the best of his ability, and take and subscribe an oath the same in substance as the condition of the bond, which oath and bond must be filed with the clerk."

> "633.44 New bond. New bonds may be required by the court or judge thereof, to be given in a new penalty and with new securities, when it is found necessary."

it is to be observed that neither of the foregoing sections specifically makes such bonds a lien upon real estate, or for that matter any other property. The bonds herein provided for are statutory bonds and cannot be added to or detracted from. See *Dallas County v. Perry National Bank*, 205 Iowa 672, 216 N.W. 119. To this fact situation, it is stated in 11 *C.J.S.*, Bonds, at page 427:

> "In the absence of a covenant or statute to that effect, a bond will not constitute a lien on the promisor's land."

citing in support thereof the case of *Mt. Vernon v. Brett*, 86 N.E. 6, 193 N.Y. 276, where action was brought to recover upon an official bond given by Brett, who was the elected receiver of taxes and assessments for the City of Mt. Vernon. The obligation part of the bond involved provided the following:

> "Know all men by these presents: That we, John H. Brett, as principal, and Andrew M. Kenlon, Patrick H. Sharkey, John J. Fay, Henry Palm and Peter Sheridan, as sureties, are held and firmly bound unto the city of Mount Vernon in the penal sum of twenty-five thousand dollars, to be paid to the said city of Mount Vernon for which payment well and truly to be made we jointly and severally bind ourselves, our and each of our heirs, executors and administrators firmly by these presents. Sealed with our seals and dated the 15th day of June in the year of our Lord one thousand eight hundred and ninety-eight. . . ."

to which the Court stated:

> "The bond is not a lien unless some statute expressly makes it one, for there is no covenant to that effect. No writing obligatory, whereby the obligor simply promises to pay a sum of money to another, is a lien on the property of the promisor in the absence of a statute or covenant expressly making it a lien, and where there is such a statute, it must be strictly complied with, in order to create the lien. An important case, decided by the Kentucky Court of Appeals, is directly analogous in principle. . . ."

In view of the foregoing, I am of the opinion that there is no duty upon the clerk of the district court to docket and enter upon the lien index bonds in probate provided under §§633.43 and 633.44, Code of 1962.

7.34

COUNTIES AND COUNTY OFFICERS: Duty of recorder to furnish abstract of chattel mortgages—§556.14, 1962 Code. Recorder is required to furnish certified copy of chattel mortgages, but not to furnish abstract of chattel mortgages under specified name.

July 30, 1962

Mr. J. T. Snyder
Buena Vista County Attorney
Storm Lake, Iowa

Dear Mr. Snyder:

Reference is here made to your letter of April 25, in which you submitted the following:

"The question is whether or not the County Recorder is required to furnish an abstract of chattel mortgages filed in her office on request from an individual, firm or corporation. The question arises due to the large volume of requests received in this County for an abstract of the chattel mortgages recorded in reference to a specified individual or individuals. These requests come from a variety of individuals and companies extending credit. The County Recorder of Buena Vista County has previously been furnishing these abstracts upon request without charge, but the volume of the said requests are now taking time from other statutory duties.

"My research indicates that under Section 556.14, the Recorder must furnish a certified copy of a chattel mortgage upon request. I do not find specific authority requiring the Recorder to abstract the chattels under a specified name, however."

The statutory duties of the county recorder do not include the duty to furnish an abstract of the chattel mortgages while in her office, with or without charge. The applicable rule is stated in the case of *Polk County v. Parker*, 178 Iowa 936, with respect to a county or city assessor, wherein it was stated as follows:

"It will be remembered that defendant was a county or city official, and not a mere servant, who was required to give his entire time to his master. As an official, he had certain specific duties to perform, and none other could be required of him, save as the legislature might direct or authorize. * * *

"The rules applicable here differ a little from those obtaining where the relation is purely that of master and servant. An official is entitled to his salary as a matter of law, and the relation does not grow out of contract. His duties are fixed by statute, and when these are performed, he is not required to do more."

The recorder is required under §556.14 to furnish the certified copy of the chattel mortgages as therein provided. However, no statute imposes upon the recorder the duty to furnish an abstract of chattel mortgages under a specified name.

7.35

COUNTIES AND COUNTY OFFICERS: Federal levy on salaries—§642.2, 1958 Code. The levy by the Internal Revenue Service, U. S. Treasury, upon the salary of a county employee or official is authorized and permissible and there is no defense to the levy according to statute, a political corporation shall not be garnished.

September 14, 1961

Mr. William C. Ball
Black Hawk County Attorney
Suite 201 First National Building
Waterloo, Iowa

Dear Mr. Ball:

This will acknowledge receipt of yours of the 5th inst., in which you submitted the following:

"The Auditor of Black Hawk County on August 24, 1961 was served with a Notice of Levy by the United States Treasury Department, Internal Revenue Service. This Notice of Levy is in the form of a demand which is set out as follows:

'You are further notified that demand has been made upon the taxpayer for the amount set forth herein, and that such amount is still due, owing, and unpaid from this taxpayer, and that the lien provided for by Section 6321, Internal Revenue Code of 1954, now exists upon all property or rights to property belonging to the aforesaid taxpayer. Accordingly, you are further notified that all property, rights to property, moneys, credits, and bank deposits now in your possession and belonging to this taxpayer (or with respect to which you are obligated) and all sums of money or other obligations owing from you to this taxpayer are hereby levied upon and seized for satisfaction of the aforesaid tax, together with all additions provided by law, and demand is hereby made upon you for the amount necessary to satisfy the liability set forth herein, or for such lesser sum as you may be indebted to him, to be applied as a payment on his tax liability.'

"My question is, 'May the Auditor of Black Hawk County make a check payable to the United States Treasury Department, Internal Revenue Service, for the moneys claimed due under said Notice of Levy in view of Section 642.2 of the 1958 Code of the State of Iowa?' "

Assuming that the property upon which the levy is made consists of the salary of a county employee or official, I am of the opinion that, on the authority of the case of *Sims v. United States,* 359 U.S. 108, 79 S. Ct. Rep. 641, this is a legal levy, in effect substituting the United States as the owner of the fund that has been levied upon. The conclusion of the case is stated in headnote number 4 of the case, reading as follows:

"Under statute providing that any person in possession of property or rights of property subject to levy upon which a levy has been made shall surrender such property rights and upon failure to surrender shall be subject in his own person and estate, a state is a 'person' and a levy on accrued salaries of employees of a state is permissible. 26 U.S.C.A. (I.R.C. 1954) §6332".

While in fact that case deals with the salary of a state employee, it is clear that it is likewise applicable to the salary of a county employee. The fact that §642.2, 1958 Code, providing as follows:

"A municipal or political corporation shall not be garnished.",

immunizes such corporations from garnishment does not provide a defense to this levy. This conclusion is confirmed by the following federal authorities:

U. S. v. Hoper, C.A. 111. 1957, 242 F. 2d 468, 471:

"... but exemptions provided by State law are ineffective against the statutory lien of the United States for federal taxes."

U. S. v. Heasley, D.C.N.D. 1959, 170 F. Supp. 738, 742:

"The Congress of the United States created the federal tax lien, and such liens cannot be affected by state legislatures without the consent of the Congress ... The several states cannot carve out homestead exemptions from the effect of the federal tax lien."

In re Washington Square Slum Clearance, Borough of Manhattan, City of New York, 1959, 5 N.Y. 2d 300, 184 N. Y. Supp. 2d 585, 157 N. E. 2d 587, 591:

"As a generality, it may be said that the right of the Government to levy and collect taxes uniformly throughout the land may not be defeated by the State Court rule or regulation."

and at 592:

"A government tax lien, however, is not always paramount. By Federal statute, it 'shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary.' "

By reason of the foregoing, therefore, your auditor may make the check payable to the Internal Revenue Service, United States Treasury Department, as payee.

7.36

COUNTIES AND COUNTY OFFICERS: Hospital accounts, collection— §347.17, 1958 Code. Section 347.17 imposes the duty on the county board of hospital trustees to collect all accounts for hospital services, and if necessary, to institute legal proceedings to enforce collection of the accounts. Compromise of accounts, in the sound discretion of said board, is in order.

May 23, 1961

Mr. David Harris
Greene County Attorney
Jefferson, Iowa

Dear Mr. Harris:

This will acknowledge receipt of your letter of May 8, 1961, in which you state the following:

"I would appreciate your opinion and comment on the following situation and question. This question has to do with the authority of a county board of hospital trustees under Section 347.17 of the Code. The nature of the question has to do with the authority of the board to compromise a hospital account. We have a situation which I presume is not too unusual wherein a young resident of this county has been compelled to incur a very sizable hospital bill for services performed for his wife. The young man is, of course, not able to pay the account at this time, although the board is not in a position to say that the bill will be forever uncollectable. It happens that the bill is so sizable and the present current circumstances of the resident so pressed that a good many of his neighbors and friends have taken up collections with which they hope to compromise the bill for a great deal less than the full amount. The question is whether, under these circumstances, the board must exhaust their remedies in an attempt to collect before the bill can be compromised. In other words, what steps are necessary, if any, for the board to take before they can compromise a bill under circumstances such as these. I assume that the board does have authority to compromise."

It seems to me that sound discretion is vested in the county board of hospital trustees insofar as collection of its accounts is concerned. It is true that the language of the statute imposes, by the use of the word "shall", a mandatory duty to pursue delinquent accounts to action and judgment. However, it is quite apparent that treating the statute as mandatory would defeat its very purpose. To seek collection of all its accounts, if delinquent, by action and judgment, would deprive the hospital trustees of the power to secure revenue that under the strict mandatory construction of the statute would be unavailable. We think the legislature had no such intent. The mandatory "shall" in the statute in prescribing the duty of the board in making its collection is therefore interpreted to mean "may." Compromise of accounts, in the sound discretion of the board, is in order.

7.37

COUNTIES AND COUNTY OFFICERS: Hospital observation, dog bite— The board of supervisors is without authority, express or implied, to enact an ordinance providing at the owner's expense for 10-day hospital observation of a dog which has bitten a person within their county.

June 30, 1961

Mr. Peter J. Peters
Pottawattamie County Attorney
Council Bluffs, Iowa

Dear Mr. Peters:

This will acknowledge receipt of yours of June 21, 1961, in which you submitted the following:

> "The Board of Supervisors of my county have requested that I prepare for them an ordinance which would provide for the Sheriff to have authority, whenever a dog shall bite a person within the county, to remove the same to a Veterinary Hospital for 10 days for observation and costs thereof to be charged to the owner of the dog.
>
> "I am unable to find any statutory authority for the Board of Supervisors to pass an ordinance of any kind. However it would appear under Section 332.3, Code of Iowa, 1958, that perhaps the Board would have authority to make certain rules not inconsistent with law.
>
> "At your convenience would you please advise whether or not such a rule could be promulgated legally by the Board of Supervisors."

In reply thereto I would advise that I find no authority express or implied in the board of supervisors to enact an ordinance of the character described in your letter. The board of supervisors is limited in its power by those expressly conferred or necessarily implied from the express powers.

7.38

COUNTIES AND COUNTY OFFICERS: Insane liens—§§230.17, 230.27, 1958 Code. It is the duty of the board of supervisors to effect collection of insane liens, by compromise if necessary, there being no statutory authority to transfer said lien from one property to another.

April 24, 1961

Mr. John W. Shafer
Allamakee County Attorney
Waukon, Iowa

Dear Mr. Shafer:

We beg to reply to your request for opinion, reading as follows:

"I have come into a situation wherein an institutional lien was filed against certain farm property for care of the owners wife under Section 230.25.

"Recently the farm was sold and the same party purchased a different and larger farm in order to extend his farming operation and better his financial position. Under Section 230.27 it appears to be the duty of the Board of Supervisors to order the County Attorney to collect such liens. However, Section 230.29 would seem to give some discretion to the Board of Supervisors in making such collection or compromising such a lien.

"Does the Board of Supervisors have discretion to transfer such a lien to the newly purchased property in such a case where the purchased farm was taken in an effort to better the situation of the owner as to his farming operation, or may the Board order collection at the time of sale and refuse such transfer in their discretion."

The pertinent statutes governing are as follows:

"Board and county attorney to collect. It shall be the duty of the board of supervisors to collect said claims and direct the county attorney to proceed with the collection of said claims as a part of the duties of his office."

It appears from your letter that the money is available to satisfy the lien from the proceeds of the sale of the debtor's farm.

The statute is plain and unambiguous, and sets forth the mandatory duty of the board of supervisors to collect the claim with the assistance of the county attorney if necessary.

The board may enter into a compromise settlement, when such compromise is deemed to be for the best interests of the county. (§230.17, Code 1958)

I find no statutory provisions authorizing the transfer of the statutory lien from one parcel of land to another. (See 1954 *O.A.G.* 107.) As bearing on this question, see also 1950 *O.A.G.* 135, and *Plymouth County v. Koehler,* 221 Iowa 1022.

Therefore, in our opinion, under the facts stated, it is the duty of the board to collect said claim in full or by compromise settlement, and there is no statutory authority whereby the board may transfer said lien.

7.39

COUNTIES AND COUNTY OFFICERS: Insuring of prison inmates— §§356.5(2), 517A.1, 1958 Code. County board of supervisors cannot insure prisoners for injuries that might be incurred on work project during period of confinement.

October 16, 1961

Mr. Edward F. Samore
Woodbury County Attorney
204 Court House
Sioux City, Iowa

Dear Mr. Samore:

This is to acknowledge receipt of your recent letter in which you set forth the following:

"Your opinion is respectfully requested concerning the feasibility of insurance coverage, contracted for by the County, to cover the prisoners, who, during the term of imprisonment, are assigned tasks or work projects. The problem is where a prisoner may be injured in the course of such employment, we are confronted with a responsibility of the County under such conditions as to whether or not the County can cover such a contingency by entering into an insurance contract."

It is the opinion of this Department that a county cannot insure prisoners against injuries which might result from work projects to which those prisoners are assigned during the course of their confinement. These prisoners during the term of their confinement would be considered wards of the State but in no event would they be considered employees bringing them within the provisions of §517A.1. We find no other statutory authority for the purchase of insurance covering the risk.

As you are aware, however, the county is obligated to furnish the necessary medical aid that might be needed by prisoners. §356.5(2) 1958 Code. Also, in this regard see 1936 *O.A.G.* 411 and 1922 *O.A.G.* 334.

7.40

COUNTIES AND COUNTY OFFICERS: Joint expenses by cities and counties—§750.6, 1962 Code. A county and city may not make joint purchases or embark upon joint ventures unless they are, expressly or by necessary implication, given the power to do so by the legislature.

August 17, 1962

Mr. William C. Ball
Black Hawk County Attorney
Suite 201, First Nat'l. Bank Bldg.
Waterloo, Iowa

Dear Mr. Ball:

This is in response to your opinion request in which you state:

"On a number of occasions Black Hawk County has been asked to participate in the purchase of special equipment used in the investigation of violations of state laws. These requests invariably come from the police departments of the various cities within our County. Such equipment would be illustrated by cameras and projectors for use in prosecution of violations of state laws, such as Section 321.281, Operating a Motor Vehicle While Intoxicated.

"Further, Black Hawk County has been asked to stand the costs of procurement and testing of blood and urine specimens in the same type cases mentioned above.

"I have been unable to find any statutory provision which would provide a line of delineation between expenses which should be properly borne by the county and expenses which should be properly borne by the various city police departments in the investigation and prosecution of criminal cases.

"Will it be possible to issue an opinion laying down certain guide lines for use in this area?"

As stated by the Iowa Court in *In Re Estate of Frentress,* 249 Iowa 783, 786, 89 N.W. 2d 367 (1958):

"The law is well settled that a county is a creature of statute, a quasi

corporation, and its officials have only such powers as are expressly conferred upon it by statute, or necessarily implied from the powers so conferred."

Similarly, in *Stoner-McCray System v. Des Moines,* 247 Iowa 1313, 1322, 78 N.W. 2d 843 (1956), the Court stated:

"[M]unicipalities can exercise only such powers as are expressly granted, or such implied ones as are necessary to make available the powers expressly conferred. Powers granted by the legislature must be granted in express terms, and *implied powers must be more than simply convenient —they must be indispensable to the exercise or express powers.*" (Emphasis supplied)

From this it can readily be seen that a county and city may not make joint purchases or embark upon joint ventures unless they are expressly or by necessary implication given the power to do so. The legislature has, for example, granted them such power in the leasing, owning and maintaining of radio, electronic and telecommunications systems. §750.6, Iowa Code, 1962. However, no statute either expressly or by necessary implication authorizes a city and county to jointly purchase or share the expenses of those things specifically enumerated in the opinion request.

7.41

COUNTIES AND COUNTY OFFICERS: Lease of building by fair board— §§174.2, 285.10, 504.2, 1958 Code. A county fair board may lease a fair building for the non-fair purpose of storing schoolbusses. The local school board has the power to enter into such a lease if limited in duration to the length of the term of the school board of directors.

March 27, 1962

Mr. G. A. Cady
Franklin County Attorney
Hampton, Iowa

Dear Mr. Cady:

This is an acknowledgement of your letter under date of October 13, 1961, wherein you submit the following:

"The Franklin County Fair Board is desirous of erecting a rather large building on the present fair grounds in Franklin County for the purpose of furthering the County Fair. The building would be suitable for, and the Hampton Community School District is interested in, leasing the building for the purpose of storing the school busses. The County Fair Board and the Hampton Community School District propose to enter into a lease for a period of ten years, whereby the Fair Board would lease to the School District the right to house their school busses in said building for said period of time.

"I would like to have a ruling from your office on the following questions:

1. Can the Franklin County Fair Board enter into a lease for ten years, leasing to the Hampton Community School District said building for garage purposes?

2. Can the Hampton Community School District enter into a lease for said period of time leasing the building for said purpose?"

The powers of fair societies are set forth in Chapter 174 of the 1958 Code

of Iowa, and §174.2 of this chapter provides in pertinent part:

> "In addition to the powers granted herein, the society shall possess the powers of a corporation not for pecuniary profit under the laws of this state and those powers enumerated in its articles of incorporation, such powers to be exercised before and after the holding of such fairs . . ."

With respect to the powers of "a corporation not for pecuniary profit", §504.2 provides in pertinence to this problem:

> ". . . it may have a corporate seal, alterable at its pleasure, and may take by gift, purchase, devise or bequest real and personal property appropriate to its creation, and may make bylaws. It may make contracts, borrow money and transfer property, possessing the same powers in such respects as natural persons . . ."

The above language in §174.2 was added to that section by an amendment of the 54th G.A. Even prior to this amendment, §174.2 was interpreted by the Iowa Supreme Court, in *State ex rel. Don McElhinney v. All-Iowa Agricultural Assn.*, 242 Iowa 860 (1951). The Iowa Court upheld the right of the fair society to lease its amphitheater and race track for a non-fair purpose, and in support thereof stated on page 869:

> "It seems unlikely to us the legislature intended section 174.2 to limit the powers of every society receiving state aid to an annual holding of a fair. A corporation owning property of such value as defendants, under a large year around expense for management, care and maintenance, should not be confined to the annual holding of a fair unless the legislative intent so to do is stated more clearly than in Section 174.2."

Your first question is therefore answered in the affirmative.

As to your second query, your attention is invited to §285.10, 1958 Code of Iowa, which in part provides:

> "The powers and duties of the local school boards shall be to:
>
> 1. Provide transportation for each pupil who attends public school, and who is entitled to transportation under the laws of this state.
>
> 2. * * *
>
> 3. *Purchase or lease* busses and *other transportation facilities,* and maintain same." (Emphasis supplied)

By virtue of the express language of §285.10, it is an obligation of the local school boards to provide transportation. In order to execute this power, the legislature saw fit to expressly vest the local school boards with the power to purchase or lease busses and other *transportation facilities* (emphasis supplied). Clearly, the building in question would constitute a transportation facility and, by virtue of subsection (3) of §285.10, the local school board has the power to purchase or lease the same.

However, by virtue of long administrative interpretation the board of directors of a school district cannot enter into a lease for transportation facilities which would extend beyond the length of the term of the board of directors. This interpretation by the State Department of Public Instruction should be given great weight, as it has been in effect for a considerable length of time. *School Dist. of Soldier Twp., Crawford County v. Moeller,* 1956, 247 Iowa 239, 73 N.W. 2d 43.

Thus, in answer to your second question, while the school board has the authority to execute a lease, the term of the lease is limited to the length of the term of the board of directors.

7.42

COUNTIES AND COUNTY OFFICERS: Legal counsel for conservation board—§§111A.7, 336.2, 1958 Code. County attorney may be reimbursed for legal work done by him for county conservation board in excess of that which he has a statutory duty to perform.

July 25, 1961

Mr. Richard H. Wright
Davis County Attorney
Bloomfield, Iowa

Dear Mr. Wright:

This is to acknowledge receipt of your letter of May 5, 1961, in which you state the following:

"Last fall, the Davis County Conservation Board requested my assistance in helping them through a difficult matter.

"In general, the Conservation Board had made an improvement in a park in the town of Drakesville, Iowa, and then encountered difficulties in having the matter approved by the State Conservation Commission because of certain legal obstacles. The Conservation Board asked me to attend a meeting at which meeting they authorized me to proceed with the necessary legal work to enable them to pay for the improvements and complete the project.

"The nature of the legal work involved the drafting, redrafting and execution of leases from the City of Drakesville to the County Conservation Board. Preparation of notices for the city to make the lease valid; travel expenses which were paid out of my pocket; and in addition several long distance calls, all of which were paid by me.

"Upon completion of the work, I submitted a statement for services rendered which included the actual out-of-pocket expenses and a fee for legal services.

"The Board would now like the opinion of the Attorney General as to whether or not they are authorized to pay for these services and expenses which were incurred."

The duties of the county attorney are defined by Chapter 336, 1958 Code. In particular, your attention is directed to Iowa Code §336.2(1), which requires the county attorney to "perform other duties enjoined upon him by law," as well as the powers specifically set out in Chapter 336. This requirement would, in our opinion, include those duties specifically imposed upon him under Chapter 111A dealing with county conservation boards.

Section 111A.7 provides:

"*Joint operations.* Any county conservation board may cooperate with the federal government or the state government or any department or agency thereof to carry out the purposes and provisions of this chapter. Any county conservation board may join with any other county board or county boards to carry out the provisions of this chapter, and to that end may enter into agreement with each other and may do any and all things necessary or convenient to aid and to cooperate in carrying out the provisions of the chapter. * * * The state conservation commission, county engineer, county agricultural agent, and other county officials shall render such assistance as shall not interfere with their regular employment. * * * "

Thus, under §111A.7, the county conservation board can require the county attorney to do no more than he is specifically required to do by §336.2. While §336.2(7) requires the county attorney to give advice or his opinion in writing without compensation, we find no requirement that the county attorney draft leases or pay travel expenses or phone tolls out of his own pocket.

Therefore, in our opinion, you are entitled to compensation from the county conservation board for the work mentioned in your letter. See, in accord, 1940 *O.A.G.* 516 and 1940 *O.A.G.* 112. In addition, it is not necessary that the county board of supervisors approve the payment of said compensation. See 1958 *O.A.G.* 51, #5.8.

7.43

COUNTIES AND COUNTY OFFICERS: Legal settlement—§252.16, 1958 Code. One receiving old age assistance does not come within the proscription of subsection 3 of §252.16 as being supported by public funds such as to prevent acquiring a legal settlement.

April 24, 1961

Mr. Walter L. Saur
Fayette County Attorney
Oelwein, Iowa

Dear Mr. Saur:

We have your favor of April 12, 1961, in which you state:

"Our board of supervisors has a question regarding settlement and its acquisition as set forth by the amendments of the 58th General Assembly to Chapter 252.16 of the 1958 Code of Iowa. Subsection 252.16(2) points out that any person may acquire settlement in a county of this state by residing therein for a period of one year. However, the above section is tempered by subsection 252.16(3) which states that any person 'being supported by public funds shall not acquire settlement' unless he acquired such settlement before being supported by public funds.

"Therefore, is not one who is receiving old age assistance (or any other form of public support) ineligible to acquire settlement if they move to a new county while receiving said assistance? I am informed that some counties where the overseer of the poor and the social welfare board are intergraded, say, or use the standard, that settlement may be obtained when the party is receiving old age assistance, if said party is not in a nursing home. In our present case the lady has moved in from another county, lives in a private home but does receive old age assistance."

In the case of *Warren County v. Decatur County,* 232 Iowa 613, the Court held:

"But we hold that, while old age assistance is an additional help to that provided by the poor laws, the statutes affording this assistance are not to be construed in the light of the laws with reference to the poor which have been in force for many years."

Following this case, which was decided in 1942, the Attorney General issued two opinions, the first found in 1948 *O.A.G.* 241, and the other in 1956 *O.A.G.* 103, which hold that one receiving old age assistance under the provisions of Chapter 249 of the Code is not being supported by public funds within the meaning of subsection 3 of §252.16 relating to legal settlement so as to make inoperative subsection 2 of said section.

Therefore, on the authority of the Warren County case, *supra,* one receiving old age assistance does not come within the proscription of subsection 3 of §252.16 as being supported by public funds such as to prevent acquiring a legal settlement.

7.44

COUNTIES AND COUNTY OFFICERS: Medical examiner—Ch. 258, §1(6), Acts 58th G.A. (§339.6, 1962 Code). The medical examiner of a county other than the county in which a death occurred performing a post mortem in the county of his residence is entitled to compensation from the county in which the death occurred for the performance of such post mortem.

January 18,1962

Mr. John F. Boeye
Montgomery County Attorney
Red Oak, Iowa

Dear Mr. Boeye:

This will acknowledge receipt of yours of the 28th, ult., in which you submitted the following:

"I enclose a letter I received from Dr. Oscar Alden, who is the Montgomery County Examiner.

"I would appreciate your comments on the doctor's letter and whether or not you believe Mills County is obligated to pay the Montgomery County Medical Examiner for a post mortem examination performed at the request of the Mills County Medical Examiner.",

in connection with which is the letter of Dr. Alden, Montgomery County Medical Examiner, stating the following:

"On August 16, 1961, I was called to the scene of an accident on the Montgomery-Mills County line. Larry Duane Viner, age 11, was driving a tractor on the road, power steering broke and the tractor went into the ditch on the Mills County side of the road, and Larry Viner was killed. There were no marks, bruises, cuts or lacerations to identify, in any way, the cause of death. The body was brought to the Nelson Funeral Home, Red Oak, Iowa, and due to the accident occurring on the Mills County side of the road, I called Doctor Ward DeYoung and informed him of my investigation to date, and he in turn asked me to complete the investigation. I told him I would have to do a post mortem to determine cause of death. I completed the post mortem and found death was due to a broken neck, region c-5.

"I sent the necessary forms including a statement, to Doctor DeYoung, for services rendered, for him to file with the Mills County Board. They paid for mileage and $15.00 for examination, but refused to pay $50.00 for post mortem examination. * * *"

Upon the foregoing statement of facts, I am of the opinion, based upon the provisions of Chapter 258, §1(6), Acts 58th G.A., as follows:

"If, in the opinion of the county medical examiner, an autopsy examination is advisable and in the public interest, such autopsy shall be performed. The autopsy may be made by the county medical examiner or by such competent pathologist as he may designate.",

that the charge of Dr. Alden for post mortem services is the liability of Mills County. According to the foregoing, the county medical examiner may per-

form a post mortem, or it may be performed by such competent pathologist as he may designate. This he did. The statute neither expressly nor impliedly limits the exercise of this power of appointment to the county of the medical examiner who appoints the pathologist, the only limitation being that his appointee be a competent one. The fact that the appointee is the medical examiner of another county does not affect the terms of the statute. It is a fair inference that Dr. Alden was appointed, not because he was the official medical examiner, but because he was a competent pathologist.

In my opinion, Mills County is liable for the payment of the services of Dr. Alden.

7.45

COUNTIES AND COUNTY OFFICERS: Medical examiner—Ch. 258, Acts 58th G.A. (§§339.2, 339.5, 1962 Code). The expenses for making an investigation under said chapter must be borne by the county in which the death occurs.

April 24, 1961

Mr. Walter L. Saur
Fayette County Attorney
22 East Charles
Oelwein, Iowa

Dear Mr. Saur:

This is to acknowledge receipt of your letter of March 23, in which you state the following:

> "At a recent meeting of medical examiners with the State Department of Health in Des Moines, it was decided that those persons injured in accidents in one county and immediately transported to a hospital in another county would be attended by the medical examiner in the county in which the hospital was located. Therefore, the question arises as to whether or not the county in which the accident occurred is responsible for the medical examiner's fee even though the examination, by pre arrangement between the medical examiners, took place in a different county."

Chapter 258, Acts 58th G.A., (§§339.2, 339.5, 1962 Code), establishes the office of the county medical examiner in lieu of the county coroner. An examination of §1 of said Act discloses that the primary purpose of the medical examiner is to take charge of dead bodies and make inquiries as to the manner of death, reducing such findings to writing. The medical examiner is never contacted until there has been a death within the county, and is under no duty to investigate an accident unless such investigation is within the course of ascertaining the cause of death.

Paragraph 2 of §1, Chapter 258, provides:

> "Each county medical examiner shall be licensed in Iowa as a doctor of medicine and surgery, or licensed in Iowa as an osteopathic physician or osteopathic physician and surgeon as defined by law. He shall be appointed by the board of supervisors from lists of two or more names submitted by the component medical society and the osteopathic society of the county in which he is a resident. If no list of names is submitted by either society, the board of supervisors shall appoint a county medical examiner from the licensed doctors of medicine, or licensed osteopathic physicians or osteopathic physicians and surgeons of the county. If no qualified appointee can be found in the county, the board of supervisors shall appoint the medical examiner from another county."

Paragraph 5 of §1, Chapter 258, in pertinent part, provides:

"For each such preliminary investigation, including the making of the required reports, the county medical examiner shall receive a fee of fifteen dollars ($15.00), plus his actual expenses, to be paid by the county for which he is appointed."

The medical examiners in no way can contract away the specific duty imposed upon them by statute. The only time a county might be liable to another county for the expense of the medical examiner is where one county finds no qualified appointee to perform such duties within the county.

Therefore, we are of the opinion that, because of the fact that the county medical examiner cannot be called until there has been a death, the examiner of the county wherein the death occurred is the proper person to make the investigation, and such expense would be borne by said county.

7.46

COUNTIES AND COUNTY OFFICERS: Medical examiner, confidentiality of records—Ch. 258, 58 G. A. (Ch. 339, 1962 Code). Reports and records compiled and filed by the county medical examiner are public records and may not be treated as confidential or privileged communications.

October 27, 1961

Edmund G. Zimmerer, M. D., M. P. H.
Commissioner of Public Health
LOCAL

Dear Dr. Zimmerer:

We have your favor of October 2, 1961, reading as follows:

"A question has arisen as to the confidentiality of the findings and opinion of the medical examiners. The law says that he must file a report with the county attorney and the State Department of Public Safety.

"May he, (the medical examiner), give the attending physician his opinion of the cause of death?

"How much information may be given surviving members of the family? To the legal representative of the surviving family, and to the sheriff or other peace officers at the scene of the accident?

"May he reveal information discovered at autopsy?

"Is there a confidential relationship such as exists between doctor and patient?"

Chapter 258, Laws 58th G.A., as amended, requires that the county medical examiner shall take charge of the dead body, make inquiry regarding the cause and manner of death, reduce his findings to writing, and deliver the original to the county attorney, retaining one copy for his own use and forwarding one copy to the criminal investigation division of the State Department of Public Safety.

If necessary, an autopsy may be held and the findings *filed* with the county medical examiner and in the office of the county attorney, and pertinent information shall be furnished the appropriate state department or agency.

The law further provides that the reports, records and reports of autopsies

shall be received as evidence in any court or other proceedings, and the person preparing a report or record may be subpoenaed as a witness.

In addition thereto, §622.43 provides that certified copies of such records, entries or papers shall be evidence in all cases of equal credibility with the original record or papers filed. Section 622.46 states that every officer having the custody of a public record or writing shall furnish any person, upon demand and payment of the legal fees therefor, a certified copy thereof.

It appears to be universally held that a "public record" is a written memorial made by a public officer authorized by law to perform that function, and intended to serve as evidence of something written, said or done. (See *Words and Phrases,* Vol. 35, Public Records, pp. 315 et, seq., and pocket part).

In view of the statutory provisions referred to and the general authorities cited, it is quite clear that the reports and records compiled and filed by the county medical examiner are "public records." As such, they are subject to inspection by anyone having an interest therein; particularly so, in view of the fact that I find no provision in the law, Chapter 258, Acts 58th G.A., which states that such records shall be maintained as "confidential" records.

The common-law doctrine with reference thereto is stated in 45 *Am. Jur.* 427, § 17, in the following language:

> "... Every person is entitled to the inspection, either personally or by his agent, of public records, including legislative, executive and judicial records, provided he has an interest therein which is such as would enable him to maintain or defend an action for which the document or record sought can furnish evidence or necessary information. ...
>
> "In this country, the person asking inspection must have an interest in record or paper of which inspection is sought and the inspection must be for a legitimate purpose, but interest as a citizen and taxpayer is sufficient in some instances. ..."

Therefore, it is our opinion that any information that would be embodied in the reports or records of the county medical examiner can be lawfully revealed to an interested party or parties as enumerated in your letter.

As to that portion of your letter with reference to a confidential relationship (privileged communications), we quote from the case of *State v. Flory,* 198 Iowa, at page 79, which we believe fully answers your question:

> "The rule which protects privileged communications has no application to public records. The requirements of the law that a public record be kept could not be complied with if the privilege were extended thereto, and statutes authorizing the introduction of certified copies thereof in evidence would be a nullity. Upon this question, see *Bozicevich v. Kenilworth Merc. Co.,* 58 Utah 458 (17 A. L. R. 346, and note appended thereto): 5 Wigmore on Evidence (2d Ed.), Section 2385-a."

7.47

COUNTIES AND COUNTY OFFICERS: Medical examiners, duties and responsibilities—Ch. 258, 58th G. A. (1) Medical examiners have no power to compel individuals to answer inquiries. (2) Whether or not there is liability in giving out information to news agencies is a question of fact determinable only by a trial court. (3) There is no duty requiring medical examiners to fill out "Proofs of Death" involving claims between beneficiaries and insurors.

August 1, 1962

Mr. Harry Perkins
Polk County Attorney
Room 406, Courthouse
Des Moines, Iowa

Attention: Mr. C. L. Becker, Assistant County Attorney

Dear Sir:

Reference is made to your opinion request which reads:

"We would appreciate an opinion on the following questions:

"1. If a person refuses to answer inquiries made by the County Medical Examiner, what proceeding should be followed in order to obtain answers to such inquiries?

"2. (a) To what extent may the medical examiner become liable in giving out information to news agencies?

(b) Would it be proper to inform news agencies to wait until a case has been completed and becomes a public record?

"3. The County Examiner is frequently requested to fill out 'Proof of Death' forms. Section 141.3 of the 1958 Code of Iowa specifically designates the persons who have the responsibility of executing a death certificate, namely, the funeral director or embalmer, or other person in charge of the funeral or disposition of the body. Question: Would it be proper for the County Medical Examiner to refuse to fill out 'Proof of Death' forms?"

It is the duty of the county medical examiner, upon receipt of notice of a death pursuant to the provisions of Chapter 258, Acts 58th G.A., to:

"... take charge of the dead body, *make inquiries* regarding the cause and manner of death, reduce his findings to writing on forms provided by the Commissioner of Public Health for such purpose and deliver the original of such form to the County Attorney, retaining one copy for his own use, and forwarding another copy to the Criminal Investigation Division of the State Department of Public Safety." (§1(5), Chapter 258, Laws 58th G.A.) (Emphasis ours)

The medical examiner is authorized to make inquiries. He is invested with no inquisitorial powers, such as were previously held by coroners under the provisions of Chapter 339, Code 1958, now repealed. It is fundamental that no one can be compelled to give testimony against himself involving him in criminality. (See *State v. Meyer,* 181 Iowa 449). Nor does the medical examiner have any authority to subpoena persons to testify under oath, as was previously held by coroners. He can only make inquiries and secure such information as may be voluntarily given, record the same in his findings, and distribute the same as provided in the statute above set forth.

Referring to question 2(a), it is assumed that the threatened law suits refer to actions in the nature of libel and slander, and as to whether or not there may be liability in giving out information would depend upon the peculiar facts and circumstances arising in each case, and is a factual matter solely within the province of a trial court or jury. Again, depending upon the facts involved in each case, there may be a good defense by way of qualified or absolute privilege arising from communications made by a public officer in the discharge of his official duties.

In answer to question 2(b), it is within the personal discretion of the medical examiner to withhold information to news agencies until after the investigation is completed and becomes a public record. After the report has been filed, they become public records. See opinion dated October 27, 1961, copy of which is attached hereto.

Referring to your third question:

> "The funeral director or embalmer or other person in charge of the funeral or disposition of the body of every person dying in this state shall be responsible for the proper execution of a death certificate, ... *and filed with the local registrar* of the registration district in which the death occurred or the body was found." (§141.3, Code 1958) (Emphasis ours)

However, §141.5 of the Code now provides that:

> "... The death and last sickness particulars shall be furnished by the attending physician, *or in the absence of such person,* or if there be no such person, by the county medical examiner. ..."

and §141.6 provides:

> "In case of any death occurring without medical attendance, the funeral director or embalmer, or person acting as such, shall promptly report the case to the county medical examiner. *In such cases the county medical examiner shall furnish such information as may be required by the state registrar in order to classify the death.*" (Emphasis ours)

It may be seen that the medical examiner is required to execute death certificates in certain situations, and file same with the local registrar. This is probably the reason for the requests to the medical examiner to fill out "Proof of Death" forms.

Section 622.46 of the Code requires:

> "Every officer having the custody of a *public record or writing* shall furnish any person, upon demand and payment of the legal fees therefor, a certified copy thereof." (Emphasis ours)

However, from the sample forms exhibited which appear to be claim forms by beneficiaries to insurance companies, being a private individual matter between said parties, there is no duty prescribed by statute whereby such forms must be completed at the request of said parties by the county medical examiner. If certified copies of death certificates are required, they can be obtained from the local registrar upon payment of the legal fee as provided by the above quoted statutes.

7.48

COUNTIES AND COUNTY OFFICERS: CITIES AND TOWNS: Official matters, publication.—§618.3, 1958 Code. A newspaper that has not been mailed through the post office of current entry for more than two years does not meet the requirements of said section for the publication in a newspaper of official matters.

July 27, 1961

Mr. S. E. Tennant
Superintendent of Printing
LOCAL

Dear Mr. Tennant:

This will acknowledge receipt of yours of the 12th inst. in which you ad-

vise that there is disagreement with your conclusion that the Coralville News is a newspaper for the publication of official notices, records of proceedings, etc., required to be published, and my opinion of this situation is requested.

The facts upon which an opinion is asked are set forth in a letter to you dated July 5, 1961 from J. C. Oehler, City Attorney for the City of Coralville, which follows:

"It is respectfully requested that the question as to whether or not the Coralville News is qualified to be the official newspaper of the City of Coralville, Iowa, be submitted through your office to the Attorney General for an official opinion. In connection with this request, the following is submitted.

"1. Section 618.3, 1958 Code of Iowa. 'Newspaper' defined. For the purpose of establishing and giving assured circulation to all notices and/or reports of proceedings required by statute to be published within the state, where newspapers are required to be used, newspapers of general circulation that have been established, published regularly and mailed through the post office of current entry for more than two years and which have had for more than two years a bona fide paid circulation recognized by the postal laws of the United States shall be designated for the publication of notices and/or reports of proceedings as required by law.

"2. The City Council of Coralville has not recognized the Coralville News as a newspaper as defined in the above section. The Council has used the Iowa City Press-Citizen, a daily newspaper which has general circulation in Coralville, for the publication of the minutes of its meetings and other matters which may be published in a newspaper of general circulation. Other matters which may be posted when there is no newspaper published in the city have been posted.

"3. The Coralville News is a weekly newspaper which is published at Solon, Johnson County, Iowa, every Tuesday and is delivered by mail to subscribers in Coralville.

"4. The records of the Solon Post Office show that The Coralville News was first entered as second class mail at Solon, Iowa, on June 2, 1959. At that time there were twenty paid subscriptions and a mailing total of 164 copies.

"5. On May 5, 1961, the post office of current entry was changed from Solon to Iowa City upon the application of the publisher of The Coralville News on a form entitled 'Application for Re-entry Permit.'

"6. The Coralville News was mailed as second class matter at Solon, Iowa, for a continuous period of one year, eleven months and three days before the change of the post office of current entry from Solon to Iowa City. On June 6, 1961, the post office of current entry was again changed from Iowa City to Solon upon the application of the publisher. The post office of current entry since that date has been Solon, Iowa.

"The information contained herein concerning the mailing of the Coralville News can be verified by writing the Regional Controller, Post Office Department, St. Louis, Missouri."

In my opinion, the Coralville News does not qualify as a newspaper for the publication of official city matters as such newspaper is defined in §618.3, 1958 Code. My reason for reaching that conclusion is based upon the conceded fact that the Coralville News has not been published regularly and mailed through the post office of current entry for more than two years. The post office of current entry, being the town of Solon, was entered as such

on June 2, 1959, and has remained as such post office of current entry until May 5, 1961, at which time it changed its post office of current entry to the post office of Iowa City. Clearly, the two-year requirement of mailing through the post office of current entry has not been met. The period between the dates of June 2, 1959 and May 5, 1961, constituted a period of less than two years and therefore the Coralville News does not qualify as a newspaper for the publication of official matters within the terms of §618.3, 1958 Code.

7.49

COUNTIES AND COUNTY OFFICERS: Official newspapers—§332.3, Ch. 349, 1962 Code. The board of supervisors, in the selection of official newspapers authorized under the provisions of Chapter 349, is controlled by the following: over-the-counter purchasers of newspapers may not be included in the count of bona fide yearly subscribers under §§349.5 and 349.7 of the Code of Iowa, but persons given a yearly subscription by a supermarket may be included. Rules of procedure and evidence in official newspaper contests are matters for the determination of the board of supervisors.

December 21, 1962

Mr. Walter L. Saur
Fayette County Attorney
Oelwein, Iowa

Dear Mr. Saur:

This is in reply to your letter of December 10, 1962, in which you have raised certain questions concerning official newspapers and contests in relation to the selection thereof. These questions are as follows:

1. Can over-the-counter purchasers of newspapers be included in the count of yearly subscribers within the meaning of §349.5 of the Code of Iowa (1962).

2. In proceedings before the board of supervisors, who has the burden of proof; may the board continue the hearing until the next day or week?

3. If persons are given a year's subscription by a supermarket, which pays the publisher one-half of the normal yearly rate, are these persons "bona fide yearly subscribers" within the meaning of §349.5 of the Code of Iowa (1962).

In reply to the first question, §349.7 provides in part:

"Subscribers—how determined. The board of supervisors shall determine the bona fide yearly subscribers of a newspaper within the county as follows:

"1. Those subscribers listed by the publisher whose papers are delivered, by or for him, by mail or otherwise upon an order or subscription for same by the subscriber, and in accordance with the postal laws and regulations, and who have been subscribers at least six consecutive months prior to date of application. * * * "

It is clear from this section that bona fide yearly subscriptions must be made "upon an order or subscription for same by the subscriber". The word subscriber, in this context, has previously received the attention of this office and it was then said at 1898 *O.A.G.* 45 that:

". . . unless the person receiving the paper can be shown to have done something for which an implied contract to pay for the paper would be raised, I do not think he could be considered a subscriber."

In the case of *Young v. Rann,* 111 Iowa 253, 82 N. W. 785 (1900), the Iowa Supreme Court said at 111 Iowa, 259:

> "If they had subscribed for a year, they were yearly subscribers, although they had not taken the paper for more than a month."

Although this part of the decision has been subsequently changed by the last clause of §349.7(1), it shows the necessity of a binding contract between the publisher and the buyer to cover a period of at least a year before the buyer may be considered a yearly subscriber. In over-the-counter sales, there is no contract between the publisher and the buyer beyond that immediate sale, and such sales therefore may not be considered in the county of "yearly subscribers". Also see, *VanderBurg v. Bailey,* 209 Iowa 991, 229 N. W. 253 (1930); *Kane v. Sturgis,* 198 Iowa 836, 200 N. W. 329 (1924); *Brown v. McGuire,* 181 Iowa 225, 164 N. W. 600 (1917).

In response to the second question, §332.3 of the Code of Iowa (1962) provides in part:

> "General powers. The board of supervisors at any regular meeting shall have power: * * *
>
> "2. To make such rules not inconsistent with law, as it may deem necessary for its own government, the transaction of business and the preservation of order.
>
> "3. To adjourn from time to time, as occasion may require."

The case of *Riggs v. Board of Supervisors,* 181 Iowa 178, 164 N. W. 359 (1917), holds that in hearings before the board, it acts in its official capacity and that continuations can and should be granted in some circumstances. In *VanderBurg v. Bailey, supra,* the Court stated that the board of supervisors is a statutory quasi-judicial tribunal vested with the power and duty of determining such contests as those here involved. The board is not bound by the affidavits of the publishers nor is it told by statute what procedure should be followed or what evidence received. *Smith v. Yoram,* 37 Iowa 89 (1873). In the case of *Bailey v. Lizer,* 265 N. W. 618 (Iowa, 1936), the Court did indicate that the verified statement filed by the publisher must ordinarily be taken to be correct unless an attack is made thereon, in which case the board may take other evidence. In summarizing the authorities available in reference to the second question, it appears that the granting of continuances and the procedure and burden of proof when a verified statement is attacked are matters to be determined at the discretion of the board of supervisors pursuant to its rule-making power under §332.3(2)(3).

The third question poses the problem of whether persons given subscriptions by a third party who paid reduced rates are "bona fide yearly subscribers" within the meaning of §349.7(1). That fact that the subscription rate was reduced, even if for the purpose of increasing circulation to get the county printing, does not preclude the subscribers from being bona fide unless there was collusion to enable the paper to secure the printing. A nominal charge might indicate lack of good faith, but a reduction in rates is not necessarily so. *Smith v. Rockwell,* 113 Iowa 452, 85 N. W. 632 (1901). As discussed under the first question raised, there are present in this situation the requirements of an enforceable contract and a length of time of a full year. The only remaining problem is whether the individual donee or the supermarket should be listed as the subscriber. The donee is a third party beneficiary of a contract actually entered into by the supermarket and the publisher, and has an enforceable interest against the publisher. The donee is also a subscriber in the ordinary sense, even if there was no consideration flowing from him. The situation here is analagous to a birthday or Christmas gift of a magazine. The purpose of the statute, an assured circulation, is fully met, and §349.7(1) seems to require the use of the names of "those subscribers listed by the publisher."

In summary, over-the-counter purchasers of newspapers may not be included in the count of bona fide yearly subscribers under §§349.5 and 349.7 of the Code of Iowa (1962), but persons given a yearly subscription by a supermarket may be included. Rules of procedure and evidence in official newspaper contests are matters for the determination of the board of supervisors.

7.50

COUNTIES AND COUNTY OFFICERS: Outside compensation—Recorder must account to treasurer for fees received from county A.S.C. office in payment for work performed outside of official office hours.

March 23, 1962

Mr. Gordon L. Winkel
Kossuth County Attorney
Box 405
Algona, Iowa

Dear Mr. Winkel:

This will acknowledge receipt of yours of January 30, 1962, in which you submitted the following:

"The facts are simply as follows. During 1960 and 1961 the Kossuth County Recorder has been performing services for the Kossuth County A.S.C. office. The state checker has not audited Kossuth County for 1961 so the question will be concerned primarily with the year 1960.

"The A.S.C. office prior to preparing the sealed crop notes forward a list of names to the County Recorder for the purpose of having said names checked to see if there are any crop mortgages listed against them. In the past, the A.S.C. office has employed someone outside of the Recorder's Office to perform this task and has also used the services of an A.S.C. employee for such. Because of the difficulty in obtaining a qualified and efficient person for the performance of this service, the A.S.C. office manager requested the County Recorder to perform this service and agreed to pay the Recorder 15 cents for each name checked.

"The Kossuth County Courthouse is open from 8:00 a.m. to 4:00 p.m. during the week and from 8:00 a.m. to 12:00 noon on Saturdays. The specific services in regard to the checking of the names has been performed by the Recorder personally prior to 8:00 a.m. and after 4:00 p.m. I have personally investigated this matter and have satisfied myself that the Recorder did not perform any of these services during the Courthouse business hours.

"After the work is completed the lists of liens which the Recorder makes up are picked up by an employee of the A.S.C. office and all materials and supplies in regard to this matter are furnished directly by the A.S.C. office. Any postage used in regard to this matter is furnished directly by the A.S.C. office. Consequently, the County has been charged with no expense in regard to the operation.

"The A.S.C. office receives a bill from the Recorder in the Recorder's personal name and the bill is paid direct to the Recorder periodically. The County Recorder has never accounted to the County for any sums received for performing these services.

"I would, therefore, like to request an opinion as to the responsibility, if any, of the County Recorder accounting for any of the money received from the A.S.C. office for these services."

In a comparable situation involving the accounting for compensation received by a county recorder for services performed for abstract companies and others, to whom he furnished material for their daily reports, it was held that the recorder was not entitled to these fees and they should be accounted for to the county treasurer. *Board of Commissioners of Hennepin Co. v. Dickey,* 90 N.W. 775 (Minn. 1902); *People v. Hamilton Co.,* 37 Pac. 627 (Calif. 1894); *People v. VanNess,* 21 Pac. 554 (Calif. 1889). See also, 1960 *O.A.G.* 74, Strauss to Brodie, Woodbury County Attorney. A similar result was reached in 1911-12 *O.A.G.* 209, which rule is hereby confirmed. Support was found for the conclusion there reached in the foregoing California adjudications, and the *Hennepin Co.* case, which followed the *VanNess* case. In *People v. Hamilton, supra,* the situation was stated by the Court as follows (page 628):

> "It appears that the money which it is alleged the defendant failed to account for to his successor in the office of county clerk was received by said defendant, while county clerk, as deposits from litigants, to cover anticipated costs in cases pending the superior court of the county of San Diego; and it is contended there was not at that time any law which authorized the defendant, as county clerk, to demand or receive such deposits, and therefore, being illegally collected, no duty devolved upon him, under the law, to pay the same to his successor in office; that such money belonged to litigants, and should have been returned to them, or if received under color of office, and not claimed by such litigants, it should have been paid to the county treasurer."

The applicable rule arising therefrom was stated by the Court on page 629:

> "We are also of opinion the deposits were received by the clerk in his official capacity, and under color of his office as clerk of the superior court, and, if not used in the payment of fees accruing in the cases in which they were deposited, or demanded by the depositors, should have been paid over by defendant to their proper custodian. In People v. VanNess, 79 Cal. 85, 21 Pac. 554, it appeared that the defendant, as commissioner of immigration for the port of San Francisco, had, under color of his office, illegally collected certain fees for administering oaths to ship captains, for which there was no authority of law, and this court held that 'the money, having been collected under color of office, should have been paid into the state treasury, and did not belong, in any view, to Van Ness, and he had no right to retain it. * * *' "

Similarly, the fees herein considered were collected by the county recorder from the county A.S.C. officials under color of office and without statutory authority therefor. Consequently, the recorder is required to account to the county treasurer for the fees received by her in the perfomance of the duties for the county A.S.C. office even though these duties were performed by the recorder outside of official office hours.

7.51

COUNTIES AND COUNTY OFFICERS: Perfecting lien for institutional care—§§230.25, 230.26, 1962 Code. To establish statutory notice of lien auditor must keep index of names of persons committed, their spouses and a maintenance cost ledger for said persons. Index is required under said statutes to be set up in comparable form to chattel mortgage index.

August 3, 1962

Mr. Arlen F. Hughes
Ringgold County Attorney
Mount Ayr, Iowa

Dear Mr. Hughes:

Reference is herein made to yours of the 8th, ult., in which you submitted the following:

"A. On April 15, 1959, Mr. 'X' was committed to the mental health institute at Clarinda, Iowa;

"B. Mr. 'X' was married and his wife, Mrs. 'X', held title to real estate in Ringgold County, Iowa, in her sole name;

"C. The Ringgold County Auditor entered in his ledger of state institution accounts, the name of Mr. 'X' and other matter on the same ledger sheet, which I have set down on a ledger sheet, which is enclosed herewith. You will notice that the auditor entered on this ledger sheet Mrs. 'X' as the name of a relative, guardian, or other person liable for their support, and that to date the lien is in the amount of $1732.90.

"D. Recently, Mrs. 'X' has sold the real estate which she held in her own name.

"E. Section 230.25 of the Code of Iowa, as amended in 1959, provides any assistance furnished under this chapter shall be and constitute a lien on 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 effecive 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.

"F. Section 230.26 provides the auditor of each county shall keep an accurate account of the cost of the maintenance of any patient kept in any institution as provided for in this chapter and keep an index of the names of the persons committed from such county, and the indexing and the record of the account of such patient in the office of the county auditor shall constitute notice of such lien. The name of the husband or the wife of such person committed shall also be indexed in the same manner as the names of the persons committed are indexed.

"G. In the office of the Ringgold County Auditor, there is no index as such to any institutional accounts, and the only record kept is the entries made alphabetically in the ledger book, a sample of which is herewith enclosed.

My question is: Does a record kept in the manner of the sample enclosed meet the requirements of Sections 230.25 and 230.26 sufficiently to constitute a lien against the real estate of a spouse of one committed to a state institution?

"If not, then my next question is: Should the auditor keep an index such as the chattel mortgage index of the names of persons committed to state institutions, and also the names of such person's spouse in order to effect a lien against the real estate of the spouse of the person committed, or should the auditor keep and enter in his ledger a separate sheet listing the name of the spouse of the person committed and designate on this ledger the name of the person as spouse of the name of the person committed in order to constitute a lien as provided in Sections 230.25 and 230.26?

"In report of the Attorney General, 1960, page 284, it is stated that all such liens running in favor of the county must be *indexed* in time or lost. In report of the Attorney General, 1960, pages 65 and 66, it is stated that the statutes concerning statutory liens are required to be strictly construed and a lien created thereby is limited in operation and extent by the terms of the statute.

"The two sections involved provide that the name of the husband or

wife shall be *indexed* and also that the name of the husband or wife shall be indexed in the same manner as the name of the person committed. In the case of *U.S. vs. Cedar Valley Livestock, Inc.,* Washington, D.C., 1959, 169 F. Supplement 169, it was held that under Iowa law a mortgage which is recorded does not constitute a constructive notice to third persons where it is not indexed. By Iowa statute, indexing of mortgages is provided for, and the matter of indexing the same is set forth."

(1) It is clear by the provisions of §230.26, Code of 1962, that the legislature did not intend that the ledger entry be an index. If that be the intent, then there would have been no necessity for the requirement that the auditor index the name of the husband or wife of the committed person, as well as keeping a ledger of the cost of maintenance of such person. That these are two different things is plain from the wording of the statute, §230.26. This statute requires the auditor to keep an accurate account of the cost of the maintenance of the patients kept in any institution and also keep an index of the names of the persons committed from such county and the names of their spouses. Compliance with these requirements will constitute statutory notice of the lien. It appears from your letter that the auditor has complied with one of these requirements for establishing notice of lien by entry in the ledger book, but has not complied with the provision that indexing per se in addition is required. I am of the opinion that no notice of the lien is created by the ledger entry.

(2) While the type of index and the details to be shown therein are not prescribed by the statute, it is plainly implied that an index be set up in form comparable to an index of chattel mortgages showing the name of the committed person and that of his or her spouse, and such other items required by statute as will perfect notice of this statutory lien.

7.52

COUNTIES AND COUNTY OFFICERS: Purchase of property by county —§345.1, 1962 Code. The county has no authority to contract for the purchase of property and pay therefor over a period of years by the application of future rental payments.

July 31, 1962

Mr. Robert L. Oeth
Dubuque County Attorney
Dubuque, Iowa

Dear Mr. Oeth:

This will acknowledge yours of the 13th inst., in which you submitted the following:

"We have been requested by our Social Welfare Department to ask for an opinion from your office relative to the contemplated purchase of certain property by Dubuque County.

"The property involved has an asking price of $40,000.00. Because of the limitations placed on purchases by Section 345.1, the question is whether or not the County could enter into a rental agreement for a period of years until such time as they could pay less than $20,000.00 for the property, having been given credit for all payments made under the lease.

"Tentatively, the agreement between the County and the Seller would be that the County would rent the property for a certain number of years with the option of purchasing said property and the seller giving credit to the County for payments made under the rental agreement

toward reduction of the purchase price, so that the purchase price would be under the $20,000.00 maximum of Section 345.1.

"The question is 'can the County enter into this type of agreement and legally purchase property for $20,000.00 or less when the original selling price is $40,000.00 which has been reduced by rental payments?' "

In accordance with the rule adhered to by the attached opinions, one dated January 8, 1957, addressed to Mr. Charles King, Marshall County Attorney; one addressed to Mr. Carl Nystrom, County Attorney, Decorah, dated January 12, 1937; and one dated July 27, 1959, addressed to Ray Hanrahan, Polk County Attorney; I am of the opinion that your county may not enter into an agreement, agreeing to purchase property for $20,000.00 or less under the circumstances described in your letter.

The cost of the improvement cannot be paid over a period of years under the guise of monthly rental payments.

7.53

COUNTIES AND COUNTY OFFICERS: Recorder—County recorder has the power and duty of refusing to accept plats of rural subdivisions unless such plats, with road plans, plats and field notes, bear the approval of the board of supervisors, county engineer, and city engineer or council of adjoining municipalities.

September 18, 1961

Mr. T. K. Ford
Des Moines County Attorney
Burlington, Iowa

Dear Mr. Ford:

This will acknowledge receipt of yours of the 1st ult. in which you submitted the following:

"We would very much appreciate your interpretation of the Section which was adopted by the 59th General Assembly in substitution for Chapter 306.15, 1958 Code of Iowa.

"The substituted section provides that 'all road plans, plats and field notes for rural subdivisions should be filed with and recorded by the County Auditor and approved by the Board of Superviors and the County Engineer before the subdivision is laid out and platted - - - - -' The reading of this section appears to make such filing and approval mandatory but then the last sentence in the substituted section very clearly contemplates a failure to comply with the early mandatory provisions of the section.

"This raises the question of whether the County Recorder can accept such plats for filing where the mandate of the statute has been ignored. It would appear clear from a reading of Section 409.14 dealing with cities and towns that the Recorder is specifically prohibited from accepting plats for filing which have not complied with the conditions set out in that section and further that she is subject to a penalty if she does accept them for filing. Please give us your opinion as to her rights to refuse to accept such rural subdivision plats for filing.

"Our Board of Supervisors has come face to face with the question of whether the substituted section results in roads within such subdivisions becoming immediately a part of the county road system. In the past the Board of Supervisors and County Engineer have not approved rural subdivision roads until the county was prepared to bring such roads into the county road system. The question would appear to be just exactly

what is being approved under the newly substituted section 306.15 of the Code. Is the approval merely an approval of the plans and plats leaving the Board of Supervisors with discretion as to when the roads within the rural subdivision shall be brought into the county system or does the approval contemplated in this new section amount to acceptance by the county of the said roads into the county road system upon their completion?"

The Act under which your problems arise is Chapter 167, Acts 59th G.A., which provides as follows:

"SECTION 1. Section three hundred six point fifteen (306.15), Code 1958, is hereby repealed and the following enacted in lieu thereof:

'All road plans, plats and field notes for rural subdivisions shall be filed with and recorded by the county auditor and approved by the board of supervisors and the county engineer before the subdivision is laid out and platted, and if any proposed rural subdivision is within one mile of the corporate limits of any city or town such road plans shall also be approved by the city engineer or council of the adjoining municipality. In the event such road plans are not approved as herein provided such roads shall not become the part of any road system as defined in chapter three hundred six (306), Code 1958.' "

By reason of the following, I am of the opinion that the recorder has the power and duty of refusing to accept a plat of a rural subdivision with its road plans, plats and field notes unless such plat and its road plans, plats and field notes bear the approval of the board of supervisors and the county engineer, as well as the approval of the city engineer or the city council of the adjoining municipality. This power and duty of the recorder of accepting or refusing plats for recording, including plats of subdivisions within a mile of any city or town, is vested in him by §409.14, as amended by Chapters 219 and 220, Acts 59th G.A. Such statute in that respect, as it existed prior to the enactment of Chapters 167, 219 and 220 of the 59th G.A., provided, so far as pertinent, as follows:

"Approval condition to filing and recording. No county auditor or recorder shall hereafter file or record, nor permit to be filed or recorded, any plat purporting to lay out or subdivide any tract of land into lots and blocks within any city having a population by the latest federal census of twenty-five thousand or over, or except as hereinafter provided, within one mile of the limits of such city, unless such plat has been first filed with and approved by the council of such city as provided in section 409.7, and by the city plan commission as required by law in cities where commission exists."

Chapter 167 of the 59th G.A., heretofore exhibited, attached the further requirement prior to the platting, insofar as such rural subdivisions are concerned, that such road plans shall also bear the approval of the city engineer or the city council of the adjoining municipality. Such requirement is not in terms an amendment to §409.14. However, it is to be observed that they relate to the same subject matter and to attain the legislative intent must be interpreted as one statute under the rule of *pari materia.* Thus the conclusion is reached that the recorder has a power and duty to refuse plats where the statute has not been complied with.

In this connection, for a further clarification of Chapter 167, I enclose copies of the following three opinions, which by this reference are made a part hereof.

1. Opinion issued to Peter J. Peters, Pottawattamie County Attorney, Council Bluffs, Iowa, dated July 25, 1961, relating to the question of

whether §409.9, 1958 Code, is applicable to subdivisions within one mile of the limits of the town or city.

2. Opinion issued to L. M. Clauson, Chief Engineer, Iowa State Highway Commission, Ames, Iowa, dated September 18, 1961, holding that approval of road plats of rural subdivisions does not by such approval assume responsibility for maintenance of such roads.

3. Opinion issued to Melvin Larsen, Secondary Roads Engineer, Iowa State Highway Commission, Ames, Iowa, dated September 18, 1961, holding that approval of rural plats does not operate as an acceptance of platted roads as part of the secondary road system.

7.54

COUNTIES AND COUNTY OFFICERS: Recorder—§§556.9, 556.12, 556.18, 556.19, 614.1(6), 1958 Code. County recorder may destroy unreturned chattel mortgages at the end of five years after maturity thereof without regard for release or satisfaction thereof.

October 5, 1961

Mr. Harry Perkins, Jr.
Polk County Attorney
Des Moines, Iowa

Dear Mr. Perkins:

I have your letter of October 4, 1961, in which you request the opinion of this office in regard to the following question:

"After what period of time may filed chattel mortgages be destroyed by the county recorder?"

Your inquiry raises questions in regard to the interpretation of the following Code sections:

"556.12 *Mortgage void after five years—extension.* Every mortgage so filed shall be void as against the creditors of the person making the same, or as against subsequent purchasers or mortgagees in good faith, after the expiration of five years after the maturity of the debt thereby secured, unless an extension agreement, duly executed by the mortgagor, shall be filed with the instrument to which it relates, and such extension agreement shall operate to continue the lien in the same manner as the original instrument."

"556.18 *Original returned to maker.* When any unrecorded chattel mortgage or other instrument of writing or indebtedness, which may have been filed as herein provided, shall have been satisfied, it shall be the duty of the recorder, after making a proper entry of such satisfaction in the index book or record where the original instrument is recorded, to return the original instrument, with any extension, assignment, or release, thereto attached, to the mortgagor or person executing the same, upon request therefor."

"556.19 *Originals destroyed.* In case such unrecorded instrument, with the extension or release thereof, if any, be not returned as hereinbefore provided, after the expiration of five years from the maturity thereof, or the maturity of any extension thereof, the recorder shall destroy such chattel mortgages with the extension or releases thereto attached, or other instruments or writing relating thereto, by burning the same in the presence of the board of county supervisors, or a committee appointed by the board of supervisors from their own number, to super-

intend the same, and when so destroyed the date of such destruction shall be entered on the index record under 'remarks'."

These sections have been the subject of previous opinions of this office. In 1928 *O.A.G.* 325 the Attorney General ruled that when no maturity date appeared on a chattel mortgage, it could not be destroyed prior to the expiration of ten years from the date of the instrument. This opinion was based upon the reasoning that a ten-year period would satisfy the requirements of §§556.12 and 556.19, *supra,* as well as those of §614.1(6), which fixes a ten-year statute of limitations on all actions founded upon written contracts. The wisdom of this ruling is not questioned and is reaffirmed.

When a maturity date is stated upon the instrument, however, the problem becomes more complex. In 1930 *O.A.G.* 343 the Attorney General ruled that a county recorder could destroy filed chattel mortgages five years after maturity date or extension thereof. And in 1940 *O.A.G.* 198 it was held, in an apparently conflicting opinion, that a county recorder could destroy a filed chattel mortgage only when properly released of record and not returned to mortgagor. No significant statutory changes were made in the three above-quoted Code sections during the period from 1930 to 1940.

In our opinion, the 1930 ruling is correct, and the opinion of 1940 is therefore withdrawn. It is a generally recognized rule of statutory construction that the grammatical sense of the statutory language should be adhered to, unless that sense is contrary to the clear intent and purpose of the statute, or if it would result in an absurdity, or a repugnance, or in inconsistency in different provisions of the statute. See *Haugen v. Drainage District,* 231 Iowa 288, 1 N.W. 2d 242 (1941); *Lamb v. Kroeger,* 233 Iowa 730, 8 N.W. 2d 405 (1943). Iowa Code §556.12 provides that every filed chattel mortgage shall be void after the expiration of five years after maturity, unless an extension agreement is filed. Thus, assuming the absence of such an extension agreement, a void instrument is on file at the expiration of five years after the date of maturity. Section 556.19 clearly provides for the destruction of such of these void instruments remaining unreturned to the makers thereof under §556.18. Destruction is directed in specific language without regard for release or discharge. See §556.19, which provides, "In case such unrecorded instrument, with the extension or release thereof, *if any,* be not returned ... the recorder shall destroy such chattel mortgage." Nowhere do we find the intent, express or implied, that the county recorder may destroy only those instruments which have been discharged or satisfied. This is not a case where all trace of the filed document will be obliterated. Section 556.9 provides:

"556.9 *Index book.* The county recorder shall keep an index book in which shall be entered a list of instruments affecting title to or encumbrance of personal property, which may be filed under this chapter. Such book shall be ruled into separate columns with appropriate heads, and shall set out:

1. Time of reception.
2. Name of each mortgagor or vendor.
3. Name of each mortgagee or vendee.
4. Date of instrument.
5. A general description of the kind or nature of the property.
6. Where located.
7. Amount secured.
8. When due.

9. Page and book where the record is to be found.

10. Extension.

11. When released.

12. Remarks and assignments.",

and under §556.19, *supra,* the date of destruction must be entered in the index. Thus, a destroyed but unreleased instrument still remains a matter of record in the county, and we find no provision authorizing the destruction of the index record.

Therefore, in our opinion, a county recorder may, under the plain meaning of §556.19, *supra,* destroy all unreturned chattel mortgages at the end of five years after stated date of expiration without regard for their release or satisfaction.

It goes without saying that this opinion does not apply to recorded chattel mortgages, as opposed to those which are filed, for the reason that physical possession of the document is not retained by the recorder in the former case.

7.55

COUNTIES AND COUNTY OFFICERS: Recorder, fee for mortgage release.—§556.17, 1962 Code. Mortgage filed prior to July 4, 1957 without payment of release fee is not exempted from payments of fee for subsequent release of record.

July 6, 1962

Mr. Robert S. Bruner
Carroll County Attorney
212 West Fifth Street
Carroll, Iowa

Dear Mr. Bruner:

This will acknowledge receipt of yours of April 30, 1962, in which you submitted the following:

> "Prior to its enactment by Section 1, Chapter 254 of the 57th General Assembly, Section 556.17 provided that 'When the amount due on any chattel mortgage * * * is paid, the mortgagee * * * shall release of record such instrument, evidencing the security, at his own expense ----.' As amended, this section now states that 'The fee for the release of any of the above instruments shall be paid directly to the County Recorder at the time the original instrument is filed of record.'
>
> "The question is whether such instruments which were filed prior to July 4, 1957, and on which no release fee was paid are now entitled to be released without the payment of any fee."

Obviously any person who filed an original instrument prior to July 4, 1957, would not be expressly required to pay the release fee at the time the original document was filed. It is obvious also that the original security having been filed prior to July 4, 1957, the statute referred to can have no application to such an original filing. However, the following portion of §556.17 still requires payment of release fees for such instruments filed prior to July 4, 1957:

> "When the amount due on any chattel mortgage, conditional sales contract, or pledge of personal property is paid, the mortgagee, conditional vendor, pledgee or his personal representative or assignee, or those legally

acting for him shall release of record such instrument evidencing the security, at his own expense, by filing with the original instrument a duly executed satisfaction piece or release, or by indorsing a satisfaction on the index book under the heading of 'remarks' in the same manner as mortgages are released by marginal satisfaction, and when so released on index book, the recorder shall enter a memorandum thereof on the original instrument or on the record thereof, if recorded."

7.56

COUNTIES AND COUNTY OFFICERS: Release of lien for institutional care—§§230.25, 230.26, 230.27, 230.29, 614.5, 1962 Code. The statutory lien provided by §230.25 cannot be enforced by affirmative legal action after the five-year statute of limitations has run on the underlying obligation, but this does not mean that the lien is outlawed. It would still be of record and encumber the title of the affected real estate. The county board of supervisors can release the lien only under the conditions set forth in §230.29, which conditions allow for the compromise and settlement thereof.

December 3, 1962

Mr. Richard F. Branco
Ida County Attorney
Holstein, Iowa

Dear Mr. Branco:

This will acknowledge receipt of your recent request, wherein you stated:

"... 'Does a lien for the support of the mentally ill, established under Section 230.25, ever become outlawed by statute of limitation or by laches?' I would appreciate any information you can give me concerning this question, as Ida County is being asked to compromise several liens for the support of the mentally ill, and whether or not such compromise of liens is for the best interest of the County depends, in part, upon whether or not liens for the support of said mentally ill are outlawed."

Section 230.25, 1962 Code of Iowa, provides that any assistance furnished by a county for the support of a mentally ill person shall be and constitutes a lien on any real estate owned by the patient or the spouse of the patient.

In order for the lien to arise, the county auditor must comply with the procedure set forth in §230.26, 1962 Code, by keeping an accurate account of the cost of the maintenance of the patient in any institution, indexing the name of the person committed from that county, and the record of account of such patient. Also, if the patient is married, the name of the spouse of the patient must be indexed in the same manner as the name and account of the patient. See: Staff to Hughes, Ringgold County Attorney, dated August 3, 1962.

These sections of the Code create a right to the county where no such right existed at common law. Statutes creating liens 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 in the statute. See: 1950 *O.A.G.* 135; 1942 *O.A.G.* 27; and *Howard v. Burke,* 176 Iowa 123, 157 N. W. 744.

As the county pays the charges to the State for the support of the mentally ill patient, the payment gives rise to an obligation of the patient's estate, and any person legally bound for the support of the patient, to the county. This would include the patient's spouse. *Scott County v. Townsley,* 174 Iowa 192, 156 N. W. 291. As the charges are paid by the county and the proper records of account kept by the county auditor, an "open account" is created for the patient's care, which is continuous and current within the meaning of §614.5,

1962 Code of Iowa. It is, therefore, subject to the five-year statute of limitations from the date the last item was entered in the account, within which the county must commence legal action to collect the debt. See: 1954 *O.A.G.* 105; 1944 *O.A.G.* 15; 1942 *O.A.G.* 27; 1923 *O.A.G.* 336; *School Township v. Nicholson,* 227 Iowa 290, 300, 288 N. W. 123; *Scott County v. Townsley,* 174 Iowa 192, 194, 152 N. W. 291; *Buena Vista County v. Woodbury County,* 163 Iowa 626, 145 N. W. 282; *Cedar County v. Sager,* 90 Iowa 11, 13, 57 N. W. 634; *Harrison County v. Dunn,* 84 Iowa 328, 330, 51 N. W. 155.

Of course, the statute of limitations is an affirmative defense, which must be specifically pleaded and proved by the party pleading it. *R.C.P.* 101, 1962 Code; *Swan Lake Consolidated School District v. Consolidated School District of Dolliver,* 244 Iowa 1269, 58 N. W. 2d 349. Failure to plead a limitation statute operates as a waiver of the defense. *R.C.P.* 101, 1962 Code; *Cuthburtson v. Harry C. Harter Post No. 839,* 245 Iowa 922, 65 N. W. 2d 83.

Section 230.27, 1962 Code of Iowa, places responsibility for collecting the claims of the county on the board of supervisors, who direct the county attorney to proceed with the collection. See: 1954 *O.A.G.* 197.

In order for the county to enforce the lien that it has been given by §230.25, it would be necessary for a foreclosure action to be commenced. As you know, the procedure for foreclosing a lien on real estate is to sue on the underlying obligation on which the lien is based, recover a judgment thereon, and then procure a writ of special execution on the real estate which the lien encumbers.

If the underlying obligation cannot be enforced because barred by the statute of limitations, it necessarily follows that the lien cannot be enforced by affirmative legal action, but this does not mean that the lien is outlawed. The general rule is that the lien of the security for a debt is not impaired because the legal remedy for the recovery of the debt is barred by the statute of limitations. See: 53 *C.J.S., Limitations of Actions,* §8. Section 230.25 does not provide a time limit for the lien it creates.

Since the lien created by §230.25 becomes of record and constitutes notice by the auditor's compliance with the provisions of §230.26, it would still be of record and encumber the title to the real estate affected, although the statute of limitations bars court action by the county on the underlying obligations.

Section 230.29, 1962 Code of Iowa, provides that the board of supervisors of the county shall release the lien when fully paid, or when compromised and settled by the board of supervisors, or when the estate of which the real estate affected by Chapter 230 is a part, has been probated and the proceeds allowable have been applied on such lien. This is the only manner of release of the lien created by §230.25 provided by Chapter 230.

Therefore, the lien created by §230.25, which arises and becomes effective when the procedure set forth in §230.26 is complied with by the county auditor, does not become outlawed by the statute of limitations running on the underlying obligation. It cannot, however, be foreclosed by affirmative legal action by the county unless the obligee waives the affirmative defense of the limitations statute or fails to plead it. And, the county board of supervisors can release the lien on the conditions set forth in §230.29, which conditions allow for compromise and settlement thereof.

7.57

COUNTIES AND COUNTY OFFICERS: Repair of city streets—§§455.162, 682.23, 1958 Code. The county board of supervisors has no power to assist a town in the repair of streets within the town limits. Benefits of taxation should be directly received by those directly concerned in bearing the burdens

of taxation. In general, state, county and district tax moneys must be expended respectively for state, county and district purposes, except insofar as the constitution may provide for an exception to that rule.

March 30, 1961

Honorable Samuel E. Robinson
House of Representatives
Statehouse
LOCAL

Dear Mr. Robinson:

This will acknowledge receipt of yours of March 22, 1961, in which you submitted the following:

"I am requested to submit for an opinion on the following—one town in my county is asking county to assist in repair of a street or streets within incorporated limits as indicated in rough outline below. The board of supervisors question the legality of their participation in assistance requested."

1. The county board of supervisors is an administrative body having express powers and those incident to the performance thereof as conferred upon the board by the legislature. I find no power in the board of supervisors to assist the town in the repair of streets within the town limits.

2. "It is a sound principle of taxation which prescribes that the benefits of taxation should be directly received by those directly concerned in bearing the burdens of taxation, so that a legislature cannot divert taxes raised by one taxing district to the sole use and benefit of another district; and, in general, state, county, and district tax moneys must be expended respectively for state, county, and district purposes, except in so far as the constitution may provide for an exception to that rule." 85 *C.J.S.* Taxation, page 647.

Under the foregoing rule, the board of supervisors could not expend county funds for town purposes.

7.58

COUNTIES AND COUNTY OFFICERS: Right of board of supervisors to contract with outside firm or party—§332.3(6), 1962 Code. The board of supervisors may contract with outside firm or party to make recommendations in respect to the type of machines and bookkeeping systems involved in the spreading of valuations and assessments for the purposes of the county auditor and the county treasurer, but may not act for the assessor in making such contract.

July 3. 1962

Mr. Harry Perkins
Polk County Attorney
Room 406 Court House
Des Moines, Iowa

Dear Mr. Perkins:

This will acknowledge receipt of your letter of November 1, 1961, in which you request an opinion of this office on the following question:

"Does the Board of Supervisors have the authority to hire an outside firm or persons to make recommendations of the type of machines and bookkeeping systems that would tie the assessor's, auditor's, and treasurer's work together in spreading valuations and assessments?"

The general powers of the county board of supervisors are found in §332.3 of the 1962 Code. There is no express specific authority in the Code authoriz-

ing the board of supervisors to contract with firms or persons to provide them with advisory opinions. However, §332.3(6) provides as follows:

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

"6. To represent its county and have the care and management of the property and business thereof in all cases where no other provision is made."

This provision has been given a broad construction by both the Supreme Court of Iowa and prior opinions of this office for many years, when the matter in question pertains to the management of the county's property or to its business matters.

The bulk of the decisions in this area here involved the hiring of "special counsel" by a board of supervisors without the request or concurrence of the county attorney, and such a procedure has been repeatedly upheld under authority of §332.3(6) and its predecessor sections. Examples of such decisions are:

Shinn v. Cunningham, 120 Iowa 383, 94 N.W. 941 (1903);

Disbrow v. Board, 119 Iowa 538, 93 N.W. 585 (1903);

Galusha v. Wendt, 114 Iowa 597, 87 N.W. 512 (1901);

Bevington v. Woodbury Co., 107 Iowa 424, 78 N.W. 222 (1899);

Taylor Co. v. Standley, 79 Iowa 666, 44 N.W. 911 (1890);

1936 *O.A.G.* 838;

1928 *O.A.G.* 442;

1920 *O.A.G.* 619.

Other decisions have established the authority of the board of supervisors to contract for various services in the nature of clerical help, purchasing agents, accountants for special assignments, agents for procuring lawyers for county-owned real estate, and agents for various special assignments. Examples of such decisions are:

Gunn v. Mahaska Co., 155 Iowa 527, 136 N.W. 929 (1912);

Call v. Hamilton Co., 62 Iowa 448, 17 N.W. 667 (1884);

Denison v. Crawford Co., 48 Iowa 211 (1875);

1938 *O.A.G.* 328;

1926 *O.A.G.* 188;

1926 *O.A.G.* 181.

Language expressed in the opinion appearing in 1926 *O.A.G.* 188 seems to summarize these decisions, where it is said:

"The Board of Supervisors are in effect the managers of the county's business and have general supervision and control over its affairs when not otherwise limited or specifically directed by statute. * * *

"There is no provision regarding the employment of an accountant by the Board of Supervisors and we are of the opinion, therefore, that it is clearly within their general power in the management and control of the business of the county, to employ an accountant for the purpose contemplated."

The limitations imposed upon the board of supervisors by the previously-cited authorities require that no delegation of discretionary duties be made, that duties of other public officials may not be invaded, and that the board of supervisors exercise sound discretion in entering into such contracts.

It appears from the request submitted that the contemplated contract would only include recommendations to be made to the board of supervisors and that the board would not be relinquishing any of its discretionary duties. However, it is to be observed that while the board of supervisors would have the foregoing power and may exercise it in connection with the powers and duties of the county treasurer and the county auditor in assessment matters, it is also to be observed that the assessor, either city or county, does not have the same status in relationship to the board of supervisors as do the county auditor and the county treasurer. The assessor is a public agency separate and apart from the board of supervisors. The assessor is controlled by statutes prescribing his powers and duties, including therein specific directions with respect to the exercise of the assessor's powers; he is supported by his own funds; his powers do not include acting jointly with the board of supervisors or making the board an agent in the exercise of his powers.

I am of the opinion, therefore, that while the board is within its powers in entering into a contract of the character described, for county purposes, it does not have authority to act for the assessor.

7.59

COUNTIES AND COUNTY OFFICERS: County attorneys, right to appear in justice courts—§§336.2(2), 336.2(4), 340.9, 1958 Code. Duty of justice of peace to inform county attorney of all cases to come before his court. Commission on fines based upon rendition of some contribution in the case.

November 9, 1961

Mr. H. K. Roggensack
Clayton County Attorney
Elkader, Iowa

Dear Mr. Roggensack:

This is to acknowledge your letter under date of August 19, 1961, wherein you submit:

"I have had several instances in which Justices of Peace have dismissed good cases because there is no appearance entered for the State of Iowa. These are cases in which I have received no notification of any kind and some weren't even contested by the defendant. I have been expecting a ruling out of your office to the effect that the appearance of the County Attorney in all cases involving the State of Iowa is mandatory. There will be four cases pending in the City of _____ in _____'s court and I am anticipating that they will be taken to _____'s court on a change of venue and that the defendants will be again obliged by dismissing their cases because of non-appearance by the State of Iowa.

"In view of the above, I respectfully request an opinion on the following:

(1) Does Section 336.2(2) by operation of law enter the appearance of the County Attorney in Justice of Peace Courts?

(2) Does Section 336.2(2) by virtue of its language automatically entitle the County Attorney to the commission on fines levied in Justice of Peace Courts?

(3) Does the County Attorney have a legal right to be informed by the Justice of the Peace of all cases arising before his court?"

Section 336.2(2) 1958 Code, provides that it shall be the duty of the county attorney to:

"appear for the state and county in all cases and proceedings in the courts of his county to which the state or county is a party, except cases brought on change of venue from another county, and to appear in the supreme court in all cases in which the county is a party, and also in all cases transferred on change of venue to another county, in which his county or the state is a party."

The use of the word "shall" when addressed to public officials will ordinarily be given the "imperative" construction. *Hansen v. Henderson,* 244 Iowa 650, 56 N.W. 2d 59 (1953); however, in the instant case, the subsection in question is followed by subsection (4) of §336.2 and pertains to the same subject matter. Subsection (4) of §336.2 is specific in its reference to justice of peace courts, and provides that it shall be the duty of the county attorney to "appear and prosecute misdemeanors before justices of the peace whenever he is not otherwise engaged in the performance of official duties."

In the construction of statutes, those on the same subject are to be considered with relation to each other, *Rhode v. Bank et al.,* 52 Iowa 375 (1879), and the specific provisions will control general provisions on the same subject, *McBride v. Railway Company,* 134 Iowa 398 (1907). Subsection (4) of §336.2 is specific and must necessarily control subsection (2) of §336.2. By the express language of subsection (4), the county attorney is commanded to appear and prosecute only when he is not "otherwise engaged in the performance of official duties." The legislature in employing this language obviously contemplated the non-appearance as well as non-appearance and prosecution in instances where the county attorney is otherwise engaged. Therefore, the appearance of the county attorney is not entered by operation of law by §336.2(2) in justice of the peace courts.

Entitlement to a commission on a fine will depend upon the operative language of §340.9, Code 1958, which in part provides:

"Except in counties having a population of sixty thousand or over ... in addition to the salary above provided, he shall receive the fees as now allowed to attorneys for suits upon written instruments where judgment is obtained, *for all fines collected where he appears for the state, but not otherwise,* ... (emphasis supplied)".

The legislature chose to employ the phrase, "for all fines collected where he appears for the State, *but not otherwise*" (emphasis supplied), and by so doing, leads one necessarily to the conclusion that the legislature contemplated instances wherein the county attorney would not appear for the State in every case that a fine was imposed.

We invite your attention to an opinion issued by this Department under date of August 1, 1939, found in 1940 *O.A.G.* 328, which holds in part:

"It is our opinion that in order to be entitled to a commission on fines provided for in this section, that the county attorney must either have physically appeared in the case at some stage of the proceedings, either by way of prosecution of the case or by way of having actively participated in the collection of the fine, or have had his appearance entered of record prior to the time that the fine is actually paid.

"We believe that it is contemplated by the wording of this statute that the county attorney must have made some contribution of effort in the case in order to be entitled to the commission on the fine. That if he

physically appeared in the case, either before the fine was actually imposed, or after it was imposed but before it was collected, even though his appearance is not entered on the docket, that this physical appearance raises sufficient presumption of having contributed effort towards collection of the fine. On the other hand assuming there has been no physical appearance, but there is a formal entry of appearance on the docket, made prior to the time the fine was collected, that this raises sufficient presumption of contribution of effort to entitle him to a commission on the fine."

This opinion is in accord with the pervading idea that runs through the law in this area, that being "where there is no service rendered, one is not entitled to the fees." For other jurisdictions supporting this position, see *Edwards v. County of Fresno* (1887), (California), 16 P. 239; *Funk et al. v. Milliken et al,* (1939), (Kentucky), 317 S.W. 2d 499; and *Smith v. Town of Virginia Beach* (1931), (Virginia), 159 S.E. 74. We are therefore disposed to the conclusion that a county attorney is not automatically entitled to a fee under §336.2(2).

The county attorney is the chief law enforcement officer in the county, and §336.2(1), Code 1958, imposes a duty upon the county attorney to "diligently enforce or cause to be enforced in his county, all of the laws of the state, actions for a violation of which may be commenced or prosecuted, in the name of the State of Iowa, or by him as county attorney, except as otherwise specially provided."

The State of Iowa, through its official representative, is entitled to know of all violations in which it may be interested in prosecuting. It is only logical that the chief law enforcement officer of the county be kept fully informed of transgressions of the law, which may demand his presence in the prosecution of the same, and so that he may diligently perform his duties in enforcing or causing to be enforced the laws which it is his obligation to uphold. Certainly it does not rest within the discretion of the justices of peace to determine whether or not the State wishes to appear through its representative, but this necessarily resides within the discretion of the county attorney. Although §336.2 is considered to be only an outline of the county attorney's duties by this Department, they necessarily constitute the duties which he is obligated to perform. Obviously, performance cannot be achieved if one has no knowledge of the need for the same. It has been said that the mere presence of the county attorney or knowledge that the county attorney is available for prosecution results in numerous defendants' election to plead guilty. An absurdity would result if the county attorney, being clothed with law enforcement obligations, were compelled to operate in the obscure shadows of non-information as to where and when a case is to be docketed. Such a lack of information would lend itself to possibilities of frivolous changes of venue, ultimate dismissal for want of prosecution, and numerous violators escaping the sanctions of the law. Justice is not to be administered in a veil of secrecy. We believe that is an obligation of the justice of the peace to inform the county attorney having jurisdiction over his court whenever a violator is to be brought before the court, within sufficient time to enable the county attorney to exercise his duties in appearing, rendering advice, directing that his appearance be entered, or appearing and prosecuting if not otherwise engaged in the performance of official duties.

It is also our belief that, not only is it the justice's duty, but it is a legal right of the county attorney to appear or appear and prosecute. Without means of information, this legal right would be denied.

Your attention is invited to *Clark & Grant v. Lyon County,* (1873), 37 Iowa 469, where the trial court refused the district attorney the right to appear on behalf of the defendant county of his district. On appeal, the Supreme Court stated:

"It is the right as well as the duty of the district attorney to appear for any county in his district, in any and all actions pending in the district court in which said county is a party. The duty thus positively enjoined upon the district attorney must of necessity be accompanied with the right to do the thing required. If it is a positive duty, resting upon the district attorney to appear in district court for the respective counties in his district, it is just as much a duty for the board of supervisors to permit him when he so desires. A refusal to allow him to appear denies a legal right."

We are of the opinion that it is the duty of the county attorney to appear or appear and prosecute when he is not otherwise engaged, and it is the county attorney solely who can determine whether or not other official duties will preclude his entering an appearance in the case. Consequently, the justice of the peace has a duty to inform the county attorney of all cases before his court wherever the State or the county is a party to the action.

7.60

COUNTIES AND COUNTY OFFICERS: Right to close offices—Ch. 64, Acts 58th G.A. (§4.1(23), 1962 Code). Elective county officers, and the offices of the county board of social welfare, county assessor, soldier's relief commission and county superintendent of schools, may legally close their respective offices for the whole day of Saturday.

July 18, 1961

Mr. Don C. Salisbury
Jasper County Attorney
Newton, Iowa

Dear Mr. Salisbury:

This will acknowledge receipt of your letter of May 18, 1961, in which you submit the following:

"... The problems upon which I desire an opinion from your department are as follows:

"1. May the elective county officers legally close their said public offices upon each said officer's own authority and discretion for the complete day of Saturday or any other complete secular day of the week which said Saturday or other said secular day is not a legal holiday?

"2. Also, as an opinion is requested concerning problem 1. above, I would desire an opinion upon this matter: May the following public officers in the Courthouse legally close their said public offices upon each said officer's own authority and discretion for the complete day of Saturday or any other complete secular day of the week which said Saturday or other said secular day is not a legal holiday:

a. The County Board of Social Welfare

b. The County Assessor

c. The Soldiers' Relief Commission

d. The County Superintendent of Schools

"The only law that I have been able to find on these matters is as follows:

"a. Report of the Attorney General for 1940 at page 381 which dealt only with Saturday afternoons as pertaining to the above problems, and

"b. Report of the Attorney General for 1949 at page 111 which dealt only with hours as pertaining to the above problems among other things."

The Department, upon the review of the foregoing, is of the opinion that the opinions referred to control the problem submitted by you. The principles therein laid down are as applicable to the problem of closing all day Saturday or any other secular day as they are to the situations there presented. In connection with the exercise of these powers, it is stated in the opinion appearing in the Report for 1940:

"It is presumed that all County Officers will perform the duties enjoined upon them by law."

43 *Am. Jur.* Public Officers, page 77:

"The obligations of public officers as trustees for the public are established as part of the common law, fixed by the habits and customs of the people. Among their obligations as recipients of a public trust are to perform the duties of their offices honestly, faithfully, and to the best of their ability; . . . "

It is to be observed further that the long existence of the opinions to which you refer, without disturbance or change of statutes by the legislature, represent the law as to the courthouse Saturday closing hours which is now presented. In fact, there is confirmation thereof, as well as the conclusion reached, in the provisions of Chapter 64, Acts 58th G.A., which provides as follows:

"SECTION 1. Subsection twenty-three (23) of section four point one (4.1), Code 1958, is hereby amended by striking the period (.) in line six (6) thereof, and by adding thereto the following: ", provided that, whenever by the provisions of any statute or rule prescribed under authority of a statute, the last day for the commencement of any action or proceedings, the filing of any pleading or motion in a pending action or proceedings or the perfecting or filing of any appeal from the decision or award of any court, board, commission or official falls on a Saturday, a Sunday, the first day of January, the twelfth day of February, the twenty-second day of February, the thirtieth day of May, the fourth day of July, the first Monday in September, the eleventh day of November, the twenty-fifth day of December, and the following Monday whenever any of the foregoing named legal holidays may fall on a Sunday, and any day appointed or recommended by the governor of Iowa or the president of the United States as a day of fasting or thanksgiving, the time therefor shall be extended to include the next day which is not a Saturday, Sunday, or such day hereinbefore enumerated."

Thus the closing of the courthouse or offices of the elective officials on Saturday will not affect the right to file such notices, proceedings and other procedural papers described in the foregoing statutes within the required time if such required time be a Saturday.

7.61

COUNTIES AND COUNTY OFFICERS: Sheriff—§695.4, 1958 Code. Sheriff has no authority to issue more than one type of gun permit, limiting area of concealment.

February 21, 1961

Mr. J. T. Snyder
Buena Vista County Attorney
Storm Lake, Iowa

Dear Mr. Snyder:

Reference is made to your letter of January 11, in which you state the following:

"For the purpose of closer control of concealed weapons in this county, we have for a number of years issued two types of permits. I'm enclosing a copy of the face of each of these types of permits. You will note that one is a permit to carry concealed weapon without restriction. My question is in reference to the other type of permit, namely the one which is restricted. This restriction requires the permit holder to unload the weapon and lock the same in a trunk or glove compartment while the weapon is being transported anywhere in this County. The specific question is whether or not the language of 695.4, 'to carry concealed *or otherwise*' would give the sheriff the power to make reasonable restrictions in reference to the permit issued."

The general rules relating to the construction of statutes are applicable equally to licensing statutes, and should be given a strict construction. *Des Moines Asphalt Paving Co. v. Johnson,* 213 Iowa 594, 239 N.W. 2d 575. Where the statute fails to define the word in question, the rule that "statutes in *pari materia* shall be construed together" applies with peculiar force to statutes passed at the same session of the legislature. *Iowa Farm Serum Company v. Bd. of Pharmacy Ex.,* 240 Iowa 734, 35 N.W. 2d 848.

The statute in question, §695.4, 1958 Code, was amended by Chapter 122, Acts 46th G.A., which at the same time enacted §695.2, reading in pertinent part as follows:

"No person shall carry a pistol or revolver concealed on or about his person or whether concealed *or otherwise* in any vehicle operated by him, * * * without a license therefor as herein provided." (Emphasis supplied.)

Section 695.4 provides:

"Permit to carry concealed weapon. The sheriff of any county may issue a permit to a resident of his county only, limited to the time which shall be designated therein, to carry concealed or otherwise, a revolver, pistol, or pocket billy."

This section was amended by inserting after the word "concealed" the words "or otherwise", which have been defined by Webster's New International Dictionary, 2d Edition, to mean, "In a different manner; in another way."

Construing the two sections together, the words "or otherwise" contained in §695.4 refer back to the restriction in the manner of carrying a weapon in a vehicle. The authority vested in the sheriff by virtue of §695.4 allows him to issue a permit to carry a concealed weapon with a limitation as to time; however, there is no authority conferred upon the sheriff to limit the type of concealment for which the permit is issued.

Therefore, we are constrained to hold that the sheriff does not have the authority to issue a restricted permit as outlined in your letter.

7.62

COUNTIES AND COUNTY OFFICERS: Special appraisal fund—§441.50, 1962 Code. The special appraisal fund created by §441.50 can be used only for the employment and compensation of professional and expert appraisers, not local appraisers under the county assessor's direction.

November 2, 1962

Mr. Samuel O. Erhardt
Wapello County Attorney
Ottumwa, Iowa

Dear Mr. Erhardt:

Referring to yours of the 11th ult. in which you submitted the following:

"The County Assessor of this County has requested an Attorney General's Opinion as to whether or not the Special Appraisal Fund must be used for employment of Professional Appraisal Companies, or can it be used to hire local appraisers under the direction of the County Assessor.",

I am of the opinion that it is quite clear that the special appraisal fund created by §441.50 can only be used in the employment and compensation of professional and expert appraisers and cannot be used for the compensation of local appraisers to assist the county assessor. Such statute provides:

"Appraisers employed. The conference board shall have power to employ appraisers or other technical or expert help to assist in the valuation of the property, the cost thereof to be paid in the same manner as other expenses of the assessor's office. The conference board may certify for levy annually an amount not to exceed one and one-half mills upon all taxable property for the purpose of establishing a special appraiser's fund, to be used only for such purposes. From time to time the conference board may direct the transfer of any unexpended balance in the special appraiser's fund to the assessment expense fund."

It would seem that if the special appraiser's fund could be used for the purpose of employing and paying appraisers to assist the county assessor, there would be no necessity for its creation, because then both funds could be used for the same purpose. If that had been the legislative intent, there would be no necessity for the provision that such special appraiser fund "be used only for such purposes."

7.63

COUNTIES AND COUNTY OFFICERS: Tax assessment correction—A county auditor can correct the tax assessment of a taxpayer at any time prior to his payment of the tax in question, or any portion thereof.

April 21, 1961

Mr. Robert W. Burdette
Decatur County Attorney
Box 61,
Leon, Iowa

Replying to your letter of March 2, 1961, in which you state the following:

"I would like to request an opinion on the following set of facts. The question has to do with the interpretation of Code Section 443.6 which states that the auditor may correct errors in assessment. My question is as follows:

"A tax payer states to the assessor that he has $10,000 of funds that are subject to Money's and Credit's Tax. He does not divulge the nature of these funds, but admits that they are subject to tax, and the same is listed on the assessment sheet which he signs. This assessment is then placed on the tax books and the auditor has certified them to the treasurer with no complaint from the tax payer. Then after the following January 1, when the books are in the Treasurer's office, but prior to having paid the tax and prior to the day of April 1, the tax payer makes the complaint that the said funds were in a savings and loan association and therefore are exempt from Money's and Credit's Tax.

"Is this a type of error that the Auditor can correct? Or must the tax now be collected?"

I am of the opinion that the auditor can correct the error if the taxes have not been paid. As to what errors can be corrected by the auditor, we said at 44 *O.A.G.* 6:

"It is our opinion that the authority of the auditor to correct any error in the assessment or tax list may be exercised at any time until there has been a full payment of the tax involved."

This opinion was based on the reasoning of the case of *First National Bank v. Hayes,* 186 Iowa 892, 171 N.W. 715. In the opinion we find this statement:

"There ought to be a time beyond which even an error in name, description, or valuation may not be corrected to the detriment of the taxpayer, and that time is when the proceedings relating to assessment, listing and collection of the tax always construed ad invitum, have been consummated by full payment of the amount exacted by the records as they exist."

This statement is further supported by these cases and this position is therein affirmed:

Elliot v. Reynolds, 203 Iowa 218, 212 N.W. 468

First National Bank v. Anderson, 196 Iowa 587, 192 N.W. 6.

I conclude then that the auditor can correct the tax assessment of this taxpayer at any time prior to his payment of the tax in question or a portion thereof.

7.64

COUNTIES AND COUNTY OFFICERS: Use of general fund for constructing and equipping county home—§345.3, 1962 Code. Where a proposition submitted to the board to issue bonds for construction and equipping of county home did not limit the amount that could be expended for such purposes, the board of supervisors has the authority to expend county funds, if available, for additional equipment.

October 19, 1962

Mr. Thomas E. Tucker
Deputy Lee County Attorney
516 Seventh Street
Fort Madison, Iowa

Dear Mr. Tucker:

Referring to your letter of the 17th, inst., submitting the following:

"On December 8, 1960 the electors of Lee County, Iowa approved a bond issue in the amount of $950,000 for 'constructing and equipping' a county home.

"Date of completion of this structure is near and the Board is now concerned with final expenses such as furnishings, landscaping, etc. The question has arisen as to whether or not expenditures for any part of construction, furnishings or equipment may exceed the original $950,000 voted upon by the people.

"Section 345.3 of the 1962 Code of Iowa authorizes improvements on County Homes from unappropriated assets in the general fund. Will this

section be applicable as an additional cushion to the original figure voted upon by the electors of Lee County?

"I have also found the case of Zerwekh -vs- Thornburg, 123 Iowa 254, a 1904 case, which would seem to indicate, at least under the law existing at that time, expenditures for furnishings may be made from the general fund, thus allowing the full $950,000 for expenditures for other than furnishings."

I am of the opinion that unless the proposition submitted to the voters contained a limitation upon the amount that could be expended for the purpose of constructing and equipping the county home, the board of supervisors could expend county funds, if available, for the purpose of additional equipment. However, §345.3, 1962 Code of Iowa, is not available for the purpose of equipping. That section makes monies available for additions to the county home.

Support for the foregoing is found in the case you cited, *Zerwekh v. Thornburg,* 123 Iowa 254; and see 1954 *O.A.G.* 41.

7.65

COUNTIES AND COUNTY OFFICERS: Vested right of public employee in pension—Retired public employee has legal right to continuation of pension upon re-employment by the department from which he retired or another public entity.

July 23, 1962

Mr. Harry Perkins
Polk County Attorney
Room 406 Court House
Des Moines, Iowa

Attention: C. L. Becker

Dear Mr. Perkins:

This will acknowledge yours of the 17th inst., in which you submitted the following:

"A person retires from city employment on a City of Des Moines pension, he then applies for employment with Polk County, Iowa.

"Does the Polk County Board of Supervisors have authority to employ such a person and pay him the salary set up for the particular position applied for without taking into consideration the pension he receives from the city?"

A like situation has had the consideration of the Supreme Court in the case of *Lamb v. City of Boone,* 237 Iowa 273, 21 N.W. 2d 462, where Lamb, being a member of the Boone police force, having attained the age and possessed the length of service conditioned to retirement, his application for retirement was granted and his pension fixed. Subsequently, he returned to service with the Boone Police Department, and thereupon his retirement pension was discontinued while his regular salary as a policeman was paid. He retired again, and upon this second retirement Lamb made a demand upon the board of trustees of the police pension fund for the payment of the monthly pension that had accrued between his re-entry into the department as a policeman and his second retirement from city employment as a member of the police department.

This demand was refused, but upon certiorari the district court sustained a writ and ordered the board of trustees to pay the accrued pension to Lamb. The Supreme Court, speaking to the contention here made, observed that:

"We are of the opinion that under the holdings of this court appellee is entitled to the relief granted by the trial court. When appellee was granted a monthly pension on July 1, 1940, he had a vested right therein and could be deprived thereof only as by law provided. *Dickey v. Jackson,* 181 Iowa 1155, 165 N.W. 387; *Glaser v. City of Burlington,* 231 Iowa 670, 679, 1 N.W. 2d 709.

"Our most recent pronouncement upon said matter is found in the case of *Dickey v. Board of Trustees,* 236 Iowa 794, 799, 20 N.W. 2d 8, 10, which opinion was handed down on the 16th day of October, 1945. Therein, the court quoted from the case of *Dickey v. Jackson,* supra, wherein Justice Weaver, speaking for the court, said, at page 1160 of 181 Iowa, page 389 of 165 N.W.:

" 'That the plaintiff in this case was regularly placed upon the police pension roll is not denied, and that, under the statute, he became entitled to recover from that fund a monthly payment of $41.25, is also conceded. His status as a pensioner being once fixed, the statute provides one, and only one, method of removing him therefrom. He does not occupy that statuts by the grace of the city or of the trustees of the fund. His place upon the pension roll is one of statutory right.' "

The rule there announced has been followed in the case of *Rockenfield v. Kuhl,* 242 Iowa 213, 46 N.W. 2d 17, in the following terms:

"We have held that while a pension is not a matter of contract or vested right so far as concerns the right of the lawmaking power to change it by modifying or repealing the law, nevertheless when the right once has accrued it becomes vested 'so far as relates to the obligations of the custodians of the fund to pay.' "

While the Lamb case concerned the situation where the retired policeman re-entered public service with the same agency that granted him his pension, undoubtedly the same rule is applicable to the situation where the retired policeman would re-enter public service with a separate public entity. With respect to this, the annotation at 162 *A.L.R.,* 1470 stated the following:

"The basic rule underlying the decisions in all the cases was well expressed by the Nebraska supreme court. Speaking of a statute providing for a pension for retired firemen and containing no clause suspending such pension in case the pensioner re-entered public employment, the court in State ex rel. *Herman v. Grand Island* (1944), 145 Neb. 150, 15 N.W. 2d 341, said: 'In considering the statute before us we are required to observe the rule that the policy or impolicy of the statutory provision is the exclusive function of the legislature and not of the courts. We must accept the statute as we find it and no requirement which is not in the statute will be or can be considered to govern our action. The general rule is that, "Where the language of the statute is unambiguous there is not necessity for construction, and courts cannot change the clear language of a statute" . . . we can only conclude that it is immaterial that a pensioner entitled to a pension under the provisions of (the statute) is able to or actually does obtain other employment with a separate entity, there being no such exception in the statute.' "

On the authority of the foregoing, I am of the opinion that the board of supervisors of Polk County has the legal authority to employ a person who has retired from the police department of Des Moines upon a statutory pension, and pay him the compensation legally fixed for such employment without deduction therefrom of the amount of the pension, and without other legal objection thereto.

7.66

COUNTIES AND COUNTY OFFICERS: Voting machines, fees—§§52.2, 52.9, 52.16, 342.1, 1962 Code. The county auditor is required to account for fees received by him in connection with the use of county-owned voting machines by the City of Des Moines.

July 24, 1962

Honorable Chet B. Akers
State Auditor
Statehouse
Des Moines, Iowa

Dear Mr. Akers:

This is to acknowledge receipt of your letter of June 1, 1962, in which you posed the following question:

"For a number of years last past, the City of Des Moines has periodically entered into a contract with the County Auditor of Polk County, Iowa, 'as an individual', for the use of certain equipment, the property of Polk County, Iowa, namely county-owned voting machines used at city elections, for a stipulated amount of money paid by the City of Des Moines to the County Auditor of Polk County, Iowa, pursuant to such contract. There is no record of, or accounting in the records of Polk County for the moneys paid to the County Auditor for or in connection with the use of such county property.

"Your opinion is respectfully requested as to whether or not, in the event a County Auditor is paid a monetary consideration for or in connection with the use of county-owned equipment, such as voting machines, by a municipality located in the county, the said County Auditor may legally retain or disburse such moneys without accounting therefor as provided for by Chapter 342 and Section 343.5 of the 1962 Code of Iowa."

The following provisions of the Iowa Code (1962) are particularly important and, as far as relevant, are herein set forth. Section 52.2 provides:

"52.2 Purchase. The board of supervisors of any county, or the council of any incorporated city or town in the state may, by a majority vote, authorize, purchase, *and order the use of voting machines* in any one or more voting precincts within said county, city, or town, until otherwise ordered by said board of supervisors or city or town council." (Emphasis supplied)

Section 52.9 provides:

"52.9 Duties of local authorities—certificates of test. *The local authorities adopting a voting machine shall,* as soon as practicable thereafter, provide for each polling place one or more voting machines in complete working order, and shall *thereafter keep them in repair, and shall have the custody thereof* and of the furniture and equipment of the polling place when not in use at an election. . . .

"It shall be the duty of the county auditor or the city clerk or their duly authorized agents not less than twelve hours before the opening of the polls on the morning of the election to examine and test said machines. . . ."

Secion 52.16 provides:

"52.16 Duties of election officers—independent ballots. . . . If not previously done, they shall arrange, in their proper place on the voting

machine, the ballots containing the names of the offices to be filled at such election, and the names of the candidates nominated therefor. If not previously done, the machine shall be so arranged as to show that no vote has been cast, and the same shall not be thereafter operated, except by electors in voting. Before the polls are open for election, each judge shall carefully examine every machine and see that no vote has been cast, and the same shall be subject to inspection of the election officers. . . ."

Section 342.1 provides:

"342.1 Fees belong to county. Except as otherwise provided, *all fees and charges of whatever kind collected for official service* by any county auditor, treasurer, recorder, sheriff, clerk of the district court, and their respective deputies or clerks, *shall belong to the county.*" (Emphasis supplied)

The voting machines in question were apparently purchased by Polk County under authority of §52.2 of the Code, and we must assume that their use by the City of Des Moines has been ordered or authorized in some manner by the Polk County Board of Supervisors. It is clear under §52.2 that only the board of supervisors has the power to authorize their use. The county auditor has no such power. In the case of *Wiedenheft v. Frick,* 234 Iowa 51, 59, 11 N.W. 2d 561, 565, (1943) the Iowa Supreme Court, in construing this section, said:

"If a city purchases them, they may be used within the city in all elections, regardless of whether the election be a city, county, or state election. If a county purchases them, then the county may authorize the use of them in all elections within the county without any further authorization by the smaller units of the county such as a city."

The foregoing language indicates the control over the use of the machines possessed by the county when the machines are owned by it. Section 52.9 also provides that "The local authorities adopting a voting machine shall . . . keep them in repair, and shall have the custody thereof. . . ." It is clear from these words that custody and the duty to repair are imposed upon the board of supervisors when it is the body owning the machines. Section 52.2 authorizes the board of supervisors to give the *"use"* of the machines to the city, but it does not permit it to shift its obligations of repair and custody.

The second paragraph of §52.9 provides that it is the duty of the county auditor or city clerk to examine and test the machines. Since custody and the duty of keeping in repair are obligations of the authority which owns the machines, it is clear that the county auditor is responsible for examining and testing the machines owned by the county, regardless of who is using them. Section 52.16 provides that it is the duty of the election boards to set up the machines with the ballots, to set the machines at zero, and to inspect the machines to see that no vote has been cast before the polls are open. In view of these statutory requirements, it seems that there is no necessity or authorization to hire outside sources and, when the county auditor performs the work, it must be presumed that he does so in his official capacity and as authorized and required by law.

In conjunction with the above statements, it should be pointed out, however, that the second paragraph of §52.9 was enacted by Chapter 95, §1, Acts 58th G.A., which became effective July 4, 1959, and that no similar provision existed prior to that time. Thus, the board of supervisors had the duty of keeping the machines in repair and custody of them, and the judges of election had the duty of setting up the ballots on the machines, but there was no express provision requiring examination and testing of the machines. Impliedly, this latter duty would fall upon the county as an incident of the duty to keep in repair, but it was not an express statutory duty of the county auditor, nor

apparently could he have been compelled to perform it. The fact that there was no express duty is not absolutely determinative of the officer's right to retain the fee, however.

Section 342.1 of the Code provides that all fees or charges collected for official service belong to the county. A similar question has recently been before this office wherein we ruled:

> "Similarly, the fees herein considered were collected by the County Recorder from the County A.S.C. officials *under color of office and without statutory authority therefor.* Consequently, the Recorder is required to account to the County Treasurer for the fees received by her in the performance of the duties for the County A.S.C. office even though these duties were performed by the Recorder outside of official office hours." (STAFF to Winkel, Kossuth Co. Atty., 3/23/62) (Emphasis supplied)

In an opinion found in 1938 *O.A.G.* 208, it was stated, "One appointed or elected to a county office is not entitled to any compensation or emolument from such office save and except that provided for by statute." In an earlier opinion, found in 1912 *O.A.G.* 379, the case of *Massie v. Harrison County,* 129 Iowa 277, 105 N.W. 507 (1906) was cited as controlling, wherein it is stated, at page 280 of the Iowa Reports:

> "... and we have distinctly ruled in several cases that no contract can be made looking to the allowance of payment to a public officer of any other or greater compensation than that fixed by law."

The right of the county auditor to be compensated for custodianship of voting machines bestowed upon him by the board of supervisors is denied in an opinion of this Department appearing in 1924 *O.A.G.* 122, where it was stated:

> "His compensation is fixed by statute and the board of supervisors could not by resolution or any other method change the compensation provided by the statute, either by increasing or decreasing the same. Any allowance by the board of supervisors of additional compensation to the county auditor as custodian of the voting machines would be clearly unauthorized and illegal. The county auditor would be entitled to the actual expense incurred by him in distributing the voting machines or ballots and ballot boxes and in preparing them for the election. Any amount received by him in excess of these actual legitimate expenses should be charged back to him and refunded to the county."

In the case of *Nueces County v. Currington,* 139 Tex. 297, 162 S.W. 2d 687, 688, (1942), the Court states: "... a fee paid a public officer for the performance of a duty enjoined by statute is a fee collected in an official capacity." In the case of *Moore v. Sheppard,* 144 Tex. 537, 192 S.W. 2d 559, 560 (1946), the Court states: "The Clerks of the Courts of Civil Appeals are not entitled to receive extra compensation for services performed within the scope of their official duties prescribed by law." Similar holdings are found in *Collman v. Wannamaker,* 27 Idaho 342, 149 Pac. 292 (1915); *State v. Holm,* 70 Neb. 606, 97 N.W. 821 (1903); *Landis v. Lincoln County,* 31 Ore. 424, 50 Pac. 530 (1897).

In view of the above decisions, opinions, express statutory provisions, and the questions of public policy involved, it is my opinion that the county auditor is required to account for the fees received by him, in the circumstances recited by you in connection with the county voting machines.

7.67

Assessment for water district—§357.19, 1958 Code. The board of supervisors,

in making an assessment for a benefited water district, is restricted in reckoning the cost of the improvement to an assessment according to frontage, but not in excess of the benefit conferred. (Strauss to Hamilton, Webster Co. Atty., 8/4/61) #61-8-3

7.68

Auditor—§§332.3 (10), 332.21, 335.1, 1958 Code. County auditor is not entitled to extra compensation for discharging duties of recorder where vacancy in that office exists. (Strauss to Heslinga, Mahaska Co. Atty., 7/13/61) #61-7-8

7.69

Auditor—§11.6, 1958 Code. The payment of annual audits of the agricultural extension service, county assessor, and soldiers' relief, is within the area of county audits, and their separate funds are not available for the payment thereof. (Strauss to Carroll, Union Co. Atty., 7/25/61) #61-7-24

7.70

Auditor—§298.18, 1958 Code. Where a school bond issue has been authorized by vote of the electors, and school district has certified resolution for assessment for annual levy to retire the bonds and filed the certified copy with the county auditor, the duty of the auditor is mandatory to include in the proposed budget the amount estimated to be realized from the sale of the bonds and also to make the levy certified by the school district to him, subject, however, to the limitation of certification to the provisions of §298.18. (Strauss to Akers, St. Aud., 8/31/61) #61-8-30

7.71

Benefited fire districts—§§357A.1, 357A.3, 357A.4, 1962 Code. In determining the boundaries of a benefited fire district under Ch. 357A, jurisdiction of the board of supervisors to act thereon is confined to the proposed boundaries as defined in the petition to the board. (Strauss to Bainter, Henry Co. Atty., 11/21/62) #62-11-3

7.72

Board of education—1. A county board of education would have no authority to levy a tax for educational purposes without a legislative enabling act. 2. If an enabling act is adopted, unless it so required, there would be no necessity of submitting the proposition of levying a tax to the voters of the county. (Strauss to Roggensack, Clayton Co. Atty., 3/30/61) #61-3-19

7.73

Board of supervisors—§§430.9, 445.68, 1958 Code. The board of supervisors has no authority to refund taxes paid upon capital stock of a bank after it has been closed and placed in the hands of a receiver, or upon taxes of the capital stock of a bank, the value of which has been destroyed. (Strauss to Smith, O'Brien Co. Atty., 7/26/61) #61-7-29

7.74

Board of supervisors—Only appointing officer has authority to revoke appointment of county employees duly appointed with approval of board of supervisors. (Strauss to Hughes, Ringgold Co. Atty., 7/13/61) #61-7-12

7.75

Board of supervisors—§§111A.4(2), 332.3(17), 1958 Code. County board of supervisors has no power to lease portion of county farm to county conservation board. (Creger to Wenger, Fremont Co. Atty., 7/25/61) #61-7-26

7.76

Board of supervisors—§332.3, 1958 Code. There is neither implied power nor express power in the board of supervisors to permit the construction of a building on the county home grounds subject to purchase by the board after the building has served the purposes of the builder. (Strauss to DeButts, Marshall Co. Aud., 8/9/61) #61-8-12

7.77

Board of supervisors—§§309.17, 332.3(2), 1958 Code. In proceedings before the board of supervisors there are no requirements that a nomination of an appointive county office bear a second. (Strauss to Charlton, Delaware Co Atty., 1/8/62) #62-1-2

7.78

Board of supervisors—§341.1, 1958 Code. Power of approval vested in the board of supervisors, of approving appointments of deputies, assistants, etc. in county elective offices, does not include the power to disapprove because an employee may be more than 70 years of age. (Strauss to Perkins, Polk Co. Atty., 8/16/61) #61-8-26

7.79

Board of supervisors—§349.18, 1958 Code. In publishing the proceedings of board of supervisors' compensation of secondary road employees, the compensation of each employee must be listed separately. Publication of the total compensation to all such employees is regarded as "bunching" and is unauthorized. (Strauss to Cameron, Jefferson Co. Atty., 3/30/62) #62-3-10

7.80

Combination of offices—Ch. 189, §6, Acts 59th G.A. (§332.21, 1962 Code). 1. Insofar as a proposed combining of the offices of county recorder and county clerk, form of petition is approved subject to suggested changes. 2. Proposal may be submitted to electors at a special election, which may be held at the same time as the primary election to be held in 1962. 3. Insofar as fixing the salary arising out of the combining of such offices, §6 of Ch. 189, Acts 59th G.A. would control the fixing of such salary, and not the provisions of §5, Ch. 253, Acts 58th G.A. (Strauss to Christensen, St. Rep., 8/14/61) #61-8-18

7.81

Commission of hospitalization—§229.2, 1958 Code. Commission of hospitalization is authorized to designate place of confinement of mentally ill prior to meeting of commission and pending its investigation. (Allen to Samore, Woodbury Co. Atty., 7/13/61) #61-7-11

7.82

Contracts for construction— §§309.40, 309.80, 1958 Code. 1. The requirement

of §309.40, requiring advertising and public letting on contracts involving more than $5,000, is restricted to contracts for construction. 2. The power of the highway commission over such contracts is limited to the approval of contracts made by the board of supervisors based upon the provisions of §309.40. (Strauss to Willett, Tama Co. Atty., 8/10/61) #61-8-14

7.83

County attorneys—§306.9, 1958 Code. A commission on a fine imposed as a result of a contempt proceeding is allowable where the county attorney rendered some contribution in the proceedings. (Yost to Rasche, Clinton Co. Atty., 11/22/61) #61-11-20

7.84

County hospital depreciation fund—§§347.12, 347.14, 347.14(11), 1962 Code. A county hospital depreciation fund may be established by the board of hospital trustees by proper resolution, in which the county auditor has no part. Government bonds acquired by the trustees as part of the depreciation fund shall be deposited to the county treasurer under §347.12. (Strauss to Bedell, Dickinson Co. Atty., 11/26/62) #62-11-4

7.85

Definition of voucher—§332.15, 1958 Code. The word "voucher", defined generally in the context of §332.15, includes the statement of account or claim upon which voucher is issued. (Strauss to Samore, Woodbury Co. Atty., 12/12/61) #61-12-5

7.86

Drainage assessments—§455.63, 1958 Code. The county treasurer, upon payment of drainage assessment, may not impose all the interest thereon that would accrue if the assessment were not paid until maturity. (Strauss to Butler, Cerro Gordo Co. Atty., 8/7/61) #61-8-9

7.87

Election to fill vacancy in office of county auditor—§43.3, 1958 Code. A person appointed to fill vacancy in office of county auditor holds office until the next general election, and at such election the vacancy shall be filled for the remainder of the term and the nominee for such vacancy shall be selected at the preceding primary. (Strauss to Samore, Woodbury Co. Atty., 2/26/62) #62-2-7

7.88

Erection and repair—§332.7, 1958 Code. The installation of an elevator in a pre-existing shaft does not constitute building, erection, or repair as provided by §332.7. Such installation constitutes equipment, and letting of a contract therefor by public bidding is not a statutory requirement. (Strauss to O'Connor, Chickasaw Co. Atty., 3/7/61) #61-3-2

7.89

Funds of conservation boards—§§111A.6, 334.1, 452.4, 1958 Code. Neither county conservation board nor county treasurer has power to invest funds in short term investments, but county treasurer may deposit money at interest

so long as the money may be withdrawn on demand. (Creger to Leir, Scott Co. Atty., 5/23/61) #61-5-12

7.90

Improvement bids—§§331.3(5)(6), 332.7, 332.8, 1958 Code. (1) Contracts for building improvements in excess of $2,000 let by the board of supervisors of the county in which said improvements are to be made, without advertisement for bids as provided in Code §§332.7 and 332.8, are illegal and (2) said board of supervisors is without authority to direct the county auditor to issue warrants for expenditure of funds based on said illegal act. (Strauss to Simpson, Boone Co. Atty., 6/6/61) #61-6-3

7.91

Incompatibility—§250.6, 1958 Code. No incompatibility between administrative assistant to Soldiers' Relief Commission and justice of the peace. (Rehmann to O'Connor, Chickasaw Co. Atty., 6/30/61) #61-6-22

7.92

Incompatibility—§441.9(1), 1958 Code. County assessor may not also at the same time hold position of town clerk, even if the duties to be performed in the other position are done at night after the county assessor's duties have ended for the day. (Strauss to Hasbrouck, Guthrie Co. Atty., 8/1/61) #61-8-1

7.93

Incompatibility—Ch's. 358B, 378, 1958 Code. A trustee of a municipal library organized under Chapter 378 may not be trustee of a county library organized under Chapter 358B. (Rehmann to Grafton, St. Lib., 3/10/61) #61-3-8

7.94

Incompatibility of county attorney and member of Soldier's Relief Commission —The offices of county attorney and member of the Soldier's Relief Commission are incompatible and, in addition, the county attorney is disqualified from occupying those two offices at the same time. (Strauss to Allen, Monona Co. Atty.-elect, 12/11/62) #62-12-1

7.95

Insane liens—Ch's. 230, 332, 1958 Code. Boards of supervisors have no power to purchase insurance on homestead of recipient to protect lien of county for assistance rendered. (Bianco to Dunn, Hardin Co. Atty., 7/13/61) #61-7-7

7.96

Insurance for employees—§§332.3(20), 517A.1, 1958 Code. County board of supervisors may purchase insurance under §517A.1 for employees which gives broader coverage and is, therefore, not limited in amount by §332.3(20). (Bump to Ball, Black Hawk Co. Atty., 5/3/62) #62-5-1

7.97

Inter-county levee district—Art. XI, §3, Const. of Iowa. An inter-county levee district is not a political or a municipal corporation within the terms

of Article XI, §3, of the Constitution of Iowa. (Strauss to Matthews, Louisa Co. Atty., 11/13/61) #61-11-14

7.98

Interest, special assessments—§391.60, 1958 Code. In the computation of interest on special assessments under §391.60, a June-to-June basis must be used extending from the date of the levy to the following June 1st. If the levy is made after June 1 and prior to January 1, a refund of prepaid interest might be required. (Bump to Ford, Des Moines Co. Atty., 6/15/61) #61-6-11

7.99

Issuance of marriage license—§598.17, 1958 Code. The clerk of the district court may legally issue a license to marry to persons who have been divorced within one year, providing that the divorce was not granted in the State of Iowa. (Strauss to Butler, Cerro Gordo Co. Atty., 7/7/61) #61-7-4

7.100

Liens for institutional care—§§509.12, 511.37, 627.8, 1958 Code. County cannot garnish, attach or levy upon funds received by persons as benefits from social security or disability insurance in order to obtain rebate for moneys expended for institutional care of such persons, but the same rule does not apply to Railroad Retirement benefits. (Creger to Maddocks, Wright Co. Atty., 11/1/61) #61-11-2

7.101

Medical examiner, duties—Ch. 258, Acts 58th G.A. (§§339.4, 339.5, 1962 Code). Where death of an inmate occurs in the Iowa State Penitentiary, regardless of cause, such death must be reported to the county medical examiner. (Bianco to Tucker, Deputy Lee Co. Atty., 3/8/61) #61-3-3

7.102

Medical examiner—Ch. 258, Acts 58th G.A., (Ch. 339, 1962 Code). The county board of supervisors may appoint such deputy medical examiners as are necessary to assist him in the performance of his duties. He shall promptly notify the chairman of the board of supervisors, who shall designate some other qualified person to serve in his place when he is unable to perform his duties. (Rehmann to Nelson, Story Co. Atty., 4/24/61) #61-4-20

7.103

Medical examiner— Ch. 258, Acts 58th G.A., (Ch. 339, 1962 Code). County medical examiners may not charge a docketing fee. (Rehmann to Perkins, Polk Co. Atty., 4/24/61) #61-4-19

7.104

Medical examiners—§339.1, 1958 Code. The medical examiner is under no duty to pay burial expenses of a person who dies within his jurisdiction. (Rehmann to Levis, Audubon Co. Atty., 8/7/61) #61-8-8

7.105

Medical examiner—Ch. 258, Acts 58th G.A., reports and records compiled and filed by the county medical examiner are public records and may not be

treated as confidential or privileged communications. (Bianco to Zimmerer, Com'r. Public Health, 10/27/61) #61-10-13

7.106

Mentally ill, claims—Ch. 230, §249.20, 1958 Code. The provisions of §249.20 cannot be resorted to to force assignment of a tax sale certificate to board of supervisors under lien provisions of Ch. 230. An ordinary action at law may be brought against a guardian of a mentally ill patient of a state institution to enforce collection of county claims for support under Ch. 230 or an equitable action to foreclose the statutory lien granted counties under said statutes. (Bianco to Maddocks, Wright Co. Atty., 3/8/61) #61-3-4

7.107

Publication of proceedings of board of supervisors—§349.18, 1962 Code. County auditor is required to furnish a copy of proceedings of meeting of board of supervisors, same being an official document. This copy, if changed by the official newspaper or its editor in any respect, ceases to be an official copy of the proceedings. (Strauss to Sams, Mitchell Co. Atty., 5/31/62) #62-5-8

7.108

Qualification of deputy assessor—§10, Ch. 291, Acts 58th G.A. (§441.10, 1962 Code). A deputy county assessor has no independent or original status, and in order to qualify for appointment to such office under a new assessor is required to pass examination required by §10, Ch. 291, Acts 58th G.A. (Strauss to Hoover, Clay Co. Atty., 11/28/61) #61-12-1

7.109

Recreation commission fund—Levy of one mill for recreation or conservation purposes, authorized by Ch. 132, Acts 58th G.A., is operative notwithstanding the provisions of H.F. 398, 59th G.A., authorizing an additional limited county levy. (Strauss to Selden, St. Compt., 7/10/61) #61-7-5

7.110

Residence for steward of county home—There is no statutory authority in the board of supervisors to provide the steward of the county home with a separate residence or to expend money for such purpose. (Strauss to Perkins, Polk Co. Atty., 6/21/62) #62-6-1

7.111

Retirement of bonded indebtedness by county hospital—§76.1, 1958 Code. Method of redemption of callable bonds, in order serially or otherwise, should be contained in resolution of authority for issuance of such bonds. (Strauss to Bainter, Henry Co. Atty., 7/20/61) #61-7-17

7.112

Secondary road fund—§309.9, 1962 Code. The secondary road fund is not available for the payment of insurance premiums on insurance covering secondary road employees. 1928 *O.A.G.* 353 confirmed. (Strauss to Williamson, Adair Co. Atty., 11/21/62) #62-11-2

7.113

Service of warrant by sheriff—§337.11(2), 1962 Code. Under circumstances wherein service of warrant could be made and the peace officer has not attempted "in good faith" to serve such warrant, the peace officer is not entitled to repayment of expenses authorized under §337.11. (Allen to Hasbrouck, Guthrie Co. Atty., 5/31/62) #62-5-9

7.114

Sheriff, living allowance—§340.8, 1958 Code. The sheriff is entitled to the six hundred dollars ($600.00) living allowance provided by §340.8, when he elects not to use the living quarters provided. (Strauss to Ford, Des Moines Co. Atty., 12/12/61) #61-12-6

7.115

Statutory meeting of board of supervisors—§331.15, 1958 Code. The regular statutory meeting of the board of supervisors prescribed by §331.15 as the second secular day of January of each year, is a regular meeting of the board and continues until the next statutory meeting, and a petition filed at the time of the said regular meeting is entitled to action by the board. (Strauss to Schrader, Jones Co. Atty., 3/13/62) #62-3-4

7.116

Steward of county home—§253.4, 1958 Code. A corporation is not eligible to be steward of a county home, as the duties to be performed by the steward are personal services that could be performed only by him. (Strauss to Heslinga, Mahaska Co. Atty., 1/15/62) #62-1-5

7.117

Transfer of funds—§441.16(4), 1962 Code. There is no authority to transfer funds for the purpose of meeting an increase in the salary of the assessor. The assessor's salary when fixed for the term may not be changed or altered during the term. (Strauss to Goreham, Poweshiek Co. Atty., 6/27/61) #61-6-13

7.118

Use of courthouse by city—§§332.3 (13)(16)(17), 1958 Code. The county has no authority to grant to the city the use of the courthouse grounds by lease or otherwise for a comfort station for use by the public. (Strauss to Saur, Fayette Co. Atty., 4/19/62) #62-4-7

CHAPTER 8

COURTS

STAFF OPINIONS

LETTER OPINIONS

8.1

COURTS: Clerk, marriage license—§4.1(23), 1958 Code. 1. Under §4.1(23), as amended by the 58th G.A. (Ch. 64, §1) and H.F. 223, Acts 59th G.A., a clerk of the district court may issue a marriage license on the third day AFTER the day on which application therefor was filed, if the affidavit of a disinterested person as to the age and qualifications of the contracting parties satisfies him as to their competency to contract the marriage. Where the last day of the three-day period falls on Sunday, said period is extended to the following Monday. 2. The clerk of court is not a disinterested person and therefore cannot make the required affidavit. 3. The license, when issued, must be handed to one of the parties who is to use it. Delivery cannot be made by mail.

June 27, 1961

Mr. Donald E. Skiver
Osceola County Attorney
315 Ninth Street
Sibley, Iowa

Dear Mr. Skiver:

This will acknowledge receipt of your letter of June 19, 1961, in which you state the following:

"John L. Harms, the Osceola County Clerk of Court and President of the Iowa Clerk of Courts Association, has requested that I obtain an opinion on the following questions:

"House File 223 as Enacted by the 59th General Assembly provides as follows:

" 'Section 1. Section five hundred ninety-five point four (595.4), Code 1958, is hereby repealed and the following substituted in lieu thereof:

" 'Previous to the issuance of any license to marry, the parties desiring such license shall sign and file a verified application with the clerk of court which application either may be mailed to the parties at their request or may be signed by them at the office of the clerk of the district court in the county in which the license is to be issued. Such application shall set forth at least one affidavit of some competent and disinterested person stating such facts as to age and qualification of the parties as the clerk may deem necessary to determine the competency of the parties to contract a marriage. Upon the filing of the application for a license to marry the clerk of the district court shall file the applica-

tion in a record kept for the purpose and no license shall be issued until the expiration of three days from the date of filing the application. After the expiration of three days from the date of filing the clerk shall issue the license to the parties if he is satisfied as to the competency of the parties to contract a marriage.'

"1. In your opinion, would there be compliance with the statute if a marriage license be issued after 72 hours have elapsed from the time of filing of the application for license to marry? In other words, if an application were filed at 11:00 A.M. Monday morning, can a clerk issue a license at 11:01 A.M. Thursday morning? The statute is confusing on this point because it refers to days.

"2. Can the Clerk execute an affidavit, as a disinterested person, when the same is to be used in connection with an application for license to marry?

"3. The statute provides 'The Clerk shall issue all license to the parties.' Must this be issued to the contracting party or parties personally or can he mail the license to either of the parties if requested by them?"

1. In answer to your Question No. 1, I would advise, in respect to example submitted, that an application filed on Monday morning would authorize license to be issued on the following Thursday. Specifically, in computing such time under §4.1(23), Code 1958, as amended by Chapter 64, §1, Acts 58th G.A., the day of filing the application, being the first day, shall be excluded, and the last day shall be included. The foregoing method of reckoning time accords with both the letter and legislative intent of §4.1(23), Code 1958, as amended by the 58th G.A., and the provisions of H.F. 223, Acts 59th G.A. This accords with the policy of the State in such time reckoning, as exhibited in the case of *St. Paul Mercury Indemnity Company, et al. v. Laura K. Nyce, individually and as administratrix of the estate of Earl H. Nyce,* 241 Iowa 550, 563, where it was stated:

"The method of computing time in the construction of statutes as required by Code section 4.1(23), (11), supra, has been a provision of every Code of Iowa, from the first to the last, both included. The same method has been quite uniformly used in computing periods of time in contracts and other instruments and proceedings. For many years in England and in this country there was much uncertainty in the computing of time, which arose from the differing views as to whether the first or last day or both should be excluded. The statutory method controls in this state, unless it conflicts with the specific legislative intent as manifested by the language of the statute. Occasionally this court may have used the statutory method though contrary to the plain intent evidenced by the statute construed (Consolidated Ind. Sch. Dist. v. Martin, 170 Iowa 262, 152 N. W. 623) or disregarded the statutory method by excluding the last day (First Trust Joint Stock Land Bank v. Terbell, 217 Iowa 624, 627, 252 N. W. 769). But this court, in computing periods of time fixed by statute or by proceedings thereunder, has uniformly complied with the statutory method, unless contrary to legislative intent. See Fink v. Fink, 8 (Clarke) Iowa 313; Richardson v. Burlington & Missouri River R. Co., 8 (Clarke) Iowa 260, 261; Wilson v. Knight, 3 (Greene) Iowa 126; Carleton v. Byington, 16 Iowa 588; Teucher & English v. Hiatt, 23 Iowa 527, 529, 530, 92 Am. Dec. 440, 441, 442, in which, speaking of the beginning and termination of the period of redemption from a judicial sale, the court, through Cole, J., said:

" 'But, in our state, the manner of computing time has been regulated by statute (Code of 1851, section 2513; Revision of 1860, section 4121). * * * Under the Code of 1851, or the Revision of 1860, we are clear in the opinion, that the *first,* or day of sale, is to be excluded, and that

the right of redemption, therefore, existed during the whole of the same day of the succeeding year. The sale being made on the 28th day of January, 1860, the right to redeem continued until the last moment of the 28th day of January, 1861. The redemption in this case ('January 28, 1861, 3 o'clock and 40 minutes P.M.') was, therefore, in due time.'

2. In answer to your Question No. 2, I am of the opinion that the clerk is not a disinterested person within the terms of the foregoing statute. In the event of an affidavit made by him, he would, as clerk, pass upon his own statements as to age and qualifications of the parties to determine their competency to contract the marriage.

3. In answer to your Question No. 3, I am of the opinion that the authority of the clerk to issue a license to the parties, if he is satisfied as to their competency to contract the marriage, requires such license to be handed to the parties personally. Mailing of such license is neither an express nor implied power in the clerk under the authority to issue the license. Support for this conclusion is found in the case of *Maggett v. Roberts,* 112 N. E. 71, 16 S. E. 919 (1893), where with respect to a marriage license and its issuance, it was said:

"When filled out by such agent, and handed to the party who was to use it, it was then 'issued'.",

and in citing the above case, see 55 *C.J.S.* Marriage, 857, stating:

"As applied to a marriage license the word 'issue' means the filing up of the paper and handing it previously signed, to the person proposing to be married."

4. In addition to the foregoing, I would advise you that, in computing the time prescribed in H.F. 223, Acts 59th G.A., the terms of Code §4.1(23), as amended, likewise are applicable to the situation where the last day of the three-day period falls on Sunday. In that event, the three-day period is extended to include the whole of the following Monday. In the case of *Brembry v. Armour Company,* 250 Iowa 630, it is stated:

"The prevailing view seems to be that where the last day falls on Sunday in computing a statutory period, it is usually held that the following day shall be included."

8.2

COURTS: Justice of peace—§§39.21, 748.1 and 748.3, 1958 Code. A justice of peace is a magistrate, a county officer, but not a peace officer.

December 22, 1961

Mr. Carl H. Pesch, Commissioner
Department of Public Safety
LOCAL

Dear Mr. Pesch:

This is to acknowledge your letter under date of December 15, 1961, wherein you submit the following:

"This office is in receipt of a letter dated December 13, 1961, over the signature of Elmer Willis, J. P., posing the question, 'Is a J. P. considered a peace officer'?"

The legislature, being its own lexicographer, saw fit to define "peace officer" in §748.3, Code of Iowa, 1958. This definition provides, "The following are 'peace officers': ... sheriffs and their deputies ... constables ... marshals

and policemen of cities and towns ... all special agents appointed by the commissioner of public safety and all members of the state department of public safety excepting the members of the clerical force ... such persons as may be otherwise so designated by law."

If a justice of peace is to be considered a peace officer, it must of necessity result from the statutory language "such persons as may be otherwise so designated by law." In §748.1, Code of Iowa, 1958, a justice of peace is defined as a "magistrate", and is also defined as a "county officer" in §39.21, Code of Iowa, 1958. An examination of the Iowa statutes fails to reveal further definitive words or phrases pertaining to justices of peace and thus the language employed does not fall within the favor of §748.3, which defines "peace officer."

It is, therefore, our belief that a justice of peace is not a peace officer.

8.3

COURTS: Justice of the peace, fees—§§601.14, 601.131, 762.1, 1958 Code. To retain criminal fees, the proceedings must be held in the township where the justice of the peace is elected.

March 14, 1961

Mr. Harlan W. Bainter
Henry County Attorney
118½ South Main
Mt. Pleasant, Iowa

Dear Mr. Bainter:

This is to acknowledge receipt of your letter of February 27, in which you made the following inquiry:

"We have a Justice of Peace in our county who has served competently for quite a number of years. Up through 1959, he resided in Mt. Pleasant Corporation and was elected from this township as a Justice of Peace. In the year 1959, he built a home and moved to Tippecanoe Township, his business still remaining in Mt. Pleasant Corporation. In the last election, he lived in Tippecanoe Township, was on the ballot in Tippecanoe Township, and was elected Justice of Peace in Tippecanoe Township. He still continues to hold office at his place of business in Mt. Pleasant Corporation. I might add, that until a week ago, he was the only Justice of Peace in the entire county. We have recently, at my insistence, appointed a Justice of Peace from Mt. Pleasant Corporation, and I am insisting he handle all matters going over to District Court in order to protect District Court prosecutions until this matter is resolved.

"I feel that I need some specific direction from your office with regard to a current construction of the Rogers case and Section 601.131 of the 1958 Code of Iowa. I am advised that 601.131 is intended to prevent a Justice of Peace from collecting the $1200.00 minimum in two different townships. In our county a Justice of Peace does not even make half of $1200.00 in one township in any given year.

"I am wondering if you would give me a current construction of the two matters cited in your opinion in relation to the fact situation as set out in my letter."

The problem presented in your letter appears to include two questions:

1. Whether or not a justice of the peace elected in one township could hold court in another township in which his place of business is located, and

2. If court were held in a township other than that for which he was elected, whether or not he would be entitled to collect fees in criminal cases.

The jurisdiction of justices of the peace, when not restricted, is coextensive with their respective counties. (§601.1, 1958 Code). Actions in all cases may be brought in the township where the defendant or one of several defendants resides or, when actual service is made upon a defendant within the county, then in the township wherein the service is made. (§§601.3 and 601.4, 1958 Code). The justice of the peace acquires jurisdiction upon service of the defendant within his township, either because he resides there or because service is personally made upon him within the township, even though the offense is committed elsewhere.

However, §601.14 provides:

"If there is no justice in the proper township qualified or able to act, the action may be commenced in any adjoining township in the same county. If there be no such justice in an adjoining township, it may be commenced before the justice in the same county nearest to the township in which the defendant resides."

Thus a justice of the peace can acquire jurisdiction in some instances even though service was not made upon the defendant within the township from which he was elected.

The Supreme Court, in commenting upon the above-mentioned statute, in the case of *Coulter Bros. v. Riegel,* 204 Iowa 1032, at 1036, 216 N.W. 715, said:

"It is thus seen that the statute creates four possible venues: First, the township where either the plaintiff, the defendant, or any one of the several defendants resides. Second, any other township of the same county, provided that actual service is had on one or more of the defendants in such township. Third, an adjoining township to the proper township, when there is no qualified or acting justice in the proper township, regardless of notice on the defendant in such township. Fourth, any township of the same county where a justice is found, when there is no qualified or acting justice in the adjoining township, without respect to the service of notice in the township where such action is commenced."

Section 762.1 provides:

"Justices of the peace have jurisdiction of, and must hear, try, and determine all public offenses, less than felony, committed within their respective counties, in which the punishment prescribed by law does not exceed a fine of one hundred dollars or imprisonment thirty days."

This section makes it mandatory for the justice of the peace to hear non-indictable offenses within his township when jurisdiction is conferred upon him as set out above. However, this office has held, in 1925-26 *O.A.G* 205, that a justice of the peace elected in one township may hold court in criminal matters in another township within the same county, where his jurisdiction is coextensive within the limits of the county. In the case of *Rogers v. Loop,* 51 Iowa 41, 50 N.W. 224, the Court held that stipulation of the parties that court would be held outside the township for which the justice of the peace was elected did not oust the justice of the peace from his jurisdiction. Thus the validity of any decisions rendered by the justice of the peace outside the township for which he was elected would not be affected for the reason of lack of jurisdiction.

The fact that a justice of the peace may hold court outside the township for which he is elected has no relationship to the method of compensation to the justice of the peace as provided in §601.131, 1958 Code. The manner of compensation of a justice of the peace is determined upon the population of the township from which he was elected. While statutory provisions allow exceptions to hold court outside the township for which he was eleced, §601.131(2)(c) provides:

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

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

The statute is clear and unambiguous. To be able to retain criminal fees, the proceedings must be held in the township where the justice of the peace is elected. Because there is statutory authority allowing the justice of the peace to hold proceedings outside his township does not make an exception to this restriction.

Thus, the answer to your first question is in the affirmative and the second in the negative.

8.4

COURTS: Juvenile courts--§§231.1, 231.3, 231.7, 1958 Code. In a county where the judges of two municipal courts have been designated by the district court judges to hold juvenile hearings, there is only one juvenile court in that county and the two municipal courts constitute separate divisions of that juvenile court. The designated juvenile judge is not required to hold a juvenile hearing at his municipal court. The clerks of the respective municipal courts shall each act as clerk of his division of the juvenile court.

April 26, 1961

Mr. William C. Ball
Black Hawk County Attorney
Suite 201 First National Building
Waterloo, Iowa

Dear Mr. Ball:

This is in response to your letter of January 18, 1961, in which you set forth the following:

"In Black Hawk County we presently have two Municipal Courts. The City of Cedar Falls has a duly appointed Municipal Court Judge and the City of Waterloo has two such duly appointed Municipal Court Judges. Further, each of these judges has been appointed as a Juvenile Court Judge for Black Hawk County.

"1. *Jurisdiction:*

a. Does Section 231.3 give a Municipal Court Judge, so appointed, exclusive jurisdiction over children within the corporate limits of the city where such judge sets as a Municipal Court Judge and concurrent jurisdiction with Judges of the Juvenile Court in cases outside his or their corporate limits? or

b. Does Section 231.3, when read in conjunction with 231.1

give any such duly appointed Judge of the Juvenile Court concurrent jurisdiction with any other such judge in the same county in any case arising within said county.

"2. *Records and Place of Business:*

a. In view of Section 231.7 do the Clerks of both such Municipal Courts also act as Clerks of their respective Juvenile Courts?

b. May Juvenile Court hearings in such situations, as described above be held in the Court Rooms in either or both Municipal Courts in their respective cities?

c. May the Clerk's office of the respective Juvenile Courts keep Juvenile Court records in each of said offices?

d. Would a Municipal Court Judge, duly appointed as a Juvenile Judge, be required to hold Juvenile Hearings in his appointed place for holding Municipal Court only?"

Commenting initially upon the jurisdictional question, but extending by necessity over the entire range of the questions, it appears that it was the intent of the legislature that there should be but one juvenile court in each county. We direct your attention to §*231.1*, which provides:

"231.1 Jurisdiction. There is hereby established *in each county a juvenile court,* which, and the judges thereof, shall have and exercise the jurisdiction and powers provided by law." (Emphasis supplied)

However, it is evident that the limitation there imposed does not extend to the number of judges a county or judicial district may have. Section *231.3* provides:

"231.3 *Designation of judge.* The judges of the district court may designate one of their number to act as judge of the juvenile court in any county or counties, and may designate a superior or municipal court judge to act as judge of the juvenile court in cases arising in any city in which any such court is organized and in cases arising in any part of any county convenient thereto. In counties having a population of one hundred thousand or over, unless said district judges designate a superior or municipal court judge to act as juvenile judge, they shall after each election, designate one of their number to act as juvenile judge for the ensuing four years."

Thus, in the situation you have presented, where the district court judges have appointed two judges from the Waterloo Municipal Court and one judge from the Cedar Falls Municipal Court as juvenile court judges for Black Hawk County, the municipal courts are not independent juvenile courts, but are merely properly appointed divisions of the Black Hawk County Juvenile Court.

With the juvenile court being so constituted, §231.3, *supra,* provides further clarification on the jurisdictional question. The municipal judge designated as juvenile court judge shall sit "in cases arising in any city in which any such court is organized and in cases arising in any part of any county convenient thereto." (§231.3, *supra.*) The designation by the district court judges limits the inhabitants of the two cities to their organized municipal courts on juvenile jurisdiction under this section, but the only test of county jurisdiction of the respective divisions of the juvenile court is that it be a part of the county "convenient" to the municipal court. This is not to say, however, that any designated division of the juvenile court has "exclusive jurisdiction over children within the corporate limits of the city." The Iowa court in *State v. Reed,* 207 Iowa 557 (1928), has held that the district court is not

deprived of jurisdiction in indictments against persons under eighteen years of age.

The municipal court has no jurisdiction in juvenile matters "unless otherwise authorized" (§602.14) by the district court (§231.3), so it is apparent that the district court, operating within the provisions of §231.3, could define the jurisdictional limits of the various divisions of the juvenile court outside of the respective municipalities. Absent such direction from the district court, the jurisdiction of the divisions of the Black Hawk County juvenile court is as set forth above and outside of the corporate limits of either municipality the divisions of the juvenile court would have concurrent jurisdiction.

Under the factual situation set forth above and in answer to question two, the clerks of both municipal courts would also act as clerks of their respective divisions of juvenile court. Section 231.7 provides:

> "231.7 *Clerk.* The clerk of the court whose judge acts as the juvenile court shall act as clerk of the juvenile court."

The records of the juvenile court in this situation would be maintained in both municipal courts, i.e., each clerk would maintain the Black Hawk County Juvenile Court records insofar as that division had participated in juvenile proceedings, in accordance with §231.6. (See also §602.13.)

Subject to the jurisdictional observations made above, juvenile court hearings *may* be held in the court rooms in either division of the juvenile court, but there is no requirement that such hearings be held in a courtroom. Further, there is no requirement that a juvenile court judge hold hearings only in the Municipal Court from which he was designated. (See for example, §232.7, Neglected, Dependent and Delinquent Children):

> "232.7 Time and place of hearing—notice. Upon the filing of the petition, the (juvenile) court or judge shall fix a time for the hearing and a place within the district convenient to the parties, and cause notice to issue as hereinafter provided."

Also bearing on the question of where a juvenile hearing can be held, see *State v. Johnson*, 196 Iowa 300 (1923), where the Court, in commenting upon the conduct of a criminal case before the juvenile court, stated at page 303:

> "The judge ordinarily is not 'on the bench.' "

8.5

COURTS: Vacancy, effect of Judicial Reform Amendment—§69.8, 1962 Code. Until legislation effectuates said Constitutional Amendment in regard to judicial vacancies, they shall be filled as provided by said §69.8.

July 17, 1962

The Honorable Norman Erbe
Governor of the State of Iowa
Statehouse
Des Moines, Iowa

My dear Governor:

This will acknowledge receipt of yours of the 13th inst., in which you submitted the following:

> "In view of the adoption of the Judicial Reform Amendment and its annexation to the Constitution, I wish to be advised of the method provided therein for filling vacancies in the District Courts, or, if no pro-

vision is therein made, then to advise me any other method by which this vacancy may be filled."

There is provision in the Judicial Reform Amendment, now effectively a part of the Constitution. Such provision and method is in effect but by its terms is not self-executing; and resultantly requires legislation to effectuate the Constitutional provision. Pending the enactment of legislation, therefore, resort must be made to other constitutional or statutory provisions directed to the method of filling any vacancy in the district courts of the State.

Section 69.8, Code of 1962, makes provision for filling such vacancies. This section provides:

"69.8 Vancancies—how filled. Vacancies shall be filled by the officer or board named, and in the manner, and under the conditions, following:

"2. State offices. In all state offices, judges of courts of record, officers, trustees, inspectors, and members of all boards or commissions, and all persons filling any position of trust or profit in the state, by the governor, except when some other method is specially provided."

Therefore, the obligation to fill this vacancy rests in you as the Governor of Iowa, under the authority of the foregoing designated section.

8.6

Age requirement of deputy clerk—§602.9, 1958 Code. Minimum age requirement for the holding of office of deputy clerk of the municipal court is 21 years, for the reason that a minor may not execute a bond, as is required by §602.9. (Strauss to Samore, Woodbury Co. Atty., 10/27/61) #61-10-12

8.7

Clerk, marriage licenses—§595.7, 1958 Code. Notification applies without distinction to all marriage licenses, including minors. (Strauss to Skiver, Osceola Co. Atty., 7/13/61) #61-7-14

8.8

Clerk, marriage licenses—§595.2, 1958 Code. In performing the duty of issuing marriage licenses where one or both of the applicants are minors, the clerk's authority is conditioned by an order of court of the county the clerk is serving. (Strauss to O'Connor, Chickasaw Co. Atty., 9/15/61) #61-9-9

8.9

Compatibility—Art. V, §5, Const. A judge of the district court, during the term for which he was elected, is ineligible for any office except that of the Supreme Court. (Strauss to Engelkes, Judge, Dist. Ct., 7/25/61) #61-7-23

8.10

Court reporters—Court reporters are public officers and that status is not changed to that of employer and employee by Ch. 189, Acts 59th G.A. (Strauss to Tucker, Dep. Lee Co. Atty., 8/14/61) #61-8-21

8.11

Expenses of district judge—§332.3(15), 1958 Code. Neither the county general fund nor the court expense fund is available for payment of rent for an office of judge of the district court outside the courthouse. (Strauss to Barlow, Palo Alto Co. Atty., 8/14/61) #61-8-19

8.12

Judges' retirement—Ch. 605A, 1962 Code. 1. The rate and limitation of the Judges' Retirement Act as applied to both judges in active service and those eligible for retirement but who have not actually retired, insofar as prior service is concerned, is controlled by the rate of contributions and limitations as fixed by S.F. 190, 59th G.A. 2. The rate and limitation of the annuity as applied to judges now drawing annuity will be computed and paid under the provisions of S.F. 190, 59th G.A., after its effective date, July 4, 1961; until said date the annuity will be computed upon the statute prior to its amendment by the said S.F. 190, 59th G.A. 3. Increase in the amount of contribution by members who are not now receiving annuity benefits, over those who are retired judges, resulting in increased benefits to them by reason of such increased contributions, is not a matter for the courts but for the legislature to determine. (Strauss to Selden, St. Comp., 6/30/61) #61-6-20

8.13

Justice of the peace fees—§601.131, 1958 Code. To retain criminal fees, the proceedings must be held in the township where the justice of the peace is elected. (Rehmann to Bainter, Henry Co. Atty., 3/14/61) #61-3-9

8.14

Marriages—§595.10, 1958 Code. Judges of police courts cannot solemnize marriages. (Rehmann to Carroll, Union County Atty., 1/25/61) #61-1-13

8.15

Number of judges in municipal court—§602.5, 1958 Code. The provisions of §602.5 relating to the number of municipal judges to be appointed or elected are mandatory in nature, and a municipal court district of over 40,000 and less than 60,000 inhabitants *must* have two municipal judges. (Bump to Duffy, St. Rep., 3/26/62) #62-3-8

8.16

Police court—§§367.13, 601.131(3)(d), 1958 Code. Upon the establishment of a police court, the county in which it is created is obligated to pay fees provided for in §367.13, notwithstanding the existence of two justice of the peace courts within the same city, and the statutory fees prescribed for the justice courts are not diminished but civil fees for those justice courts are discretionary with the board of supervisors. (Bump to Perkins, Polk Co. Atty., 6/5/61) #61-6-25

CHAPTER 9

CRIMINAL LAW

STAFF OPINIONS

LETTER OPINIONS

9.1

CRIMINAL LAW: Billiard halls, sale of beer—§726.9, 1958 Code. A billiard room separated by incomplete partition from room where beer is sold is "a billiard hall where beer is sold" under §729.6.

January 17, 1961

Mr. A. F. Draheim, Jr.
Wright County Attorney
Clarion, Iowa

Dear Mr. Draheim:

This is to acknowledge receipt of your recent letter wherein you state:

"An establishment commonly known as a recreational parlor where beer is sold has excluded an area by a substantial partition wall for the playing of pool and billiards, and such area has a separate outside entrance; however there is access between the area where beer is sold and the billiard room.

"Would the operation of such billiard room, which permits the patronage of minors, be in violation of Iowa Code Section 726.9 (1958)?"

In reply thereto, we must first note that §726.9 provides as follows:

"No person who keeps a billiard hall where beer is sold, or the agent, clerk, or servant of any such person, or any person having charge or control of any such hall, shall permit any minor to remain in such hall, or to take part in any of the games known as billiards. The council in any city or town shall have power by ordinance to establish minimum age limits for minors for the purpose of regulating their admittance to billiard halls which do not sell beer and their participation while therein in the games known as pool and billiards."

We note that §726.9 was amended by the 57th G.A., Chapter 273, §1, to add the final sentence thereof and to insert the words, "where beer is sold" after the word "hall" in line one. House File 229, 57th G.A., which set forth said amendment, included the following explanation:

"This authorizes municipal councils to set a lower age limit than that provided by state law for the entry of minors into poolrooms and billiard halls, provided that beer is not sold in such poolrooms and billiard halls.

This will give communities the right to establish additional desirable inside recreation for minors."

In the situation described, the billiard and pool playing area is separated by a partition from the beer sale area, but "there is access between the area where beer is sold and the billiard room." In other words, the partition between the two areas is not complete, and we deem it fair to assume that the beer may be consumed in the billiard area by participants and spectators of that game.

In reaching our conclusion we have relied upon well-known rules of statutory construction which are cited with approval in *Masteller v. Board of Control,* 251 Iowa 234, 100 N.W. 2d 111, at 112:

"We agree no construction should be adopted which would nullify, destroy or defeat the legislative intent. 'Since the intention of the legislature, embodied in a statute, is the law, the fundamental rule of construction, to which all other rules are subordinate, is that the court shall, by all aids available, ascertain and give effect, . . . to the intention or purpose of the legislature as expressed in the statute.' " (citing cases)

The fact that an incomplete partition has been erected to partially separate the two rooms does not, in our opinion, remove the establishment from the category of a "billiard hall where beer is sold." We feel that the obvious intent of the legislature, as expressed in the statute, is to proscribe the attendance of minors at billiard halls where beer may be procured and consumed. Where, as in the instant situation, purchasers of beer may freely pass from the "selling area" into the "billiard area" and consume the beer therein, the establishment would, in our opinion, be classified as a "billiard hall where beer is sold."

In answer to your question, we must therefore reply in the affirmative.

9.2

CRIMINAL LAW: Blood tests in OMVI—§625.14, 1958 Code. Expense of blood test in OMVI cases taxable as costs if Court allows them as such.

April 19, 1961

Mr. Keith Mossman
Benton County Attorney
Vinton, Iowa

Dear Mr. Mossman:

This will acknowledge receipt of your recent opinion request in which you state:

"I would appreciate an Attorney General's Opinion in connection with the taxing of costs in OMVI cases.

"It has been the practice of the officers in Benton County, Iowa, to call a local physician and surgeon to the County Jail for the purpose of examining every person arrested in this county for OMVI. The doctor conducts an examination to determine whether or not the person is intoxicated and requests that the suspect submit to a blood or urine sample. The Clerk of the District Court in this county has been taxing as a part of the costs the doctor's charge for the examination and the laboratory charge for the analysis of the blood or urine sample has been obtained. In your opinion, can the Clerk legally tax the doctor's fee and cost of analysis of the blood or urine sample as a part of the costs in the case? In the event that you are of the opinion that these items could be charged

as costs in the case, would the amounts be limited to the statutory charges for witness fees?"

Operating a motor vehicle while intoxicated is a criminal offense, of course, and thus the taxation of costs in such cases depends upon the rule in criminal cases. §321.281.

At 20 *C.J.S.*, Costs, §435, at page 677, it is stated:

"At common law costs as such in criminal cases were unknown. As a consequence it is the rule as well in criminal as in civil cases that the recovery and allowance of costs rest entirely on statutory provisions—that no right or liability for costs exists in the absence of statutory authorization. Such statutes are penal in nature, and are to be strictly construed."

In *State Line Democrat v. Keosauqua Independent,* 161 Iowa 566, 143 N.W. 409, at page 509 of 161 Iowa, it is stated:

"As costs were not taxable at common law, it is fundamental that they cannot now be taxed in the absence of a statute providing therefor, and as a rule statutes granting the power are strictly construed, and implied authority to tax is not generally recognized."

To the same effect see *City of Ottumwa v. Taylor,* 102 N.W. 2d 376, 378 (Iowa); *State v. Hess,* 170 Iowa 397, 400, 150 N.W. 6; *Keller v. Harrison,* 151 Iowa 320, 332, 128 N.W. 851.

It is thus apparent that costs in criminal cases cannot be taxed unless there is statutory provision for such action. Chapter 625, 1958 Code of Iowa, covers costs in civil cases. There is no similar Code chapter for costs in criminal cases, although §337.12 does make provision for certain costs in criminal cases. However, in *Schuvler v. Clinton County,* 118 Iowa 569, 92 N.W. 860, the Iowa Supreme Court, citing what is now Chapter 625, held that it was applicable in a criminal case and stated at page 572 of 118 Iowa:

"That the provisions of the general chapter of the Code relating to costs, and the taxation thereof, govern in criminal as well as civil cases, is conceded."

In *City of Ottumwa v. Taylor, supra,* at page 379 of 102 N.W. 2d, it is stated:

"Section 625.1 is a general statute applicable to all types of actions."

On the basis of the above authority, I must conclude that the taxation of costs in criminal cases depends upon statutory authorization, and that such authorization is found at Chapter 625, 1958 Code of Iowa.

Section 625.14 states what shall be taxed as costs, which includes witnesses' fees, fees of officers, compensation of referees, deposition expenses, and "... any further sum for any other matter which the court may have awarded as costs in the progress of the action, or may allow." No specific mention is made of the expense incident to analysis of blood or urine samples in OMVI cases. However, §625.14 authorizes any expense which "... the court may have awarded ... or may allow." Therefore, based on the above authority, in answer to your first question it is my opinion that the clerk may legally tax the doctor's fee and cost of analysis of the blood or urine sample as part of the costs in the case, *if* the Court awards or allows such costs.

In answer to question number two, the allowance or disallowance of such expenses as costs depends upon whether or not the Court allows them, not upon the statutory provision making witness fees a part of the costs. Therefore, it is my opinion that the amount allowed for such expenses in OMVI

cases is not limited to the statutory charges for witness fees but is controlled by what the Court allows.

9.3

CRIMINAL LAW: Justice of the peace courts—Justice of the peace courts do *not* have power to suspend sentences imposed by them and they are authorized to issue a mittimus to enforce the sentence which was the subject of the void suspension.

December 22, 1961

Mr. Joseph H. Sams
Mitchell County Attorney
Osage, Iowa

Dear Mr. Sams:

This will acknowledge receipt of your recent letter, in which you state as follows:

"I request your opinion as to whether or not a Justice of the Peace has authority to suspend a jail sentence, imposed by himself in his own Court, and if he does have such authority, does the same Justice of the Peace have authority to repudiate the suspension, and issue a mittimus requiring the Defendant to serve the full sentence originally imposed by the said Justice of the Peace?

"The material facts in this case are as follows: The Defendant was charged with assault and battery, and also with being intoxicated in a justice of the peace court in the proper township and county. The Defendant with his attorney entered a plea of guilty to both charges in the said court. The justice of the peace thereupon sentenced the Defendant to serve a term of 30 days upon each of the two charges, but immediately, and in the same judgment of sentence suspended 24 days on each of the said charges. The Defendant was then incarcerated in the County Jail where he remains at this time. Several days later the same justice of the peace rescinded the 24 days suspension, and issued a mittimus commanding the sheriff to hold the said Defendant as a prisoner in his jail for the full 30 days, which was originally imposed by the said justice of the peace."

In answer to the first part of your request, it is our opinion that a justice of the peace does *not* have authority to suspend a jail sentence which he has imposed. As the Supreme Court of Iowa stated in *State v. District Court (Cass County)*, 248 Iowa 250, 254, 80 N.W. 2d 555:

"A court has no power to suspend the operation of a sentence pronounced by it unless that power is conferred by statute. Pagano v. Beckly, 211 Iowa 1294, 1296, 232 N.W. 798. See also State ex rel. Hammond v. Hume, 193 Iowa 1395, 1399, 188 N.W. 796; State v. Voss, 80 Iowa 467, 470, 45 N.W. 898, 8 L.R.A. 767."

While district courts of Iowa are granted the power to suspend sentences by §247.20, and municipal courts are given the same power by virtue of §602.28, there is no statute which confers such power upon justice of the peace courts. See 1940 *O.A.G.* 100.

In answer to your second request, it is our opinion that the same justice does have authority to issue a mittimus requiring the defendant to serve the full sentence originally imposed. In *State v. Radcliffe*, 242 Iowa 572, 575, 47 N.W. 2d 175, the Supreme Court of Iowa acknowledged that this State

has adopted the rule which is set forth in *Morgan v. Adams,* 226 F. 719, 721 (C.C.A. 8th), as follows:

"If the order suspending such a sentence is illegal, it is so not because it is irregular or technically defective, but because it is beyond the power of the court, and it is therefore void, and the sentence stands, and is enforceable by the court at any time after its rendition, either before or after the term of the court, until the convict has suffered the penalties it imposes. Even if the order of suspension is embodied in the judgment which imposes the sentence, nevertheless the sentence is authorized and valid, while the order of suspension is unauthorized and void, and, as the latter is separable from the former, the latter falls, while the sentence stands."

As you have pointed out in your request, a previous opinion of this office, found in 1932 *O.A.G.* 137, conflicts to some extent herewith. Insofar as that opinion holds that a justice of the peace may suspend a sentence imposed by him, it is hereby overruled.

9.4

CRIMINAL LAW: Parole by court, conditions applicable to granting of parole—§247.20(1)(2)(3), 1958 Code. Section 247.20 sets forth conditions which must be satisfied before parole may be granted.

March 30, 1962

Mr. G. W. Templeton
Hancock County Attorney
Garner, Iowa

Dear Mr. Templeton:

This will acknowledge receipt of your recent letter in which you state:

"As section 247.20 now reads, it appears at first blush that the requirements of subsections 1, 2 and 3 pertain to the final discharge from a sentence and do not constitute conditions which must be satisfied before the trial court can grant a suspension and parole.

"I would appreciate it if you could give me your immediate opinion as to whether subsections 1, 2 and 3 of Code section 247.20 establish conditions which must be satisfied before a trial court may suspend the operation of a sentence and grant a parole, or whether such subsections are applicable only to the granting to a paroled person a final discharge."

The present §247.20 appeared as §3800 in the 1924 Code of Iowa, as follows:

"The trial court before which a person has been convicted of any crime except treason, murder, rape, robbery or arson, may, by record entry, suspend the sentence and parole said person during good behavior:

1. If said person has not previously been convicted of a felony.

2. If said person is shown to be free from venereal disease.

3. If said person, if an adult and able to labor, has obtained apparently permanent employment for a reasonable time."

This statute remained in substantially the same form until 1957, when the 57th G.A. amended it by striking the colon after the word "behavior" and by inserting in lieu thereof the words, "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:".

As §247.20 now stands, it must be admitted that there could be uncertainty as to whether the conditions following the colon apply only to the granting of the discharge from parole or whether they still apply to the granting of the parole. Historical investigation, however, clearly indicates that it has been the firm policy of the legislature to make these conditions applicable to the granting of the parole. To reach the anomalous conclusion that they apply only to discharge from parole would be in direct contravention of such policy.

As the Supreme Court of Iowa stated in *Spencer Publishing Co. v. City of Spencer,* 250 Iowa 47, 51, 92 N.W. 2d 633:

> "Perhaps the primary rule of construction of statutes by the courts is to ascertain and declare the intention of the legislature, and in case of uncertainty or ambiguity it may often be ascertained by historical investigation, especially when a settled and definite legislative policy is apparent from a series of prior enactments regarding the matter. City of Emmetsburg v. Gunn, 249 Iowa 297, 86 N.W. 2d 829, and cases cited therein. Many cases may be cited as to these pronouncements, but we refer only to a few. (citations)."

It is therefore our opinion that subsections 1, 2, and 3 of §247.20, 1958 Code of Iowa, set forth conditions which must be satisfied before a trial court may suspend the execution of a sentence and grant a parole.

9.5

CRIMINAL LAW: Prosecution of minors under 18 years of age for violations of Ch. 124—§§124.37, 232.18, 1958 Code. Section 124.37, as amended by the 58th G.A., makes a violation of Ch. 124 a misdemeanor when committed by a minor; but a minor under 18 years of age when charged with such violation in justice of the peace court must, together with his case, be transferred to juvenile court under §232.18.

February 16, 1962

Mr. Harold Heslinga
Mahaska County Attorney
Oskaloosa, Iowa

Dear Mr. Heslinga:

This will acknowledge receipt of your recent letter in which you state:

> "I would appreciate your interpretation of the portion of Section 124.37 of the 1958 Code of Iowa, as amended by Chapter 134 of the Acts of the 58th General Assembly, that states as follows:
>
> " '*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 my opinion that it was the intent of the Legislature to give justices of the peace jurisdiction in cases of violation of Chapter 124 by any person under the age of twenty-one. Section 232.1 gives the juvenile court jurisdiction of children under the age of eighteen years but Section 232.3(1) limits this jurisdiction to delinquent children who violate any law of this state punishable as a felony or an indictable misdemeanor. Section 124.37, as amended, does not specifically exclude the application of Chapter 232, as does Section 321.482, and there could be some controversy as to my opinion since you have frequently held

that a statute imposing a penalty should be given a strict construction in order to avoid the penalty imposed."

The above-quoted amendment to §124.37, 1958 Code of Iowa, does make a violation of Chapter 124 a misdemeanor when committed by a minor. Chapter 232 deals with jurisdiction of delinquent children by juvenile courts and, as you point out in your request, §232.3 would seem to indicate that a minor could not be deemed a delinquent child unless he had violated a law of this state punishable as a felony or indictable misdemeanor. Section 232.18 provides, however, that:

"Any child, taken before any justice of the peace or police court, charged with a *public offense* shall, together with the case, be at once transferred by said court to the juvenile court."

Section 232.19 then provides that such cases will be disposed of in the same manner as cases originally brought before the juvenile court. Misdemeanors are public offenses as defined in §687.1, 1958 Code of Iowa, and it is our opinion that any minor under 18 years of age who is charged with violating Chapter 124 in a justice of the peace court must be transferred, together with the case, to juvenile court.

9.6

CRIMINAL LAW: Prosecution witness' fees as costs taxed to defendant— §§625.1, 625.2, 625.14, 1958 Code. A defendant in a criminal case may be required to pay allowances for prosecution witnesses as part of court costs under Ch. 625 even though he enters plea of guilty before witnesses are heard.

December 22, 1961

Mr. Robert A. Maddocks
Wright County Attorney
Clarion, Iowa

Dear Mr. Maddocks:

This will acknowledge receipt of your recent letter wherein you state:

"The State of Iowa recently charged a man in Wright County under Chapter 321 of the 1958 Iowa Code. The man never entered a plea but the trial was continued several times with the County Attorney continually asking defense counsel if his client would plead guilty to the charge as filed in the Justice of the Peace Court. Defense Counsel refused several days before trial so the County Attorney issued subpoenas for two witnesses. The day of the trial the witnesses appeared at the hearing, having come a considerable distance but as soon as Justice Court convened, Defense entered a plea of guilty and both Counsels made oral statements. The question of costs for the witnesses was left undecided even though the Justice adjudged that the defendant must pay other costs.

"May the proper costs of the subpoenas and the witness fees for the prosecution be adjudged as part of the Court costs against the defendant wherein the defendant plead guilty before the witnesses were heard?"

Chapter 625, 1958 Code of Iowa, is a general statute devoted to the question of costs. This chapter is applicable to all types of actions including those of a criminal nature. *City of Ottumwa v. Taylor,* 251 Iowa 618, 102 N.W. 2d 376; *Hayes v. Clinton County,* 118 Iowa 569, 92 N.W. 860.

Section 625.1 provides that, "Costs shall be recovered by the successful against the losing party", and §625.14 provides that:

"The clerk shall tax in favor of the party recovering costs the allowance of his witnesses, . . . "

Section 625.14 should also be read in conjunction with §625.2, which deals with mileage limitations.

Even if the defendant enters a plea of guilty before the prosecution witnesses are heard, it seems clear that the allowances for such witnesses may, in a proper case, be taxed to the defendant. The rule is well stated in the case of *Parsons Band Cutter v. Sciscoe,* 129 Iowa 631, 634, 106 N.W. 164, as follows:

"Generally speaking, a witness is one who gives evidence in a court. * * * But this is not always the test. The losing party may be taxed with costs for witnesses who were properly subpoenaed and attended the trial, although they gave no evidence. It is often proper and necessary to summon witnesses whose evidence afterwards becomes immaterial and unnecessary."

It is our opinion, therefore, that the allowances for prosecution witnesses may be taxed to the defendant in a criminal cause whenever it becomes necessary to summon such witnesses, even if their evidence should subsequently become unnecessary.

9.7

CRIMINAL LAW: Sentence of convict, credit for time in mental health institute—§§246.38, 789.13, 1958 Code. Time spent as voluntary patient in mental health institute during suspension of sentence cannot be credited by warden on term of sentence.

March 13, 1961

Mr. Robert N. Johnson
Lee County Attorney
516 Seventh Street
Fort Madison, Iowa

Dear Mr. Johnson:

This is to acknowledge receipt of your recent letter, wherein you state:

"On January 28, 1961, the District Court of Lee County at Keokuk entered a judgment reciting that on October 31, 1960, a defendant in said court had been found guilty of the crime of lascivious acts with children in violation of Section 725.2 and sentencing and committing him to the penitentiary for a term not exceeding three years and suspending the commitment during the good behavior of the defendant and pending further order of the said Court and upon condition that the defendant make application for mental treatment in a mental hospital satisfactory to the Court and further reciting that the said sentence provided that the confinement of the defendant in the mental hospital shall be considered for all purposes under that sentence as confinement in the penitentiary and the defendant given credit for all the time that he is confined in a mental hospital. The said order or judgment of January 28, 1961, further recited that the defendant was admitted to the Mental Health Institute at Mt. Pleasant as a voluntary patient on November 25, 1960, and confined there until January 28, 1961, on which date the Court was advised by the Institute that they found it difficult to work with the defendant and recommended that he be returned to the penitentiary. The said order of January 28, 1961, then revoked the suspension of the commitment and committed the defendant to the penitentiary under the sentence dated October 31, 1960, and ordered that the defendant be

given credit for all the time which he was confined in the Mental Health Institute.

"The Warden and now particularly the Record Clerk of the penitentiary has raised the question as to whether or not the defendant under the provisions of section 246.38 of the Iowa Code can be given credit for the time he was confined in the Mental Health Institute as provided in the Court's order of January 28, 1961, or whether Section 248.38 requires that the defendant's penitentiary time shall start upon his receipt at the penitentiary."

We must first note that §246.38, 1958 Code of Iowa, provides as follows:

"No convict shall be discharged from the penitentiary or the men's reformatory until he has served the full term for which he was sentenced, less good time earned and not forfeited, unless he be pardoned or otherwise legally released. *He shall be deemed to be serving his sentence from the day on which he is received into the institution,* but not while in solitary confinement for violation of the rules of the institution." (Emphasis added).

This statute clearly indicates that a prisoner's sentence does not begin until he is received into the custody of the warden of the state penitentiary. See 1918 *O.A.G.* 444; 1938 *O.A.G.* 883.

Section 246.16 provides for the transfer of mentally ill convicts to the department for the mentally ill after incarceration in the penitentiary. The time spent in such department would, by the terms of said section, be credited to the term of the prisoner's sentence. Where, as here, the defendant had not been committed to the custody of the warden prior to his voluntary confinement in the Mental Health Institute, there is no authority under the laws of Iowa for the crediting of such time to the term of his sentence.

It should be further noted that the sentence, as originally rendered, is governed by the terms of the indeterminate sentence law, §789.13. The Supreme Court of Iowa has clearly held that the terms of this section cannot be altered or rendered nugatory by the sentencing court.

In *Cave v. Haynes,* 221 Iowa 1207, 1218, 268 N.W. 39, 44, the Court, in referring to said section, stated as follows:

"The warden holds the prisoner under the sentence imposed by the court. When the court sentences him to confinement in the penitentiary the warden is furnished a copy of such sentence. The time that he holds the prisoner is determined by him from the statute of the state, which provides the penalty for the crime charged, and he is not bound by the recitations of the sentence where an attempt is made therein to fix the time of confinement. He has a right, for his own guidance, to note on the books of the penitentiary the time that the law requires the prisoner to be kept. He having done so in the instant case, and having specified on said books the proper length of time for which the prisoners are to be kept, under the statutes of the state, there is no warrant or authority to compel him to change his record."

Accord: *Adams v. Barr,* 154 Iowa 83, 134 N.W. 564. See 1912 *O.A.G.* 125; 1940 *O.A.G.* 117.

In view of the fact that the terms of §246.38 clearly provide that a convict shall serve his sentence, "from the day on which he is received into the institution", and that the sentencing court has no power to reduce or modify a sentence governed by the indeterminate sentence law, it is our opinion that the defendant cannot be given credit for the time he was confined in the Mental Health Institute.

9.8

CRIMINAL LAW: Sentence of convict, credit for time spent in jail prior to conviction—§§247.20, 247.21, 1958 Code. Time spent in jail prior to conviction cannot be credited on term of sentence fixed by the court. Sentence not suspended in accordance with §§247.20 and 247.21.

February 23, 1962

Board of Control of State Institutions
State Office Building
LOCAL

Attention: M. J. Brown, Administrative Assistant

Dear Sir:

This will acknowledge receipt of your recent letter, in which you state as follows:

> "A woman was recently incarcerated in the Women's Reformatory upon a mittimus issued pursuant to a judgment of guilty entered upon a charge of soliciting in violation of Section 724.2, 1958 Code of Iowa. The judgment was entered on the 27th day of November, 1961, and, in pertinent part, provided as follows:
>
> " 'The defendant appears in court under custody and with her attorney, states she is ready to plead guilty to the lesser included offense Soliciting in violation of Section 724.2, 1958 Code of Iowa. The State recommends that said offer be accepted. The court accepts the same. Defendant now pleads guilty to said lesser included offense. Defendant states she is ready to be sentenced. The Court sentences the defendant to be confined in the Linn County Jail for six months and to pay the costs. *Credit to be given for the time spent in the Linn County Jail beginning Sept. 22, 1961.* (Emphasis added)
>
> "The mittimus issued pursuant to said judgment also stated that credit was to be given for the time spent in the Linn County Jail beginning September 22, 1961.
>
> "Our question, therefore, is whether the sentence of six months is to begin upon receipt of the prisoner at the Women's Reformatory, or whether credit is to be given for the time previously served as provided in the judgment and mittimus?"

The sentence of the court in the judgment entry to which you refer was confinement in the county jail for a period of six months and the payment of costs. The remaining portion of the order, in which it was stated that the defendant was to be given credit for time spent in the county jail prior to conviction, was an attempt by the court to direct the time at which the sentence was to be carried out.

In *Miller v. Evans,* 115 Iowa 101, 88 N.W. 198, the Supreme Court of Iowa quoted with approval the following language from the case of *Hollon v. Hopkins,* 21 Kan. 638:

> "The time for executing a sentence, or for the commencement of its execution, is not one of its essential elements, and strictly speaking, it is not a part of the sentence at all. The essential portion of the sentence is the punishment, including the kind of punishment, and the amount thereof, without reference to the time when it is to be inflicted."

See also, 1918 *O.A.G.* 444.

In 1940 *O.A.G.* 118, it is stated:

"We think it very clear that a sentence for a crime cannot, even by a court's order, be fixed to commence for any period prior to commission of the crime, as this would have the effect of rendering nugatory the sentence fixed by the legislature."

We think it equally clear that a court cannot fix the commencement of a sentence at a time prior to the conviction of the crime for which the sentence was imposed. This would also have the effect of rendering nugatory sentences fixed by the legislature.

Furthermore, the court's attempt to give such credit on the term of confinement could be regarded as a partial suspension of the sentence. This suspension was not made in accordance with §§247.20 and 247.21 and, since a court's power to suspend rests upon statutory authorization, the attempted partial suspension would be void. See, *State v. District Court (Cass County)*, 248 Iowa 250, 254, 80 N.W. 2d 555; Staff to Maddocks, Wright Co. Atty., December 22, 1961.

It is therefore our opinion that those portions of the above judgment entry and the mittimus issued pursuant thereto which direct that credit be given for time spent in the county jail prior to conviction are of no force and effect, and that the sentence of confinement for six months should begin upon receipt of the prisoner at the Women's Reformatory.

9.9

Boxing contest—§727.5, 1958 Code. Under §727.5, boxing is illegal if a prize is received when an admission fee is charged. (Bump to Denman, St. Rep., 1/11/61) #61-1-3

9.10

Extradition—§759.24, 1958 Code. Expense incurred in care of mentally ill fugitive from Iowa in foreign state should be borne by the foreign state until delivered into custody of the State of Iowa. (Allen to Wood, Hamilton Co. Atty., 8/4/61) #61-8-4

9.11

OMVI on public highway and elsewhere throughout the state—§§321.228, 321.281, 1958 Code. Section 321.228 extends prohibition of §321.281 on operating motor vehicle while intoxicated, to highways and elsewhere throughout the State of Iowa. (Allen to Butler, Cerro Gordo Co. Atty., 10/4/61) #61-10-5

9.12

Sentence for escape—§745.1, 1958 Code. Sentence for escape should not commence until the expiration of the last sentence entered prior to the sentence for escape. (Allen to Johnson, Lee Co. Atty., 10/4/61) #61-10-3

9.13

Suicide not criminal offense—§147.111, 1958 Code. Suicide and attempted suicide are not criminal offenses within the meaning of §147.111. (Allen to Ball, Black Hawk Co. Atty., 9/5/61) #61-9-2

9.14

Transfer of appeals from justice of the peace courts—§769.32, 1958 Code. §769.32 does not authorize district court to transfer appeals from justice of the peace court to municipal court for trial. (Allen to Ball, Black Hawk Co. Atty., 9/5/61) #61-9-1

CHAPTER 10

DRAINAGE DISTRICTS

STAFF OPINIONS

LETTER OPINIONS

10.1

DRAINAGE DISTRICTS: Levy for improvements—§§455.201, 457.28, 466.4, 466.5, 466.8, 1962 Code. Intercounty levee district cannot issue warrants for levee improvement payable over a period of years, levying annually the amount of the obligation falling due the following year, in order to reflect changes in assessed valuation.

October 1, 1962

Mr. William L. Matthews
Louisa County Attorney
Wapello, Iowa

Dear Mr. Matthews:

We have your recent letter in which you request the opinion of this office in regard to the following:

> "Can an Intercounty Levee District issue warrants payable over a period of years and levy annually an amount sufficient to pay off all such obligations falling due the following year together with the interest on all such obligations, or must this District, prior to the issuance of warrants, first levy an amount not less than the amount of the obligations to be issued?"

Such districts exist under Chapters 457 and 466, 1962 Code, the latter being entitled "Drainage Districts in Connection with United States Levees". Under §466.8, the provisions of Chapters 455 to 465 are applicable to the "levy and collection of drainage or levee assessments and taxes . . .". See also, §457.28. The question, therefore, is whether any statutory authority for an annual levy exists in any of the above chapters for the improvement of a levee in cooperation with the Corps of Engineers.

You state that the District levies on the assessed valuation of the lands within the District under §466.4, and that it desires the payment of assessments for the proposed improvements in installments over a period of years in order that these installments might reflect changes in assessed valuation. Iowa Code §466.5 provides as follows:

> "If the proposed improvement is the maintenance of a levee, the amount collected in any one year shall not exceed twelve and one-half mills on the dollar of the assessment valuation, which said assessment shall be levied at a level rate on the assessable value of the said lands, easements, and railroads within the district.
>
> "If the amount necessary to pay for the improvement exceed said sum, it shall be levied and collected in annual installments. For all other improvements, the board shall levy a rate sufficient to pay for the same, and may, at their discretion, make the same payable in annual installments of ten or less."

Thus, annual installments are specifically authorized by statute. This section contains no authority, however, for annual levies to reflect changes in assessed valuation. Nor do we find any authority for such levies in Chapters 455 to 465. Section 455.201 contains language authorizing financial cooperation with the United States government, but none of this language deals with the funding apparatus itself.

Therefore, in our opinion, an intercounty levee district cannot issue warrants for levee improvement payable over a period of years, levying annually the amount of the obligation falling due the following year, in order to reflect changes in assessed valuation.

10.2

Improvement—§§455.135, 455.157, 1958 Code. Trustees of drainage district may improve drainage outlet and right of way acquired by it in the state of Missouri. (Creger to McGrath, Van Buren Co. Atty., 4/27/61) #61-4-28

10.3

Recovery of damages—§§455.162, 682.23, 1958 Code. The governing body of Drainage District No. 7 in Des Moines County, Iowa, does not have authority to invest funds received from the United States Government, representing damages to the drainage district due to the operation of Mississippi River Navigation Pools, in certificates of deposit of approved banks and lending institutions. (Strauss to Ford, Des Moines Co. Atty., 3/17/61) #61-3-11

10.4

Trustees—§462.7, 1958 Code. Person selling his land located in election district for drainage or levy district on contract no longer eligible to serve as trustee, since equitable conversion took place on execution of contract and his real property interest was converted into a personal property interest. (Creger to Knoke, Asst. Pottawattamie Co. Atty., 3/30/62) #62-3-12

CHAPTER 11

ELECTIONS

STAFF OPINIONS

LETTER OPINIONS

11.1

ELECTIONS: Absentee ballots—Ch. 53, 1962 Code. County auditor has no authority to refuse absentee ballot known to him to have been secured in a manner not authorized by statute. Such ballot may be the subject of challenge at the polls.

May 29, 1962

Mr. D. E. Skiver
Osceola County Attorney
315 Ninth Street
Sibley, Iowa

Dear Mr. Skiver:

This is to acknowledge receipt of your letter of May 18, 1962, in which you submitted the following:

"Chapter 53 of the 1962 Code sets forth the method of obtaining the Application for an absentee ballot. On February 11, 1958, the Attorney General interpreted Chapter 53 and stated that the Application for ballot cannot be delivered by the Auditor to the voter's agent nor can the voter's agent deliver the Application for ballot to the Auditor, but that the same must be submitted by mail.

"I will appreciate receiving your opinion on whether ballots and applications brought to the Auditor's office by an agent of the voter should be refused by the Auditor because the procedure was not in conformity with Chapter 53, or should the Auditor receive the same and act only if a challenge is made to the absentee ballots submitted in this manner?

"If the Auditor must wait until a challenge is made to the ballots, can the challenge be made any time until the ballots are delivered at the polling place."

There appears to be no statutory power or duty conferred on the auditor arising out of any variance between the statutory directions to him respecting the delivery and receipt of either applications for absentee ballots or of the ballots themselves and actual fact situations known to him in that connection. It appears that such variances are the subject of challenge at the time the absent vote is cast. Section 53.31, 1962 Code of Iowa, provides the following:

"53.31 Challenges. The vote of any absent voter may be challenged for cause and the judges of election shall determine the legality of such ballot as in other cases.",

and such statute has been interpreted by opinion of this department appearing in 1928 *O.A.G.* 428, a copy of which is attached.

11.2

ELECTIONS: Absent ballots at primary and special election—§§53.1, 53.5, 53.13, 53.37, 1958 Code. (1) A member of the armed forces, as defined in §53.37, may vote in the primary election under the provisions of §53.37. However, to vote in the special election on the same date as the primary, an absent member of the armed forces must qualify under §53.1, Code 1958, 1917-18 O.A.G. 65. (2) An absent voter, other than a member of the armed forces, must make separate application for absentee ballot for the primary election and for the special election, and is likewise required to execute separate blank forms prescribed by §53.5 and separately execute the affidavit prescribed by §53.13 for the primary and for the special election. The ballots resulting from these applications must be placed in separate envelopes, one for voting at the primary election and one for voting at the special election.

April 30, 1962

Honorable Melvin D. Synhorst
Secretary of State
LOCAL

Dear Mr. Synhorst:

This is to acknowledge receipt of your letter of the 17th inst., in which you submitted the following:

"The holding of a special election at the same time and in conjunction with the Primary election on June 4, 1962, creates some questions with regard to administration of the Iowa Absent Voters law.

"1. It would appear that the sections relating to absent voting by armed forces are applicable to the Primary and General elections only, therefore, in what manner can a member of the armed forces of the United States, as defined by Section 53.37, Code of Iowa, 1958, vote in the special election to be held on June 4, 1962?

"2. When an absent voter, other than a member of the armed forces, makes application under the provisions of Sections 53.2, 53.10 and 53.11 must he specify that he is applying for both a primary ballot and a special election ballot in order to receive both of them? Must the absent voter, in order to vote in both of these elections, execute the form of blank application prescribed by Section 53.5 and the voters affidavit on the envelope prescribed by Section 53.13 for each of these ballots, or will the execution of the one application blank and the one voter affidavit

on the envelope suffice providing that both elections are described on each of these forms?

"The last question involves the additional question as to whether both ballots may be placed in a single ballot envelope."

(1) A member of the armed forces, as defined in §53.37, Code 1958, may vote in the primary election under the provisions of §53.37. However, to vote in the special election to be conducted in the year 1962 on the same date as the primary election, an absent member of the armed forces must qualify under §53.1, Code 1962. 1917-18 O.A.G. 65.

(2) An absent voter, other than a member of the armed forces, must, in order to vote an absentee ballot at both the primary and the special election, make separate application for each election, (1) primary and (2) special. Such applicant, in desiring to vote in both elections, is required to execute, (1) the blank form prescribed by §53.5, Code 1958, and the affidavit prescribed by §53.13, 1958 Code, for the primary and (2) the blank form prescribed for the special election.

(3) The ballots must be placed in separate envelopes, one in response to the application for voting at the primary election and one for voting at the special election.

11.3

ELECTIONS: Ballot for hospital trustee—§347.35, 1962 Code. The office of hospital trustee is a non-partisan office filled in the general election, the ballot for which should show the names of the candidates as follows: (1) in a column designated "non-partisan ticket"; (2) there should be an "independent" column wherein a person could vote for hospital trustee other than those nominated; (3) no write-in vote should appear under partisan columns.

December 19, 1962

Mr. Keith A. McKinley
Mitchell County Attorney
Osage, Iowa

Dear Mr. McKinley:

This will acknowledge receipt of yours of the 29th, ult., in which you submitted the following:

"In view of the provisions contained in the first sentence of Section 347.25, Code of Iowa, 1962, is it proper for the names of those persons nominated for the position of Hospital Trustee to appear on the General Election Ballot in a column designated as 'Independent'; and further, is it proper on said ballot to provide 'write-in spaces' for said office in both major party columns?"

(1) I am of the opinion that the names of persons nominated by petition for hospital trustees appear on the ballot in a column designated "non-partisan ticket".

(2) In addition, there should be an "independent" column, by which an elector could vote for a person for hospital trustee other than those nominated by petition.

(3) The election of hospital trustees is non-partisan, and therefore no write-in vote for such persons should appear on the partisan columns designated "Republican" or "Democratic".

11.4

ELECTIONS: Candidate's change of party affiliation—§43.41, 1962 Code. A candidate for county office, having filed Affidavit of Candidacy, nomination papers and written declaration under §43.41 stating his change of party affiliation to the party whose nomination he seeks, has sufficiently changed his party affiliation and his name may appear on the primary ballot.

May 29, 1962

Mr. Joseph H. Sams
Mitchell County Attorney
Osage, Iowa

Dear Mr. Sams:

This will acknowledge receipt of yours of the 3rd, inst., in which you submitted the following:

"A situation has arisen in Mitchell County where a candidate has filed for a county office on a party ticket. The nomination papers were regular in form and of course the candidate was recognized as a party member by the signers of his nomination papers and by the affidavit appended thereto. His own affidavit was also regular. We have no advance registration in this County, and voting records at the last primary election indicate that the candidate was a member of the opposite party. After filing his nomination papers, the candidate filed a written declaration under Section 43.41, stating his change of affiliation to the party whose nomination he seeks.

"Our question now is: Should the candidate's name appear on the primary ballot? I have informed the County Auditor that in my opinion, the candidate sufficiently changed his party affiliation when he filed his affidavit as a candidate. I am of the opinion when he filed his nomination papers and affidavit, he complied with any requirement that he be a member of the party whose nomination he seeks, and that when he later filed his declaration under 43.41 it was merely for the purpose of a change in the poll-books. Will you please either confirm my opinion or give me a contrary opinion upon which to base further advice to my Auditor?"

On the authority of opinion appearing in 1930 *O.A.G.* 313, wherein it is stated:

"Each candidate is required to file an affidavit as provided for in Section 544, Code of 1927, and the fact that he is nominated on a party ticket with which party he was not affiliated at the last election would, in our judgment, make no difference in view of Section 544, Code of 1927.",

the candidate's name may appear upon the primary ballot.

11.5

ELECTIONS: Canvass of votes—§4.1(23), 1962 Code. The statutory time for canvassing the votes cast at the 1962 General Election is the Monday following election day. This statutory time is not extended to the following day by reason of the preceding Sunday being Veterans Day, which is a statutory holiday.

October 17, 1962

Honorable Melvin Synhorst
Secretary of State
L O C A L

Dear Mr. Synhorst:

Referring to your oral request as to whether the canvass of the votes of the

1962 election shall take place on the Monday following election day as provided by statute or, due to the fact that Veterans Day, a holiday, falls on Sunday the 11th of November preceding the prescribed Monday, such canvass should be postponed to the Tuesday following the statutory Monday, I would advise as follows:

Prior to the enactment of Chapter 64, Acts 58th G.A. which amended §4.1(23), the view of this office was clearly stated in the opinion to Mr. John J. Williams, Montgomery County Attorney, October 29, 1956, wherein it was stated:

> "In reply thereto I advise you that it has been the view of this Department that the fact that Veterans' Day this year falls on Sunday does not make the following Monday a holiday. Therefore, it is the further view of this Department that the canvass of the 1956 vote should be made on Monday and not the following day."

The previously mentioned amendment, Chapter 64, Acts 58th G.A., provides:

> "SECTION 1. Subsection twenty-three (23) of section four point one (4.1), Code 1958, is hereby amended by striking the period (.) in line six (6) thereof, and by adding thereto the following: ', provided that, whenever by the provisions of any statute or rule prescribed under authority of a statute, the last day for the commencement of any action or proceedings, the filing of any pleading or motion in a pending action or proceedings or the perfecting or filing of any appeal from the decision or award of any court, board, commission or official falls on a Saturday, a Sunday, the first day of January, the thirtieth day of May, the fourth day of July, the first Monday in September, the eleventh day of November, the twenty-fifth day of December, and the following Monday whenever any of the foregoing named legal holidays may fall on a Sunday, and any day appointed or recommended by the governor of Iowa or the president of the United States as a day of fasting or thanksgiving, the time therefor shall be extended to include the next day which is not a Saturday, Sunday or such day hereinbefore enumerated.' "

From reading this amendment it can be seen that it expressly applies to the "commencement of any action or proceedings, the filing of any pleadings or motions in a pending action or proceedings or the perfecting or filing of any appeal from the decision or award of any court, board, commission or official." Therefore, applying the rule of statutory construction that the inclusion of these provisions excludes all others, the exclusion from the amendment of election canvassing is to be implied from the inclusion of the previously mentioned provisions. *Archer v. Board of Education in and for Fremont County,* 251 Iowa 1077, 104 N.W. 2d 621 (1960).

Therefore, it is the opinion of this office that the amendment enacted by the 58th G.A. is of no effect upon our previous ruling and therefore the election canvassing must take place on Monday, November 12, and not on the following day.

11.6

ELECTIONS: Clerks and judges—There is no statute preventing a candidate for precinct committeeman from working as a judge or a clerk at a primary election.

April 18, 1962

Honorable Scott Swisher
State Representative
505 Iowa State Bank Building
Iowa City, Iowa

Dear Mr. Swisher:

Reference is herein made to yours of the 2nd, inst., in which you make in-

quiry as to whether a person may work at the polls on election day if the person is a candidate for the office of precinct committeeman.

I know of no statute that would prevent a candidate for precinct committeeman from working as a judge or a clerk at a primary election. The precinct committeeman at best is only a party office and that in itself would not be a bar to such service. Judges and clerks at the primary, according to §43.31, Code of 1958, are selected under the same statutes as judges and clerks for general elections. These selections for general elections are made under the provisions of §49.12 et seq.

There is neither express nor implied intent therein to bar the services of a candidate for precinct committeeman.

11.7

ELECTIONS: Congressional districts—Ch's. 43, 49, 1958 Code; Ch. 68, 59th G.A. Candidates for Congress in the 1962 election will run from the several congressional districts as composed by Ch. 68, 59th G.A., and their nomination and elections shall be controlled by Ch's. 43 and 49, Code of 1958.

January 12, 1962

Honorable Melvin D. Synhorst
Secretary of State
L O C A L

Dear Mr. Synhorst:

Pursuant to your oral request for advice concerning the various statutory steps to be taken in the nomination and election of candidates to Congress in the 1962 election, I advise as follows.

The composition of the several congressional districts prior to action by the 59th G.A. was provided in Chapter 40 of the Code of 1958. This chapter was repealed by the 59th G.A. by Chapter 68 thereof, and this repeal was effective on July 4, 1961. This chapter, in addition to the foregoing repeal, enacts a substitute therefor. The substitute fixes the composition of congressional districts effective July 4, 1961, and now in effect. Such composition is the basis for further statutory action, as set forth in Chapter 43, Code of 1958, in the matter of the nominations at the June primary, 1962, and the subsequent election in November of that year, as provided by Chapter 49 of the Code.

Section 2 of Chapter 68, Acts 59th G.A. so provides in these terms:

> "Sec. 2. This Act shall be effective as to the nomination and election of representatives in congress for this stage in 1962 and succeeding years. Nothing herein contained shall affect the law concerning the filling of vacancies, should any occur in the eighty-seventh (87th) congress."

11.8

ELECTIONS: Constitutional amendments—The submission of the proposed constitutional amendment exhibited in Ch. 343, Acts 59th G.A., at the primary election in 1962 requires the use of separate poll books.

January 5, 1962

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

Dear Mr. Leir:

Reference is herein made to your letter in which you submitted the following:

"Our County Auditor has requested a ruling as to whether or not next June, when the Primary Election is held and also the Special Election to vote on the Constitutional Amendment proposition, they will need two sets of Poll books at each polling place, one set for the Primary Election and one set for the Constitutional Amendment matter."

The proposed constitutional amendment to which you refer is exhibited in Chapter 343, Acts 59th G.A. Section 2 thereof provides in the following terms:

"Sec. 2. The foregoing proposed amendment to the Constitution of Iowa, having been adopted and agreed to by the Fifty-eighth (58th) General Assembly, thereafter duly published, and now adopted and agreed to by the Fifty-ninth (59th) General Assembly in this Joint Resolution, shall be submitted to the people at a special election to be held for that purpose at the same time and in conjunction with the primary election to be held for the selection of political party candidates for public office in the year nineteen hundred sixty-two (1962). The submission at said special election shall in all respects be governed and conducted as prescribed by law for the submission of a Constitutional amendment at a general election."

for its submission to the people at the primary election to be held in the year 1962, and requires its submission to be governed and conducted as subscribed by law for the submission of a constitutional amendment at a general election.

A similar question, among others incident to such election, was submitted to this Department, and in answer to the specific question you ask, it was held that separate poll books are required in such election in connection with a primary election, 1916 *O.A.G.* 192. A copy of this opinion is hereto attached and insofar as applicable remains the view of this Department.

11.9

ELECTIONS: Constitutional amendments—§§49.43, 52.24, 1958 Code. The submission to the voters at the primary election to be held in the year 1962 of the proposed constitutional amendment to the judicial article of the Constitution requires the using of separate ballots, and the use of voting machines for such submission is denied.

January 8, 1962

Honorable Melvin D. Synhorst
Secretary of State
LOCAL

Dear Mr. Synhorst:

This will acknowledge receipt of your letter submitting the following:

"Chapter 95, Acts of the 58th General Assembly, which provides that 'constitutional amendments and public measures including bond issues may be voted on the voting machines,' and prescribed the manner in which this should be done.

"Chapter 77, Acts of the 59th General Assembly, provides that 'separate ballots shall be used for the submission to the people of the question of a Constitutional Convention or amendments or contracting State debts.'

"When Chapter 343, Acts of the 59th General Assembly, the proposed amendment to the judicial Article of the Constitution, is submitted to the voters in the manner and at the time prescribed in Section 2 thereof, do the provisions of Chapter 77, Acts of the 59th General Assembly, make it mandatory that it be on a separate paper ballot?"

Section 49.43, Code of 1958, provides for use of a separate ballot where a proposed constitutional amendment is to be voted on by the electors. The terms of the section are these:

"49.43 Constitutional amendment or other public measure. When a constitutional amendment or other public measure is to be voted upon by the electors, it shall be printed in full upon a separate ballot, preceded by the words, 'Shall the following amendment to the constitution (or public measure) be adopted?' "

Insofar as the foregoing section is applicable to voting by machine, it was provided by §52.24, Code of 1958, the following:

"52.24 What statutes apply—separate ballots. All of the provisions of the election law now in force and not inconsistent with the provisions of this chapter shall apply with full force to all counties, cities, and towns adopting the use of voting machines. Nothing in this chapter shall be construed as prohibiting the use of a separate ballot for constitutional amendments and other public measures."

Chapter 95, §6, Acts 58th G.A., amended Chapter 52, Code of 1958, in terms as follows:

"Chapter fifty-two (52), Code 1958, is hereby amended by adding the following: 'Constitutional amendments and public measures including bond issues may be voted on the voting machines in the following manner:

" 'The entire amendment or public measure shall be printed and displayed prominently in at least two (2) places within the voting precinct and on the left hand side inside the curtain of each voting machine, said printing to be in conformity with the provisions of Chapter forty-nine (49), Code 1958. The amendment or public measure shall be summarized by the auditor or city clerk and in the largest type possible printed on the inserts used in said voting machines. In the case of an amendment or measure to be voted upon in more than one county, the summary shall be worded by the secretary of state and said summary shall be used in each county.

" 'Any portion of sections forty-nine point forty-three (49.43), forty-nine point forty-four (49.44), forty-nine point forty-five (49.45), forty-nine point forty-six (49.46), forty-nine point forty-seven (49.47), or forty-nine point forty-eight (49.48), Code 1958, in conflict herewith is hereby declared inapplicable to those counties which have adopted voting machines and follow the procedure of this section.' "

Chapter 77, Acts 59th G.A. amended §52.24, Code of 1958, in the following terms:

"SECTION 1. Section fifty-two point twenty-four (52.24), Code 1958, is hereby amended as follows:

"1. By striking from lines seven (7) and eight (8) the words 'constitutional amendments and other'.

"2. By striking the period at the end of line eight (8) and adding the following: '; provided, however, that separate ballots shall be used for the submission to the people of the question of a constitutional convention or amendments or contracting state debts.' "

And such §52.24, as so amended by Chapter 77, now provides as follows:

"52.24 What statutes apply—separate ballots. All of the provisions of the election law now in force and not inconsistent with the provisions of this chapter shall apply with full force to all counties, cities and

towns adopting the use of voting machines. Nothing in this chapter shall be construed as prohibiting the use of a separate ballot for public measures; provided, however, that separate ballots shall be used for the submission to the people of the question of a constitutional convention or amendments or contracting state debts.

As a result of the foregoing, I am of the opinion that the legislative intent was to restrict the submission of a proposed constitutional amendment to the voters to the use of separate ballots in such submission, and not by voting machine. Reason for this conclusion is found in the fact that by the express language of §6 of Chapter 95, 58th G.A., the use of voting machines for such submission was made permissive and not mandatory. Such language preceding the prescription of the method of printing and displaying the proposed amendment provides:

"Constitutional amendments and public measures including bond issues may be voted on the voting machines in the following manner:"

Thus, in using the word "may" in such section, the legislature conferred *authority* for such use and not *direction*. On the other hand, the 59th G.A., by Chapter 77, in providing,

"that separate ballots shall be used for the submission to the people of the question of a constitutional convention or amendments or contracting state debts."

by the use of the word "shall", made use of separate ballots mandatory and resulted in implied repeal of the authority conferred by §6 of Chapter 95, Acts 58th G.A., insofar as their use for the submission of proposed constitutional amendments is concerned.

11.10

ELECTIONS: Counting board—§§49.12, 51.1, 1958 Code, Ch. 343, Acts 59th G.A. The use of counting boards at special elections is unauthorized, including a special election at which a Constitutional amendment is submitted.

March 27, 1962

Honorable Melvin D. Synhorst
Secretary of State
LOCAL

Dear Mr. Synhorst:

This will acknowledge receipt of yours of the 14th, ult., in which you submitted the following:

"A question has been raised relative to the use of counting boards in the forthcoming Primary election, inasmuch as a proposed Constitutional Amendment, in re: Judges will be submitted to the people at a special election to be held for that purpose at the same time and in connection with the Primary election."

The statute providing for counting boards in elections is Chapter 51, Code of 1958. Section 51.1 thereof provides the following:

"Election counting board. In all election precincts the board of supervisors may appoint for each primary and general election three additional judges and two additional clerks to be known as the election counting board."

That section has had the consideration of this Department in an opinion

appearing in 1938 *O.A.G.* at page 800, where the question involved was whether at a special election to vote upon a public measure a double election board, as served at the preceding general election, could function at the foregoing special election. It was there said with respect to that question:

> "Under the provisions of Chapter 42, supra, the election board provided for by Section 730, becomes a receiving board and does not function as a counting and certifying board except as specified in said chapter. On the other hand, the board, created under Chapter 42, supra, by appointment of the board of supervisors, is a counting board. There can be no question but what, under the provisions of the cited chapter, it is discretionary with a board of supervisors as to whether or not an election counting board will be created by appointment for any primary or general election. Furthermore, such board is specifically limited in appointment to primary and general elections. There is no authority vested in law for boards of supervisors to appoint a counting board for a special election. Therefore, if your question alone concerned the power of a board of supervisors to appoint a counting board for a special election, the answer necessarily would be that a board of supervisors has no such authority."

The foregoing would foreclose the question, were it not for the following provision in the proposed Constitutional Amendment being submitted at the special election, appearing at page 343, Acts of the 59th G.A., to-wit:

> "The submission at said special election shall in all respects be governed and conducted as prescribed by law for the submission of a Constitutional amendment at a general election."

However, the word "prescribed" as used in the foregoing proposed amendment, according to authorities, is held to mean to lay down authority as a guide, direction or rule of action. See *City of Norfolk v. Virginia Elec. & Power Co.*, 197 Va. 505, 90 S.E. 2d 140, 148; *Alsop v. Pierce,* 155 Fla. 184, 19 So. 2d 799, 803; *Smith-Brooks Printing Co. v. Young,* 103 Colo. 199, 85 P. 2d 39, 41; *Commonwealth ex rel. Blattenberger v. Ashe,* 133 Pa. Super. 509, 3 A. 2d 287, 288.

In the aspect of that definition, the only direction with respect to election boards is that contained in §49.12, as amended by Chapter 95, paragraph 3, 58th G.A., providing as follows:

> "Election boards. Election boards shall consist of three judges and two clerks. Not more than two judges and not more than one clerk shall belong to the same political party or organization, if there be one or more electors of another party qualified and willing to act as such judge or clerk. Nothing in this chapter shall change or abrogate any of the provisions of law relating to double election boards. In any precinct using voting machines in which more than three (3) such machines are used, the board of supervisors is authorized to name one additional judge for said precinct for each such additional machine, maintaining the bipartisan political balance hereinbefore referred to."

The use of a counting board in addition to the board provided by the foregoing section is discretionary with the board of supervisors. Such discretionary powers vested in the board of supervisors obviously are not directions, and therefore not within the term "prescribed" as used in the foregoing Constitutional amendment.

I am of the opinion, therefore, that at the special election upon the proposed Constitutional amendment, double election boards are not authorized.

11.11

ELECTIONS: County convention delegates—§§43.90, 43.91, 43.94, 43.95, 1962 Code. Party that fails to elect delegates from some precincts to county convention at primary election must proceed without said representatives since no method is provided for filling vacancies of delegates.

June 18, 1962

Mr. Frederick M. Hudson
Pocahontas County Attorney
Rolfe, Iowa

Dear Mr. Hudson:

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

> "The Republican party held a caucus in each of the precincts at which time delegates to the County Convention were nominated. The Republican County Chairman then took the list of candidates for delegates to the County Convention for each precinct and had gummed stickers printed with the list of names of the candidates for use of the voters at the primary. For this reason I am certain that the delegates to the Republican County Convention have been properly elected to said convention at the Primary. The Democratic County Chairman advises me that Primary caucuses were not held by the Democratic party and that no such lists were furnished the voters at the Primary Election. He is concerned about the fact that possibly some of the precincts did not elect delegates to the County Convention. I note that Section 43.94 of the 1962 Code of Iowa provides as follows: 'The term of office of such delegates shall begin on the day following final canvass of the votes by the Board of Supervisors and shall continue for two years and until their successors are elected.'
>
> * * *
>
> "I also note on the annotations to Section 43.95 quoting from the 1916 Attorney General Opinion at page 209 as follows: 'Any primary which fails to elect delegates to County Convention at June Primary must go without representation in the County Convention as no method is provided for filling vacancy of delegates to the County Convention.'
>
> "... (D)oes the 1916 opinion above stated continue to be the law to be followed, which could result in some precincts not being represented at the County Convention for failure to elect any delegates at this June Primary."

In our view this 1916 opinion, a copy of which we attach, is controlling. The statutes make provision for the selection of delegates to the county convention. Failure to comply with such provisions results in the situation which is presented by you. The provisions of §43.90 that the county convention shall be composed of delegates elected at the last preceding primary election will prevail. The successors to such delegates, as contemplated by §43.94, can now only be elected in 1964.

11.12

ELECTIONS: County hospital trustees, names on ballot—§§49.35, 347.25, 1962 Code. The names of candidates for the office of county hospital trustee shall, at the general election, appear on the ballot in separate columns for each candidate nominated by petition and not by separate ballot or a column for trustees only.

August 30, 1962

Honorable Melvin D. Synhorst
Secretary of State
LOCAL

Dear Mr. Synhorst:

This will acknowledge receipt of your oral request for opinion in the following situation:

"Section 4, Chapter 191, Acts Regular Session 59th General Assembly states, in part, that 'The election of hospital trustees shall take place at the general election on ballots which shall not reflect a nominee's political affiliation.'

"Does this mean that the names of the persons nominated be on a separate ballot? The auditors from the various counties that have county hospitals have different versions as to how the trustees shall be voted on, like in the Independent column, an additional column for the trustees only and on separate ballots."

Technically, §347.25, Code of 1962, provides for the nonpartisan character of such trustees and the method of their election in these terms:

"347.25 Election of trustees. The election of hospital trustees shall take place at the general election on ballots which shall not reflect a nominee's political affiliation. Nomination shall be made by petition in accordance with chapter 45. The petition form shall be furnished by the county auditor, signed by qualified electors of the county equal in number to one percent of the vote cast for governor by both political parties in the last previous general election, which nomination petition shall be filed at least fifty-five days with the county auditor prior to the date of said general election. A plurality shall be sufficient to elect hospital trustees, it being the intent that there be no primary election.

"If any of the provisions of this section shall be in conflict with any of the laws of this state, then the provisions of this section shall prevail."

Note that the nomination for such offices as provided herein would be made by petition in accordance with Chapter 45, Code of 1962.

Insofar as the name of such candidate so nominated may appear on the ballot, it is provided by §49.35 as follows:

"49.35 Order of arranging names. Each list of candidates for the several parties and groups of petitioners shall be placed in a separate column on the ballot, in such order as the authorities charged with the printing of the ballots shall decide, except as otherwise provided, and be called a ticket."

This section has been interpreted by this department, by opinion appearing in 1928 *O.A.G.* 418, where it is stated:

"It is further provided by statute, Section 753 of the Code as follows:

'Each list of candidates for the several parties and groups of petitioners shall be placed in a separate column on the ballot, in such order as the authorities charged with the printing of the ballots shall decide, except as otherwise provided, and be called a ticket.'

"We are therefore of the opinion that where there are two independent candidates for the same office their names must be arranged in separate

columns on the ballot under the above provisions and that if the group of petitioners sponsoring the Independent candidate does not designate a name for such ticket, that the county auditor shall designate some suitable name for the head of the column under which the candidate's name shall be placed. In other words, in the above situation, if there were no other parties having candidates at the election there would be a column for the Republican candidates, a column for the Democratic candidates (since there are Democratic candidates on the ballot for other offices), a column for one candidate on the Independent ticket for county board of supervisors, and the fourth column for the other Independent candidate."

I am of the opinion, therefore, that the names of the candidates for the office of county hospital trustees shall be placed upon the ballot in separate columns for each candidate nominated by petition, and not by separate column for trustees only, nor on separate ballots.

11.13

ELECTIONS: County officers—Art. XI, §6, Constitution of Iowa; §39.1, 1958 Code. Vacancies in county offices must be filled in accordance with the provisions of Art. XI, §6, Constitution of Iowa, even though certain county officers are elected for a term of four years instead of two as provided in §39.1.

February 16, 1961

Mr. Fritz Goreham
Poweshiek County Attorney
Montezuma, Iowa

Dear Mr. Goreham:

Reference is made to your letter of February 6 and also to that of February 13 in which you made an inquiry as to whether an appointee filling a vacancy in an elective office must run at the next general election. More particularly, the facts pointed out in your letter that the person duly elected as clerk of the district court resigned in November of last year. Under the provisions of §69.1, Code 1958, the person elected failed to qualify in time, and appointment was made to fill the vacancy in the office of the clerk of the district court.

Your attention is directed to Article XI, §6, Constitution of Iowa, which provides, to wit:

"*How vacancies filled.* Sec. 6. In all cases of elections to fill vacancies in office occurring before the expiration of a full term, the person so elected shall hold for the residue of the unexpired term; and all persons appointed to fill vacancies in office, shall hold until the next general election, and until their successors are elected and qualified."

The Supreme Court, in the case of *State ex rel. Halbach v. Claussen,* 216 Iowa 1079, 250 N.W. 195, held that "next general election" within the provisions of the Constitution means the next general election at which a vacancy may be legally filled, not necessarily the next ensuing general election. The provisions of §39.1 state that the general election of county officers shall be held throughout the state on the Tuesday next after the first Monday in November of each even-numbered year. The fact that it is no longer necessary to elect certain county officers at each general county election does not repeal §39.1 by implication as to those offices.

Therefore, under the constitutional provision, the vacancy in the elective office must be filled at the next ensuing general election in November of 1962 to fill the remainder of the unexpired term of the clerk of the district court.

11.14

ELECTIONS: Duty of county auditor to place name of candidate on primary ballot—§§43.23, 43.27, 1962 Code. Notwithstanding the fact that a candidate for the office of United States Senator has been convicted of an infamous crime, the county auditor has no other duty in the preparation of the primary ballot than listing the name of such candidate as a candidate for such office.

May 7, 1962

Mr. Harold B. Heslinga
Mahaska County Attorney
118 North Market Street
Oskaloosa, Iowa

Dear Mr. Heslinga:

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

"Under Article II, Section 5, Constitution of the State of Iowa, it is provided that no person convicted of any infamous crime shall be entitled to the privileges of an elector.

"Herbert F. Hoover, a Mahaska County resident, has qualified as a candidate for the office of United States Senator for the primary election to be held June 4, 1962. Many years ago Mr. Hoover was convicted by the Federal Courts for refusal to register under the Selective Service Law and was sentenced to a term in excess of one year, to be served in a Federal Correction Center. As of this date, Mr. Hoover has not received a pardon or restoration of citizenship. The Iowa Supreme Court has held that any crime punishable by imprisonment in the penitentiary is an infamous crime.

"I would appreciate your opinion as to whether or not a conviction for refusal to register under the Selective Service Law, with subsequent imprisonment in a Federal Correction Center, is to be construed as an infamous crime punishable by imprisonment in a penitentiary, so as to cause the loss of the privileges of an elector.

"In the event that you determine that the same does constitute an infamous crime, is Mr. Hoover disqualified from being a candidate for the aforesaid elective office, or is he disqualified only from assuming office if elected, if the said reason for such disqualification is not corrected prior to the date of election.

"In the event that you determine that the same does constitute an infamous crime, will a restoration of citizenship from the Governor of the State of Iowa remove such disqualification without a pardon from the National Government, and will a Presidential pardon, without restoration of citizenship by the Governor also, remove such disqualification?

"I am requesting the aforesaid opinions on behalf of the Mahaska County Auditor who must have absentee ballots printed and ready for distribution by May 16th of this year. Since time is of the essence, I would appreciate your prompt attention to these matters."

Your question as to "whether or not a conviction for refusal to register under the Selective Service Law, with subsequent imprisonment in a Federal Correction Center, is to be construed as an infamous crime punishable by imprisonment in a penitentiary, so as to cause the loss of the privileges of an elector" has had the consideration of this Department.

(1) An opinion appearing in 1936 *O.A.G.* 417 with respect to eligibility of a sheriff for nomination who had served a sentence in the penitentiary and served time otherwise states:

"To be eligible to an elective office created by law, a person must be a qualified elector.

"State vs. Van Beek, 87 Iowa 569.

"Section 5 of Article II of the Constitution of Iowa provides:

" 'No idiot, or insane person, or person convicted of any infamous crime, shall be entitled to the privilege of an elector.'

"Any crime punishable by imprisonment in the penitentiary is an 'infamous crime'.

"Flannagan vs. Jepson, 177 Iowa, 393.

"The crime was, therefore, an infamous one, regardless of its nature. A person, then, convicted of an infamous crime, by such conviction is under the Constitution prevented from exercising the elective franchise or holding an elective office."

(2) As to whether the foregoing conclusion disqualifies Mr. Hoover from candidacy for the office of United States Senator or if he would be disqualified from assuming office if elected if the said reason for such disqualification is not corrected prior to the date of election, I would advise that based upon records and files in the office of the Secretary of State, Mr. Hoover filed therein his Affidavit of Candidacy for the office of United States Senator, and that the Secretary of State has performed the duties imposed upon him by §43.22, 1962 Code of Iowa, in certifying to the county auditor the following:

"43.22 Nominations certified. The secretary of state shall, at least fifty-five days before a primary election, furnish to each county auditor a certificate under his hand and seal, which certificate shall show:

"1. The name and post-office address of each person for whom a nomination paper has been filed in his office, and for whom the voters of said county have the right to vote at said election.

"2. The office for which such person is a candidate.

"3. The political party from which such person seeks nomination."

including in such certification the name of Herbert F. Hoover of Oskaloosa, Mahaska County, as a Republican candidate for the office of United States Senator."

On the foregoing record, the question at hand is the authority and duty of the county auditor in the primary election processes. This certification requires the county auditor to issue proclamation, as directed by §43.23, 1962 Code of Iowa:

"43.23 Notice of election. Such auditor shall, immediately after receiving such certified matter from the secretary of state, publish a proclamation of the time of holding the primary election, the hours during which the polls will be open, the offices for which candidates are to be nominated, and that the primary election will be held in the regular polling places in each precinct."

Thus, the only official basis upon which the names of candidates for office whose nomination papers have been filed in the office of the Secretary of

State can be based is the certification made by the Secretary of State to the county auditor under the provisions of §43.22, 1962 Code of Iowa. Thereafter it is imposed upon him the duty of printing the ballots under the provisions of §43.27, 1962 Code of Iowa, providing as follows:

"43.27 Printing of ballots. The ballots of each political party shall be printed in black ink, on separate sheets of paper, uniform in color, quality, texture, and size, with the name of the political party printed at the head of said ballots, which ballots shall be prepared by the county auditor in the same manner as for the general election, except as in this chapter provided."

The foregoing duties to be performed by the county auditor emanating from the certification by the Secretary of State are ministerial. Such act has been defined in the case of *First Nat. Bank v. Hayes,* 186 Iowa 892, 901 as follows:

"A ministerial act has been defined as 'one which a person or board performs upon a given state of facts, in a prescribed manner, in observance of the mandate of legal authority, and without regard to or the exercise of his own judgment upon the propriety of the act being done.' Flournoy v. City of Jeffersonville, 17 Ind. 169 (79 Am. Dec. 468, and note in which cases are collected). See, also, Henry v. Taylor, 57 Iowa 72; Benjamin v. District Township, 50 Iowa 648. As pointed out in 26 Cyc. 160:

" 'The distinction between merely ministerial and judicial or other official acts seems to be that, where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial. But where the act to be done involves the exercise of discretion or judgment, it is not to be deemed merely ministerial. Discretion may be defined, when applied to public functionaries, as the power or right conferred upon them by law of acting officially under certain circumstances, according to the dictates of their own judgment and conscience, and not controlled by the judgment or conscience of others.' "

The foregoing acts of the county auditor are duties to be performed by him with such precision and certainty as to leave nothing to the exercise of discretion or judgment. These statutes invest him with neither discretion nor judgment in the making up of the ballot with the names of the candidates as certified to him by the Secretary of State. This conclusion is fortified by the fact that in order to withhold Hoover's name as a candidate on the ballot for the June primary, the county auditor would be required to exercise a judicial function in adjusting the constitutional provisions and the interpretations of the Attorney General in the opinion previously quoted to the situation here presented.

I conclude, therefore, that the auditor has no other duty in the preparation of the primary ballot than listing the name of Herbert F. Hoover of Oskaloosa, Mahaska County, as a Republican candidate for the office of United States Senator.

The case of *State ex rel. Dean v. Haubrich,* 248 Iowa 978, 83 N.W. 2d 451 is plainly distinguishable from the situation here under consideration. That case deals with the question of eligibility to hold public office. The question here under consideration involves eligibility for candidacy of such office.

11.15

ELECTIONS: Election board composition—§§49.12, 49.14, 49.15, 1958 Code. Township clerk has duty of serving as clerk of election board in

precinct where he resides, together with the other election clerk required to compose an election board.

March 27, 1962

Honorable Melvin Synhorst
Secretary of State
LOCAL

Dear Mr. Synhorst:

This will acknowledge receipt of your request for opinion as to the status of the township clerk in connection with the composition of election boards.

The status of the township clerk is fixed under the provisions of §49.12, Code 1958, as amended by Ch. 95, §3, 58th G.A., §49.14, Code 1958, and §49.15, Code 1958 as amended by Ch. 73, par. 1, 59th G.A.

Section 49.12 requires that all election boards consist of three judges and two clerks. Not more than two judges and not more than one clerk shall belong to the same political party or organization if there be one or more electors of another party qualified and willing to act as such judge or clerk.

Section 49.14 provides that the clerk of the township shall be the clerk of the election board in the precinct in which he resides, and the trustees of the township shall be judges of election, except that in townships not divided into election precincts, if all of the trustees be of the same political party, the board of supervisors shall determine by lot which two of the three trustees shall be judge of such precinct.

It is clear that election boards shall consist of three judges and two clerks. In township precincts, the clerk of the township shall be clerk of the election of the precinct in which he resides and the trustees shall be judges of election, subject to the provisions conditioning their eligibility specified in §49.12 and §49.14, Code 1958. The township board which lacks any members imposes upon the board of supervisors the duty of completing membership of such election boards in accordance with the provisions of §49.15.

This coincides with the view of this Department expressed in an opinion appearing in 1938 *O.A.G.* 758 interpreting the foregoing statutes, subject to subsequent amendment unnecessary to quote here, where it is said:

"From the foregoing quoted sections of the Code it will be seen that an election board shall consist of five persons, three of whom shall be judges and two of whom shall be clerks. No more than two judges and no more than one clerk may belong to the same political party. Therefore, the remaining judge and clerk must necessarily belong to some other political party, providing, of course, there is at least one elector of another political party qualified, willing and able to act as such judge or clerk. Section 730, supra.

"This division remains the same in all precincts whether they be in cities and towns or in townships.

"Where, by reason of the political complexion of a city or town council or board of township trustees (no more than two judges nor one clerk may be of the same political party), it becomes necessary to complete or make up in its entirety the election board for a given precinct, it is incumbent, under the law, upon the county boards of supervisors to complete or make up the election board from the membership of those parties casting the largest and next largest number of votes in the precinct at the last general election, providing, however, that no more than two judges and no more than one clerk of any election board can be members of the same political party."

Therefore, in answer to the specific question, I would advise that the township clerk has the duty of being clerk of the election board in the precinct in which he resides, and shall serve with the other election clerk required to compose an election board.

11.16

ELECTIONS: Establishment of precincts and wards—§§49.3(3), 363.7, 363.8, 363A.2, 1958 Code. Cities organized as mayor-council government may be divided into one precinct or precincts for general elections and wards for municipal elections.

April 13, 1962

Mr. Gordon L. Madson
Calhoun County Attorney
Braginton Building
Manson, Iowa

Dear Mr. Madson:

Reference is herein made to your letter of the 20th, ult., in which you submitted the following:

"Rockwell City in Calhoun County has the Mayor-Council form of municipal government, electing a mayor and two councilmen at large and a councilman from each of two wards under Section 363A.2. The said town also has been separated by ordinance into two separate voting precincts which identically correspond to the two wards of the town.

"It is now the desire of the town, at the urging of the county to save expense, to consolidate the entire town into one voting precinct under Section 49.5, and yet the town wishes to preserve its ward division.

"The question is: Would it be possible under Section 49.5 for the purpose of national, state and county elections to consolidate the town into one voting precinct and still perserve the separate wards for city elections in view of the fact that 49.1 says it applies to all elections?"

Insofar as Chapter 49 concerns itself with precincts in cities, §49.3(3) provides the following:

"49.3 Election precincts. Election precincts shall, except as otherwise provided, be as follows: * * *

"3. Such divisions of cities as may be fixed by council by ordinance.

* * * "

Under the authority therein conferred, "as otherwise provided", the legislature has acted to confer on all cities the power to divide a city into wards. Section 363.7, 1958 Code of Iowa, so provides as follows:

"363.7 Wards. Cities may be by ordinance divided into wards, new wards created, or the boundaries changed, but in all cases the boundaries of wards shall be as far as practicable established so as to give all wards an equal population."

Specifically, insofar as cities organized as mayor-council form of government, it is provided by §363A.2, 1958 Code of Iowa, the power to elect its councilmen by wards in terms, so far as applicable, as follows:

"363A.2 Councilmen—number and election. Towns operating under the mayor-council form of government shall have a council composed of five councilmen at large, elected by the entire electorate. Cities operating under the mayor-council form of government may have a council com-

posed of five councilmen at large, or may have a council composed of two councilmen or aldermen at large, and one councilman or alderman from each ward, . . ."

In that situation, I am of the opinion that by ordinance the council may divide a city so organized into voting precincts, or one voting precinct, for general elections, and for election of its governing body the city may be divided into wards. Note, however, that on both elections, according to §363.8,

". . . Voting places shall be fixed by the council, and at least one polling place provided for each precinct or ward, as the case may be."

This situation in mayor-council form of government has had the consideration of the Institute of Public Affairs, State University of Iowa, *A Citizen's Guide to Iowa Municipal Government and Elections,* where it is said at page 40:

"Cities divided into wards

"Some cities—places that have 2,000 population or more—are divided into special political districts called wards. Wards may be voting precincts —that is, all voters in the ward vote at one polling place—or wards may be divided into separate precincts. The voters of each ward may elect one councilman to represent them on the city council; this applies to mayor-council cities only.

"The city council decides whether or not the city should be divided into wards, what the boundaries of the wards are to be, whether wards are to be divided into precincts, and whether councilmen are to be elected to represent the wards or all councilmen elected at large. All these matters are set according to ordinances passed by the city council. And the council can make changes in the boundaries of wards just by passing new ordinances. The population of the various wards of the city should be as nearly equal as practicable; precincts should be set up so that they serve the convenience of the voters best."

Thus, in answer to your question, I am of the opinion that there may be a precinct or precincts established by cities when used only for general elections, and as far as city elections are concerned, wards are available for voting in such elections.

11.17

ELECTIONS: Legal residence for purpose of voting—(1) Where an elector is a temporary resident in a nursing home in a town within the county of his residence, he is still eligible to vote in the town claimed as his residence. (2) Where an elector became a resident in a nursing home in a town in the same county, and casts his vote in such county, he can, by showing that he does not intend to and did not in fact acquire a new residence by voting in such town, retain his old residence and he can reestablish his old residence by actually moving there with the declared intention of making that his residence.

October 17, 1962

Honorable William J. Coffman
State Representative
North English, Iowa

Dear Mr. Coffman:

This will acknowledge receipt of yours of the 9th inst., in which you submitted the following:

"When a person has always lived and voted in North English, Iowa and they are put in a nursing home in another town, are they still eligible to vote at North English which is really their legal residence?

"If at the last general election, they voted at this nursing home which changed their residence, is there any way we could reestablish their residence at North English?"

(1) Insofar as a person who has always lived and voted in North English is concerned, the fact that he is a resident in a nursing home in another town within the county with no intent to make that a permanent residence makes him still eligible to cast his vote at North English, which you state is his legal residence.

(2) In answer to your question as to whether, such person having cast his vote at the location of the nursing home in another town as his residence, his residence could be reestablished as North English, I would say (1) according to opinion of this Department appearing in 1911-12 *O.A.G.* 678, it was held that one who has a legal residence and does not actually intend to or in fact acquire a new residence by voting and exercising the rights of citizenship elsewhere, he may retain his old residence, or (2) he could reestablish his residence in North English by actually moving there with the declared intention to make that his residence.

11.18

ELECTIONS: Nomination by convention—§§43.66, 43.98, 1962 Code. County convention has no power to nominate a candidate for an office where no candidate's name was printed on the primary ballot and no write-in candidate got the minimum votes required by said statutes.

June 14, 1962

Mr. Don Salisbury
Jasper County Attorney
Newton, Iowa

Dear Mr. Salisbury:

Referring to the oral request for opinion as to the power of the county convention to make a nomination for the office of county attorney where at the recent primary it appears that no candidate's name was printed upon the ballot, and no write-in votes were cast for any candidate for that office, I am of the opinion that the county convention is without the power to make nomination in that situation.

This is based upon the provisions of §43.98, 1962 Code of Iowa, which provides as follows:

"43.98 Nominations prohibited. In no case shall the county convention 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 the filing of nomination papers."

Opinions in 1938 *O.A.G.* 844 and 1932 *O.A.G.* 236 reached the same conclusion under a statute then in effect, which provided the county convention could not nominate for an office "for which no person was voted for in the primary election of such party". That provision was stricken by amendment and replaced by the prohibition now existing in the foregoing numbered statutes.

It is clear from the foregoing fact situation that no nomination may be made because there is no person voted for at the primary receiving one-half the number of votes required for nomination by §43.66. Under that numbered section a candidate whose name was not printed on the ballot must, in order to be nominated, receive 10 per cent of the number of votes cast for governor at the last general election, at least one-half of such number being required before the county convention has power to make a nomination. Plainly this power does not exist in this situation. This conclusion has the support of *Voting in Iowa,* a publication of the Institute of Public Affairs at the State University of Iowa on page 50. It was there stated:

> "Suppose no one files nomination papers to run for an office in the primary? In that case there would be no names printed on the ballot for that office and the voters could write in the names of candidates. If one of the write-in candidates gets 35 per cent of all the write-in votes, he wins—if he also gets enough votes to equal 10 per cent of the votes cast for his party's candidate for governor in the last general election. But suppose no write-in candidate gets that many votes? Well, if one of them gets enough votes to equal five per cent of the votes his party's candidate for governor got in the last general election, a convention can name somebody to run for that office. If no write-in candidate gets that many votes, the convention cannot name a candidate. On the general election ballot a blank space will be printed in that party's column for that office. Voters may write in the names of the candidates of their choice. Remember, if you write in such a name, you must put an 'X' in front of it or your vote won't count."

By reason of the foregoing, the county convention is without the power to make a nomination for the office of county attorney where no candidate's name was printed on the ballot and no write-in votes were cast for that office.

11.19

ELECTIONS: Nominations for justice of the peace—§43.53, 1962 Code. In nominations for two vacancies, both Republican candidates and the Democratic candidate were duly nominated.

August 17, 1962

Mr. Henry L. Elwood
Howard County Attorney
P. O. Box 377
Cresco, Iowa

Dear Mr. Elwood:

Reference is herein made to yours of the 6th, inst., in which you submitted the following:

> "I am writing to you and requesting an opinion on the following problem, to wit: Facts. In the last primary election which was held in June, 1962, there were 3 candidates running for Justice of the Peace from Vernon Springs Township, in Howard County, Iowa. The City of Cresco is located in Vernon Springs Township. 2 candidates for Justice of the Peace ran on the Republican ticket, and 1 candidate for Justice of the Peace ran on the Democratic ticket. Only the eligible Republican voters were required to vote for 2 of the Republican candidates. Also, only the eligible Democrat voters were required to vote for the Democrat candidate. The 2 Republican candidates for Justice of the Peace received the highest number of votes, and the Democrat candidate received the third highest number.
>
> "Our specific problem is whether all 3 candidates for Justice of the

Peace are considered nominated and whether 2 from the 3 will be elected in the General election this fall, or whether the 2 Republican candidates are now considered nominated and are thus eligible for election in the fall, or whether the 1 Republican candidate who received the highest number of votes and the Democrat candidate are considered nominated and are thus eligible for election in the fall.

"I would appreciate an opinion on this as soon as possible."

In the foregoing situation, I am of the opinion that both candidates on the Republican ticket and the one candidate on the Democrat ticket are the nominees to the office of justice of the peace, and should appear upon the printed ballot to be voted on at the November election. Assuming that a municipal court does not exist in the City of Cresco, according to §32.21, Code of 1962, Vernon Springs Township is entitled to two justices of the peace and the township, being a subdivision of the county insofar as this election process is concerned, is controlled by the provisions of §43.53 appearing as follows:

"The candidate or candidates of each political party for each office to be filled by the voters of any subdivision of a county having received the highest number of votes shall be duly and legally nominated as the candidate or candidates of his party for such office, except that no candidate whose name is not printed on the official primary ballot, who receives less than five percent of the votes cast in such subdivision for governor on the party ticket with which he affiliates, at the last general election, nor less than five votes, shall be declared to have been nominated to any such office."

Thus, under the terms of such sections, there being two offices of justice of the peace to be filled, the two candidates upon the Republican ticket having received the highest number of votes on that ticket are the Republican nominees for these two offices and their names entitled to be printed as the Republican candidates for such two offices. The one candidate upon the Democratic ticket having received the highest vote of that party is nominated and entitled to have his name printed as a candidate for one of these offices at the November election.

In short, these three are the candidates to be voted for at the November election for the two offices of justice of the peace of Vernon Springs Township.

See letter opinion dated April 16, 1960, a copy of which is herewith enclosed; 1912 *O.A.G.* 212 and 1912 *O.A.G.* 743.

11.20

ELECTIONS: Payment for ballots used in voting machines—§§49.56, 52.24, 53.46, 1962 Code. Cost of printing ballots used in voting machines is controlled by §49.56, which is incorporated into Chapter 52.

August 10, 1962

Mr. Harlyn A. Stoebe
Humboldt County Attorney
429 Sumner Avenue
Humboldt, Iowa

Dear Mr. Stoebe:

Reference is herein made to yours of the 28th, ult., in which you submitted the following:

"Humboldt County has used voting machines for the last several elections. The 1962 primary election required the printing of separate ballots for submission of a special issue and the printing of ballots for absentee

use. Claim has been filed with the County Auditor by the Jaqua Printing Company for the printing of less than five hundred (500) ballots in the sum of six hundred eighty-five dollars ($685.00), which sum included the print strips for the machines which would be less than fifty (50) in number. Had no machines been used the total ballots required to be printed by law in this county would have been less than five thousand (5000). This renders the bill grossly in excess of the legal rate for printing ballots contained in Section 49.56 of the 1962 Code of Iowa. The voting machine law in Section 52.24 makes all other election laws not in conflict with the chapter on voting machines applicable. It is the contention of the Printing Company claimant that inasmuch as this county has purchased and uses voting machines the statute on the maximum cost of printing no longer applies and they are entitled to be paid upon their claim alleged to be based on the time and material cost basis. Our question therefore is:

"Does Section 49.56 of the 1962 Code of Iowa as extended by Section 52.24 control and limit the cost of ballot printing in primary or general elections in counties using voting machines?"

The only authority for paying the cost of these ballots is that provided by §49.56 of the Code of 1962. By the terms of §52.24, all the provisions of election law now in force and not inconsistent with the provisions of Chapter 52 will apply with full force to all counties, cities and towns adopting the use of voting machines. By reason thereof, §49.56 is as much a part of Chapter 52 as if restated. This provision of §52.24 includes the authority to pay the cost of printing ballots used in voting machines in accordance with the terms of §49.56. If this section is not used, there is no other authority in the board of supervisors to pay for the cost of printing these ballots. As confirming this construction of the legislative intent is the fact that provision is made by §53.46, bestowing power upon the Iowa Servicemen's Ballot Commission to prescribe and direct the preparation of specially printed ballots, et al., for use in connection with absent voting by voters in the armed forces, and providing that the provisions of §49.56 shall not govern as to the cost of such specially printed ballots.

By reason of the foregoing, I am of the opinion that §49.56, Code of 1962, controls the cost of printing the ballots for use in voting machines.

11.21

ELECTIONS: Primary election—§§43.53, 43.59, 43.66, 43.75, 43.94, 1962 Code. §§43.53 and 43.66 concerning write-in candidates do not apply to the election of delegates to a county convention since delegates are not candidates except as provided in §43.59. Judges of election who failed to determine a tie vote by lot pursuant to §43.75 should reconvene and make such determination. Township not electing full number of delegates is represented at convention by those elected who shall cast full number of votes entitled.

June 13, 1962

Mr. Richard Hasbrouck
Guthrie County Attorney
Guthrie Center, Iowa

Dear Mr. Hasbrouck:

This will acknowledge receipt of yours of the 7th, inst., in which you submitted the following:

"In our primary election June 4, 1962, none of the four Republican candidates running for County Attorney received the required 35% and

therefore the Republican candidate for County Attorney will have to be selected at the Republican County Convention. In order that the convention will go smoothly as possible, it is necessary that we have an opinion regarding the legalities of the selection of some of the delegates.

"My questions are these:

"1. Does Section 43.53 of the 1962 Code of Iowa apply in the case of the election of delegates (to a county convention)?

"2. We have a Township that is entitled to vote for 8 delegates and the names of 10 delegates were written in and 5 of the 10 received the same number of votes. The judges of the election failed to make a determination by lot as provided in Section 43.75. How am I to make a certification as to who the delegates are?

"3. We have a Township that was entitled to 2 delegates and only elected one. Does Section 43.94 apply and the delegates who were elected and qualified two years ago continue in office and be delegates at this convention? If so, how do you determine which one of them is to be the delegate?

"4. Does Section 43.66 apply to the election of delegates?"

(1) In answer to your question no. 1, §43.53 does not apply to the election of delegates to a county convention. Section 43.53 concerns candidates, and delegates to the county convention are not candidates within that section. This conclusion results from the fact that §43.59 provides that the term "candidate", as used in §§43.56 to 43.58, inclusive, shall include and apply to persons voted for as delegates and party committeemen. It is clear that there would be no necessity for this definition of a delegate as being a candidate if the delegate was to be deemed a candidate within the meaning of §43.53.

(2) In answer to your question no. 2, I would advise that the board of election judges who failed to take the action provided by §43.75 should be reconvened and correct their certification to the canvassing board and perform their duty to determine the tie vote, as provided by §43.75. See 1952 *O.A.G.* 157.

(3) In answer to your question no. 3, I am of the opinion that the situation is controlled by §43.96, providing as follows:

"43.96 Proxies prohibited. If any precinct shall not be fully represented the delegates present from such precinct shall cast the full vote thereof, and there shall be no proxies."

I find no relevancy of §43.94 fixing the term of delegates to the situation described.

(4) In answer to your question no. 4, §43.66, concerning write-in candidates, has no application to the election of delegates. Section 43.66 concerns candidates, and for the reason stated in answer to your question no. 1, delegates are not candidates under Chapter 43, except as provided in §43.59, Code of 1962.

In summary, neither §43.53 or §43.66 concerning write-in candidates apply to the election of delegates to a county convention, since delegates are "candidates" within the meaning of Chapter 43 only as specifically provided in §43.59. Where the judges of election failed to make a determination by lot pursuant to §43.75, where a tie vote resulted, they should be reconvened to make such determination. Where a township has not elected its full number of delegates, it is to be represented at the convention by those elected, casting the full number of votes to which it is entitled as provided in §43.96.

11.22

ELECTIONS: Publication of ballot—§39.1, 49.54, 49,72, 1962 Code. Notwithstanding the limitation on the cost of publishing the ballot for the general election, as required by §49.54, the published ballot should contain the names of the candidates and the terms for which they stand. The reasonable cost exceeding the statutory amount is payable by the board of supervisors from the county general fund.

October 26, 1962

Mr. Edward F. Samore
Woodbury County Attorney
204 Courthouse
Sioux City, Iowa

Dear Mr. Samore:

This is in response to your letter of October 18, 1962, in which you submitted:

"In Woodbury County, on the Nov. 6, 1962, general election, we will have one Supervisor for the First District whose term is for January 1, 1964; also a Supervisor for the 2nd district whose term is for January 1, 1963, and also a Supervisor for the 5th District, whose term is for January 1, 1964. A copy of the ballot is enclosed.

"1. Can we publish the ballot like the enclosed without the names and terms of the supervisors?

"2. Must we publish the names and terms of the supervisors, and how should it be done.

"If we publish the names and terms, it will involve three ballots, which will violate Code Section 49.54, limiting the cost of the publication."

Section 49.72, Code of 1962, provides as follows:

"49.72 Publication of list of nominations. The county auditor shall, prior to the day of election, publish a list of all nominations made as provided by law, and to be voted for at such election, except township, city, or town officers. Such publication shall be, as near as may be, in the form in which such nominees will appear on the official ballot. Such publication shall be in two newspapers, representing, if possible, the political parties which cast at the preceding general election the largest number and the next largest number of votes."

In compliance therewith, the auditor is required to publish all nominations for office to be voted for at the general election, and candidates for the office of supervisor are not within the exception noted in such section. This provision clearly provides for the publication not only of the office to be filled, but the names of the candidates for such office. So far as candidates for the office of supervisor are concerned, the terms for which they are candidates must be shown, notwithstanding the fact that the cost thereof exceeds the limits of the cost as fixed by §49.54. It is to observed that this election is required by the Constitution. The Amendment of 1916 thereof provides:

"To repeal section seven (7) of article two (2) of the constitution of Iowa and to adopt in lieu thereof the following, to-wit:

"General election. 'The general election for state, district, county and township officers in the year 1916 shall be held in the same month and on the same day as that fixed by the laws of the United States for the election of presidential electors, or of president and vice-president

of the United States; and thereafter such election shall be held at such time as the general assembly may by law provide.' ",

and as between such Constitutional provisions and §39.1, enacted in pursuance thereof, and §49.54 limiting the cost thereof, the Constitution will prevail. Obviously, the cost involved in such election process cannot control the operations of the Constitutional provision. The limitation, therefore, may be excluded or eliminated under the foregoing rule: *Sutherland Statutory Construction,* 3rd Edition, Vol. 2,

"A majority of the cases permit the elimination or disregarding of words in a statute in order to carry out the legislative intent.

"As in all other cases, words may be eliminated only when such action is consistent with the legislative intent. Courts permit the elimination of words for one or more of the following reasons: where the word is found in the statute due to the inadvertence of the legislature or reviser, or where it is necessary to give the act meaning, effect, or intelligibility, or where it is apparent from the context of the act that the word is surplusage, or where the maintenance of the word would lead to an absurdity or irrationality, or where the use of the word was a mere inaccuracy, or clearly apparent mishap, or was obviously erroneously inserted, or where the use of the word is the result of a typographical or clerical error, or where it is necessary to avoid inconsistencies and to make the provisions of act harmonize, or where the words of the statute fail to have any useful purpose or are entirely foreign to the subject matter of enactment, or where it is apparent from the caption of the act or body of the bill that the word is surplusage."

By reason thereof, the publication of the ballot should contain the names of the candidates and the terms for which they stand, notwithstanding the cost limits of such publication as fixed by §49.54 which will thus be exceeded.

The reasonable cost of this publication exceeding the statutory amount is payable by the board of supervisors from the county general fund.

11.23

ELECTIONS: Publication of proposed Constitutional amendment.—§§39.5, 39.6, 1958 Code. Publication of proposed Constitutional amendment is effected by publication by the sheriff of each county of the Governor's Proclamation of the holding of special election wherein proposed Constitutional amendment will be submitted to voters. No duty is imposed upon the Secretary of State or county auditor to publish said proposed amendment in a newspaper.

May 2, 1962

Honorable Melvin D. Synhorst
Secretary of State
L O C A L

Dear Sir:

In reply to your request as to whether there is any duty imposed upon the Secretary of State or the county auditor to publish in a newspaper the proposed Constitutional amendment to be voted for at a special election to be held June 4, 1962, I would advise that there appears to be no such statutory or Constitutional duty so imposed.

It is to be observed that publication of such amendment is effected by publication required to be made by the sheriff of each county of the Governor's Proclamation of the holding of this special election, at which election the

proposed Constitutional amendment amending Article V of the Constitution will be submitted to the voters. This duty of the sheriff is imposed by §§39.6 and 39.5, Code of 1958, each appearing as follows:

"39.6 Notice of special election. A similar proclamation shall be issued before any special election ordered by the governor, designating the time at which such special election shall be held; and the sheriff of each county in which such election is to be held shall give notice thereof, as provided in section 39.5."

"39.5 Notice of election. The sheriff shall give at least ten days notice thereof, by causing a copy of such proclamation to be published in some newspaper printed in the county; or, if there be no such paper, by posting such a copy in at least five of the most public places in the county."

11.24

ELECTIONS: Registration of voters—§47.1, Ch. 48, 1958 Code. Section 47.1 bestows on the board of supervisors the authority to provide for registration of voters in townships having a population of 1500 or more, but does not extend to permanent registration as set up by Ch. 48.

March 27, 1962

Mr. Peter J. Peters
Pottawattamie County Attorney
Council Bluffs, Iowa

Dear Mr. Peters:

This will acknowledge receipt of yours of the 27th, ult., in which you submitted the following:

"The Pottawattamie County Board of Supervisors has received a request from the Chairman of the Republican Central Committee and the Chairman of the Democratic Central Committee that the County initiate a program for registration of voters in townships having a population of 1500 or more outside the corporate limits of the city of Council Bluffs.

"In this connection a dispute seems to have arisen between them as to whether Chapter 47 or Chapter 48 is the proper statute to implement in this program.

"I request your opinion as to whether or not Chapter 48 applies to registration in counties in townships with a population of 1500 or more. This question is asked in view of the provisions of Section 48.22 of that Chapter.

"Subject to your opnion as to whether Chapter 48 does apply, if you are of the opinion that it does apply can you state who is to be the county registration commissioner; and do you have one county registration commissioner or do you have one for each township?

"In addition, if Chapter 48 does apply, does it also apply to Kane township in Pottawattamie County which embraces the entire city of Council Bluffs but which has township area outside the corporate limits of the city? What would be the role of the county registration commissioner where the city clerk of Council Bluffs is presently the registration commissioner for the corporate limits of the city?"

Section 47.1, 1958 Code of Iowa, bestows on the board of supervisors the authority to provide for the registration of voters in townships having a popu-

lation of 1500 or more, the terms of the section being as follows:

"47.1 Registration required. Registration of voters shall be made for all elections, in all cities having a population of ten thousand or more, not counting inmates of any state institution. Provided, however, that by city ordinance, registration of voters may be required in any city having a population of not less than four thousand and not more than ten thousand. Provided, however, that the county board of supervisors by proper action may require registration of voters in any township having a population of 1500 or more.

"Registration of voters shall not be made for school elections except as otherwise provided."

However, the authority thus vested in the board of supervisors does not extend to permanent registration as set up in Chapter 48, Code of Iowa. Section 48.20 restricts the application of §47.1 heretofore quoted to registration under Chapter 47. The terms of §48.20 are these:

"48.20 Nonapplicability of statutes. The provision of chapter 47, and lines 6 to 10, inclusive, of section 49.78, shall not be applicable to sections 48.1 to 48.18 inclusive, of this chapter."

Therefore, in view of the conclusion that registration of voters in townships having a population of 1500 or more is restricted to the provisions of Chapter 47, Code of Iowa, there is no necessity of answering the remaining questions of your letter. Section 48.22, Code of Iowa, does no more than vest discretionary power in the board of supervisors to adopt permanent registration, if it has prior thereto adopted registration.

11.25

ELECTIONS: Special election on Constitutional amendment—§49.26, 1958 Code. (1) Any qualified voter without party affiliation is eligible to vote on the proposed Constitutional amendment at the special election to be held June 4, 1962. (2) At such election a separate ballot box for the depositing of ballots on the Constitutional election is permitted, but not required, where the primary voting is by paper ballot. Where the primary voting is by machine, a separate ballot box is required. Where the primary voting is by paper ballot, there is no necessity for separate booth for voting on the Constitutional amendment. Where the primary voting is by machine, a separate booth for voting on the Constitutional amendment is required. (3) The ballot box used for depositing of ballots for delegates to the county convention may be used for the depositing of ballots for the Constitutional amendment. (4) In fulfilling his duty to provide ballot boxes, the auditor must use one that is to be kept locked and otherwise provides security and secrecy of the ballots.

April 30, 1962

Honorable Melvin Synhorst
Secretary of State
L O C A L

Dear Sir:

Reference is herein made to the several questions submitted to you in connection with the submission of the Constitutional amendment on June 4, 1962. The questions are as follows:

"Supposing a voter does not wish to declare either as a Republican or a Democrat, would he not be entitled to vote on the Constitutional question and if so, what provisions will the Auditor have to make in setting up the

voting place? It would seem that the voting machine booth could not be used as the voter would have to declare before entering. It has been ruled that paper ballots are to be used and therefore a ballot box has to be supplied. Would it also be necessary to set up a separate voting booth to take care of these people who do not wish to vote either Republican or Democrat?

"Can the same ballot box used for the Judges' question also be used to deposit ballots for the delegates to the County Convention, or will it be necessary to furnish a separate ballot box for that? In case we do, are collapsible card board ballot boxes, secured with gummed tape, legal for use?"

(1) Any qualified voter with no party affiliation is eligible and is entitled to vote on the matter of the proposed Constitutional amendment at the special election to be held on June 4, 1962.

(2) A separate ballot box for the depositing of ballots on the Constitutional amendment is permitted, but not required, where the primary voting is by paper ballot, 1916 *O.A.G.* 1962. However, where the primary voting is by machine, a separate ballot box is required.

(3) Insofar as a separate booth is concerned, there would be no necessity of such separate booth where voting is by paper ballot at the primary. However, where voting at the primary is by voting machine, a separate booth for voting on the Constitutional amendment is required.

(4) A ballot box used for the ballots for delegates of the county convention may be used for the depositing of ballots on the Constitutional amendment.

(5) According to §49.26, Code of 1958, the auditor is required to provide the necessary ballot boxes. Statute does not specify the material that will go to make up the ballot box. However, it would appear that the box must be one that is to be kept locked and otherwise provides security and secrecy of the ballots.

11.26

ELECTIONS: Special election on Constitutional amendment—§49.82, 1962 Code. In submission of the judicial Constitutional amendment at special election, eligible electors are not required to request a ballot to receive it from the judges of election for the purpose of voting on such amendment.

June 2, 1962

Mr. Harry Perkins
Polk County Attorney
Des Moines, Iowa

Dear Mr. Perkins:

Referring to the question as to whether, at the June 4th submission of the proposed Judicial Constitutional Amendment, judges of election will furnish electors ballots upon the foregoing Amendment only upon request, I advise as follows:

The 59th General Assembly, in legislation concerning submission of this proposed Amendment to the voters, provided that such submission be at special election held in accordance with the laws governing general elections. Section 49.1, Code of Iowa, 1962, applies to all elections, whether general, city or special. With that in mind, with respect to the handling of ballots as between judges of election and electors, §49.77 provides:

"The judges of election of their respective precincts shall have charge of the ballots and furnish them to the voters. Any person desiring to vote shall give his name, and, if required, his residence, to such judges, one of whom shall thereupon announce the same in a loud and distinct tone of voice.",

and if not challenged, or if the challenge be voided, §49.82 provides:

"One of the judges of election shall give the voter one ballot and only one, on the back of which a judge shall indorse his initials, in such manner that they may be seen when the ballot is properly folded. No ballot without said official indorsement shall be deposited in the ballot box. The voter's name shall immediately be checked on the registry list."

In view of these sections, and the constitutional right of all persons over twenty-one having a residence of six months in the state and sixty days in the county to vote at all elections, (Art. II, §1, Constitution of Iowa) and in view of the specific legislation, in order to alert the voters of an opportunity to vote on this Constitutional proposal, requiring the Amendment to be submitted on paper ballots and not by machines, and with no other statutes limiting this right and the method of effectuating its operation, I am of the opinion that judges of election, being ministerial officers, have a duty to deliver a ballot to the voter without request from the voter, if he be eligible to vote.

11.27

ELECTIONS: **Transmitting abstract of votes**—§50.46, Ch. 345, 1958 Code. There is no duty imposed upon the county auditor to transmit to the Secretary of State an abstract of votes canvassed resulting from a special election involving the adoption or rejection of a proposition.

May 23, 1961

Mr. Robert F. Schoeneman
Butler County Attorney
Aplington, Iowa

Dear Mr. Schoeneman:

This will acknowledge receipt of your letter of May 8, 1961, in which you state the following:

"The Board of Supervisors recently held a special election on the proposition of building a new county shed. This proposition was submitted as required by Chapter 345, 1958 Code of Iowa. The proposition carried and now my question is whether the county auditor must transmit to the Secretary of State an abstract of the votes canvassed as required in Sec. 50.46, 1958 Code of Iowa."

In my opinion, there is no duty imposed upon the county auditor to transmit to the Secretary of State an abstract of the votes canvassed resulting from the special election described. Section 50.46, Code 1958, with respect to canvass and certificate of special election provides as follows:

"50.46 Special elections—canvass and certificate. In case a special election has been held, the board of county canvassers shall meet at one o'clock in the afternoon of the second day thereafter, and canvass the votes cast thereat. The county auditor, as soon as the canvass is completed, shall transmit to the secretary of state an abstract of the votes so canvassed, and the state board, within five days after receiving such abstracts, shall canvass the returns. A certificate of election shall be issued by the county or state board of canvassers, as in other cases. All the pro-

visions regulating elections, obtaining returns, and canvass of votes at general elections, except as to time, shall apply to special elections."

The reference in the foregoing section to the county auditor furnishing the Secretary of State an abstract of the votes canvassed is in *pari materia* with the provisions of §50.30, Code 1958, providing the following:

"50.30 Abstracts forwarded to secretary of state. The auditor shall, within ten days after the election, forward to the secretary of state, in separate, securely sealed envelopes, one of the said duplicate abstracts of votes for each of the following offices:

1. President and vice-president of the United States.
2. Governor and lieutenant governor.
3. United States senator.
4. Representative in congress.
5. Supreme and district judges.
6. Senators and representatives in the general assembly for the county alone.
7. Senators in the general assembly in districts comprising more than one county.
8. All state officers not otherwise specified above."

Thus the two quoted sections make consistent the obligation imposed by §50.46 upon the county auditor to transmit to the Secretary of State an abstract of the votes canvassed, and the obligation of the state board of canvassers to issue a certificate of election. By plain implication, the meaning of the statute (§50.46) is limited to the canvass of returns in relation to election to office and not the returns relating to an election involving the adoption or rejection of a proposition. There is confirmation for this conclusion in §345.11, Code 1958, which imposes upon the board of supervisors, as a result of the canvass of the returns upon the proposition submitted, the duty of entering the result of the canvass in the minute book and thus making the proposition, if ratified by the voters, in force and effect as a result of that canvass.

11.28

ELECTIONS: Vacancy in office of state senator—Ch. 69, 59th G.A. The vacancy occurring in the office of State Senator in the 14th District should be filled by the electors in the district as it existed at the time the vacancy occurred. Thus, the electors of Mahaska County only shall fill the vacancy and not the electors of Keokuk County, which is to be attached to the 14th District commencing with the legislative session of 1963 and at any special session thereafter prior to 1965.

March 14, 1962

Mr. Harold B. Heslinga
Mahaska County Attorney
118 North Market Street
Oskaloosa, Iowa

Dear Mr. Heslinga:

Reference is herein made to yours of the 9th, inst., in which you submitted the following:

"As you undoubtedly know, John Gray, the State Senator representing the old Fourteenth Senatorial District, recently passed away. Mr. Gray's term of office did not expire until 1965 and the vacancy thus existing must be filled by the general election to be held in 1962.

"The State Senatorial Redistricting, as passed by the 59th General Assembly, provides for the combining of Mahaska County, now constituting the Fourteenth Senatorial District, and Keokuk County to constitute the new Eleventh Senatorial District and further provides that Keokuk County shall be attached to Mahaska County for the purpose of representation in the Senate for the Legislative Session in 1963. The Supreme Court of Iowa, in a recent decision, held that such representation would not be unconstitutional even though the electors of Keokuk County, Iowa had no opportunity to vote on their representative in the Senate. The Redistricting Act, as passed by the 59th General Assembly, further provides that in the event of any vacancy occurring in any Senatorial District after July 4, 1961, it shall be filled by the electors of the district as it existed at the time the vacancy occurred. In my opinion the office now vacant should be filled by the electors of Mahaska County without the necessity of a vote by the electors of Keokuk County.

"I would appreciate your opinion as to whether the same is constitutional since we are, in effect, depriving the electors of Keokuk County of the opportunity to vote for their representative in the Senate to fill the vacancy that exists."

I agree with your conclusion that, "the office now vacant should be filled by the electors of Mahaska County without the necessity of a vote by the electors of Keokuk County." This conclusion is controlled by, (1) the express terms of Chapter 69, Acts 59th G.A., which provides, as affecting Keokuk County, the following:

"This Act shall not affect the terms of office of senators now holding certificates of election from the present senatorial districts. In the event of any vacancy occurring in any senatorial district after July 4, 1961 it shall be filled by the electors of the district as it existed at the time the vacancy occurred. For the legislative session in 1963 and at any special session thereafter prior to 1965 the following counties are hereby attached for the purpose of representation in the senate to the present districts designated opposite the name of the county:

"Winneshiek to the fortieth

Muscatine to the twenty-third

Keokuk to the fourteenth

Greene to the thirty-first

Grundy to the thirty-ninth

Humboldt to the twenty-seventh

Wright to the forty-third."

and (2) by interpretation of the foregoing provision by the Supreme Court of Iowa in the case of *Selzer v. Synhorst et al.*, decided March 6, 1962. The Court stated:

"III. The Act under attack provides that for the legislative sessions in 1963 and at any special session prior to 1965, seven counties are attached for the purpose of representation to designated districts.

"This provision is attacked as violative of the Fourteenth Amendment to the Constitution of the United States and section 1 of Article III of the Constitution of Iowa. * * *

"There is no violation of section 1, Article III, of the Iowa Constitution.

"The voters in the attached counties have the right to vote in 'all elections which are now or hereafter may be authorized by law.'

"For the purpose of interim 'representation' the counties are attached to districts. This attachment will continue only until there is a senatorial election in the new district of which they are a part. As soon as there is a Senator to be elected from their district, they can vote. Until there is an election or some one or some thing to vote for, the question of the right to vote is academic but not real. There is no denial of a right to vote until there is an election. There is no disenfranchisement as to a particular office when there is no vacancy to be filled. The Constitution does not say a voter is entitled to vote for every office in our national or state government at every election. It does say he is entitled to vote at all elections authorized by law. That simply means he is entitled to vote on candidates and propositions submitted to the voters in his voting precinct."

11.29

ELECTIONS: Write-in candidate—§§43.53, 43.66, 1962 Code. To be nominated, a write-in candidate for county office needs only 5 per cent of the votes cast for governor in the county subdivision on the party ticket with which he affiliated at the last general election.

August 10, 1962

Mr. James D. O'Connor
Chickasaw County Attorney
3½ West Main Street
New Hampton, Iowa

Dear Mr. O'Connor:

Reference is herein made to yours of the 24th, ult., in which you submitted the following:

"In the primary election on June 4, 1962, a write-in candidate for supervisor in a two-township supervisor district received in excess of 5%, but less than 10% of the vote in the two townships for his party's candidate for Governor in the 1960 general election. A question has arisen concerning the section of the code which applies in determining if he has been duly and legally nominated.

"Sections 43.52 and 43.53, Code of Iowa, 1962 appear to apply to county offices. The former addresses itself to offices filled by the voters of the county in which case a write-in candidate needs 10% of the vote for his party's candidate for Governor in the last general election; the latter concerns itself with offices to be filled by voters of a subdivision of a county in which case the write-in candidate needs only 5% of the vote.

"It has been my opinion that a supervisor district was a subdivision of a county in which case Section 43.53 would apply and the candidate referred to would be duly and legally nominated since he received in excess of 5% of the vote. However, I have just read an opinion of the Attorney General set out at page 163 of the 1942 Report. The question submitted presented an identical fact situation and submitted by the then County Attorney of this county. The Attorney General did not refer to

either Sections 43.52 or 43.53 of the Code but only to Section 43.66. The Opinion holds that the candidate was not duly and legally nominated since he did not have 10% of the vote for his party's candidate for Governor in the last general election.

"The County Attorney apparently anticipated the answer and asked whether the county convention or central committee could make a nomination. The Attorney General said no, pointing out that Section 624 of the 1939 Code, now Section 43.97, did not give authority to make a nomination of any office to be filled by the voters of any subdivision of the county.

"I am unable to reconcile your 1942 Opinion with Section 43.53, nor does the Attorney General's Opinion cited in the annotations to Section 43.53 and set out in full at page 482 of the 1936 Report seem reconcilable with that Opinion.

"I should therefore appreciate your opinion on whether a person who receives write-in votes for the office of Supervisors in a two-township supervisor district in excess of 5% but less than 10% of his party's vote for Governor in the last general election is duly and legally nominated for that office so that the County Auditor may put his name on the ballot."

On the authority of the provisions of §43.53, Code of 1962, providing as follows:

"Who nominated for township office. The candidate or candidates of each political party for each office to be filled by the voters of any subdivision of a county having received the highest number of votes shall be duly and legally nominated as the candidate or candidates of his party for such office, except that no candidate whose name is not printed on the official primary ballot, who receives less than five percent of the votes cast in such subdivision for governor on the party ticket with which he affiliates, at the last general election, nor less than five votes, shall be declared to have been nominated to any such office.",

and opinions of this Department appearing at 1936 *O.A.G.* 482 and 1936 *O.A.G.* 467, a candidate for supervisor in one of two township districts who has received the highest vote shall be duly and legally nominated, provided as a write-in candidate he also has received five percent of the vote cast for Governor at the 1960 election by the party with which he is affiliated. Such candidate is not required to receive either 10 percent or 35 percent of such vote in order to be nominated. See 1940 *O.A.G.* 511. Copies of the opinions referred to are hereto attached. The opinion appearing in 1942 *O.A.G.* 163, reaching a contrary conclusion, is hereby withdrawn.

11.30

ELECTIONS: Write-in votes for justice of the peace—§50.45, 1962 Code. The justice of the peace having received the greatest number of votes at the general election, since no specific number is required, is the declared elected official.

December 19, 1962

Mr. G. A. Cady
Franklin County Attorney
Hampton, Iowa

Dear Mr. Cady:

This will acknowledge receipt of your recent letter, in which you submitted the following:

"At the last general election, one individual received four write-in votes for justice of the peace, and the question . . . is whether or not this number is sufficient so that the individual is duly elected to that office."

Section 50.45, 1962 Code of Iowa, provides as follows:

"Canvass public—result determined. All canvasses of returns shall be public, and the persons having the greatest number of votes shall be declared elected."

According to that statute, the individual receiving four write-in votes, if this is the majority of the votes, is the elected justice of peace.

11.31

Challengers at municipal elections—§49.104, 1958 Code. There is no authority for the presence of challengers at the counting of ballots in non-partisan municipal elections. (Strauss to Samore, Woodbury Co. Atty., 1/17/62) #62-1-7

11.32

Constitutional amendment—The same judges and clerks shall perform the necessary duties in the primary election and in the special election concerning the proposed constitutional amendment. A qualified voter with no party affiliation is eligible to vote on said constitutional amendment. (Strauss to Perkins, Polk Co. Atty., 3/26/62) #62-3-7

11.33

Election boards—Ch. 73, §1, Acts 59th G.A. (§49.15, 1962 Code). In township precincts having only one voting machine, if the township trustees are all of the same political party, the board of supervisors shall determine the completion of the election board based upon the precinct vote. (Strauss to Maddocks, Wright Co. Atty., 10/4/61) #61-10-6

11.34

Elector qualified to sign petition—§§332.17, 332.18, 1962 Code. (1) An "elector" eligible to sign a petition to the board of supervisors to call an election to combine county offices under §332.17 and §332.18 means a person authorized by the Constitution to exercise the elective franchise. (2) Ditto marks are a legal method of identifying place of residence and other statements attached to a signature on a petition. (Strauss to Mincks, St. Sen., 5/31/62) #62-5-10

11.35

Filing dates for nomination papers—§42.11(2), 1958 Code. Insofar as the June 1962 primary is concerned, the earliest date for filing nomination papers for the offices of United States Senator, elective state office, representative in Congress, and member of the General Assembly is March 11, 1962 and the latest date for filing is March 31, 1962. (Strauss to Synhorst, Sec'y. of State, 1/12/62) #61-1-3

11.36

Filling of vacancy in county office—§§69.8(5), 59.13, 1962 Code. The vacancy occurring in the office of supervisor occurring less than fifty days before the general election in 1962 is filled under the provisions of §69.8(5), and the

appointee to fill the vacancy will hold office until January 1, 1964, at which time the person elected for the full term beginning January 1, 1964 will take office. (Strauss to Morr, Lucas Co. Atty., 10/3/62) #62-10-1

11.37

Requirements re number of judges and clerks—§§49.12, 49.13, 49.14, 49.15, 49.17, 1958 Code. (1) Where township precinct has only one machine; (2) Where township precinct has more than one machine; (3) In precincts that are not township precincts; and (4) In a precinct not a township precinct in which four machines are used. The only place where appointments to the board are limited to members of the two largest parties is §49.15. There is no support in either §49.12 or §49.15 for the idea that the majority of judges must be from the party receiving the largest number of votes. (Strauss to Bedell, Dickinson Co. Atty., 5/23/62) #62-5-6

11.38

Return of ballots—§273.7, 1958 Code. Failure of election judges, in an election for the purpose of electing members to the county board of education, to return the ballots cast at the election within the statutory forty hours after the closing of the polls is deemed an irregularity and such ballots should be included in the official canvass. (Strauss to Maule, St. Rep., 11/8/61) #61-11-8

11.39

School, residence qualification—§277.12, 1958 Code. A person is ineligible to vote at a school election unless he is a resident of the school district, and has been an actual resident thereof for ten days prior to the election. (Strauss to Coffman, St. Rep., 9/27/61) #61-9-16

11.40

Submission of two propositions on public measures on same ballot—§49.48, 1962 Code. Two propositions on public measures may be voted upon by the elector even if inconsistent, if the purpose of both is single and not dual, and the voter may exercise free choice of one or all. (Strauss to Akers, St. Aud., 7/26/62) #62-7-2

11.41

Voting machines—§49.99, 1958 Code. A voter can write in the name of a candidate in order to cast his vote for him, even though such candidate's name is printed on the ballot in such a position as to make it impossible to vote mechanically for him because of a prior vote, when he is given the opportunity to cast his ballot for two. (Rehmann to Schroeder, Jackson Co. Atty., 4/7/61) #61-4-10

11.42

Voting machines—§52.3, 1958 Code. One-half mill levy provided by S. F. 49, Acts G.A., for the purpose of voting machines is operative, notwithstanding the provisions of H. F. 398, 59th G.A., authorizing an additional limited county levy. (Strauss to Akers, St. Aud., 7/13/61) #61-7-6

CHAPTER 12

HEALTH

STAFF OPINIONS

LETTER OPINIONS

12.1

HEALTH: County hospital board of trustees—§347.9, 1962 Code. Neither a registered nurse nor a funeral director is eligible for election to county hospital board of trustees.

August 15, 1962

Mr. Gary L. Cameron
Jefferson County Attorney
Fairfield, Iowa

Mr. Harold B. Heslinga
Mahaska County Attorney
Oskaloosa, Iowa

Dear Sirs:

This will acknowledge your requests for an opinion as to whether either a registered nurse or a funeral director is eligible to election to the board of trustees of a county hospital.

Section 347.9, 1962 Code of Iowa, provides:

"Trustees—appointment—terms of office. * * * the board shall appoint seven trustees chosen from the resident citizens of the county * * * none of whom shall be physicians or licensed practitioners."

The foregoing statute excepts from the holding of office of trustee of the county hospital board physicians or licensed practitioners. Chapter 147, Code of 1962, includes among others deemed to be practitioners, a nurse.

In view of the foregoing statute, I am of the opinion that a registered nurse is a practitioner within the terms of the statute and therefore would not be eligible to the office of county hospital trustee.

The question of eligibility of a funeral director has arisen before and was answered by an opinion issued to Mr. David I. Grimes, Monroe County Auditor, 1958 *O.A.G.* 90. That opinion, advising that a funeral director is not eligible, is hereby confirmed.

12.2

HEALTH: Marriage licenses, premarital certificates, laboratory tests—Ch. 596, §§596.1, 596.3, 596.8, 1962 Code. It was the intent of the legislature that the physician's certificate required under the above sections of the law be based upon standard serological tests made by the state hygienic laboratory or by such other laboratories as approved by the State Department of Health, located in the State of Iowa or outside the state. Said certificate is required of nonresidents and residents alike.

July 11, 1962

Dr. Edmund G. Zimmerer
Commissioner of Public Health
L O C A L

Dear Dr. Zimmerer:

Reference is made to your favor of June 21, 1962, reading as follows:

"An opinion regarding premarital health certificates given us on October 14, 1946 says in part with reference to Section 596.8: 'No laboratory tests are prescribed outside of the state.'

"We believe this sentence to be in conflict with the thought of the succeeding paragraph. Clerks of court, however, are inclined to neglect this latter paragraph and decide that the sentence quoted means that non-residents need have no blood test.

"A clarifying opinion is therefore respectfully requested which states clearly that the diagnosis of syphilis or its absence must be based upon serology performed in a competent laboratory."

The opinion referred to above is found in 1946 *O.A.G.* 212.

In 1942 *O.A.G.* 53, it was ruled that nonresidents of the State of Iowa may be examined by an Iowa physician or they may be examined by a physician licensed in the state of the applicant's residence; and that an Iowa resident who is temporarily living outside the state may be examined and procure his health certificate as contemplated from a physician licensed to practice in the state where he is temporarily residing. It was also stated in said opinion that the purpose and intent of the legislature in enacting said law was to prevent, as nearly as possible, the marriage in this state of persons having syphilis in a communicable stage, and that said law should be liberally construed to carry out the intent of the legislature in enacting this law.

Section 596.1, 1962 Code, provides that the physician's certificate sets forth—"* * * that said person to the proposed marriage is either free from syphilis or not in a stage whereby it may become communicable as nearly as can be determined by a thorough physical examination and such standard microscopic and serological tests as are necessary for the discovery of syphilis."

Substantially the same provisions are prescribed for applicants from another state in §596.8 as are prescribed in §596.1.

Section 596.3 provides: "All standard serological tests for syphilis as required under this chapter shall be made by the state hygienic laboratory of the state department of health *or by such other laboratories which are approved by the state department of health.*" (Emphasis ours)

It is a scientific fact, of which judicial notice can be taken, that confirmation of the disease of syphilis in the communicable stage requires a serological test of the blood.

We believe that it was the intent of the legislature in the enactment of said law to require that the physician's certificate for nonresident applicants for a marriage license, or resident Iowa applicants temporarily residing out of the state, would be based upon a standard serological test made at the state hygienic laboratory, or by such other laboratories which are approved by the State Department of Health, either within the State of Iowa or outside the state. Section 596.3 further provides: "* * * The results of all laboratory tests shall be reported on standard forms prescribed by the Commissioner of Public Health."

In 1946 *O.A.G.* 212, there appears on page 213 this statement: "No laboratory tests are prescribed outside of the state, unless required by the other state." This statement is not germane to the question resolved in that opinion and therefore should be and is withdrawn and deleted from said opinion for the reason that it was not the intent of the legislature to waive standard serological tests for nonresident applicants or residents of the state temporarily residing in another state. Said opinion stands affirmed, with said deletion.

In conclusion, it is our considered opinion that under the specific provisions of Chapter 596, and §§596.1, 596.3 and 596.8, it was the intent of the legislature that applicants for a marriage license, whether residents or nonresidents of the State of Iowa, must file a certificate by a duly licensed physician that the applicant to the proposed marriage is either free from syphilis or not in a stage whereby it may become communicable, based upon standard serological tests made by the state hygienic laboratory or by such other laboratories as approved by the State Department of Health, located in the State of Iowa or outside the state.

12.3

HEALTH: Pharmacy examiners board—§147.95, Ch. 155, 1962 Code. The operators of a mail-order pharmacy business, located in a foreign state, without a license to practice pharmacy in the State of Iowa are in violation of Chapter 155, and under §147.95 it is the duty of the board to warn such operators.

June 1, 1962

Mr. J. F. Rabe, Secretary
Board of Pharmacy Examiners
State of Iowa

Dear Mr. Rabe:

Reference is made to your letter of recent date, which reads:

"Can the Iowa Pharmacy Examiners issue a restraining order against the Getz Prescription Co., 916 Walnut Street, Kansas City 6, Missouri, for advertising and the filling of prescriptions—legend drugs, within the State of Iowa?

"This particular organization is not licensed in the State of Iowa and it, apparently, is operating by means of mail order."

It appears from other information available that the said Getz Prescription Co., as well as other such mail-order business houses, are soliciting patients receiving medication to send their prescriptions to a centralized point, where the medicines are then compounded and forwarded by mail to the patient. All of these organizations conducting such mail-order business, so far as known, are located outside the borders of the State of Iowa.

Those operating such a business are deemed to be engaged in the practice of pharmacy under the provisions of §155.1, 1962 Code and should be licensed

as such before conducting such business.

The practice of pharmacy is regulated under police power. (See *Reppert v. Utterback,* 206 Iowa 314, 217 N.W. 545, 1928).

This type of operation presents a serious problem from the standpoint of the enforcement of the state licensure laws.

All authoritative bodies recognize in mail-order Rx operations a variety of dangers to public health: the danger of too long a delay between the time an Rx is written and the time the patient takes the medication, the danger that the pharmacist cannot check the authenticity of the Rx, the danger that he cannot check with the doctor on matters of dosage, incompatibility and other dangers.

This type of operation is in violation of Chapter 155, regulating the practice of pharmacy in the State of Iowa, and it is within the powers and duties of the Board of Pharmacy Examiners to warn such persons that they are in violation of the law, said Board being charged with the duty of enforcing the law with reference to the practice of pharmacy by §147.95.

12.4

HEALTH: Pharmacists, hospital license—Ch's. 135B, 155; §§155.1, 155.-3(8), 155.10, 155.11, 1962 Code. It was not the intent of the legislature in the enactment of §155.3(8) to exempt hospitals from employing a licensed pharmacist in the operation of their drug department where medicines and drugs are compounded; the intent of said provision was to exempt such hospitals from the requirement of securing retail or wholesale drug licenses for such establishments.

October 30, 1962

Mr. J. F. Rabe, Secretary
Iowa Pharmacy Examiners
LOCAL

Dear Mr. Rabe:

Reference is made to your letter of August 10, 1962, requesting opinion as follows:

"The question arises whether or not hospitals are required to have in their employ a registered pharmacist.

"There is a question in our mind under Section 155.3, subsection 8, whether or not they are exempt from employing a registered pharmacist. It would appear that they are exempt from the license fee, but whether or not this can be read into the exemption of a registered pharmacist under Chapter 155 is a question.

"So, the question is, must a hospital have in their employ a registered pharmacist who compounds drugs and medicines and fills the prescriptions of a licensed physician, surgeon, dentist or veterinarian?"

Prior to the enactment of Chapter 96, Laws 57th G.A., under the provisions of Chapter 155 of the 1954 Code of Iowa, the only license required for dispensing drugs was that of a pharmacist.

From a reading of Chapter 96, Laws 57th G.A., it appears that the primary purpose of said Act was to provide legislation for the regulating and licensing of retail and wholesale drug establishments. Prior to said enactment the law required that anyone coming within the provisions of §155.1 was deemed to

be engaged in the practice of pharmacy, and a license was required therefor.

Section 155.3(8), providing that "The provisions of this chapter shall not apply * * * to hospitals licensed under Chapter 135B * * *", seems to exempt hospitals from requiring the services of a registered pharmacist to fill prescriptions in the drug department of such hospital.

But obviously, any such construction of the law would defeat the whole purpose of the chapter and permit the hiring, promiscuously, of anyone to perform these highly professional and technical services, and we would have an absurd or ridiculous result, which we believe was not the intent of the legislature.

In construing any particular clause or words of the statute, it is especially necessary to examine and consider the whole statute including the title, and gather if possible from the whole the express intention of the legislature. It could not be resolved from isolated words taken out of context. (See *State ex rel v. McEwen,* 250 Iowa at page 725, 96 N. W. 2d 189, and cases cited therein.)

It can be seen from a reading of the statute prior to the enactment of Chapter 96, Laws 57th G.A., that the primary purpose of said enactment was to regulate the licensing of retail and wholesale drug establishments, and that there was no intent on the part of the legislature to exempt hospitals by the use of the language quoted above, in the matter of the employment of a registered pharmacist where it is required to compound and dispense drugs and medicines or fill prescriptions. As bearing on this question, see 1909 *O.A.G.* 177, a copy of which is attached hereto.

A further rule of construction on this question appears in *Sutherland Statutory Construction,* 3rd Edition, Vol. 2, which reads:

> "A majority of the cases permit the elimination or disregarding of words in a statute in order to carry out the legislative intent.
>
> "As in all other cases, words may be eliminated only when such action is consistent with the legislative intent. Courts permit the elimination of words for one or more of the following reasons: where the word is found in the statute due to the inadvertence of the Legislature or reviser, or where it is necessary to give the act meaning, effect, or intelligibilty, or where it is apparent from the context of the act that the word is surplusage, or an absurdity or irrationality, or where the use of the word was a mere inaccuracy, or clearly apparent mishap, or was obviously erroneously inserted, or where the use of the word is the result of a typographical or clerical error, or where it is necessary to avoid inconsistencies and to make the provisions of act harmonize, or where the words of the statute fail to have any useful purpose or are entirely foreign to the subject matter of the enactment, or where it is apparent from the caption of the act or body of the bill that the word is surplusage."

Therefore, in answer to your question, it is the opinion of this office that the legislature, in using the words "The provisions of this chapter shall not apply * * * to hospitals licensed under Chapter 135B * * *" in §155.3(8), did not intend to exempt such hospitals from the requirements for §155.1 defining those persons deemed to be engaged in the practice of pharmacy and who must be licensed as such under the provisions of Chapter 155, Code of 1962; that the intent of the legislature is to exempt hospitals as such from the requirement of securing a license to operate a retail or wholesale drug establishment under the requirements of §§155.10 and 155.11, 1962 Code.

12.5

HEALTH: Pharmacists, unprofessional conduct—§147.56(1), 1962 Code. The use of "telewriters" in such manner as to deprive a patient of the

right to select a pharmacist of his own choosing to compound his medicine would subject the pharmacist using such "telewriters" to a charge of unprofessional conduct.

May 29, 1962

Mr. J. F. Rabe, Secretary
Iowa Pharmacy Examiners
State of Iowa
L O C A L

Dear Mr. Rabe:

Reference is made to your favor of recent date, requesting opinion of this office, which reads as follows:

"It has been brought to our attention that the newly licensed _____ Medical Clinic Dispensary is using a mechanical unit called the Telewriter which electronically transmits the prescription written by the physician directly to the licensed retail pharmacy located within the clinic.

"The _____ Medical Clinic Dispensary is owned by the _____, who rent space from the physicians owning the clinic.

"In view of the opinion rendered by the Attorney General in 1954 regarding the interpretation of Section 147.56, Code of Iowa, 1950, relating to unprofessional conduct as it relates to steering of prescriptions by use of imprinted prescription blanks, etc., would not the use of a telewriter be cause to subject the user to a charge of unprofessional conduct within the meaning of the Attorney General's opinion?"

The practice of pharmacy is, of course, a "profession" (§147.1(3)), and those in the practice are subject to all the restrictive standards of ethics, one of which is quoted above.

When a patient receives a prescription from a doctor, he has the sole right to choose which pharmacist shall compound the medicine. Although the marvels of the electronic age have created many benefits in the way of speedier service and many other scientific benefits, it should not be used in such manner as to deprive one of the right to choose his own pharmacist for service.

There is, of course, a factual question to be determined here, from which a conclusion can be drawn as to whether or not the use of the "telewriter" is employed in such a manner as to constitute solicitation of patronage by agents or persons popularly known as "cappers" or "steerers".

The words "cappers" or "steerers" have a commonly accepted meaning and the legislature was not bound to define those terms. The legislative intent was to forbid the obtaining of patronage by the use of solicitors. The use of these mechanical solicitors (telewriters) without the express consent of the patients for the compounding of their prescriptions could, in our opinion, constitute unprofessional conduct. (See *People v. Dubin,* 367 Ill., 229, 10 N.E. 2d 809, 811; 1954 *O.A.G.* 148; *Sanchick v. Michigan State Board of Examiners in Optometry,* 342 Mich. 555, 70 N.W. 2d 757.

However, we must point out that evidence of any unprofessional conduct should be clear, satisfying, and convincing in order to justify proceedings to revoke any professional license, and each individual case should be analyzed on the basis of its own facts.

It is our conclusion that if a licensed pharmacist makes arrangement for the use of the so-called "telewriters" and said instruments are used in such manner as to deprive the patient of the right to select a pharmacist of his

own choosing to compound the medicine, then the pharmacist would be subject to a charge of unprofessional conduct under the provisions of the statute appearing at subsection 1, §147.56, 1962 Code.

12.6

HEALTH: Psychiatrist for mental health clinic, tax levy—§230.24, 1962 Code. The additional tax levy authorized under §230.24 may be made only if there is existing a place or location wherein facilities for psychiatric examination and treatment are found.

October 31, 1962

Mr. Harold B. Heslinga
Mahaska County Attorney
118 North Market Street
Oskaloosa, Iowa

Dear Mr. Heslinga:

This will acknowledge receipt of your recent opinion request, wherein you stated:

"Interested people in Mahaska County, Iowa are desirous of beginning an organized Mental Health Clinic. At the present time a psychiatrist from the State Mental Institution at Mt. Pleasant, Iowa comes to Oskaloosa one day a week and renders treatment to people in need thereof. The organizers of this plan now intend to hire a psychiatrist for one additional day each week to aid in the aforesaid treatment.

"I would appreciate your opinion as to whether the above treatment is sufficient to qualify such a clinic as a Community Mental Health Center in order that our Board of Supervisors may legally make a levy to help offset the cost of the program. If our program, as presently set up, is not sufficient to receive the proceeds of such a levy, I would appreciate your opinion as to the minimum legal requirements necessary before such a levy may be made."

Section 230.24, 1962 Code of Iowa, in pertinent part provides:

"The county board of supervisors are authorized to expend from the county fund for mental health as provided in this section funds for psychiatric examination and treatment of persons in need thereof in each county *where they have facilities available for such treatment,* and any county not having such facilities may contract through its board of supervisors with any county which has facilities for psychiatric examination and treatment for the use thereof. Any county now or hereafter expending funds from the county fund for the psychiatric examination and treatment of persons in a community mental health center may levy an additional tax of not to exceed three eighths mill." (Emphasis ours)

In an opinion to William Pappas, Cerro Gordo County Attorney, dated September 25, 1956, a copy of which is attached, it was stated that a county mental health center providing facilities for psychiatric treatment of patients of other counties must contract with such counties on a per-patient basis. In an opinion to Evan Hultman, Black Hawk County Attorney, dated June 30, 1960, it was stated:

"... a county can merely expend funds for psychiatric examination and treatment in the community health center upon a specific individual bill being presented by the health center for services to a given patient in a specific amount."

In an opinion to T. K. Ford, Des Moines County Attorney, 1960 *O.A.G.* 126, it was stated:

> "However, it must be noted that the payment authorized in Code section 231.24 is for 'psychiatric examination and treatment of persons *in a community mental health center.' The statute does not go to the extent of defining what a mental health center is, but from the preceding language of the same statute* (section 230.24) *it seems implied that it is a place 'which has facilities for psychiatric examination and treatment.'* Thus, it follows that payment may be made for the use of the facilities in such a center even though the 'examination and treatment' be given at such center but by or under the immediate supervision of a licensed physician who is not a member of the staff of the center." (Emphasis ours)

Webster's Third New International Dictionary defines "center" as:

> "A place, area, person, group, or concentration marked significantly or dominatingly by an indicated activity, pursuit, interest, or appeal . . ."
>
> "A concentration of requisite facilities for an activity, pursuit, or interest along with various likely adjunct conveniences."

Your letter of request indicates that a psychiatrist ". . . comes to Oskaloosa one day a week and renders treatment to people in need thereof. The organizers of this plan now intend to hire a psychiatrist for one additional day each week to aid in the aforesaid treatment." Your letter fails to indicate whether your "plan" or "treatment" is merely such that the psychiatrist visits the various patients at their residences, whether home or hospital; or whether there is actually a physically-existing area or place of operation which includes facilities which are available for treating patients.

In accordance with the opinion to Mr. Ford, §230.24 of the Code implies that a mental health center is a *place* which has facilities for the treatment of patients. The term "center" itself, as used in §230.24, would by definition require a *concentration of requisite facilities* for carrying out the intended activity or pursuit.

Therefore, it is the opinion of this office that the additional tax levy authorized under §230.24 of the 1962 Code may be made only if there is existing a place or location wherein facilities for psychiatric examination and treatment are found. The Code does not indicate the quantum of facilities necessary to qualify a place or location as a mental health center.

12.7

HEALTH: Water pollution, duty of department of health—§§135.18 to 135.29, incl., §393.12, Ch's. 455, 459, 1962 Code. It is the duty of the Department of Health to control or eliminate pollution of any waters of the state, whether public or private; duty applies to any ditch, drain or watercourse within §455.1. Drainage ditches established under Ch's. 455 and 459 of the Code cannot be used as outlets for sanitary sewage or industrial wastes, except as provided in §393.12.

August 10, 1962

Dr. Edmund G. Zimmerer, Commissioner
State Department of Health
LOCAL

Attention: P. J. Houser, Director
Division of Public Health Engineering

Dear Dr. Zimmerer:

Reference is made to your favor of June 22, 1962, in which you request opinion as follows:

"We have been contacted by the representative of an industry intending to locate in an area where the process wastes would discharge into a drainage district tile line.

1. "Under provisions of Section 135.26, Code of Iowa, a permit is required for disposal of sewage or wastes into the waters of the state. Are we correct in presuming that 'waters of the state' mean 'any stream, watercourse, lake or other body of water within the state and bordering on the state' as mentioned in Section 135.18?

2. "If so, does this apply to any ditch, drain, or watercourse mentioned in Section 455.1?

3. "Now if Section 135.26 applies to a ditch, drain, or watercourse mentioned in Section 455.1, to whom do we issue the permit—the owner of the sewer or the trustees of the drainage ditch?

4. "Another question arises. Under the provisions of Section 459.1, a drainage district may *not* be established for sewer purposes. Under date of April 5, 1947, we had a letter from your office (copy enclosed) stating that drains installed under provisions of Section 459.1 cannot be used as sewers *after* the installation. The question is, does this also apply to drains installed under provisions of Section *455.1*?"

I.

Specifically pertinent to the question under consideration, §455A.18 states:

"The council shall have jurisdiction over the *public and private waters in the state* and the lands adjacent thereto necessary for the purposes of carrying out the provisions of this chapter. * * *

"The council shall make surveys and investigations of the *water resources* of the state and of the problems of *agriculture, industry, conservation, health, stream pollution* and allied matters as they relate to flood control and *water resources,* and shall make and formulate plans and recommendations for the further *development, protection, utilization,* and *preservation* of the water resources of the state. * * *" (Emphasis ours)

And directly pertinent to the question §§135.11(1) and 135.18 provide:

Section 135.11(1):

"The Commissioner of public health shall be head of the 'State Department of Health', which shall:

"(1) Exercise general supervision over the public health, promote public hygiene and sanitation, and, unless otherwise provided, enforce the laws relating to same."

Section 135.18:

"The department may, upon its own initiative, study, investigate, or survey any *stream, watercourse, lake, or other body of water within the state* and bordering on the state, and may determine ways and means of *eliminating pollution,* and may determine methods, so far as practicable, and necessary in the light of the *use* to which the water is being, or may be, put, of controlling the extent of *such pollution of said waters.*

"For the purposes of this chapter, pollution means such contamination, or other alteration of the physical, chemical or biological properties, *of such waters of the state,* or such discharge of such liquid, gaseous or solid substances into *such waters of the state* as will create a nuisance or render *such waters harmful* or *detrimental* or *injurious* to *public health, safety,* or *welfare,* or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial *uses,* or to livestock, wild animals, birds, fish or other aquatic life." (Emphasis ours)

And in Section 135.20:

"* * * 3. No order shall be issued under the provisions of subsection 2 of this section without the *written* approval of a majority of the members of the *Iowa natural resources council.*"

These laws have been enacted in the exercise of the police powers of the state, for the protection of the water resources of the State of Iowa. (See §455A.2) In this regard, see *I.L.R.* 41, p. 216 et seq. and *I.L.R.* 47, p. 549 et seq.

The Department of Health has been charged with the duty of protecting the waters of the state from pollution, under the same police powers. The state is under duty to guard the public health. *Duncan v. City of Des Moines,* 222 Ia. 218, 268 N.W. 547.

The duty of the Department is directed to cover what is designated in the law as "waters of the state", which term is repeated in §§135.26 and 135.28, from pollution as defined in §135.18.

Pollution can occur in any water resources of the state, whether public or private, and one can affect the other, depending upon the original source of the pollution. See 1936 *O.A.G.* 307.

It is significant that under the provisions of §135.18, it is also the mandatory duty of the Department to investigate alleged pollution conditions upon the written petition of city councils, local boards of health, township trustees, state agencies and by petition signed by twenty-five residents of the state.

The statutes governing the powers and duties of the Iowa Natural Resources Council and the Department of Health, with reference to problems of pollution of *water resources or waters of the state,* and the public health, safety or welfare of the citizens of the state, are in *pari materia,* and as such must be construed with reference to each other in arriving at the policy, purpose and intent of the law. The "character" of the statute must be kept in view; for instance, whether regulatory or prohibitory. With the real character in mind, that which is necessarily implied or assumed in related clauses or sections is as much a part of the law as that which is expressed. (See *State v. Gish,* 168 Ia. 70, 150 N.W. 37, Ann. Cas. 1917 B. 135; *U.S. v. Babbit,* 66 U.S. 55, 17 L.Ed. 94). Courts will construe a statute in conformity with its dominating general purpose, and will read text in light of context. (*Gear v. Birmingham,* 88 F. Supp. 189, 340 U.S. 951, 95 L.Ed. 686). Liberal construction should be given legislative enactments with a view to promote its objects. (*Thomas v. State,* 241 Ia. 1072, 44 N.W. 2d 410).

It was the general policy, purpose and intent of the legislature, by the enactment of §§135.18 to 135.29, inclusive, in all matters involving *pollution* of "any stream, watercourse, lake, or other body of water within the state and bordering on the state", to include therein *all* "waters of the state", whether public or private waters, with respect to controlling or eliminating any such pollution.

II.

Referring to your second question, the "ditch, drain or watercourse" referred to in §455.1 of the Code, are usually and generally referred to as man-made watercourses.

> "If water naturally and habitually follows a certain line or flowage, within reasonable limits as to width, the line of flow is a natural watercourse. A natural watercourse need not have a definite channel or banks, and the term includes a 'swale'. It need not be entirely natural, but can be 'aided by the hand of man', as by deepening or straightening a swale or stream. An artificial ditch may become a natural watercourse by lapse of time (10 years) as between private individuals, on principles akin to the creation of an easement by prescription, but not when the rights of the public are involved, because neither the statute of limitations nor prescriptive rights may be urged against the public. Under the foregoing principles, open drainage ditches which have been in place for 10 years should be considered to be natural watercourses, as between the private owners of land adjacent thereto, particularly where the ditch is primarily a deepening or straightening of a pre-existing watercourse." (For citations supporting the above, see Symposium—Water Use and Control, *I.L.R.* 41, p. 216, l.c. pp. 219-220).

However, we are not here concerned with the rights in the water or the bed of the stream. We are primarily concerned with the pollution, if any, of such waters, or the creation of a nuisance therein.

Therefore, our conclusion with reference to your second question is the same as to the first question; that watercourses as referred to in §455.1 are included within the intent of the water pollution laws, §135.18 et seq.

III.

The answer to question 3 must be made in conjunction with question 4, and will be dealt with therein.

IV.

Chapter 455, 1962 Code, provides for the establishment of drainage districts and the installation of drains whenever conducive to the public health, convenience, or welfare. Under the provisions of Chapter 459, drainage districts can be established embracing a part or the whole of a city or town. Section 459.1 prohibits the establishment of *any* district for sewer purposes.

However, under the provisions of §393.12 there is an exception to the above restriction, which says:

> "Any board, as defined in section 455.4, may by contract permit any city or town to discharge adequately treated sewage into drainage ditches. The contract shall fix the rental, make provision for termination, and shall provide that no nuisance shall be created."

This section of the law was enacted at the session of the 56th G.A. being §3, Chapter 198 of said Acts. Section 459.1, which contained the original restriction, was enacted at the session of the 40th G.A. (§168, Chapter 126 of said Acts).

Statutes in *pari materia* should be construed together. (*Iowa Digest,* Vol. 17, p. 397 and authorities cited). Where there is conflict between statutes, the statute passed later in time must prevail. (*State v. Harper,* 220 Iowa 515, 258 N.W. 886). Where there are two statutes upon the same subject, both will be given effect if possible. (*In re Henderson's Tobacco,* 78 U.S. 652, 20 L. Ed. 235).

The law as stated in §393.12 was enacted subsequent in time to §459.1, and it is presumed that the legislature was cognizant of its provisions when it enacted §393.12 as a modification of the strict prohibition of §459.1, and §393.12 must therefore prevail for the specific purposes expressed therein.

Drainage districts as established are primarily intended for the drainage of surface waters from agricultural lands and presumed to be a public benefit and conducive to the public health, convenience and welfare (§455.2) and not intended for use as sanitary sewage outlets, except as provided in §393.12, *supra.* (See 1919-1920 *O.A.G.* 332; *Incorporated Town v. Joint Drainage District No. 6, et al.,* 198 Iowa 182).

Therefore, it is our considered opinion that drainage ditches, as established under the provisions of Chapters 455 and 459, 1962 Code, cannot be used as outlets for sanitary sewage or industrial wastes, except as provided in §393.12 of the Code. After execution of a contract containing the specific provisions required therein by said section, which applies only to cities and towns, the permit of the Department of Health to such city or town may be issued.

12.8

Basic Science examination fees—§146.12, 1958 Code. Applicants for examinations or certificates under §146.12 received on or before midnight of July 3, 1961 may be filed on payment of $10 fee. Thereafter the fee is $20 under S.F. 459, Acts 59th G.A. (Bianco to Hertel, Bd. of Exam., 6/30/61) #61-6-17

12.9

Board of Nurse Examiners, licenses, educational standards, practical nurses—§152.3(4), 1958 Code. It is a question of fact, and within the discretionary power of the Board of Nurse Examiners to determine and approve any course of study in question, as to whether or not such course of study meets the standards prescribed in §152.3(4) relating to licensure of practical nurses. (Bianco to Sage, Bd. of Nurse Exam., 3/31/61) #61-3-21

12.10

Commission on Alcoholism, appropriations—§2, Ch. 104, Laws 59th G.A. (§123A.2, 1962 Code). Under the provisions of §2, Ch. 104, Laws 59th G.A., none of the funds appropriated therein ($25,000) can be used by or placed under the control of the Iowa Commission on Alcoholism. (Bianco to Zimmerer, Com'r. Public Health, 8/14/61) #61-8-17

12.11

Cosmetologists, age limits—§§147.3, 157.10, 1958 Code. §147.3 is not in conflict with Ch. 157 and is not within the purview of §157.10. An apprentice under 18 years of age cannot receive a permit to work as a cosmetologist before qualifying for a license under the provisions of §157.11. (Bianco to Zimmerer, Com'r. Public Health, 9/29/61) #61-9-18

12.12

Cosmetology shop in trailer or mobile home—§157.6, 1958 Code. If a trailer or mobile home comes within the common definition of a "home" or dwelling place of a person, such a home could be the location for a cosmetology shop, provided it met all other requirements of the law and the rules regulating such shops. (Bianco to Zimmerer, Com'r. Public Health, 11/8/61) #61-11-6

12.13

County hospitals, use of radiology by chiropractors—§§135B.20(2), 135B.22, 151.1, 1958 Code. A chiropractor cannot use the facilities of a county hospital to treat patients by the use of radiology, except under the direction and supervision of a doctor as defined in §135B.20(2). (Bianco to Morr, Lucas Co. Atty., 3/17/61) #61-4-1

12.14

License certificates, change of name—§§147.2 to 147.11, incl., 1958 Code. Where a legal change of name has occurred, the name under which original license was issued cannot be changed. However, the annual renewal certificates may be issued under the new name which must be displayed with the original certificate and proper notation made thereof in the registry book. (Bianco to Zimmerer, Com'r. Public Health, 11/10/61) #61-11-11

12.15

Local boards, powers and duties—§§137.7, 137.9, 1958 Code. (1) Individual members of local boards of health cannot be held personally liable while engaged in performing a governmental function, provided there is no malice or wrong motive present. (2) A local board of health cannot exercise jurisdiction outside its own territory in carrying out its police powers. (3) A county local board of health is authorized to employ health experts to assist the board in the performance of its duties, regulate and fix reasonable fees and charges therefor, and present the same to the county board of supervisors for preaudit and payment from the general fund. (Bianco to Hill, St. Sen., 10/27/61) #61-10-11

12.16

Nurse examiners, course of study—§§152.3, 152.4, 1962 Code. A two-year course of study does not meet the statutory requirement of §152.4. Whether a course of five terms, within a three-year course, meets the statutory requirement, is within the discretion of the board. (Bianco to Sage, Bd. of Nurse Exam., 8/16/62) #62-8-5

12.17

Optometry partnership—§§154.1, 154.2, 154.3, 1958 Code. A partnership composed of persons unlicensed as optometrists cannot carry on a partnership optometric practice. (Bianco to Zimmerer, Com'r. Public Health, 3/17/61) #61-3-13

12.18

Powers of Department of Health, jurisdictional limitations—Ch's. 135, 332, 1958 Code. By reason of statutory and Constitutional limitations, the Department of Health is without authority to authorize or permit the construction, maintenance and operation of a sewage treatment plant within the state for the use and benefit of a foreign municipality. (Bianco to Zimmerer, Com'r. Public Health, 11/27/61) #61-11-22

12.19

Printing of reports—§17.27, 1958 Code; §53, Ch. 1, Acts 58th G.A. (§15.43, 1962 Code). Publication and distribution of reports within the provisions of §17.27 and §53, Ch. 1, Acts 58th G.A. must have approval of the State Printing Board and the Budget and Financial Control Committee. (Bianco to Zimmerer, Com'r. Public Health, 10/4/61) #61-10-1

12.20

State Sanatorium, Oakdale—§271.2, 1958 Code. The provisions of Chapter 271 restrict the use of the facilities of said institution to bona fide residents of the state. (Bianco to Gernetzky, Bd. of Regents, 4/24/61) #61-4-21

12.21

Welfare, restricted hospitals, nursing or custodial homes, children's boarding homes, licenses—Ch's. 135B, 135C, 237, 1958 Code. Whether or not an applicant can qualify for a license for a "restricted hospital" is a question of fact to be determined by the Commissioner of Health, under the standards established by the Department of Health under the provisions of the statutes. The same is true as to nursing homes and custodial homes. The Department of Social Welfare may also license as a children's boarding home institutions which have been licensed as nursing or custodial homes, where the patients include children under the age of 14 years. (Bianco to Zimmerer, Com'r. Public Health, 3/31/61) #61-3-23

CHAPTER 13

HIGHWAYS

STAFF OPINIONS

LETTER OPINIONS

13.1

HIGHWAYS: Farm-to-market roads, authority of Highway Commission to withhold approval—§§309.22, 309.25, 310.10, 310.11, 310.13, 1958 Code. State Highway Commission does not have authority to withhold approval of county farm-to-market road project resolutions solely for the reason that the road does not carry 100 vehicles per day. The amount of such traffic is a factor to be considered and given equal weight with all other factors in determining whether county-proposed projects will affect intra-county and intercounty road connections which the cited statutes are intended to provide.

March 28, 1962

Mr. L. M. Clauson
Chief Engineer
Iowa State Highway Commission
Ames, Iowa

Dear Mr. Clauson:

We have a request for an opinion on the following:

"The Commission has asked for your study and interpretation of the following problems:

"County 'A' has submitted a resolution for paving seven miles of farm-to-market road. The traffic carried by this road varies from forty-five to sixty-nine vehicles per day, and the Commission feels this road does not carry enough traffic to warrant paving since it carries less than one hundred vehicles per day.

"The Commission has had a long-standing policy that only farm-to-market roads over one hundred vehicles per day should be paved. This policy has been somewhat modified by the report of the Automotive Safety Foundation to the Highway Study Committee wherein surfacing on roads carrying one hundred vehicles per day has been suggested (see pages 59 and 60, *Iowa Highway Needs*).

"May the Commission withhold approval of a resolution for a farm-to-market project in which the road in question does not carry at least one hundred vehicles per day?"

Farm-to-market roads are defined by §306.2(4), 1958 Code of Iowa, as follows:

"The term 'farm-to-market road' or 'farm-to-market road system' shall include those main secondary roads which have been designated as farm-to-market roads under section 310.10 or which may hereafter be so designated as the law may provide."

Section 310.10 further states:

"The farm-to-market road system shall embrace those main secondary roads (not including roads within cities and towns) which connect rural areas with each other and with the towns, cities, and primary roads, and which have heretofore been designated as farm-to-market roads under Section 310.9, as amended, and Section 310.10, Code 1946. Said road system may, with the consent of the state highway commission, be changed and modified by the board of supervisors. * * * "

Section 310.11 provides:

"Any county having complied with the provisions of this chapter may by its board of supervisors submit to the state highway commission for its approval project statements for the construction, reconstruction, or improvement of farm-to-market roads."

Section 310.13 of the Code further provides:

"If the state highway commission approves a project submitted by the board of supervisors, the county engineer shall proceed to make or cause to be made, surveys, plans and estimates for said project, and submit the same to the board of supervisors and the highway commission for approval. The construction work on said project shall be done in accordance with said approved plans, except insofar as the same may be modified to meet unforeseen or better understood conditions, and no such modification shall be deemed an invalidating matter."

In any case involving a secondary road the legislature has required of the Iowa State Highway Commission certain duties and functions regarding approval of county-proposed projects.

Section 309.22 of the Code of 1958, as amended, provides in part as follows:

"On or before the first day of December of each year the board of supervisors shall, subject to the approval of the state highway commission, adopt a comprehensive program for the next calendar year based upon the construction funds estimated to be available for such year * * * "

"In planning and in adopting said program or project by the board of supervisors, said board and the county engineer shall give due and careful consideration, (1) to the location of primary roads, and of roads heretofore improved as county roads, (2) to the market centers and main roads leading thereto, and (3) to rural mail and school bus routes, it being the intent of this chapter that said program or project will, when finally executed, afford the highest possible systematic, intracounty and intercounty connections of all roads of the county." §309.25, Code of 1958.

As farm-to-market roads are by definition included within the secondary road system, the Attorney General's opinion found in 1958 *O.A.G.* at 139, concerning the authority of the highway commission over the determinations of a county board of supervisors regarding secondary roads, is in point. We quote from that opinion at page 141.

" * * * The phrase 'subject to approval of the state highway commission' in Section 309.22 is not to be interpreted as giving the Commission authority to arbitrarily refuse to approve a program, but means that they shall investigate and pass upon and render judgment as to whether the program is sound, in relation to the estimated available revenues, the type and manner of construction, and whether such a construction program conforms to the standard plans and specifications in order to provide the public a uniformly constructed system of secondary

roads. This is emphasized by the provisions of Section 307.5, Code of 1954, which, among other things, sets out the duties of the Iowa State Highway Commission with respect to counties and provides that the Commission shall 'adopt standard plans of highway construction and maintenance and furnish the same to the counties,' and also 'furnish information and instruction to, answer inquiries of, and advise with, highway officers on matters of highway construction and maintenance and the reasonable costs thereof'. It is further evidenced by Section 309.16, Code of 1954, which provides that the Commission '... shall when requested by the board of supervisors advise with said board as to the manner of constructing and maintaining these secondary roads' * * *".

From the Attorney General's opinion found in 1950 *O.A.G.* 145, at 147, regarding a somewhat different but related matter, we quote the following:

"* * * Under section 310.13, Code of 1946, plans for a farm-to-market road project must be approved by the highway commission, and it follows that the commission may prescribe the standards according to which the roads must be graded and drained. * * *"

The Attorney General has in an official opinion recently considered the phrase "subject to the approval of". That opinion, dated July 6, 1961, and directed to the Secretary of the Executive Council of Iowa, clearly sets out and discusses the rule that one administrative body, though by statute given a duty of "approval" of the acts of another such body may nonetheless not properly substitute its own judgment as opposed to that of the other regarding the act in question. Further, that opinion cites the case of *State v. Rhein, Treasurer,* 149 Iowa 76, 81, wherein the phrase "subject to the approval" has had the consideration and judgment of the Supreme Court of Iowa:

" * * * It is a very common expedient in the making of constitutions and statutes to vest power to appoint or designate in one officer or board subject to the approval of another officer or board, and, so far as we know, no single instance has ever arisen where it has been held that the officer or body which is given the power of approval only may assume or exercise the power of selection or appointment. To 'approve' or give 'approval' is in its essential and most obvious meaning to confirm, ratify, sanction, or consent to some act or thing done by another. (Citations) To arrive at any other conclusion than we have indicated requires a reading into the statute of much that is neither expressed nor ncessarily implied, and to treat as obscure and ambiguous language which seems to us to be reasonably clear and perspicuous. * * *"

Regarding the importance of traffic study and the effect they may have upon Highway Commission approval of a county-proposed secondary road project submitted under Chapters 309 or 310, we quote again from 1958 *O.A.G.* 139, 142:

"* * * Traffic studies are important in the planning and adopting of any road program and certainly that factor is one to be considered along with those set out under Section 309.25, but that section does not require that any one of the several factors be given weight in preference to others but presupposes that all factors will be taken into consideration, so that when a program is finally executed, it will afford 'the highest possible systematic intracounty and intercounty connections of all the roads of the county'. * * *"

It is our opinion that the Iowa State Highway Commission does not have authority to withhold approval of a resolution for a farm-to-market project solely for the reason that the road in question does not carry 100 vehicles per day. However, the amount of traffic carried by the road in question is a factor to be considered and to be given equal weight with all other factors in determining whether the program as proposed by the county will affect

the systematic intracounty and intercounty road connections which the statutes cited above are intended to provide.

13.2

HIGHWAYS: Road use tax funds—§312.6, 1958 Code; Ch. 168, 59th G.A. (§312.11, 1962 Code). Determination of "arterial" streets is within discretion of municipalities. Road use tax funds may be used by municipalities solely for the purposes provided by §312.6, or necessarily inferable therefrom; unallowed uses considered. Road use tax funds may be used for payment of bonds within provisions of §6, Ch. 168, 59th G.A.

December 13, 1961

Mr. L. M. Clauson
Chief Engineer
Iowa State Highway Commission
Ames, Iowa

Dear Mr. Clauson:

You have requested an opinion of the requirements of Chapter 168, 59th G.A. (Senate File 466) regarding the use by cities and towns of road use tax funds as follows:

"Chapter 168 of the laws of the 59th General Assembly (Senate File 466) relates to the allocation and apportionment of the road use tax fund and provides in part for certain use for that part of the fund received by cities and towns.

"Some questions have been asked concerning the application of Chapter 168 and I would like your written opinion on the following questions:

1. What is the definition of 'arterial streets' as used in Section 6 of Chapter 168?

2. May the funds received by cities and towns from the road use tax fund be used to pay bonds?

3. May cities and towns use road use tax funds for maintenance? Also, may such funds be used for:

4. Engineering and administration?

5. Construction and maintenance of alleys?

6. Street lighting?

7. Off-street parking?

8. On-street parking?

9. Traffic-control signs and traffic signals?

10. Sidewalks?"

Section 6 of Chapter 168, 59th G.A., provides:

"On and after January 1, 1963, at least seventy-five percent of the funds received by each city or town from road use tax funds shall be used on its arterial streets solely for the purposes authorized in section three hundred twelve point six (312.6) of the Code, and the remainder of the funds received by each city or town from road use tax funds shall

be used on its local streets solely for the purposes authorized by such section; provided, however, that if any city or town council by resolution declares that the seventy-five percent is not needed on its arterial streets, then it may be used on any other streets in the city or town."

1. The legislature has placed control of streets in the municipalities and under this legislative investment the cities can regulate the use of their streets within the limits of public rights. §§389.12 and 389.40, 1958 Code.

Subsection 53 of §321.1 provides:

" 'Through (or thru) highway' means every highway or portion thereof at the entrances to which vehicular traffic from intersecting highways is required by law to stop before entering or crossing the same and when stop signs are erected as provided in this chapter or such entrances are controlled by a police officer or traffic-control signal. The term 'arterial' shall be synonymous with 'through' or 'thru' when applied to highways of this state."

It is our opinion that authority rests with each municipality to decide for its own purposes, within bounds of reasonableness, which of its streets shall be designated "arterial".

2. Generally, bonds of cities and towns are payable from taxation and they are supported by statutory requirements that taxes be levied sufficient to meet installments, principal and interest. Section 76.2 of the Iowa Code of 1958 provides that cities and towns shall, by resolution, provide for the assessment of an annual levy upon all taxable property in such corporation sufficient to pay the interest and principal of bonds issued by them.

Section 404.7(14) provides:

"Funds received by municipal corporations from the road use tax fund shall be separately allocated for expenditure within the street fund for only the purposes authorized and permitted by law."

By §312.6 the legislature has determined which purposes are so authorized and permitted and has allowed the use of such funds for "construction, reconstruction, repair and maintenance of roads and streets."

As financing is a necessary part of any of these projects, it is our opinion that road use tax funds may be used for the payment of street bonds. This interpretation is sustained by §396.22, clearly showing by its provisions the legislative intent:

"Any city or town issuing bonds to pay for street improvements as authorized in this section is hereby granted authority to allocate a fixed portion of the street fund not to exceed in any year the amount received from allocations of the road use tax fund to the payment of the principal and interest of said bonds as the same come due."

Further, the 1942 amendment to the Constitution of the State of Iowa provides that motor vehicle registration fees, licenses and excise fuel taxes:

"... shall be used exclusively for the construction, maintenance and supervision of the public highways exclusively within the state or for the payment of bonds issued or to be issued for the construction of such public highways and the payment of interest on such bonds."

It is our opinion that cities and towns may allocate a fixed portion of the street fund, under authority of §396.22, subject to the requirements of §6, Chapter 168, 59th G.A., for the payment of street bonds issued for programs allowed by §312.6, 1958 Code of Iowa.

3. Section 312.6 provides:

> "Funds received by municipal corporations from road use tax fund shall be used solely for the construction, reconstruction, repair and *maintenance* of roads and streets . . ." (emphasis supplied)

In our opinion, such funds may be used for maintenance in that §312.6 specifically so provides.

4. Salaries and expenses of municipal officers and employees, as well as the cost of material and supplies necessary to the administration of their offices and the expenses involved in the proper discharge of their offices are, in our opinion, expenses which are general and incidental to municipal government and, as such, are, under authority of §404.6 payable from the general fund. Section 404.7 provides that road use tax funds shall be "separately allocated for expenditure within the street fund for only the purposes authorized and permitted by law." Section 312.6 as quoted above sets out the authorized and permitted uses of such funds. Insofar as engineering expenses incurred by cities or towns are for material or labor (other than salaries or wages of municipal employees) and are necessary to and a part of construction, reconstruction, repair or maintenance of roads or streets of the municipality, they are, in our opinion, appropriate expenditures of road use tax funds, subject to the requirements of §6, Chapter 168, 59th G.A.

5. The section in question, §6 of Chapter 168, 59th G.A., provides in part as follows:

> ". . . Seventy-five percent of the funds received by each city or town from road use tax funds shall be used on its arterial streets . . . and the remainder of the funds . . . shall be used on its local streets . . ."

Alleys, if included within the purview of this section, could at best be classified local streets. However,

> "The principal purpose of a public alley is to furnish the owners of abutting lots and those dealing with them convenient access thereto. The main lines of travel are in the streets." *Dodge v. Hart,* 113 Iowa 685, 83 N.W. 1063.

Though Chapters 389 and 391 of the Iowa Code vest in cities and towns certain authority concerning alleys, and though §391.1 includes "alleys" within the term "street", nonetheless, in our opinion it is clear from the wording of Chapter 168, 59th G.A. that the chapter is concerned with "the main lines of travel". For this reason it is our opinion that road use tax funds may not be used by cities and towns for the construction or maintenance of alleys.

6. The 1958 Code of Iowa at §404.12 thereof makes specific provision for the creation by municipal corporations of a fund known as the utilities fund, and the purposes of such fund are set out in that section. Subsection 2 of §404.12 provides that the utilities fund is to be used for purposes of "electricity for street lighting and other municipal purposes." Moreover, provision is made in §389.18 for a special lighting tax to defray such cost when the city has been divided into lighting districts, and should such funds prove insufficient the general fund may be utilized. It is, therefore, our opinion that road use tax money is not available for street lighting. See 1928 *O.A.G.* 60.

7. It is our opinion that Chapter 312 of the 1958 Code of Iowa makes no provision for use of road use tax funds for off-street parking. Section 390.2 provides that the cost of off-street parking may be paid from the general fund or from the levy of a tax for a parking lot fund, and §404.7(5), provides that the general fund may be used:

"... in lieu of the tax provided by section 390.2 to acquire and improve real estate and to erect or improve buildings thereon for the parking of vehicles to the extent that income from parking meters or parking lots are insufficient for said purposes."

Section 390.8 allows income from parking meters to be used to provide and maintain off-street parking, and under §390.13 bonds may be sold to defray such costs, such bonds payable through the debt service fund.

8. Nor, in our opinion, is road use tax money available for on-street parking. Section 390.8(8) provides a fund for the widening of streets within the meter district or within two blocks thereof to provide additional parking facilities.

9. Signs and traffic signals used for the control or direction of traffic are properly paid for out of the public safety fund under authority of §404.8, which provides in subparagraph 7 thereof that such fund shall be used "for any other purpose having to do with public safety specifically authorized by law." Section 321.236 specifically authorizes local authorities to enact and enforce ordinances for the control of traffic, and §321.237 provides that the signs necessary to such ordinances, "... shall be erected at the expense of such municipality." For these reasons we are of the opinion that road use tax funds may not be used for such purposes.

10. Further, it is the opinion of this office that Chapter 312 does not allow the use of road use tax money for sidewalk purposes. Funds are available from the street fund for such a project and costs may be assessed against adjacent property as provided by §389.31.

Regarding all of your questions, it is our opinion that §6 of Chapter 168, 59th G.A., amending Chapter 312, 1958 Code of Iowa, requires that road use tax money be used solely for the purposes authorized in §312.6. Section 312.6 provides that:

"Funds received by municipal corporations from the road use tax fund shall be used *solely* for the construction, reconstruction, repair and maintenance of roads and streets ..." (emphasis added)

The uses to which road use tax money may be put are, therefore, very narrowly defined by the Code of Iowa. That a strict construction should be employed in interpreting §312.6 is further emphasized by §404.7(14), which states:

"Funds received by municipal corporations from the road use tax fund shall be *separately allocated* for expenditure within the street fund for *only the purposes authorized and permitted by law.*" (emphasis added)

13.3

HIGHWAYS: Secondary road fund—§§309.9, 345.1, 1958 Code. 1. It is legal to use any reserve in the secondary road fund to pay the cost of construction of a new county shed to replace one destroyed by fire and to use when and as the secondary road program is amended the balance of $61,820 in said secondary road fund for the same purpose, provided the approval of the Highway Commission is obtained. 2. Improvements costing more than $20,000 must be submitted to the electors under the provisions of Ch. 345, 1958 Code. 3. A secondary tax levy already having been levied, there would be no necessity for an additional tax levy for said county shed.

March 7, 1961

Mr. Robert F. Schoeneman
Butler County Attorney
Aplington, Iowa

Dear Mr. Schoeneman:

This will acknowledge receipt of yours of February 7, 1961, in which you submitted the following:

"The Butler County Shed was destroyed by fire recently and the Board of Supervisors are proposing to construct a new structure for the estimated cost of $65,000. The Board prefers to finance this building by the following described method. They have $10,000 insurance indemnity proceeds for the destroyed building and $15,000 reserve funds in the secondary road fund. They will also have $150,000 obtained from the State Highway Commission that is pledged to a county project. They intend to only use part of this, viz., $88,180 for a farm to market project, by appropriate resolution and authorization by the Highway Commission. Thus, they will have available approximately $61,820 additional funds for use to finance the cost of the county shed. The Board intends to pay the cost of the county shed, approximated at $65,000, from these funds in the year of construction, viz., 1961. The Board intends to submit this proposition to the electors as set out in Chapter 345, 1958 Code of Iowa.

"I would appreciate your opinion on the following numbered points:

1. Is it legal to use the county secondary road fund, and those funds provided by the State Highway Commission for the cost of the construction of a new county shed for the price of $65,000? Op. Atty. Gen. 1949, P. 41 seems to indicate this procedure is permissible.

2. Is authority contained in Chapter 345, 1958 Code of Iowa, for the Board to submit the construction of County Shed to the voters the cost of which is to be financed by the secondary road fund?

3. If an election is held under Chapter 345, 1958 Code of Iowa, does Section 345.7 make it mandatory that an expenditure of this type be financed by a tax levy?"

1. Under the provisions of §309.9, 1958 Code, it is legal to use any reserve in the secondary road fund to pay the cost of construction of a new county shed, and to use when and as you amend your secondary road program, with the approval of the Highway Commission, the balance of $61,820 in the said secondary road fund for the same purpose.

2. I am of the opinion that this improvement, costing more than twenty thousand (20,000) dollars, must be submitted to the electors under the provisions of Chapter 345, Code 1958.

3. In view of the fact that the tax levy has already resulted in the secondary road fund, no further levy is involved.

13.4

Contracts—§§1109.12 and 1109.13 of *Standard Specifications for Construction on Primary, Farm-to-Market and Secondary Roads* do not operate as an estoppel or prevent a contractor from bringing suit against a county in the district court. (Allen to Wood, Hamilton Co. Atty., 8/7/61) #61-8-6

13.5

Farm-to-market roads—§314.6, 1958 Code. Extension of farm-to-market road is that part within a city or town and is not determinable otherwise by the board of supervisors. Said board has discretion to include in farm-to-market road system roads whose centerline coincides with the corporate line. If county declines to include said road in said road system, county has no obligation toward that part within city limits. County history of construction, improvement, and maintenance of road operates to include it in said road system. (Lyman to O'Connell, Buchanan Co. Atty., 2/26/62) #62-3-1

13.6

Secondary roads—§§306.2(3), 306.4, 306.12, 311.7, 1958 Code. Whether or not a road is a public highway is a question of fact to be determined for each particular road. In arriving at such a determination the following questions should be considered: Was the road established by statutory procedure or dedication and acceptance? Has the road been vacated or relocated by statutory procedure? (Lyman to Heslinga, Mahaska Co. Atty., 5/23/61) #61-5-13

13.7

Secondary roads—Ch. 167, Acts 59th G.A. (§306.15, 1962 Code). Approval of rural subdivision plats by county board of supervisors and county engineer is not an acceptance of such platted roads as part of the secondary road system. (Keyes to Larsen, Hwy. Comm., 9/18/61) #61-9-12

13.8

Secondary roads—Ch. 306.15, 1958 Code. Ch. 306.15 as amended by Ch. 167, 59th G.A., requiring approval by city engineer or council of road plats for rural subdivision within one mile of the city or town, does not provide that by such approval the city assumes any responsibility for construction or maintenance of such roads. (Keyes to Clauson, Hwy. Comm., 9/18/61) **#61-9-11**

CHAPTER 14

INSTITUTIONS

STAFF OPINIONS

LETTER OPINIONS

14.1

INSTITUTIONS: Funds of prisoners and inmates of state institutions— §§218.65, 218.66, 218.67, 218.68, 218.69, 218.70, 246.37, 668.3, 670.1, 1958 Code. Funds of prisoners and inmates of state institutions may be administered by superintendents and business managers of said institutions only as authorized by statute.

April 27, 1961

Board of Control of State Institutions
LOCAL

Gentlemen:

We are in receipt of your letter requesting the opinion of this office as to the propriety of institutional administrative personnel administering the funds of inmates and patients of state institutions. You state that a number of said persons are currently receiving social security benefits, railroad retirement funds and the like, and these funds are kept in separate accounts for each patient by the business manager of each institution. The question has arisen whether the business manager may use the funds in the account of a particular person for payment of claims against that person, such as claims for support paid by the county of his legal settlement and other claims. You also question the power of the business manager to invest these funds on behalf of the person for whose benefit they are held.

In regard to inmates of correctional institutions who have attained their majority, your attention is directed to Iowa Code §246.37, which provides:

> "Property of convict. The warden shall receive and care for any property any convict may have on his person upon entering, and, if convenient, place the same, if money, at interest for the owner's use, keeping an account thereof, and on the discharge of the convict, return, and if money, repay the same with the interest so earned, to him or his legal representatives, unless in the meantime it has been previously disposed of according to law."

You will note that this section does not authorize the warden to receive any money on behalf of the prisoner during the period of his sentence, nor does it authorize the warden to deal with the property of the inmate in any way other than investing money at interest for the benefit of the inmate. The section was construed in *Thompson v. Niles,* 115 Iowa 67, 87 N.W. 732 (1901), which held that the warden had no powers over and above those established by the statute. At 115 Iowa 70, the Court said:

> "The fact of plaintiff's conviction and imprisonment did not disqualify him from receiving, holding, or disposing of property in the usual manner."

As to minors confined in correctional and children's institutions, the situation is somewhat different since, although mentally competent, these persons have no capacity to conduct their own affairs. Iowa Code §§242.2 and 244.4 provide that the superintendents of training schools and children's homes shall be the legal custodian of the inmates thereof, but the position of custodian does not, in our opinion, imply in the custodian the powers of a guardian of the property of the minor. Chapter 668 of the Iowa Code provides for the creation of guardianships of the property of minors. Iowa Code §668.3 provides:

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

Thus, all sums not exceeding the aggregate sum of $500 may be paid to the person having custody of the child without opening a Chapter 668 guardianship. Sums in excess of $500 must be administered through a formal guardianship of the property under Chapter 668. Since §668.3, *supra,* provides that a guardian *must* be appointed to manage all property of a minor in excess of $500, no exception being made for those minors who are in the custody of the superintendent of a state institution, and since that section provides that sums not exceeding $500 may be paid to a legal custodian, superintendents of state institutions, in our opinion, have no powers whatsoever in regard to funds of minors in excess of $500 and cannot legally receive them. As to funds in excess of $500, superintendents may, of course, petition for the appointment of a guardian of the property of the minor under Iowa Code Chapter 668, and may himself be appointed such a guardian if he consents. Bond, however, must be filed as in all other guardianships, and all the requirements of Chapter 668 complied with under Court supervision.

In regard to mentally incompetent persons confined in state institutions, your attention is directed to Iowa Code §670.1, which provides:

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

Thus, §668.3 is incorporated by reference in Chapter 670, which establishes procedures for the appointment of guardians for drunkards, spendthrifts, lunatics, and persons of unsound mind.

Finally, when an inmate of a state institution dies, leaving property in the hands of the superintendent or business manager of the institution, the methods of disposing of this property are clearly established by statute. Your attention is directed to Iowa Code §§218.65 through 218.70, which provide:

> 218.65 "Property of deceased inmate. The chief executive officer or business manager of each institution shall, upon the death of any inmate or patient, immediately take possession of all property of the deceased left at said institution, and deliver the same to the duly appointed and qualified representative of the deceased."

218.66 "Property of small value. If administration be not granted within one year from the date of the death of the decedent, and the value of the estate of decedent is so small as to make the granting of administration inadvisable, then delivery of the money and other property left by the decedent may be made to the surviving spouse and heirs of the decedent."

218.67 "When no administration granted. If administration be not granted within one year from the death of decedent, and no surviving spouse or heir is known, said executive officer may convert all said property into money and in so doing he shall have the powers possessed by a general administrator."

218.68 "Money deposited with treasurer of state. Said money shall be transmitted to the treasurer of state as soon after one year after the death of the intestate as practicable, and be credited to the support fund of the institution of which the intestate was an inmate."

218.69 "Permanent record. A complete permanent record of the money so sent, showing by whom and with whom it was left, its amount, the date of the death of the owner, his reputed place of residence before he became an inmate of the institution, the date on which it was sent to the state treasurer and any other facts which may tend to identify the intestate and explain the case, shall be kept by the chief executive officer of the institution or business manager, as the case may be, and a transcript thereof shall be sent to, and kept by, the treasurer of state."

218.70 "Payment to party entitled. Said money shall be paid, at any time within ten years from the death of the intestate, to any person who is shown to be entitled thereto. Payment shall be made from the state treasury out of the support fund of such institution in the manner provided for the payment of other claims from that fund."

And it has been held that the superintendent or business manager has no authority to pay on claims or to turn over the funds he holds to anyone, except as provided in the above statute. 1918 *O.A.G.* 136.

14.2

INSTITUTIONS: Liability for costs of care—§§223.14, 223.16, 223.20, 1958 Code. Counties are liable to State for full costs of care of patients at Glenwood and Woodward, but have recourse against persons statutorily liable for support.

March 27, 1962

Mr. Harry Perkins
Polk County Attorney
Room 406, Courthouse
Des Moines, Iowa

Dear Mr. Perkins:

We are in receipt of your letter of November 1, 1961, in which you request the opinion of this office in regard to the following:

"In the care of the mentally retarded placed in the home at Woodward, there is a variation in the cost of their keep according to their ages.

"The State Legislature set up this schedule and we notice, according to our billing from Woodward, that they bill us the same amount for all ages. It is my contention that it was the intent of the State Legislature in setting up this sliding scale that it would be absorbed by the State and not the County tax payers."

Iowa Code §223.14 establishes the extent of liability of the county for support of all patients therefrom at the hospital for epileptics and the schools for the mentally retarded:

"Each county shall be liable to the state for the support of all patients from that county in the hospitals and schools . . ."

This liability is definite and unconditional, and we find no statute abrogating it or any part thereof, or authorizing the recovering thereof by the county from any person, so long as the patient remains under twenty-one years of age. The situation changes when a patient attains his majority. See Iowa Code §223.16 (1958), which provides:

"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 such minor patient, for the cost of his support and treatment in these institutions."

Therefore, after a patient attains his majority, the county remains liable to the State for the costs of his care at the hospitals and schools, but may recover its expenditures under §223.16, *supra,* with the limitations imposed by §223.20, which provides:

"Adult patients—percentage of care recoverable. The charge or lien imposed upon the property of any patient over twenty-one years of age and under thirty-one years of age or upon the property of persons legally bound for the support of any such patient for the cost of his support and treatment in these institutions shall be limited to seventy-five percent of the cost hereof. For patients over thirty-one years of age and under fifty years of age such charge or lien shall be limited to fifty percent of the cost and for patients over fifty years of age no such charge or lien shall be imposed."

Based upon these considerations, it is the opinion of this office that the counties shall be liable to the State for the entire cost of the care of patients at the hospitals and schools, and that the counties' recourse lies against persons statutorily liable for support, rather than against the State of Iowa. See opinion of September 24, 1956, copy of which is attached.

14.3

INSTITUTIONS: Liability of support for patients—§§223.14, 223.16, 1958 Code. A patient at Woodward or Glenwood, under twenty-one years of age, is entitled to support and treatment without charge or a lien therefor.

November 15, 1961

Mr. John F. Boeye
Montgomery County Attorney
209 Coolbaugh Street
Red Oak, Iowa

Dear Mr. Boeye:

We have your letter of August 1, 1961, in which you request the opinion of this office in regard to the following:

"Does a County Board of Supervisors, that has approved an application for voluntary admission to the Glenwood State School on the theory that the parents are without means to pay for the child's support, have a right to review its decision in light of changed financial conditions, and request the parents to make arrangements with the State Board of Control of State Institutions to have said child cared for as a private patient?"

Your attention is directed to Iowa Code §223.14, which provides in part as follows:

"*Liability of county for support.* Each county shall be liable to the state for the support of all patients from that county in the hospitals and schools. * * * "

In addition, §223.16 provides in part as follows:

"*Support statutes applicable.* * * * 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 such minor patient, for the cost of his support and treatment in these institutions."

Under these two sections, it is clear that patients under twenty-one years of age at Glenwood State School or Woodward State Hospital are entitled to free support and treatment and that no charge or lien may be placed upon the property of any such patient or upon the property of persons legally bound for their support. See also 1956 *O.A.G.* 156, to this effect. Your inquiry is therefore answered in the negative.

14.4

INSTITUTIONS: Transfer from mental health institute, costs—Ch. 163, 58th G.A. (§218.92, 1962 Code). Under the transfer provisions of Ch. 163, Acts 58th G.A., the actual and necessary expenses of the transfer are paid by the transferring institution, and care and maintenance costs are paid by the county of legal settlement of the transferee.

January 17, 1961

William C. Ball, County Attorney
Black Hawk County
201 First National Building
Waterloo, Iowa

Dear Mr. Ball:

This will acknowledge receipt of your letter under date of December 23, 1960, set out as follows:

"On February 19, 1958, an Order was entered by a Judge of the Tenth Judicial District, committing Alphonso Francis Stein to the Mental Health Institute, at Independence, Iowa, for psychiatric examination. The Defendant was subsequently transferred to the Men's Reformatory at Anamosa, Iowa, by the Mental Health Institute pursuant to House File 661, Chapter 163 of the Laws of the 58th General Assembly.

"The Defendant was kept at the Reformatory from August 7, 1959 until October 31, 1960, at which time he was returned to the Mental Health Institute and subsequently returned to Black Hawk County where he plead guilty to the crime of Lascivious Acts and received a suspended sentence.

"The Board of Control of State Institutions passed a resolution August

6, 1959, authorizing the transfer of the Defendant to the Men's Reformatory; said resolution provided that the cost of the care of the patient should be charged to Black Hawk County by the Mental Health Institute.

"House File 661, Chapter 163 of the Laws of the 58th General Assembly provides that a transfer from any mental health institute may be made to the hospital unit for the mentally ill at the Men's Reformatory. Further it is provided, 'The cost of the transfer shall be paid from the funds of the institution from which the transfer is made.' In this instance, apparently the Mental Health Institute has reimbursed the Men's Reformatory and now the Mental Health Institute has submitted a bill for care of the Defendant at the Men's Reformatory, Anamosa, Iowa, to Black Hawk County.

"My question is: Under the provisions of House File 661, may the cost of such transfer and care provided pursuant to said transfer be assessed to the particular county from whence the patient came?"

Chapter 163, Acts 58th G.A. reads as follows:

"Section 1. Chapter two hundred eighteen (218), Code 1958, is hereby amended by adding thereto the following section:

"Whenever a patient in Glenwood state school, Woodward state hospital and school, any mental health institute, or any institution placed by the board of control under the director of mental health for administration, has become so mentally disturbed as to constitute a danger to self, to other patients in the institution or to the public, and the institution involved cannot provide adequate security, the board of control or director of mental health may order the patient to be transferred to the hospital unit for the mentally ill at the men's reformatory, provided that the executive head of the institution involved with the support of a majority of his medical staff recommends the transfer in the interest of the patient, other patients or the public. The order of the board of control or director of mental health shall have the same force and effect as a warrant of commitment for mental illness. *The cost of the transfer shall be paid from the funds of the institution from which the transfer is made.*" (Emphasis supplied).

The word "transfer" is not defined within Chapter 163, Acts 58th G.A., nor is it defined in Chapter 218, Code 1958, to which said Chapter 163 is amendatory. The generally accepted and plain meaning of the word "transfer" is removal, transportation, or conveyance from one place to another. See *Webster's New International Dictionary of the English Language, Second Edition,* Unabridged.

The Board of Control of State Institutions of the State of Iowa has advised this writer that the only cost borne by the transferring institution is that incident to the transfer or removal, and further, that upon completion of the transfer, the receiving institution then supports and maintains as well as provides necessary psychiatric care and treatment, these costs being paid by way of reimbursement from funds from which the transfer is made to the receiving institution. Further advice from said board indicates that the transferee is, after transfer is completed, carried on the transferring institution's population records as an in-patient. The superintendent of the transferring institution (for purposes of this opinion limited in fact to a mental health institute) then certifies to the State Comptroller the amount due the state from the county having such patient-transferee chargeable thereto, all in accord with the provisions of §230.20, 1958 Code, the end result being that the costs for support and maintenance are paid by the county of legal settlement of the transferee if such transferee has a legal settlement. If such person has no legal settlement in this state or if such legal settlement is unknown, such costs would be paid by the state. See: §230.1, et. seq., 1958 Code.

Therefore, and in answer to your specific question (1) the actual and necessary expenses of the transfer are paid by the institution from which the transfer was (is) made, and (2) the costs of care and maintenance are paid by the transferee's county of legal settlement.

14.5

Board of Control, federal grant—§218.96, 1962 Code. The Board of Control is authorized under Chapter 159, 58th G.A., to accept federal grant for research purposes for named applicants and to cause the grant to be disbursed in accordance with terms of this grant and kept in custody of a finance officer who need not be associated with or employed by the Board. (Bump to Brown, Bd. of Control, 2/24/61) #61-2-18

14.6

Beer and cigarettes, institutions—§98.2, 1958 Code. Institutions may not legally furnish or sell cigarettes to inmates of the State Training School for Boys under the age of 18. (Creger to Dunn, Hardin Co. Atty., 4/19/61)

14.7

Commitment of feeble-minded—§§222.18, 223.7, 229.9, 1958 Code. District courts have jurisdiction to commit feeble-minded persons to state institutions. (Creger to Elwood, Howard Co. Atty., 9/6/61) #61-9-3

14.8

Counties and county officers—§§223.13, 226.32, 227.11, 229.30, 1958 Code. Board of supervisors has no power to require parents of children admitted to hospital for epileptics and schools for mentally retarded on a voluntary basis to remove said children from these institutions and provide private nursing care for them. (Creger to Ball, Black Hawk Co. Atty., 8/1/61) #61-8-2

14.9

Employees, military service—§29.28, 1958 Code. Employees of state institutions are entitled to pay for first thirty days of military service, whether they enlist or are inducted or are called into temporary federal or state service. (Creger to Bd. of Control, 4/5/61) #61-4-8

14.10

Penal institutions—§§246.9, 246.18, 246.19, 255.28, 1958 Code. Warden has no authority to allow inmates outside confines of institutions for purposes other than those specified by statute. (Creger to Bd. of Control, 7/24/61) #61-7-18

CHAPTER 15

INSURANCE

STAFF OPINIONS

LETTER OPINIONS

15.1

INSURANCE: Authority of Commissioner re health policies—§§149.1(2), 505.8 and 507B.4, 1962 Code. The Commissioner of Insurance has the power to require an express exclusion of treatment of the feet in an insurance policy if it is the desire of the insurer to exclude such treatment from such general terms as "physicians and surgeons".

August 17, 1962

Mr. William E. Timmons
Commissioner of Insurance
LOCAL

Dear Mr. Timmons:

This is in response to your recent inquiry, asking:

"Whether the Commissioner of Insurance has the authority to notify insurers, by administrative rule or otherwise, that health insurance policies providing for treatment by 'physicians and surgeons' include treatment by podiatrists licensed under Chapter 149 of the Code of Iowa (1962), unless treatment of the feet is specifically excluded from the policy."

Section 505.8, 1962 Code of Iowa, gives the Commissioner of Insurance "general control, supervision, and direction over all insurance business transacted in the state. . . .". By §514A.3 he is given certain powers of approval over policy forms and provisions. Section 507B.4 provides:

"The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance:

"* * *

"7. Unfair discrimination. (a) Making or permitting any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such contract; or (b) making or permitting any unfair discrimination between insureds of the same class for essentially the same hazard in the amount of premium, policy fees, or rates charged for any policy or contract of insurance other than life or in the benefits payable thereunder, or in any of the terms or conditions of such contract, or in any other manner whatever."

Although the word "surgeon" appears in the Code at various places, nowhere in the Code is the word "physician" defined. It is noteworthy that Chapter 148 provides for the licensure of the practice of "medicine and sur-

gery", Chapter 149 provides for the licensure of the "practice of podiatry", and Chapter 150 provides for the "licensure of the practice of osteopathy and surgery". The Iowa Supreme Court has held that these provisions are mutually exclusive. *State v. McPheeters,* 216 Iowa 1359, 249 N.W. 349 (1933). Although each chapter contains its own definition, the definitions set forth are applicable only to the construction of the statutes and not to the question of unfair competition and deceptive practices.

Section 149.1(2) of the Code provides that:

"A podiatrist is one who examines or diagnoses or treats ailments of the human foot, medically or surgically."

Section 149.5 specifically limits his practice in certain respects. From these sections it appears that a podiatrist is a "physician and surgeon" for a limited portion of the body and any insured reading a policy containing such words could reasonably assume that a person licensed to diagnose, treat and perform surgery was intended to be included. *Williams v. Capital Life and Health Ins. Co.,* 209 S.C. 512, 41 S.E. 2d 208 (1947); *Thomas v. Carlton Hosiery Mills,* 14 N.J. Super. 44, 81 A. 2d 365 (1951).

If the insurer wishes to exclude treatment of the feet, it may easily expressly so provide. Any ambiguity existing, if one does exist, cannot be left to the interpretation that each individual insurer wishes to make in a given case.

Under the circumstances, it is my opinion that the Commissioner of Insurance has the power to require an express exclusion of treatment of the feet in the insurance policy if it is the desire of the insurer to exclude such treatment from such general terms as "physicians and surgeons".

15.2

INSURANCE: Contractual plans and face-amount certificates—§§501.1, 502.3(1) and 502.8, 1958 Code. (1) Contractual plans with a forfeiture feature for the accumulation of investment company or mutual fund shares are subject to registration under §502.3(1) but are not installment sales of stock requiring registration under §501.1. (2) Each investment or payment under such a plan constitutes a separate transaction, and any sales or commission charge in excess of 20 per cent deducted from such payment would represent a violation of the limitation specified in §502.8. (3) However, each payment toward the purchase of a face-amount certificate on an installment basis is not viewed as a complete transaction and these sales require registration under §501.1 and for this reason do not fall within the limitation of §502.8 unless over-all sales charges exceed 20 per cent.

May 9, 1962

Mr. William E. Timmons
Commissioner of Insurance
L O C A L

Dear Mr. Timmons:

This is in response to your letter in which you submitted:

"Are contractual plans (with a forfeiture feature) for the accumulation of investment company shares securities within the definitions contained in Sections 501.1 and 502.3(1) of the Code of Iowa (1958), and therefore subject to registration separate and apart from the registration required of the underlying investment company shares?

"Does the sale of contractual plans (with a forfeiture feature) for the accumulation of investment company shares constitute the sale of securi-

ties (stock) on the installment plan as contemplated by Chapter 501 of the Code of Iowa, (1958)?

"Do contractual plans (with a forfeiture feature) for the accumulation of investment company shares and/or face-amount certificates which provide for a sales charge or commission deduction of more than 20% of the investor's payments during initial years of the plan violate section 502.8 of the Code of Iowa, 1958?"

The term "contractual plan" is here used to identify a plan for the accumulation of investment company or mutual fund shares. Periodic investments are contemplated on the part of the investor, which after the deduction of certain charges are used to purchase investment company shares. The forfeiture feature has reference to the investor who defaults in these payments during the early years that the plan is in force.

Section 501.1, Code of 1958, defines "stock" as follows:

"... The term stock shall mean certificates, memberships, shares, bonds, contracts, debentures, stock, tontine contracts or other investment securities or agreements of any kind or character. ..."

Section 502.3(1) defines "security as:

"... 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."

Both definitions are sufficiently broad to include the contractual plans here in question. The definition of "security" in the Federal Investment Company Act of 1940 is very similar to that contained in the Iowa Law (15 U.S.C., §80a-2(a)(35)) and is interpreted as requiring separate registration of contractual plans. On this same basis, §502.3(1) requires registration of contractual plans, separate and apart from the registration required of the underlying investment company shares.

Although the term "stock" as defined in §501.1 would similarly include contractual plans, separate registration as an installment sale of stock is not required for the reasons explained in response to question two.

While the term "stock" as defined in §501.1 does include what we have referred to as contractual plans, the section and chapter do not require their registration because contractual plans do not involve partial payments or the purchase of securities on an installment plan. Each payment or investment made by the planholder constitutes a complete purchase of a fractional share or full shares plus a fractional share. The purchaser may receive dividends based on the shares he owns before he completes his plan. He may liquidate the shares he has purchased pursuant to the plan at any time and receive the prevailing market price. 1934 *O.A.G.* 519.

Even though applied toward completion of a continuing contract, each sum invested in a contractual plan constitutes a separate transaction for which the investor receives a notice or receipt indicating his gross payment, commission, fees deducted, net investment amount applied to the purchase of mutual fund shares, the price per share at the date of investment, and the fractional share or shares plus fractional shares added to his portfolio. A procedure termed front-end loading occurs when the bulk of commissions or sales charges which would be applicable to the entire plan are deducted from the initial payments made by the plan-holder. Under the analysis set forth in

reply to question two above, each of the sums invested constitutes a separate transaction. (Whenever the commissions or sales charges applicable to a single payment exceed the twenty percent limitation prescribed by §502.8, whether on an initial or later payment, a violation of the statute occurs.) Even though the Investment Company Act of 1940 permits such commissions or sales charges to be as high as 50% during the initial year of the plan, this does not prohibit state legislatures from prescribing a more strict limitation. Congress has not preempted the field of legislation in this regard but has expressly authorized states to legislate. 15 *U.S.C.* §80(a) (49).

Face-amount certificates are a type of security in which the purchaser obligates himself to make periodic payments pursuant to completing a plan of designated denomination. His payments plus interest accumulated thereon mature at the face amount at a stated or determinable date in the future. The issuer of face-amount certificates invests the purchaser's money, after certain charges are deducted, primarily in stable income securities and real estate mortgages. The issuer guarantees a specific rate of interest resulting in the maturation of the certificate for the face amount at a stated or determinable date.

Face-amount certificates are within the definition of "stock" as defined in §501.1 and do involve the purchase of stock on an installment basis. The face certificate is viewed as a single security. The investor has no ownership rights in the securities purchased by the issuer either during or at the completion of his plan. Even though, because of selling commissions, creation costs, and the policy of front-end loading, the deductions from initial payments may exceed the twenty percent maximum prescribed by §502.8, no violation of that section occurs if the ratio of total commissions relative to the total amounts paid in by the investor computed on a completed certificate basis does not exceed twenty percent.

Consequently, it is the opinion of this Department that contractual plans as such, separate and apart from the securities purchased thereunder, are subject to registration under §502.3(1), but they are not installment sales of stock requiring registration under §501.1. Since each investment or payment under such a plan constitutes a separate transaction, any sales or commission charge in excess of 20% deducted from such payment would represent a violation of the limitation specified in §502.8. However, each payment toward the purchase of a face-amount certificate on an installment basis is not viewed as a complete transaction and these sales require registration under §501.1 and for this reason do not fall within the limitation of §502.8 unless over-all sales charges exceed 20 percent.

15.3

INSURANCE: Domestic animal coverage—Ch. 352, 1958 Code. One can be compensated for a loss under the domestic animal fund and be paid in addition thereto, under separate contract with his insurance company, for such loss.

January 4, 1961

Mr. Richard H. Wright
Davis County Attorney
Bloomfield, Iowa

Dear Mr. Wright:

This will acknowledge receipt of yours of December 21, 1960, in which you submitted the following:

> "On November 19, 1959 an opinion was issued under your name with regard to claims against the domestic animal fund for animals killed by dogs. This opinion was addressed directly to me in your letter.

"The Board of Supervisors have come up with another question concerning this same matter and have asked that I contact your office to see if an opinion has been submitted or released by your office subsequent to the opinion of November 19, 1959, to which I have referred. If in fact a supplemental opinion has been issued I would appreciate it if you could forward a copy to this office.

"Following your opinion of November 19, 1959, the County modified their domestic animal fund claim blanks by adding the following paragraph:

'Your claimant does further state that he has not been compensated for this loss by any insurance carrier, that he has not filed any claims with any insurance company covering this loss, and that in event he should receive any compensation for this loss, except as allowed by Board of Supervisors, that he will refund to this County the amount of compensation allowed by the Board of Supervisors.'

"A very honest and sincere farmer has sustained a loss to certain domestic animals by dogs and he has raised the question as to whether or not he could honestly sign this claim, in view of the fact that he has farm protector insurance who have indicated that they will compensate only for loss to the farmer not compensated for under the domestic animal fund. For many years Davis County has not paid domestic animal fund claims in full because of insufficient funds. They have always paid a certain percentage of the claims and it would appear that this would be true for the current year.

"I would like to ask your thoughts on this matter and would like to suggest a letter from you giving your opinion as to the matter and do not feel that a formal ruling or opinion is necessary on this particular matter."

With respect to the foregoing, I enclose herewith copies of two opinions subsequent to the opinion to you November 19, 1959; one addressed to Charles R. Warren, Insurance Department, under date of December 22, 1959, and one addressed to Donald E. Skiver, Osceola County Attorney, February 3, 1960. These opinions will permit the farmer mentioned to be compensated for loss under the domestic animal fund and be paid in addition thereto under a separate contract with his insurance company.

15.4

Domestic animal fund—§352.1, 1958 Code. Nutria, a fur-bearing rodent, does not fall within the meaning of domestic animals and is not a proper subject for claim under the domestic animal fund. (Bump to Simpson, Boone Co. Atty., 1/16/62) #62-1-6

15.5

Foreign life insurance company casualty license—§§508.5, 508.29, 515.8, 515.10, 1958 Code. A foreign life insurance requesting a certificate to do business in Iowa only as a casualty company, which meets the capital and surplus requirements for a casualty company but does not meet the capital and surplus requirements for a life insurance company, cannot be authorized to write only casualty insurance in Iowa. The only statutory provision for permitting a life insurance company to write casualty insurance is section 508.29, which provides that specified lines of casualty insurance may be written in addition to life insurance. (Bump to Timmons, Com'r. Ins., 7/25/61) #61-7-28

15.6

Insurance coverage of peace officers—§85.62, 1958 Code. Insurance coverage of compensation liability for peace officers in sheriff's office would be an improper expenditure of county funds. (Bump to Ball, Black Hawk Co. Atty., 2/14/62) #62-2-2

15.7

IPERS and FICA contributions to be paid by examined insurance companies—§507.8, 1958 Code. Contributions made to IPERS and FICA by Insurance Department, on behalf of insurance companies being examined, are necessary expenses which should be charged to the respective insurance companies pursuant to §507.8. (Bump to Timmons, Com'r. Ins., 9/15/61) #61-9-10

15.8

Premium tax on accumulated dividends—§432.1, 1962 Code. Premium tax is not assessable on use of accumulated dividends to purchase fully paid policy. (Bump to Timmons, Com'r. Ins., 11/21/62) #62-11-1

CHAPTER 16

LABOR

STAFF OPINIONS

LETTER OPINIONS

16.1

LABOR: Strike breaker ordinance—§§366.1, 368.2, 1958 Code. Municipalities are without power to enact ordinances prohibiting interstate importation of strike breakers.

April 7, 1961

Honorable Lawrence D. Carstensen
State Representative, Clinton County
House of Representatives
L O C A L

Dear Sir:

Reference is made to your letter of March 8, 1961, in which you request the opinion of this office as to whether a city council has power to enact an ordinance prohibiting "interstate importation of strike breakers".

Your attention is directed to Iowa Code §368.2, which provides:

> "Cities and towns are bodies politic and corporate ... and shall have the general powers and privileges granted, and such others as are incident to municipal corporations of like character, not inconsistent with the statutes of the state, for the protection of their property and inhabitants, and the preservation of peace and good order therein ...",

and to Iowa Code §366.1, which provides:

> "Municipal corporations shall have power to make and publish, from time to time, ordinances, not inconsistent with the laws of the state, for carrying into effect or discharging the powers and duties conferred by this title, and such as shall seem necessary and proper to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort, and convenience of such corporations and the inhabitants thereof, and to enforce obedience to such ordinances by fine not exceeding one hundred dollars, or by imprisonment not exceeding thirty days."

In addition, it is generally held that a municipal corporation has only those powers which are created by statute and those which may be implied. See *Ferguson v. Brick,* 248 Iowa 839, 82 N.W. 2d 849 (1957); *City of Mason City v. Zerble,* 250 Iowa 102, 93 N.W. 2d 94 (1958); *Gritton v. City of Des Moines,* 247 Iowa 326, 73 N.W. 813 (1955); *Huff v. City of Des Moines,* 244 Iowa 89, 56 N.W. 2d 54 (1952).

Also, it has been held that these powers will be strictly construed. *Huff v. City of Des Moines,* supra; *Van Eaton v. Town of Sidney,* 211 Iowa 986, 231 N.W. 475 (1930).

Thus, unless power to enact an ordinance prohibiting interstate importation

of strike breakers is expressly authorized by statute, or to be fairly implied as among the powers of municipal corporations generally, such an ordinance, if enacted, will be void. *Peterson v. Town of Panora,* 222 Iowa 236, 271 N.W. 317 (1937). We find no statutory provision expressly authorizing such an ordinance, and power to enact ordinances affecting affairs extraterritorial to the limits of a municipality cannot, in our opinion, fairly be implied.

It is true, of course, that a municipality may, under its police powers, regulate or prohibit within its corporate limits those activities and conditions which are contrary to good order and which affect the health, safety and welfare of its citizens. See *Town of Grundy Center v. Marion,* 231 Iowa 425, 1 N.W. 2d 677 (1942). Under this power a municipality might, within its boundaries, regulate or prohibit those activities of strike breakers which are prejudicial to the good order and welfare of the community. But an ordinance purporting to prohibit the interstate importation of strike breakers would be an attempt to exercise the police powers of a municipality outside the corporate limits thereof, and it has been held that the ordinances of a municipality, like the state law, can have no extraterritorial effect. *Gosselink v. Campbell,* 40 (Cole) 296 (1956); *City of South San Francisco v. Berry,* 260 P. 2d 1045 (Cal. 1953).

In addition, your attention is directed to 18 U.S.C.A., §1231 (1950), which provides:

"Section 1231. *Transportation of Strike Breakers.* Whoever wilfully transports in interstate or foreign commerce any person who is employed or is to be employed for the purpose of obstructing or interfering by force or threats with:

"(1) peaceful picketing by employees during any labor controversy affecting wages, hours or conditions of labor, or

(2) the exercise by employees of any of the rights of self-organization or collective bargaining; or

Whoever knowingly is transported or travels in interstate or foreign commerce for any of the purposes enumerated in this section—

shall be fined not more than $5000 or imprisoned not more than two years, or both.

This section shall not apply to common carriers."

Therefore, while municipalities may not themselves prohibit the interstate transportation of strike breakers, such a prohibition does in fact exist under federal law.

16.2

LABOR: Workmen's compensation, medical and hospital benefits—§85.27, 1958 Code. Injured employee not free to choose own physician if he desires benefits under §85.27 except in unusual circumstances such as emergency.

May 17, 1962

Mrs. Katherine M. Falvey
State Representative, Monroe County
217 A. Avenue, East
Albia, Iowa

Dear Mrs. Falvey:

This is to acknowledge yours of recent date wherein you request an opinion on the following question:

"Is a workman permitted to have the services of the physician of *his*

choice and be compensated for this expense, or must he use the services of a company doctor?"

The answer to your question involves an interpretation of §85.27, 1958 Code, the Iowa Workmen's Compensation Act, which provides in part:

"85.27 Professional and hospital services—prosthetic devices. The employer, with notice or knowledge of injury, shall furnish reasonable surgicial, medical, osteopathic, chiropractic, chiropodial, nursing and hospital services and supplies therefor. * * *"

The injured employee is not free in the first instances to choose his own physician if he desires to take advantage of the benefits under §85.27, except under unusual circumstances such as emergency. *Almquist v. Shenandoah Nurseries, Inc.,* 218 Iowa 724, 254 N.W. 35 (1934); *Irwin v. Fulton Sylphon Co.,* 179 Tenn. 346, 166 S.W. 2d 610 (1942); *Iowa Workmen's Compensation Law* 19 (rev. ed. 1959); *The Iowa Law of Workmen's Compensation,* Res. Series No. 22, Bureau of Labor and Management, State University of Iowa (1960), p. 69; 1916 *O.A.G.* 46 (Compensation Opinions).

16.3

Child labor—§92.11, 1958 Code. Voluntary work without pay occasionally performed by children of church members at lunch stand operated by church to raise money does not constitute employment within the meaning and intent of §92.11. (Snell to Bainter, Henry Co. Atty., 4/27/62) #62-4-9

CHAPTER 17

MOTOR VEHICLES

STAFF OPINIONS

LETTER OPINIONS

17.1

MOTOR VEHICLES: Accidents on private property—§§321.228, 321.266, 321.A.5(1), 1962 Code. An accident occurring on private property is required to be reported to the Department of Public Safety and such an accident comes under the requirements of Chapter 321A.

September 5, 1962

Mr. Carl H. Pesch
Commissioner of Public Safety
State Office Building
L O C A L

Dear Mr. Pesch:

This will acknowledge receipt of your request for an opinion in which you state:

"A question has arisen in this department concerning whether or not accidents that occur on private property that is not defined as a trafficway are required to be reported to this department, and whether Chapter 321A, the Iowa Financial and Safety Responsibility Law, applies to such accidents.***"

Section 321.228, 1962 Code of Iowa, provides:

"The provisions of this chapter relating to the operation of vehicles refer exclusively to the operation of vehicles upon highways except:

"2. The provisions of sections 321.261 to 321.274, inclusive, and sections

321.280 to 321.284, inclusive, shall apply upon highways and elsewhere throughout the state."

"Elsewhere" is defined in *Black's Law Dictionary,* 4th Edition, as "in another place; in any other place." In *Webster's International Dictionary,* 2d Edition, it is defined as "in or to some or any other place." It seems apparent, therefore, that the legislature intended, by enacting §321.228, to make §321.266 applicable to highways and to any other place throughout the State of Iowa. See Allen to Butler, Cerro Gordo County Attorney, dated October 4, 1961.

Section 321A.5(1), 1962 Code of Iowa, states in pertinent part:

"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 one hundred dollars, suspend the license of each operator and all registrations of each owner of a motor vehicle in any manner involved in such accident, . . ." (Emphasis added)

This section is not limited by its terms to accidents occurring on the public highways and the reports to which it refers are obviously those which are made pursuant to §321.266.

When the words of these statutes are given their plain and ordinary meanings, it is clear that they are applicable to accidents occurring on private property as well as to those which occur on public highways. As stated in *Dingman v. City of Council Bluffs,* 249 Iowa 1121, 1126, 90 N. W. 2d 742:

"A statute is not to be read as though open to construction as a matter of course. Statutory construction may be properly involved only when the legislative Acts contain such ambiguities or obscurities that reasonable minds may disagree or be uncertain as to their meaning. * * * If the language given its plain and rational meaning is precise and free from ambiguity, no more is necessary than to apply to the words used their natural and ordinary sense in connection with the subject considered."

As you noted in your request, *Doyle v. Kahl,* 242 Iowa 153, 46 N. W. 2d 52, upheld the constitutionality of Chapter 321A and, at page 158 of the Iowa report, the Court stated:

"It is claimed that the Act violates the police power of the state. The purpose of this Act is to protect the public on the highways against the operation of motor vehicles by reckless and irresponsible persons, a duty which is inherent in every sovereign government and is a proper exercise of police power."

Certainly, persons who operate vehicles recklessly and irresponsibly on private property are just as likely to do so on the public highway. To apply Chapter 321A to such persons does protect the public on the highways of this state against reckless and irresponsible persons and does not contravene the purpose of the statute as set forth in *Doyle v. Kahl, supra.*

It is therefore our opinion that an accident occurring on private property is required to be reported to the Department of Public Safety and that such an accident comes under the requirements of Chapter 321A.

17.2

MOTOR VEHICLES: Certificate of title—§§321.45(2), 321.50, 1962 Code. A notation upon an automobile certificate of title by a chattel mortgagee as required by §321.50 constitutes notice to the public, and is sufficient to protect the chattel mortgagee's interest against a subsequent purchaser

who does not have actual knowledge of the existing encumbrance. This is true even though subsequent purchaser had levied upon the automobile before the chattel mortgagee's notation upon the certificate of title.

August 30, 1962

Mr. William J. O'Connell
Buchanan County Attorney
Security Bank Building
Independence, Iowa

Dear Mr. O'Connell:

This will acknowledge your opinion request in which you state:

"1. The Treasurer of Buchanan County has received an application for transfer of title, the applicant claiming right as purchaser at Sheriff's Sale on execution. At the time of levy the records of the County Treasurer showed no lien on the vehicle levied upon. After levy, but prior to sale, evidence of a lien, arising out of a chattel mortgage, was filed in the Treasurer's office. The Sheriff's Bill of Sale makes no mention of the sale being made subject to the lien and lienholder had not filed notice of ownership with Sheriff prior to sale.

"Does the Sheriff's Bill of Sale constitute evidence of extinction of the lien so as to require the Treasurer to issue a title free of the lien?

"2. The Treasurer received an application as above. The records of the Treasurer at time of levy were as above. Prior to the date of Sheriff's Sale a holder of an unrecorded chattel mortgage contacted the Treasurer's office to have his lien made of record. Notice of ownership was filed with the Sheriff prior to Sheriff's Sale but the sale was conducted as though the property was unencumbered. A Sheriff's Bill of Sale was issued and presented to the Treasurer.

"Does the Sheriff's Bill of Sale constitute evidence of extinction of the lien so as to require the Treasurer to issue a title free of the lien?"

Section 321.50 establishes a "race of diligence" between lienholders regarding the obtaining of priority of liens on motor vehicles.

"All liens, mortgages and encumbrances, noted on a certificate of title, shall take priority according to the order of time in which the same are noted thereon by the county treasurer."

Thus, under the statute, the first to have his lien noted upon the certificate of title is prior, irrespective of his knowledge of other interests. For this reason, when the chattel mortgagee in the situation presented herein had his mortgage lien noted upon the certificate of title, he had done all that the law contemplated that he should do. The notation of his lien upon the certificate of title constituted notice to the public of the existing encumbrance and, as such, it would continue valid until satisfied. *Commercial Credit Co. v. American Mfg. Co.*, 155 S.W. 2d 834, 840 (1941).

By the provisions of §321.45(2), the purchaser at the sale could not acquire any interest in such a vehicle except by virtue of a certificate of title issued or assigned to him. Section 321.50 provides that no lien shall be valid against creditors of the mortgagor, subsequent purchasers, mortgagees or other lienholders or claimants unless noted on the certificate of title. Thus, as stated by the Texas court in interpreting a substantially similar statute:

"Since no valid sale of the vehicle could be made without the certificate of title and since no lien is valid unless shown on the certificate, a pur-

chaser could not be deceived by failing to learn of the existing encumbrance." *Id.* at 838.

In the situations presented herein, the notation upon the certificate of title by the chattel mortgagee is sufficient to protect his interest, and the purchaser takes the motor vehicle subject to the chattel mortgage.

17.3

MOTOR VEHICLES: Chauffeur's license—§321.1(43), 1962 Code. Exemption from chauffeur's license requirement for occasional and incidental operation means the operation of a truck by chance or accident, and does not apply to city employee under the facts presented.

October 4, 1962

Mr. Joseph H. Sams
Mitchell County Attorney
Osage, Iowa

Dear Mr. Sams:

This is in response to your opinion request in which you state:

"The City of Osage employs an individual in the Department of Streets. He may be involved in the repair of streets or cleaning or snow removal, depending upon orders received from his superior. In connection with this work he drives a city truck, the gross weight classification of which would exceed five tons. His work is not confined exclusively to driving, but he also performs manual labor including loading, cleaning, etc.

"The question which arises is whether or not such a person is required to be licensed as a 'Chauffeur' under the Code. It is contended on one side that the business of a city is governmental, one of the subdivisions of which is maintenance and repair of streets and that therefore the operation of the city truck is incidental. Opposing this position is the view that the operator of a truck is not an occasional operator and that his principal business is that of a driver."

Section 321.1(43), in pertinent part, provides:

"The following words and phrases when used in this chapter shall, for the purpose of this chapter, have the meanings respectively ascribed to them.

"43. 'Chauffeur' means any person who operates a motor vehicle in the transportation of persons, including school busses, for wage, compensation or hire, or any person who operates a truck tractor, road tractor or any motor truck which is required to be registered at a gross weight classification exceeding five tons, or any such motor vehicle exempt from registration which would be within such gross weight classification if not so exempt except when such operation by the owner or operator is occasional and merely incidental to his principal business.

"Subject to the provisions of section 321.179, a farmer or his hired help shall not be deemed a chauffeur, when operating a truck owned by him, and used exclusively in connection with the transportation of his own products or property."

Although it is not the policy of this office to give advice upon matters affecting municipalities, an exception will be made in this case due to the importance of the inquiry to the Department of Public Safety.

It is not required that a person's *exclusive* employment be that of operating a truck such as the one in question before the requirement that he have a chauffeur's license becomes applicable. Under §321.1(43), the exemption from such license is applicable only if the use is *occasional and incidental* to his principal business. The import of such words is that the exemption will apply only if the operation of such truck is a casual event, fortuitous happening, as if by chance or accident. *Morr v. Butz,* 156 Pa. Super. 516, 40 A. 2d 699, 700 (1944); *Liberty Mut. Ins. Co. v. Thompson,* 171 F. 2d 723, 725 (9th Cir. 1949).

The question of what is "occasional" and "incidental" is necessarily one of fact, and on the facts presented herein it is my opinion that the operation of the city-owned truck by the person in question is not occasional and incidental to his principal business and a chauffeur's license must be obtained.

17.4

MOTOR VEHICLES: Display of operator's or chauffeur's license—§321.190, 1962 Code. §321.190 requires a "display" of all portions of an operator's or chauffeur's license but does not require that possession thereof should be surrendered. Although both the failure to have an operator's or chauffeur's license in the person's immediate possession and the failure to display the license if it is in his possession constitute violations of §321.190, neither will provide the basis for conviction if a license is produced in court within a reasonable time and such license was valid at the time of arrest.

September 10, 1962

Mr. Earl E. Hoover
Clay County Attorney
Spencer, Iowa

Dear Mr. Hoover:

This is in response to your recent request in which you state:

"Regarding (section 321.190), I respectfully request an opinion as to the following points:

"1. Is this section complied with if the person who is being stopped holds his drivers license up to the window so that the officer may look at the license through the car window, without handing same to the officer?

"2. Does the officer, upon proper demand, have the right to take temporary possession of the license physically for the purpose of examining same?

"3. Is there any violation of this section if the person stopped refuses absolutely to produce his license, even though it is in his possession, if he subsequently produces it in Court within a reasonable time?"

Section 321.190, Iowa Code 1962, provides:

"Carried and exhibited. Every licensee shall have his operator's or chauffeur's license in his immediate possession at all times when operating a motor vehicle and shall *display* the same, upon demand of a justice of peace, a peace officer, or a field deputy or examiner of the department. However, no person charged with violating this section shall be convicted if he produces in court, within a reasonable time, an operator's or chauffeur's license theretofore issued to him and valid at the time of his arrest." (emphasis added)

The following meaning is ascribed to the verb "display" in *Webster's New*

International Dictionary, Second Edition (unabridged):

> "To spread before the view, to exhibit to the sight, or to the mind; to manifest; to show or disclose."

From this it can be seen that §321.190 contemplates only a showing of the license so that it may clearly be seen, but does not require that possession should be surrendered. The "display" necessary to satisfy this statute is one of all portions of the license, both front and back. *O.A.G.,* Swanson to Brown, September 30, 1957.

Even though §321.299 requires that no person "shall wilfully fail or refuse to comply with any lawful order or direction of any peace officer invested by law with authority to direct, control or regulate traffic", this is a general statute and §321.190, being specific in nature, controls. *Iowa Mut. Tornado Ins. Ass'n. v. Fischer,* 245 Iowa 951, 65 N.W. 2d 162 (1954); *O.A.G.,* Swanson to Brown, *supra.* Therefore, no violation occurs if a person refuses to turn over possession of his license to a peace officer, since under the specific statute, §321.190, only a "display" is necessary.

Logically, §321.190 imposes two duties upon the holder of an operator's or chauffeur's license. He must have his license in his immediate possession, and if it is in his possession he must "display" it upon the demand of a justice of the peace, a peace officer, or a field deputy or examiner of the department. Failure to fulfill either duty constitutes "violating this section", within the meaning of the last sentence in §321.190. Therefore, a person who fails to have his license in his possession, or who fails to display it upon demand, cannot be convicted "if he produces in court, within a reasonable time, an operator's or chauffeur's license theretofore issued to him and valid at the time of his arrest."

17.5

MOTOR VEHICLES: Driver's license requirements—§321.189, 1962 Code. Express mention of various driver's license requirements in §321.189 excludes by implication the requirement that each license bear a photograph of the licensee.

September 17, 1962

Mr. Carl H. Pesch
Commissioner of Public Safety
State Office Building
LOCAL

Dear Mr. Pesch:

This will acknowledge receipt of your recent letter in which you request the opinion of this office as to whether the Department of Public Safety may legally require each driver's license to bear a photograph of the licensee.

Iowa Code §321.189 provides as follows:

> "The department shall upon payment of the required fee, issue to every applicant qualifying therefor an operator's or chauffeur's license as applied for, which license shall bear thereon a distinguishing number assigned to the licensee, the full name, date of birth, occupation, sex, residence address, a brief description of the licensee, and the usual signature of the licensee. No license shall be valid unless it bears the signature of the licensee."

There are certain license requirements specifically spelled out in the statute. It will be noted that a photograph is not required by the plain language of the statute, nor in our opinion can such requirement be implied. It is a well-established rule of statutory construction that express mention of one thing in a statute implies exclusion of all other things not mentioned. *Archer v.*

Board of Education, 251 Iowa 1077, 104 N.W. 2d 621; *Dotson v. City of Ames,* 251 Iowa 467, 101 N.W. 2d 711 (1960).

Therefore, in our opinion, mention of driver's license requirements in regard to number assigned to licensee, name, date of birth, occupation, sex, residence address, description of the licensee, and signature impliedly excludes any requirement that each driver's license bear a photograph of the licensee.

17.6

MOTOR VEHICLES: Driver's license requirements concerning name—§§4.1, 321.189, 1962 Code. The words "full name" as used in §321.189 mean the complete title by which a person is known or designated. A married woman would necessarily have a Christian name and a surname. A married woman may lawfully choose to use her maiden name as a middle name. The usual signature required under §321.189 does not mean the full name under said section.

September 17, 1962

Mr. Carl H. Pesch
Commissioner
Department of Public Safety
LOCAL

Dear Mr. Pesch:

This will acknowledge your recent letter wherein you pose the following question:

"There has been considerable concern registered with this department concerning whether or not a married woman has a right under Iowa law to have her driver's license made out in the name she normally uses with her maiden name appearing as a middle name thereon. The Iowa law, as near as I can tell, requires that the operator's or chauffeur's license as applied for shall bear thereon the full name of the licensee and the usual signature of the licensee, such requirement being found in Section 321.189, 1962 Code of Iowa.

"Due to the concern over this matter and in order that this department might issue operator's or chauffeur's licenses in conformity with the General Assembly, I submit to you the following question for your opinion:

1. What do the words 'the full name' mean and include?

2. Does the fact that the law requires the usual signature of the licensee to appear on the license have a bearing or qualify in any way whatsoever the words 'the full name'?

3. If an individual applicant is permitted to use her maiden name as part and parcel of her full name and we issue a license with the maiden name thereon, are we required to place thereon the one or more Christian or given names plus the maiden name and in addition thereto the surname?

4. Must the full name as stated on the license conform to the usual signature of the licensee? In other words, if the license is issued in the Christian, maiden and surname, must the usual signature be in conformance therewith?

5. May abbreviations be used in the full name appearing on the issued license?

6. If an individual applicant has no middle, Christian, or given name

and so states on his application, may this department insert on the license the word 'none' indicating that such person has no middle, Christian, or given name?

7. If an individual has two Christian or given names, may that person use the middle name as his or her first name and thereby comply with the intent of the statute?"

Section 321.189, 1962 Code of Iowa provides in part:

"The department shall upon payment of the required fee, issue to every applicant qualifying therefor an operator's or chauffeur's license as applied for, *which license shall bear thereon ... the full name ... and the usual signature of the licensee ...*" (Emphasis ours)

Section 4.1, 1962 Code of Iowa, in pertinent part, provides:

"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 statute: ...

2. *Words and phrases.* Words and phrases shall be construed according to the context and the approved usage of the language ..."

Webster's New International Dictionary, 2d Ed., defines the word "full" as meaning "complete". "Complete meaning full in the sense of everything needed." *Webster* also defines "name" as being "the title by which any person ... is known or designated."

The Iowa Supreme Court in the case of *Loser v. Savings Bank,* 149 Iowa 672, in defining what a "name" is, stated:

"It is perhaps a sufficient answer for present purposes to say that the name of any given individual is the word or combination of words by which he is distinguished from other individuals. It is the label or appellation which he bears for the convenience of the world at large in addressing him or in speaking of him or in dealing with him."

The court went on to say that English-speaking people usually bear at least one Christian name and a family or surname. At one time the courts recognized but two names of an individual, the surname and one given name, but this rule has been materially changed by present social and business conditions. Now, children are usually given at least two or more names at birth as well as a surname. A ruling by a court that the use of a second or middle name by an individual is no part of his name would be to sacrifice common sense to the letter of the rule which has but slight adaption to social and business conditions of present day.

There is, of course, no dispute as to the correct form of the surname of a married woman because, on her marriage, the law confers on the wife the surname of her husband. Annotated, 35 *A.L.R.* 417. As for her correct first name, it would be her maiden Christian name, rather than the Christian name of her husband. 38 *Am. Jur.,* Names, §10; 65 *C.J.S.,* Names §3(c). What middle name she chooses to use, or middle initial, seems of slight importance since the courts have stated that it is not really required for identification purposes unless used by her as a given name. *Loser v. Savings Bank, supra; State Savings Bank v. Chinn,* 130 Iowa 365; *Collings v. Board of Supervisors,* 158 Iowa 322. At common law, absent a statute to the contrary, a person can adopt or assume any name he chooses, absent an intent to defraud others through a mistake of identity. 38 Am. Jur., *Names,* §11, §28; *Loser v. Savings Bank, supra.* He is not by law required to retain the name he was given in infancy by his parents. The statutory method of changing one's name does not abrogate the common-law method, but is merely in aid thereof and has

distinct advantages. *Re Ross,* 67 P. 2d 94; 38 *Am. Jur.,* Names, §28. Along these lines, a person may even drop his first name and use only his middle name, or he may use his first letter of this first name and his middle name. This is in such general practice that the courts have been compelled to recognize it as proper. 38 *Am. Jur.,* Names, §6; *Loser v. Savings Bank, supra.*

The middle name or names, letter or letters, cannot be said to constitute a part of a person's name, but merely are not essential to the identification of the person. *Riley v. Litchfield,* 168 Iowa 187. Where the Christian or given name is written in full, the middle name, names, letter or letters may be disregarded in identifying the individual. And where only a letter or letters precede the surname, or a letter and then a Christian name, such letter or letters, in the absence of any showing to the contrary, are to be treated as the given or proper name. *Riley v. Litchfield, supra;* 38 *Am. Jur.,* Names, §5, §7.

There is no such thing as a "legal name" of an individual *in the sense that he may not lawfully adopt or acquire another, and lawfully conduct business and be known in the community where he lives under the substituted appellation.* In the absence of any restrictive statute, it is the common-law right of a person to change his name, or he may by general usage or habit acquire a name notwithstanding that it differs from the one given him in infancy. *Loser v. Savings Bank, supra.*

The word "usual" has been defined by the Iowa Supreme Court as meaning "customary, ordinary, habitual, common, or regular", See: *Glidden Co-op. v. Iowa Emp. Sec. Comm.,* 236 Iowa 910, while the word "signature" is properly defined as whatever mark, symbols or device one may choose to employ as representative of himself. See: *Denunzio Fruit Co. v. Crane,* 79 F. Supp. 117; *State et al v. Williams,* 352 P. 2d 394; 39 *Words and Phrases* 359.

The Iowa Supreme Court has recognized and taken judicial notice of the fact that the average person does not have a signature that comprises his entire name, whether such name be his given name or assumed name. *Loser v. Savings Bank, supra.*

The answer to your second question must necessarily be in the negative.

Whether or not a married woman chooses to use her maiden surname as a middle name would be a choice she can lawfully make under the common-law rule set forth above. If she chooses to use her maiden surname, whether the license is to bear all her Christian or given names, her maiden surname and her surname, would be at the discretion of your Department. The license would at least have to contain a Christian and her surname. See authorities above.

Question #4 is sufficiently answered by #2 above.

Question #5 is sufficiently answered by #1 above.

There is no statutory authority for the license to bear the word "none" as part of a person's name. It is definitely not required to identify the licensee. See authorities listed under #1 above. Therefore, it is our opinion that the word "none" should not be placed on the license.

Question #7 is sufficiently answered by #1 above.

17.7

MOTOR VEHICLES: Equipment requirement—§§321.1, 321.381, 1958 Code. (1) Bicycle with motor attached is subject to the statutory equipment requirements for motorcycles and motor vehicles. (2) It is a misdemeanor to operate a motor vehicle, motorcycle or bicycle with motor attached on any highway in the daytime that is not equipped with proper lighting equipment specified by the statutes.

May 23, 1961

Mr. Carl H. Pesch
Commissioner
Department of Public Safety
LOCAL

Dear Mr. Pesch:

This will acknowledge receipt of your recent opinion request in which you state:

"Is a bicycle with motor attached subject to statutory equipment requirements relating to motor vehicles and motorcycles (i.e., sections 321.386, 321.387, 321.388, 321.389, 321.404, 321.432, 321.437, and 321.382), or to only those equipment requirements relating to bicycles (section 321.397)?

"Is it unlawful to operate a motor vehicle, motorcycle, or bicycle with motor attached, during times other than when lighted headlamps are required to be displayed (see section 321.384), if such a vehicle is not equipped with lighting equipment (headlamps, rear lamps, and brake signal lamps) that complies with the specifications and requirements of Chapter 321, Code of Iowa. In other words, is it a misdemeanor under section 321.482 to operate such motor vehicles during daylight hours which are not equipped with the proper lighting equipment specified by statute?"

In answer to your first question, reference should be made to those sections of the Code of Iowa which establish definitions of words used in Chapter 321 on motor vehicles and the law of the road. Section 321.1 states:

"Definitions of words and phrases. The following words and phrases when used in this chapter shall, for the purpose of this chapter, have the meanings respectively ascribed to them."

"3. 'Motorcycle' means every motor vehicle having a saddle or seat for the use of the rider and designed to travel on not more than three wheels in contact with the ground including a motor scooter and a bicycle with motor attached but excluding a tractor."

It is apparent from reading the above statute that the legislature has intended to include a bicycle with motor attached within the meaning of "motorcycle". This may clearly be done by the legislature since, in defining terms as applied to any given act, the legislature is its own lexicographer. *State v. City of Des Moines,* 221 Iowa 642, 266 N.W. 41 (1936); *W. J. Sandberg Co. v. Iowa State Board of Assessment and Review,* 225 Iowa 103, 278 N.W. 643, rehearing denied 225 Iowa 103, 281 N.W. 197 (1938). Where the legislature has defined the terms of a statute, the Court will follow the definition furnished by the legislature. *Kistner v. Iowa State Board of Assessment and Review,* 225 Iowa 404, 410, 280 N.W. 587 (1938). Based upon the above-quoted definition of the word "motorcycle" and the cited authority herein, it is my opinion that a bicycle with motor attached is subject to the statutory equipment requirements regarding motorcycles rather than to those equipment requirements regarding bicycles.

Section 321.1 of the 1958 Code of Iowa defines "motor vehicle" as follows:

"2. 'Motor vehicle' means every vehicle which is self propelled but not including vehicles known as trackless trolleys which are propelled by electric power obtained from overhead trolley wires, but not operated upon rails. The terms 'car' or 'automobile' shall be synonymous with the term 'motor vehicle'."

This definition broadly includes *every* vehicle which is self propelled excluding trackless trolleys. As such, it includes motorcycles, which are self propelled and are defined by the statute as meaning every motor vehicle having certain characteristics. Since the definition of a motorcycle includes a bicycle with motor attached, and a motorcycle is a motor vehicle, the definition of motor vehicle thereby includes a bicycle with motor attached. For this reason, and based on the above-cited authority, it is my opinion that a bicycle with motor attached is subject to the statutory equipment requirements relating to motor vehicles, except where the equipment requirements for a motorcycle are specifically indicated by the statutes to be different. In the latter case, a bicycle with motor attached should be equipped as a motorcycle.

In answer to your second question, §321.381 of the 1958 Code of Iowa provides:

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

The word "vehicle" used in §321.381 is defined by §321.1(1) as follows:

"1. 'Vehicle' means every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, excepting devices moved by human power or used exclusively upon stationary rails or tracks."

A "motor vehicle" is defined by the legislature as a vehicle which is self-propelled, so that in my opinion §321.381 includes motor vehicles by its use of the word "vehicle". Section 321.381 makes is a misdemeanor to drive a vehicle on any highway which is not at all times equipped with lamps and other equipment as required in Chapter 321. It is apparent by the use of the phrase "at all times" that the legislature was referring to daylight hours as well as nighttime hours. Therefore, based upon the above authority, it is my opinion that it is a misdemeanor under §321.381, punishable as provided in §321.482, to drive or move a motor vehicle, motorcycle, or a bicycle with motor attached on any highway during daylight hours which is not equipped with lamps and other equipment as required by Chapter 321.

17.8

MOTOR VEHICLES: Financial responsibility following accident—§321A.-6(2), 1958 Code. Vehicle stopped at a traffic light when involved in an accident is within the meaning of the words "stopped" and "standing".

June 6, 1961

Mr. Harlan W. Bainter
Henry County Attorney
118½ South Main
Mt. Pleasant, Iowa

Dear Mr. Bainter:

This will acknowledge receipt of your recent opinion request in which you state:

"We would like to request a ruling as to the meaning of the words 'stopped' and 'standing' in paragraph 2 of Section 321A.6 of the Code.

In the event that a car was stopped at a stop and go light at an intersection on Washington Street, Mt. Pleasant, Iowa, and signaling to turn left, when struck by another car approaching from the rear just as the light turned to green, would this come within the meaning of this paragraph, so that the requirements as to security and suspension in Section 321A.5 do not apply?"

Chapter 321A of the 1958 Code of Iowa pertains to motor vehicle financial responsibility. The requirement for the deposit of security following an accident is found in §321A.5 and reads as follows:

"*Security required following accident—exceptions.*

"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."

Paragraph 2 of §321A.6 provides exceptions to the requirements of security.

"The requirements as to security and suspension in section 321A.5 shall not apply:

"2. To the operator or the owner of a motor vehicle if at the time of the accident the vehicle was stopped, standing, or parked, whether attended or unattended, except that the requirements of this chaper shall apply in the event the commissioner determines that any such stopping, standing, or parking of the vehicle was illegal or that the vehicle was not equipped with lighted lamps or illuminating devices or flags when and as required by the laws of this state and that any such violation contributed to the accident."

In this section, the legislature excepted under the stated statutory conditions vehicles that were stopped, standing or parked at the time of the accident. *Webster's New International Dictionary* defines these three words thusly:

" 'Stop' 4. To arrest or check the progress, motion, passage or course of action of, . . ."

" 'Stand' 3. To cease from movement or progress; to pause, stop; to remain stationary or inactive; as, he came and stood waiting."

" 'Park' 2. To stop and keep (a vehicle, esp. a motor vehicle) standing for a time on a public way, or to leave temporarily on a public way or in any open space esp. in a space assigned for the occupancy of a number of automobiles . . . a vehicle halted while awaiting a traffic signal, or while allowing an occupant to alight or a waiting passenger to get aboard, is not usually regarded as a parked vehicle."

In *Janssen v. Texas Department of Public Safety*, 322 S. W. 2d 313 (1959), the court considered whether a car, which at the time of the accident was stopped partially off the road with the motor running, came within the Safety Re-

sponsibility Act, excusing compliance in cases involving legally parked cars. The court held that said car did not come within the exception allowed legally parked cars which excuses the requirements as to security and suspension. On page 316 the court set out the reason for its decision.

> "The Safety Responsibility Act excuses compliance in the case of 'legally parked' cars, but does not define that term. Sec. 93, Article 6701d, Vernon's Rev. Cr. Stats., and also Sec. 10, Art 827a, Penal Code, state the rules relating to 'stopping', 'standing' and 'parking'. Those statutes are broader and much more inclusive than the limited term 'parked' used in the Safety Responsibility Act. * * * As proved by the Janssens themselves, they were not 'parked'. On the contrary, they were driving. The momentary stop was an incident to driving on rather than parking. All parking may involve stopping; but all stopping does not involve parking. One stops to let traffic pass, to wait for traffic signals, to make certain turns, to discharge or pick up passengers. These maneuvers are a part of driving and movement rather than the cessation of movement by parking. Such acts may involve stopping, but not parking."

See also 60 *C.J.S.*, Motor Vehicles, §329c, and 2A *Cyclopedia of Automobile Law and Practice*, §1197.

The Iowa statute herein considered is not limited to parked vehicles as was the Texas statute. As such, the legislature must have intended it to cover a broader range of situations than if the word "parked" alone was used. Nor is §321A.6 limited in applicability to any particular area, since it specifically refers to §321A.5, which applies to the report of an accident "within this state". For the above reasons and based on the cited authority, it is my opinion that the words "stopped" and "standing" as used in §321A.6(2), 1958 Code of Iowa, embrace the fact situation herein quoted from your request.

17.9

MOTOR VEHICLES: House trailers and mobile homes—§321.123, 1962 Code. The $5.00 registration fee under §321.123(3) became due for house trailers and mobile homes on July 4, 1961, the effective date of the statute.

June 11, 1962

Honorable Tom Riley
State Representative
1215 Merchants National Bank
Cedar Rapids, Iowa

Dear Mr. Riley:

This is to acknowledge receipt of your request for an opinion, in which you state:

> "As you know, Chapter 321.123 provided before the Laws of the 59th General Assembly that trailers were to pay an annual registration fee according to weight. For example, a trailer with a gross weight exceeding one ton and not exceeding two tons would pay an annual registration fee of $20.00. Chapter 108 of the Laws of the 59th General Assembly adds a section as follows:
>
> 'House trailers and mobile homes, regardless of whether or not they are used on the highways, $5.00.'
>
> "The question thus raised is: Does Chapter 108, which establishes a specific registration fee of $5.00 for house trailers and mobile homes become operative for the year 1962 and thereafter or, contrarywise, did

it become operative July 4, 1961, so as to require a double registration fee for the balance of 1961?"

Chapter 108, 59th G.A., which included the amendment to §321.123, 1958 Code, is now designated as §321.123, subsection 3, 1962 Code of Iowa. This law became effective on July 4, 1961, in accordance with §3.7, 1958 Code.

Prior to that date, an opinion was issued to Carl H. Pesch, Commissioner of Public Safety, answering the following question:

"4. If a house trailer or mobile home is presently registered for the year 1961 as a trailer pursuant to the provisions of Section 321.123, is the owner thereof required to obtain a house trailer and mobile home registration after July 4 pursuant to the provisions of House File 402? If such a registration is required, is the owner entitled to a refund of the unused portion of the 1961 registration fee under any of the provisions of Section 321.126?"

In our opinion dated June 30, 1961, a copy of which is enclosed, we said at page 5:

"The subsection added to section 321.123 by House File 402 assesses the fee regardless of whether or not the house trailers and mobile homes are used on the highways. No exception is included in the statute for other registrations. It appears, therefore, that the Legislature did not contemplate that any refunds would be given and, as indicated *supra,* section 321.126 applies only to motor vehicles. Consequently, the answers to the two questions asked under question number four are 'yes' and 'no', respectively."

In the same opinion, Commissioner Pesch inquired whether the $5.00 fee was proratable under §§321.105 and 321.106. Said sections refer to the registration or reregistration of a motor vehicle or trailer and allow a registration fee for a fractional part of a year. In answer to this question, we said:

"Neither section refers to house trailers and mobile homes. Nor did the Legislature add house trailers and mobile homes to sections 321.105 and 321.106 when House File 402 was considered and passed. Thus, in answer to question one, the full fee of $5.00 applies for the balance of 1961 and said fee is not proratable."

Section 321.123(3) provides for a registration of house trailers and mobile homes upon payment of a $5.00 fee in lieu of a registration fee for trailers based on weight. But this new registration fee does not constitute a mere change in the amount of the registration fee for house trailers and mobile homes. Rather, it is a registration fee based on an entirely different concept from the prior fee.

Prior to the amendment by the 59th G.A., the registration fee paid for house trailers and mobile homes was for operation upon the public highways of this State. See §321.105, 1958 Code. The amendment to §321.123 provides for a registration fee for house trailers and mobile homes, regardless of whether or not they are used on the highways. Further, the basis for determining the fee was charged from one based on weight to one providing a fixed amount of $5.00 regardless of weight.

We think that these differences signal legislative intent that §321.123(3) is a differently-conceived registration fee for house trailers and mobile homes than its predecessor fee.

For these reasons and those contained in our said opinion to Commissioner Pesch, it is our opinion that §321.123(3), 1962 Code of Iowa, became operative on July 4, 1961 when the statute was effective.

17.10

MOTOR VEHICLES: "Knock-down" camp trailers, §§321.1(11), 321.430(3)(4); equipment requirements on "pick-up" trucks, §§321.1(4)(5), 321.447; display of renewal registration and plates, §321.39—1. A "knock-down" camp trailer weighing less than 3,000 pounds, which does not carry people nor provide place for human habitation while being transported, need not have brakes. 2. A "pick-up" truck is a motor truck and must carry flares, flags, or reflectors under certain conditions. 3. Renewed registration and plates for motor vehicles need not be displayed prior to January 1 of year of issue.

October 25, 1962

Mr. Carl H. Pesch
Commissioner of Public Safety
LOCAL

Dear Mr. Pesch:

In yours of recent date, you requested an opinion of this office on the following questions:

"1. There have been many manufacturers who are selling and have been selling a 'knock-down' camp trailer which, as I understand, folds up into a compact unit during travel on the highway and then is set up at the camp site so that this camp trailer may be inhabited by human beings. The question I wish to pose is whether or not this type of trailer is a trailer coach so as to require brakes thereon pursuant to the provisions of Section 321.430, Code of Iowa 1958?

"2. Is a 'pick-up' a motor truck under Iowa law so that reflectors, flags, flares are required equipment thereon?

"3. When a new registration is issued and plate purchased, must these plates be immediately displayed on the motor vehicle for which they are issued?"

In answer to question 1, the following sections of the 1962 Code of Iowa provide in pertinent part:

"321.430 Brake requirements.

"3. * * * every trailer coach intended for use for human habitation, shall be equipped with brakes adequate to control the movement of and to stop and hold such vehicle, * * *

"4(b) Any trailer or semitrailer of less than three thousand pounds gross weight need not be equipped with brakes."

"321.1 Definition of words and phrases. The following words and phrases when used in this chapter shall, for the purpose of this chapter, have the meanings respectively ascribed to them.

"11. 'Trailer coach' means either a trailer or semitrailer designed for carrying persons."

Sections 321.430(3) and 321.430(4) were adopted in 1937 and did not define "trailer coach". A definition of that term was added by the 49th G.A. which shows its intent to take this type of vehicle out of the general definitions of "trailer".

In an opinion dated February 20, 1957, from Dvorak to Tucker, a 1940 opinion was referenced as follows:

> " 'As we read that statute, it appears that the legislature had in mind that all trailers or semitrailers not for human habitation and of 3000 pounds gross weight or more, must be equipped with brakes and every trailer coach without weight limitation, if it is intended for use for human habitation must be equipped with brakes.
>
> " 'It is the thought of the writer that the weight limitation does not apply to house trailers and that all trailers of this nature must be equipped with brakes.' "

Thus, the trailer in question to be lawful, i.e. without brakes, must be under 3,000 pounds and not be classified as a trailer coach.

Your attention is directed to the words "carrying" in §321.1(11) and "human habitation" in §321.430(3).

Thus, if the trailer in question does not carry people on the highway nor provide a place for human habitation in the sense of cooking, eating, or sleeping, commonly known as a house trailer, and further is less than 3,000 pounds in gross weight, it need not be equipped with brakes as described in §321.430, 1962 Code of Iowa.

In answer to question 2 as to whether a "pick-up" truck is required to carry certain safety equipment described in §321.447 which requires such equipment in "any motor truck" or "truck tractor", your attention is directed to §321.1(4) which defines a motor truck to be "* * * every motor vehicle designed primarily for carrying livestock, merchandise, freight of any kind, or over seven persons as passengers." Section 321.1(5) defines a pick-up to be "* * * any motor vehicle designed to carry merchandise or freight of any kind, not to exceed two thousand pounds."

Thus, "motor truck" is a generic term which includes within its definition the term "pick-up", and consequently a pick-up truck must carry reflectors, flags, flares and other equipment specified in §321.447 if operated outside a business or residential district at any time from a half hour after sunset to a half hour before sunrise.

Assuming that, in question 3, you refer to *renewal* registrations where a person possessing, for example, a valid 1961 registration and plates purchases his 1962 plate in December of 1961, the question is whether he is required to put the new plates on the registered vehicle prior to December 31, 1961.

Section 321.39 provides that registration expires on December 31 each year. The reason plates are sold commencing December 1 is to equalize to some degree the rush for new plates.

Thus, a renewal registration need not be displayed prior to January 1. However, the so-called grace period allowed during January and February is only for the benefit of those who have not as yet purchased plates and does not allow one in possession of new plates to refrain from placing them on the licensed vehicle.

In summary, a "knock-down" camp trailer which weighs less than 3,000 pounds, does not carry people nor provide a place for human habitation while being transported over the highway, need not have brakes pursuant to §321.-430(3).

A pick-up truck is a motor truck within the meaning of §321.447.

Renewed registration and plates for a motor vehicle need not be displayed prior to January 1 of the year for which they are issued.

17.11

MOTOR VEHICLES: Lighting equipment—§§321.384 to 321.429, 1962 Code. The legislature, in enacting §§321.384 to 321.429, inclusive, pertaining to lighting equipment on motor vehicles, intended that these statutes be comprehensive, and any such equipment not specifically authorized therein may not be used on motor vehicles in Iowa.

September 17, 1962

Mr. Carl H. Pesch
Commissioner of Public Safety
LOCAL

Dear Mr. Pesch:

This is in response to your opinion request in which you state:

"The Department of Public Safety, specifically the Commissioner thereof, is authorized by Section 321.4, 1962 Code of Iowa, to adopt and enforce such departmental rules and regulations governing procedure as made necessary to carry out the provisions of Chapter 321; and also to carry out any other laws the enforcement of which is vested in the Department of Public Safety. Further, Section 321.5 provides that all local officers charged with the administration and enforcement of this chapter shall be governed in their official acts by the rules promulgated by the department.

"At the present time, this department is promulgating departmental rules and regulations with reference to the use of items of emergency equipment, more specifically flashing lights, sirens, etc. Under the changes made in Chapter 17A by the 59th General Assembly, these, of course, do not require approval as to legality and form by the Justice Department. However, there is considerable concern with reference to the use of a certain lighting equipment which is neither authorized nor prohibited by Chapter 321. Some years ago this department authorized the use of an amber, or yellow, top light on what is commonly referred to as a 'news cruiser vehicle' and, of course top lights are used by the various taxicab companies throughout the state.

"As I have indicated, the motor vehicle laws of this state contain no provisions authorizing the use of this type of light, nor does it prohibit such use. The provisions pertaining to lighting equipment are contained in Sections 321.384 through and including Section 321.429, Code of Iowa, 1962. Additionally, Section 321.451 authorizes the Commissioner to designate a privately owned ambulance, rescue or disaster vehicle as an authorized emergency vehicle, and issue a certificate of designation therefor.

"In reading Chapter 321 and its provisions therein pertaining to the use of steady and flashing lights, amber, red, blue, etc., both in the mandatory and discretional sense, one could conclude that the legislature has covered the entire field of lighting equipment. They have specifically designated those vehicles that shall, or may, be equipped with this type of equipment. If this is so, then one could further conclude that since the legislature has included those vehicles which may be equipped with certain items of emergency equipment, they have seen fit to exclude all others. In other words, the designation appearing in Chapter 321 would operate as an absolute exclusion of all others not so designated.

"I, therefore, request an opinion as to whether any lighting equipment may be used which is not specifically authorized by statute; or put another way, may lighting equipment be used which is not embraced or comprehended by those statutes pertaining thereto?"

The legislature in enacting §§321.384 to 321.429, inclusive, pertaining to lighting equipment on motor vehicles, intended that these statutes should be comprehensive in scope and any such equipment not expressly authorized therein should not be available for use on motor vehicles. That such was its intent is clearly evidenced by the fact that it chose not only to state specifically what lighting equipment should be *required* but also that which may be used on a given motor vehicle. Examples of the latter are found in §§321.402, 321.406, 321.407 and 321.408. The express mention of lighting equipment that *may* be used necessarily implies the exclusion of any equipment not so authorized. *Archer v. Board of Ed. of Fremont County,* 251 Iowa 1077, 104 N. W. 2d 621 (1960); *Dotson v. Ames,* 251 Iowa 467, 101 N. W. 2d 711 (1960); *Pierce v. Bekins Van & Storage Co.,* 185 Iowa 1346, 172 N. W. 191 (1919). Thus, the failure of the legislature to mention the devices described in the opinion request as permissible lighting equipment indicates that such are not available for use on motor vehicles in Iowa.

17.12

MOTOR VEHICLES: Minors' school licenses—§321.194, 1962 Code. (1) The phrase "duly scheduled courses of instruction" as used in §321.194 means those courses prescribed by the board of directors of each particular school as authorized by §§280.1 and 280.17 as well as those expressly required by statute for all schools. (2) The Department of Public Safety has broad discretion in determining the necessity for issuance of a minor's school license and may adopt any policy consistent with the public safety in the exercise thereof.

September 13,1962

Mr. Carl H. Pesch
Commissioner of Public Safety
LOCAL

Dear Mr. Pesch:

This is in response to your opinion request in which you state:

"Section 321.194 provides that the Department of Public Safety may issue a restricted license to persons to operate a motor vehicle during the hours of 7 a.m. to 6 p.m. over the most direct and accessible route between the licensee's residence and his school of enrollment for the purpose of attending dnly scheduled courses of instruction at such school.

"I repectfully request your opinion as to what is meant by the words 'duly scheduled courses of instruction'. Our concern is for those students who participate in band, or some athletic function or endeavor and to whether such activity would constitute attendance at a duly scheduled course of instruction at such school.

"The statute further states that 'the fact that the applicant resides at a distance less than one mile from his school shall be prima facie evidence of the non-existence of any necessity for the issuance of such a license'.

"I have been advised by our Chief Examiner that in his belief, the best interest of traffic safety would be served by the adoption of a policy whereby no restricted license for school purposes should be issued to an applicant living within the corporate limit of a city or town, and further that none be issued to students living in the rural area unless school provided transportation is not available. Would such policy be consistent with Section 321.194?"

Section 321.194, Iowa Code, 1962, in pertinent part provides:

"Whenever the necessity therefor is shown, a restricted license may be

issued to any person between the ages of fourteen and sixteen years which license shall entitle the holder thereof, while having such license in his immediate possession, to operate a motor vehicle during the hours of 7 a.m. to 6 p.m. over the most direct and accessible route between the licensee's residence and his school of enrollment for the purpose of attending duly scheduled courses of instruction at such school ... For the purpose of establishing a need for the license provided for in this section, each application shall be accompanied by an affidavit from the school board or superintendent of the applicant's school which affidavit shall be upon a form provided by the department and shall state the facts deemed to justify the issuance of a license to the applicant. Neither such affidavit nor the inability to obtain the same shall be binding on the department but may be considered by the department in its determining of whether or not to grant the application. The fact that the applicant resides at a distance less than one mile from his school shall be prima facie evidence of the nonexistence of any necessity for the issuance of such license."

Section 280.1, Iowa Code, 1962, provides:

"The board shall prescribe courses of study for the schools of the corporation."

Section 280.17, Iowa Code, 1962, in pertinent part provides:

"The board may establish graded and high schools and determine what branches shall be taught therein, but the course of study shall be subject to the approval of the state board of public instruction."

Construing these statutes together, it becomes apparent that "duly scheduled courses of instruction" as that phrase is used in §321.194 means such courses as are prescribed by the board of directors of each school as well as such courses as are specifically required by statute. In determining what is a "duly scheduled course of instruction", it is necessary to take into account what has been prescribed by the board of directors *of each particular school* as well as what is expressly required by statute. E.g., §§280.3, 280.6, 280.7, 280.8, 280.12, 280.13, 280.15.

The Department of Public Safety has wide discretion in determining the necessity for issuance of the minors' school licenses authorized by §321.194, the only legislative declaration being that if the applicant resides within one mile of the school he is to attend, this shall be "*prima facie* evidence" of the nonexistence of any necessity. Even in this situation, the Department may issue such a license if the *prima facie* case is rebutted.

It has been held that statutes such as §321.194 are enacted for the safety of the public. *McCann v. Iowa Mut. Ins. Co.,* 231 Iowa 509, 1 N. W. 2d 682 (1942). Thus, the central criterion for the exercise of discretion by the Department of Public Safety in issuing these minors' school licenses must necessarily be to protect the public interest. In doing so, the Department may adopt any reasonable policy which leads toward that goal.

17.13

MOTOR VEHICLES: Notice of conviction in another state—§321.205, 1962 Code. The "notice" received under said section need not comply with the requirements of either Title 28, U.S.C.A., §§1738 and 1739, or §622.53, 1962 Code.

September 6, 1962

Mr. Carl H. Pesch
Commissioner
Department of Public Safety
LOCAL

Dear Mr. Pesch:

This will acknowledge receipt of your request for a review of our opinion issued to you on April 7, 1961. In your letter is stated:

"... your office issued an opinion to me in answer to a request which had attached thereto a copy of 'order of license revocation' received from the State of Oklahoma and which opinion holds that such copy was not sufficient notice of conviction to authorize suspension under Section 321.205, Code of Iowa 1958. Also, that the attached 'order of license revocation' does not comply with Title 28, U. S. Code, Section 1739.

"I have had forwarded to me some materials from the office of the Attorney General, Harrisburg, Pennsylvania, the same having been reviewed by this department. * * *

"... this material submitted to this department indicates that the two New York cases relied upon as partial basis for the opinion issued by your office were overruled by a later decision. We have found that the case of Sullivan v. Kelly has been in fact reversed in the Court of Appeals in New York as reported in 166 N.E. 2d at page 493. This New York Court of Appeals case also went on to distinguish the other New York case relied upon in your opinion.

"* * *

"Since this opinion has been issued, this department has experienced considerable difficulty in receiving out of state convictions in the required form and our requests for proper authentication have either been denied or ignored. * * *

"This brings me to the primary reason for addressing this letter to you at this time. Is it necessary that a certified copy of a conviction which is sent to this state by a sister state, such conviction involving an Iowa resident, comply with the provisions of 28 U. S. Code, Section 1739 relating to non judicial public records; or is this an optional compliance provision dependant upon whether or not a state, or states, shall exercise these requirements?"

In our previous opinion on this question, two of the authorities relied upon were *Moore v. MacDuff,* 309 N.Y. 35, 127 N.E. 2d 741, and *Sullivan v. Kelly,* 16 Misc. 2d 699, 184 N.Y.S. 2d 310. The decision of the Supreme Court in the latter case was reversed by the Court of Appeals of New York, which also distinguished *Moore v. MacDuff, supra; Sullivan v. Kelly,* 7 N.Y. 2d 462, 166 N.E. 2d 493. The two Texas cases in our former opinion are not decisions on the question you ask, but were cited for comparison purposes. For these reasons, a reconsideration of the question is appropriate.

Title 28, §1738, U.S.C.A., is a statute relating to full faith and credit of state and territorial statutes and judicial proceedings. Title 28, §1739, U.S.C.A., is a statute relating to full faith and credit to be given to state and territorial nonjudicial records. Both of these statutes relate to your question, since a notice from a Department of Public Safety in another state would be a nonjudicial record, while a notice from an out-of-state court would be a judicial record. It should be also noted that Iowa has a statute pertaining to proving a judicial record of another state. This is §622.53, 1962 Code, which refers to §622.52. These statutes provide:

"622.52 Judicial record—state or federal courts. A judicial record of this state or any court of the United States may be proved by the production of the original, or a copy thereof certified by the clerk or person having the legal custody thereof, authenticated by his seal of office if he have one."

"622.53 Of another state. That of another state may be proved by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of a judge, chief justice, or presiding magistrate that the attestation is in due form of law."

The word "That" at the beginning of §622.53 refers to the phrase "A judicial record" in §622.52.

The Pennsylvania Superior Court has considered the applicability of the cited U. S. Code statutes to matters of this kind. In *Commonwealth v. Halteman,* 192 Pa. Super. 379, 162 A. 2d 251 (1960), an appeal was taken from a suspension of a Pennsylvania resident's license to operate a motor vehicle. The suspension was based on an "improper pass on curve or crest of hill" that occurred in Indiana. Appellant's license was suspended by virtue of authority given the Secretary of Revenue by §618(e) of the Vehicle Code, 75 Pa. Stat. Ann., §618, which provides:

"The secretary is hereby authorized after a hearing before the secretary or his representative, or upon failure of the said person to appear at such hearing, to suspend the operator's license or learner's permit of any person licensed in this Commonwealth, upon receiving notice of the conviction of such person in another state of an offense therein which, if committed in this Commonwealth, would be grounds for the suspension or revocation of the license of an operator."

This statute is very similar to the Iowa statute herein concerned, §321.205, 1962 Code, which provides:

"Conviction in another state. The department is authorized to suspend or revoke the license of any resident of this state upon receiving notice of the conviction of such person in another state of an offense therein which, if committed in this state, would be grounds for the suspension or revocation of the license of an operator or chauffeur."

In the *Halteman* case, appellant contended that the suspension was invalid because the only manner in which his conviction in Indiana can be proven was by following the provisions of the federal statute, 28 U.S.C.A., §1738. Rejecting this contention, the Pennsylvania Superior Court said:

"We doubt whether this Act has any application to motor violations of the type here involved. Even if it did, the method provided in Acts of Congress are not the sole method of proving the convictions. * * *

"It is not necessary to prove by eyewitness that the appellant is guilty of the offense of illegal passing in Indiana. It is not necessary to bring the arresting Indiana policeman before the Secretary of Revenue and the court below to testify. Such a requirement would completely nullify the authority given the secretary by the legislature to suspend operators' licenses for convictions of motor law violations in other states. Considering the number of such violations and the number of necessary trips for witnesses in each case (at least two in all appeals and because of continuances often more-probably five in this case), it would be impossible to obtain evidence in practically all cases. The legislature's intention would thus be completely thwarted.

"The legislature's intent to give the executive the right to suspend operator's licenses of those convicted of motor violations outside of the Commonwealth and the executive's desire to carry out its duty to provide reasonably safe highways should not be thwarted by judicial requirements of proofs which are impossible to obtain."

In considering what the Pennsylvania statute did require as "notice of the

conviction" of the licensee in another state, the court stated that the notice must be an official notice.

The meaning of "official" notice was made clearer in *Witsch Motor Vehicle Operator's License,* 194 Pa. Super. 384, 168 A. 2d 772 (1961). On page 775 of the area Reporter the Superior Court stated:

> "What we meant by 'official' was not that the notice had to be in any particular form, but that the secretary could not act upon a notice received from one not in an official position. In other words, the secretary could not act upon a notice given by a private citizen acting as a mere informant."

In this case the Secretary of Revenue received a notice of conviction of speeding in Delaware. The notice consisted of two printed forms, one an arrest report by a policeman and the other a conviction report by a magistrate. The former document was designated by its printed form as a Traffic Arrest Report. The other report was designed to be made to the Motor Vehicle Commission, Dover, Delaware, by the court handling the charge. Of these documents, the court said, at page 775 of 168 A. 2d:

> "The two documents constitute sufficient 'notice of the conviction of (the appellee) in another state of an offense therein which, if committed in this Commonwealth, would be grounds for suspension.' It is an official notice in that it is the report of the magistrate who imposed the fine and the policeman who made the arrest."

> "The legislature might have said that the secretary could suspend an operator's license after his 'conviction' of certain offenses in another state, or, after a 'certification' of his conviction or after 'proof' of his conviction, all of which would have required more formal proof of the conviction. But it did none of these. It required only '*notice* of conviction.' "

In *Commonwealth v. Gross,* 193 Pa. Super. 46, 163 A. 2d 682 (1960), the applicability of 28 U.S.C.A., §1739, to a license suspension case was argued. See Brief of Appellee, Commonwealth of Pa., Department of Revenue. Though not specifically mentioning §1739, the court said, at 683 of 163 A. 2d:

> "We heard argument on this appeal the day before our opinion was filed in Commonwealth v. Halteman, Pa. Super., 162 A. 2d 251, 255, which decides all of the questions presented here except one."

In *Commonwealth v. Halteman,* supra, §1738 was held not applicable.

The one question presented in the *Gross* case that the court felt had not previously been decided concerned the signature affixed by the state official. One document was headed "Magistrate's Report: Disposition of Violation of Title 39: R.S." and another was headed "Notice of Revocation." The first had no signature and no place on the form for a signature. The "Notice of Revocation" had the typewritten signature of the Director, Division of Motor Vehicles. Both documents were sent to the Director of the Bureau of Highway Safety, Harrisburg, Pa., with a cover letter stating that enclosed was a copy of Notice of Revocation and copy of a magistrate's conviction report card on the licensee. The cover letter was signed by the Director, Department of Law and Public Safety, Division of Motor Vehicles, State of New Jersey. The court held that these papers taken together constituted sufficient notice. It was not necessary that each of the forms be signed, since the letter which referred to them contained the signature of the New Jersey official.

The Pennsylvania Superior Court has further held that the out-of-state conviction need not be established in the manner prescribed by 28 Pa. Stat. Ann., §92. *Commonwealth v. Moyer,* 193 Pa. Super. 599, 165 A. 2d 100 (1960).

That statute provided for evidence of proceedings had before a justice of the peace or alderman of any other state. A comparison of that statute with §622.-53, 1962 Code of Iowa, shows similar requirements for proving an out-of-state judgment. Moreover, the requirements of each are substantially the same as provided by the U. S. Code in §§1738 and 1739.

The New York courts do not appear to require that a notice to the Commissioner of Motor Vehicles under §510.2(b) of the Vehicle and Traffic Law of New York comply with the requirements of the federal acts. In *Howard v. Fletcher,* 278 App. Div. 799, 104 N.Y.S. 2d 176 (1951), a suspension was affirmed per curiam that was based on a certificate from the Secretary of the State of Maine. A dissent pointed out that the certificate did not meet the admissibility requirements for evidence under either the federal act, 28 U.S.C.A., §1738, or the New York Civil Practice Act, §394. The inference is that under the majority opinion, compliance was not required.

Other New York cases support this conclusion. In *LaVictoire v. Kelly,* 5 A.D. 2d 548, 173 N.Y.S. 2d 543 (1958), the commissioner revoked a license upon receipt of a certified copy of the licensee's conviction in Ontario, and a certified copy of the information sworn to by the Chief Constable of the Township of Cornwall in the Province Ontario. Some uncertainty as to the precise offense remained in this if only the Certificate of Conviction was considered. But since this uncertainty was dissipated by the copy of the information, the notice was held sufficient. *Moore v. MacDuff, supra,* was distinguished as decided on the ground that the charge was not clearly specified.

A notice of conviction forwarded by a Massachusetts Clerk of Court, and a copy of the notice of suspension by Massachusetts has been held sufficient notice. *Coleman v. Kelly,* 12 Misc. 2d 116, 175 N.Y.S. 2d 184 (1957).

In *Bouchard v. Kelly,* 7 A.D. 2d 774, 180 N.Y.S. 2d 774, (1958) a certificate of conviction alone was held sufficient. The court observed that there was no need to include the specific information or indictment when the certificate of conviction adequately provides the facts. Cf: *Matter of Johnson v. Hults,* 23 Misc. 2d 1076, 202 N.Y.S. 2d 884 (1960). See also *Sullivan v. Kelly,* 184 N.Y.S. 2d 310 (Supreme Court, 1959), 194 N.Y.S. 2d 460 (App. Div., 1959), 199 N.Y.S. 2d 483, 7 N.Y. 2d 462, 166 N.E. 2d 493 (Court of Appeals, 1960).

In Iowa it has been held that a judicial record of proceedings in another state need not correspond with the federal statutory requirements (now 28 U.S.C.A., §1738), to be admissible in an Iowa court. *Sullivan v. Kenney,* 148 Iowa 361, 126 N.W. 349 (1910). The court stated that while a state cannot add additional requirements to the federal requirements for full faith and credit, it may provide for less. Id. at 372. And the Iowa court has held that the federal act relating to judicial records of the courts of other states (28 U.S.C.A., §1738) does not restrict the admissibility of records of the register of deeds in Jackson County, Minnesota, which were nonjudicial. *Bristow v. Lange,* 221 Iowa 904, 266 N.W. 808 (1936).

The Iowa legislature provided authority in the Department of Public Safety, under §321.205, to suspend or revoke the license of an Iowa resident upon receiving *notice* of a conviction in another state. No other requirement than a notice is made. It would seem that if the legislature had intended that the federal statutory requirements apply it would have said so. Section 1738 of Title 28, U.S.C.A., was first enacted in 1790, and §1739 in 1804. See U.S. Code, Compact Ed. 1928, page 954. Section 321.205, Code of Iowa, was passed in 1931. Had the legislature intended the requirements of §622.53 to apply to §321.205 it could also have so provided, since the former statute existed at the time the latter was passed. Thus, it is our opinion, based upon the above analysis and authorities, that the "notice" received under §321.205, 1962 Code, need not comply with the requirements of either 28 U.S.C.A., §§1738 and 1739, or §622.53, 1962 Code of Iowa. We think that this is the

better rule and the one intended by the legislature when §321.205 was enacted. Our opinion dated April 7, 1961, and addressed to Carl H. Pesch, Commissioner, Department of Public Safety, is hereby withdrawn.

17.14

MOTOR VEHICLES: Posting of signs—§321.304(2), 1958 Code. Appropriate sign must be posted in order to constitute violation of §321.304(2) when driving on left side of roadway when approaching and within 100 feet of narrow bridge, viaduct, or tunnel.

March 31, 1961

Mr. William N. Dunn
Hardin County Attorney
Eldora, Iowa

Dear Mr. Dunn:

This will acknowledge receipt of your recent opinion request, in which you state:

"I would appreciate your informal opinion on the construction of Section 321.204 of the 1958 Code of Iowa.

"That Section reads in part as follows: 'No vehicle shall, in overtaking and passing another vehicle or at any other time, be driven to the left side of the roadway under the following conditions:

'2. When approaching within one hundred feet of any narrow bridge, viaduct, or tunnel, when so sign-posted, or when approaching within one hundred feet of or traversing any intersection or railroad grade crossing.'

"You will notice that the Section reads 'when so sign-posted.' I would appreciate your opinion as to whether or not this means that a 'no passing sign' or a 'narrow bridge sign' must be placed in order for this Section to be applicable."

The Iowa Supreme Court has held that it is a violation of §321.304(2) to drive on the left side of the roadway in overtaking and passing another vehicle, even if that intersection is not marked or sign-posted. *Florke v. Peterson,* 245 Iowa 1031, 65 N.W. 2d 372. The Court stated in *Brewer v. Johnson,* 247 Iowa 483, 72 N.W. 2d 556, that it is a violation of §321.304 to drive a vehicle on the left side of the highway when approaching and within one hundred feet of a railroad grade crossing. It thus seems clear that it is not necessary that a sign be posted in order to constitute a violation of §321.304(2), if a vehicle is driven on the left side of the highway when approaching and within one hundred feet of an intersection or railroad crossing.

However, a different situation is presented regarding narrow bridges, tunnels, and viaducts. A particularistic analysis of §321.304(2) indicates that the phrase "when so sign-posted" is not meant to apply to intersections or railroad grade crossings. It prohibits passing "within one hundred feet of any narrow bridge, viaduct, or tunnel, *when so sign-posted, or* when approaching within one hundred feet of or traversing any intersection or grade crossing." There is a definite distinction between the two classifications.

Section 321.304, 1958 Code, was enacted in its present form in 1937, Chapter 134, §335, Acts 47th G.A. Chapter 134, which with subsequent additions and amendments now constitutes Chapter 321, 1958 Code of Iowa, with some exceptions followed the provisions of the Uniform Act Regulating Traffic on Highways. *Mowrey v. Schultz,* 230 Iowa 102, 296 N.W. 822. One of the exceptions from the Uniform Act made by Chapter 134 is the addition of the

phrase, "when so sign-posted," in §321.304(2). In examining the statutes of other states which also adopted the Uniform Act, I find that their statutes are identical to §321.304(2) except that the phrase "when so sign-posted" is not included. In other words, their statutes prohibit driving on the left side of the roadway in overtaking and passing another vehicle, "when approaching within one hundred feet of any narrow bridge, viaduct, or tunnel, or when approaching within one hundred feet of or traversing any intersection or railroad grade crossing." See Idaho Code, §49-713(a)(2); Smith-Hurd Illinois Ann. Stat. Title 95½, §155(b) (2); Minnesota Stat. Ann., §169.18(5) (b) (2); Michigan Stat. Ann., §9.2339(a)(2); Nebraska Rev. Stat., §39-7110(b)(2); Baldwin's Rev. Ohio Code, §4511.30(B).

It is thus obvious that the 47th Iowa G.A., in enacting Chapter 134, §335, did not enact the Uniform Act verbatim, but inserted specially the phrase "when so sign-posted." It is an accepted rule of statutory construction that it is presumed that each provision of a statute is enacted for a reason and that it will not be presumed that the legislature enacted a provision that serves no purpose. *State ex rel. Board of Pharmacy Examiners of State v. McEwen,* 250 Iowa 721, 96 N.W. 2d 189; *Holzhauser v. Iowa State Tax Commission,* 245 Iowa 525, 62 N.W. 2d 229.

In *Incorporated Town of Decatur v. Gould,* 185 Iowa, 203,170 N.W. 449, the Iowa Supreme Court held that a traffic regulation restricting speed was invalid where signs giving notice of such regulation were not properly posted, as required by statute. Other jurisdictions have held that where a statute provides that a sign giving notice must be erected before a particular traffic law is effective, the statute is not applicable when no sign is posted. *State v. Noyes,* 107 Vt. 441, 180 A.893.

Therefore, based upon the above authority, it is my opinion that §321.304(2) requires that an appropriate sign be posted in order to constitute a violation of §321.304(2), 1958 Code of Iowa, when a vehicle is driven on the left side of the highway when approaching within one hundred feet of any narrow bridge, viaduct, or tunnel.

17.15

MOTOR VEHICLES: Recovery of old license plates—§§321.145, 444.21, 1962 Code. Inasmuch as registration plates remain the property of the State, it is within the discretion of the Department of Public Safety whether or not to salvage said plates. If salvaged, proceeds go to the general fund.

September 17, 1962

Mr. Carl H. Pesch
Commissioner
Department of Public Safety
LOCAL

Dear Mr. Pesch:

This will acknowledge receipt of your recent letter wherein you ask for an opinion on the following:

"Section 321.171 of the Iowa Code provides as follows: 'All number plates issued shall be and remain the property of the state'.

"The fact that all number plates issued are and remain the property of the State of Iowa, does this place any responsibility on this department to recover the old registration plates once a new registration and registration plates have been issued?

"My concern in this matter is as to possible salvage value of the metal

used in the production of license plates. If this section of the law places responsibility on this department to recover old license plates, there would be a possibility of those plates having some salvage value and monies received from the salvage of these old registration plates, I presume, would be deposited in the state general fund."

Since the statute involved provides that registration plates shall be and remain the property of the State of Iowa, and since the legislature has not placed any mandatory direction for your department to recover the expired plates, it would appear to be within the discretion for your Department to recover them. The method or manner of recovery would necessarily be an administrative decision.

Whether or not the salvage value of the recovered plates would exceed the cost of recovery would have to be determined in making your decision. Any excess salvage proceeds would be "unearmarked funds" and would, therefore, be placed in the general fund. See §444.21, 1962 Code of Iowa.

It is the opinion of this office that the provisions of §321.145 pertaining to the disposition of funds are not applicable to this situation.

17.16

MOTOR VEHICLES: Registration of antiquated vehicles—§321.115, 1958 Code. Motor vehicles used for stock car racing cannot be registered under the provisions of §321.115, as amended.

February 23, 1962

Mr. T. K. Ford
Des Moines County Attorney
220 Tama Building
Burlington, Iowa

Dear Mr. Ford:

This is to acknowledge receipt of your request for an opinion by our office in which you state:

"May we please have your opinion on whether Section 321.115, 1958 Code of Iowa contemplates the issuance of so called antique plates to vehicles used for stock car races?"

Section 321.115, 1958 Code of Iowa, as amended by the 59th G.A., reads as follows:

"321.115 Antiquated vehicles. Any motor vehicle twenty-five years old, or older, whose owner desires to use said motor vehicle exclusively for exhibition or educational purposes at state or county fairs, or other places where said motor vehicle may be exhibited for entertainment or educational purposes, shall be given a registration permitting the driving of said motor vehicle upon the public roads to and from said fair or other place of entertainment or education for a registration fee of one dollar per annum."

The amendment by the 59th G.A. changed the said section to apply to any motor vehicle twenty-five years old, or older, from its previous application to any vehicle fifteen years old, or older. If the owner of such a motor vehicle desires to use it exclusively for exhibition or educational purposes, registration of the vehicle may be obtained under this section for one dollar per annum.

The word "exhibition" has been defined by *Webster's New International*

Dictionary as follows:

"... 2. Act or instance of exhibiting for inspection, or of holding forth to view; manifestation; display. 3. That which is exhibited, held forth, or displayed. Any public show; a display, as of works of art, or of feats of skill, or of oratorical or dramatic ability. Specif. (with reference to laws requiring a license for public exhibition), a display or show where the display itself is the chief object and from which the exhibitor derives or expects to derive a profit; as, an industrial *exhibition*. ..." Webster's New International Dictionary, Second Edition, Unabridged.

The meaning of the phrase "educational purposes" was considered in *Ancient and Accepted Scottish Rite of Freemasonry v. Board of County Com'rs.*, 122 Nebr. 586, 241 N. W. 93 (1932). There the court said, at page 95 of the Northwestern Reporter:

"... Furthermore, lexicographers and the courts agree in defining 'educational' as pertaining to 'education.' The latter word taken in its full sense is a broad, comprehensive term and may be particularly directed to either mental, moral or physical faculties, but in its broadest and best sense it embraces them all, and includes not merely the instructions received at school, college or university, but the whole course of training —moral, intellectual, and physical.

"An educational purpose is synonymous with an educational undertaking, and whatever educates is within the meaning of an 'educational undertaking.' "

Despite the breadth of meaning of the above-quoted words, it does not seem that the legislature intended §321.115 to include vehicles used for stock car races. Patently, an important purpose, if not the main purpose, of an entrant in a stock car race is to win the race and collect the reward. This purpose is apart from any use of the motor vehicle exclusively for exhibition or educational purposes as the statute requires. *American Kennel Club, Inc., v. Hoey*, 148 F. 2d 920 (2nd Cir. 1945). It is, therefore, our opinion that a motor vehicle used by its owner for stock car racing cannot be registered under the provisions of §321.115, 1958 Code of Iowa, as amended.

17.17

MOTOR VEHICLES: Registration plates—§§321.34, 321.166, 321.167, 1962 Code. The legislature in enacting §321.34 intended that "corner plates" as used therein should be made of metal and a paper sticker may not be substituted therefor.

September 21, 1962

Mr. Carl H. Pesch
Commissioner of Public Safety
LOCAL

Dear Mr. Pesch:

This is in response to your opinion request dated August 3, 1962, in which you state:

"Section 321.166, Code of Iowa 1962, sets forth the specifications for number plates to be used as indicia of registration of the various motor vehicles licensed in the State of Iowa. Specified therein is the requirement that these number plates shall be of a distinctively different color each year and further that there shall be at all times a marked contrast between the colors of the number plates and of the numerals or letters

thereon, said colors to be designated by the Department of Public Safety of the State of Iowa.

"Section 321.34, Code of Iowa 1962, provides therein that in lieu of issuing new registration plates each year for a vehicle renewing registration, the department may reassign the registration plates previously issued to such vehicle and may adopt and prescribe a distinctive type of emblem indicating payment of registration fee, which emblem shall be displayed in the upper right-hand corner of the windshield of the vehicle for which it is issued, or it may prescribe corner plates to be attached to said registration plates bearing the numerals indicating the years for which the original plates are validated.

"Taking these statutes together, I respectfully request your opinion on the following questions:

1. May the Department of Public Safety in lieu of issuing new registration plates adopt and prescribe either a distinctive type of emblem as provided in 321.34, or corner plates as therein authorized notwithstanding the provisions of Section 321.166 which sets forth those specifications discussed above?

2. Do the words 'corner plates' include a validation sticker, a sample of which is attached to this letter?"

In relation to this problem, §321.166, Iowa Code, 1962, in pertinent part provides:

"Such number plates shall be of metal, and of a size not to exceed six inches in width by fifteen inches in length, on which there shall be the word 'Iowa', and numerals indicating the year for which it is issued. They shall be of a distinctively different color each year. There shall be at all times a marked contrast between the colors of the number plates and of the numerals or letters thereon, said color to be designated by the department."

Section 321.167, in pertinent part, provides:

"In lieu of plates, the department may furnish the county treasurers appropriate distinguishing emblems as provided in section 321.34."

Section 321.34, in pertinent part, provides:

"In lieu of issuing new registration plates each year for a vehicle renewing registration, the department may reassign the registration plates previously issued to such vehicle and may *adopt* and *prescribe* a distinctive type of emblem indicating payment of registration fee, which emblem shall be displayed in the upper right-hand corner of the windshield of the vehicle for which it is issued or it may prescribe corner plates to be attached to said registration plates bearing the numerals indicating the year for which the original plates are validated." (Emphasis supplied)

Sections 321.167 and 321.34 clearly evidence an intent of the legislature that instead of issuing number plates as described in §321.166 the Department of Public Safety may reassign such plates and issue those *indicia* of registration meeting the requirements of §321.34 in lieu thereof. It is manifest from the language used in §321.166 that the specifications therein required apply only to full-size number plates. The phrase "such number plates" in §321.166 specifically makes the requirements relating to material, size, color and lettering applicable only to such full-size number plates issued in lieu thereof by §321.34. The plain meaning of §321.166 prevails. *Horner v. State Bd. of Engineering Examiners,* 110 N. W. 2d 371, 373 (Iowa, 1961); *Clarion Ready Mixed Concrete Co. v. Iowa State Tax Comm'n.,* 107 N. W.

2d 553, 557 (1961); *Ashby v. School Township of Liberty,* 250 Iowa 1201, 98 N. W. 2d 848, 857 (1959); *Board of Ed. of Franklin Cty. v. Board of Ed. of Hardin Cty.,* 250 Iowa 672, 95 N. W. 2d 709, 712 (1959). To say that the legislature when enacting §321.34 intended that the specifications applicable to such full-size plates should also be applicable to the devices to be used in lieu thereof would reach an absurd result which may not be attributed to the legislature. *In re Klug's Estate,* 251 Iowa 1128, 104 N. W. 2d 600, 603 (1960); *Farmers Drainage Dist. v. Monona-Harrison Drainage Dist.,* 246 Iowa 285, 67 N.W. 2d 445, 449 (1955).

Thus, the only question to be resolved is what the legislature has authorized to be used in lieu of full-size registration plates by the terminology employed in §321.34.

It is significant in making this determination that the legislature, in §321.34, uses two distinct terms in describing what may be issued in lieu of new registration plates. Those terms are "emblem" and "corner plate". "Emblem", in its most relevant definition, means "a device, symbol, design or figure adopted and used as an identifying mark". *Webster's Third New International Dictionary.* "Plate", in its most relevant definition, means "a smooth, usually nearly flat and relatively thin piece of metal or other material; a perfectly flat sheet of material of uniform thickness throughout; especially a sheet of rolled iron or steel usually a quarter of an inch or more thick". *Ibid.* Although the word "plate" does not *necessarily* connote metal, it may mean such, and the legislature may give it this meaning if it so chooses. The question is necessarily one of legislative intent. *State v. Des Moines,* 221 Iowa 642, 266 N. W. 41, 42 (1936).

In determining the intent of the legislature, it is proper to look at the circumstances surrounding a particular piece of legislation. *Smith v. Sioux City Stock Yards Co.,* 219 Iowa 1142, 260 N. W. 531, 534 (1935); *Cherokee v. Northwestern Bell Telephone Co.,* 199 Iowa 727, 202 N. W. 886, 888 (1925). At the time of enactment of §321.34, §321.166 was already in force, this section specifically requiring that a registration *plate* should be made of metal. It seems logical that the legislature in using the term "plate" in a subsequent statute assumed and intended that the word should carry with it the requirement that it be made of metal. This is even more clearly pointed out by the provisions of §321.34, itself. The legislature therein stated that corner *plates* are "to be attached to said registration *plates* bearing the numerals indicating the year for which the original *plates* are validated." (Emphasis added). Since "registration plate" carries with it the requirement of metal, it would seem that the legislature in using the term "plate" in referring to the device to be attached thereto intended that such "corner plates" should also be made of metal. If the legislature had sought to authorize the use of something other than metal, they could have done so by using a term such as "emblem", as was done in describing the device to be attached to the windshield of the motor vehicle.

From this analysis, it is clear that the legislature intended by the use of the term "corner plates" that such should be made of metal, and a paper sticker may not be substituted therefor.

17.18

MOTOR VEHICLES: School bus speed limit on interstate highways—§321.377, 1958 Code. §321.377 is applicable to motor vehicles in use as a school bus, when operated on an interstate highway.

April 10, 1961

Carl H. Pesch, Commissioner
Department of Public Safety
LOCAL

Dear Mr. Pesch:

This will acknowledge receipt of your recent opinion request, in which you state:

> "Chapter 225, Acts of the 58th General Assembly provides in Section one (1) thereof that notwithstanding any other speed restrictions, the speed limits for all vehicular traffic on fully controlled access divided multi-laned highways included in, and as a part of, the national system of interstate highways shall be seventy-five (75) miles per hour from sunrise to sunset and sixty-five (65) miles per hour from sunset to sunrise.
>
> "Section 321.377 provides that no motor vehicle in use as a school bus shall be operated at a speed in excess of forty-five (45) miles per hour except that when used for purposes of an educational trip or for transporting pupils to and from any extra curricular activity a school bus may be operated at a speed not exceeding fifty (50) miles per hour.
>
> "My question is which statute controls the speed of a school bus while in operation on an interstate highway?"

If it is determined that §321.377, 1958 Code of Iowa, and Chapter 225, Acts 58th G.A., conflict and are completely unreconcilable, Chapter 225 must control. It is an accepted rule of statutory construction that if two statutes are absolutely and unqualifiedly irreconcilable, the later-enacted statute prevails. *Curlew Consolidated School District v. Palo Alto County Board of Education,* 247 Iowa 112, 73 N.W. 2d 20. However, it is also a rule that if by any fair and reasonable construction prior and later statutes which could be construed as conflicting can instead be reconciled, both shall stand. *In re Klug's Estate,* 104 N.W. 2d 600 (Iowa); *Yarn v. City of Des Moines,* 243 Iowa 991, 54 N.W. 2d 439.

In *Daily Record Co. v. Armel,* 243 Iowa 913, 54 N.W. 2d 503, where the Iowa Supreme Court dealt with apparently conflicting statutes regarding filing fees, the Court stated, at page 917 of 243 Iowa:

> " 'Indeed, as a general rule, where legislation dealing with a particular subject consists of a system of related general provisions indicative of a settled policy, new enactments of a fragmentary nature on that subject are to be taken as intended to fit into the existing system and to be carried into effect conformably to it, and they should be construed as to harmonize the general tenor or purport of the system and make the scheme consistent in all its parts and uniform in its operation, unless a different purpose is shown plainly or with irresistible clearness.' "

It is also an accepted rule of statutory construction that where a general statute, if standing alone, includes the same matter and conflicts with a special statute relating to a specific situation, the special act will be considered as an exception to the general statute, whether it was passed before or after the general enactment. *Novak v. Oneide Township School Board, Tama County,* 250 Iowa 668, 95 N.W. 2d. 291; *Iowa Mutual Tornado Insurance Association v. Fischer,* 245 Iowa 951, 65 N.W. 2d 162.

School busses are placed in a special classification and must meet several special requirements under the Iowa Motor Vehicle Law. For example, school bus drivers must have a special license, in addition to a chauffeur's license, in order to drive a school bus. §321.376, 1958 Code of Iowa. School busses must meet special construction standards, §321.373, and are subject to other special traffic regulations in addition to the speed limit. §321.372, 1958 Code of Iowa.

The speed limit imposed by §321.377 is placed upon motor vehicles "... *in use* as a school bus ...". Different speed limits are imposed for different

uses of the bus; i.e., when the bus is used for transporting pupils on an educational trip, the speed limit is fifty miles per hour instead of the normal forty-five. Thus, the speed limit is placed not upon the type of vehicle, but upon the purpose for which the vehicle is used.

Motor vehicles in use as a school bus, when operating on the interstate system, are no less a school bus than when operating on any other highway. They are being used for the purpose which §321.377, 1958 Code of Iowa, covers. Therefore, it is my opinion that §321.377 is applicable to motor vehicles in use as a school bus, when operated on an interstate highway.

17.19

MOTOR VEHICLES: Secondary road speed limits—§321.285, 1958 Code, Ch. 227, 228, 58th G.A. Speed limit on secondary road where no signs are posted is general speed limit: reasonable and proper, to stop within assured clear distance ahead, with maximum 60 miles per hour from sunset to sunrise and 70 miles per hour from sunrise to sunset.

January 5, 1961

Mr. James L. McDonald
Cherokee County Attorney
Cherokee, Iowa

Dear Mr. McDonald:

This will acknowledge receipt of your recent opinion request, in which you state:

"I have a question concerning the speed limit on a secondary road. I will try to make the question as simple as possible and I would appreciate it if your opinion would be as concise as possible. The question is:— under Section 321.285, what is the speed limit on a secondary road which is not posted pursuant to the provisions of sub-section 7 of this Section? Is the speed limit under such circumstances 60 miles per hour at night and 70 miles per hour in the day time, and governed by Sub-sections 5 and 6 of this Section, or is it merely such speeds as may be reasonable and proper under the circumstances as provided in the main body of the Section 7?"

Section 321.285, 1958 Code of Iowa, to which your letter refers, provides:

"*Speed restrictions.* Any person driving a motor vehicle on a highway shall drive the same at a careful and prudent speed not greater than nor less than is reasonable and proper, having due regard to the traffic, surface and width of the highway and of any other conditions then existing, and no person shall drive any vehicle upon a highway at a speed greater than will permit him to bring it to a stop within the assured clear distance ahead, such driver having the right to assume, however, that all persons using said highway will observe the law.

"The following shall be the lawful speed except as hereinbefore or hereinafter modified, and any speed in excess thereof shall be unlawful:

"1. Twenty miles per hour in any business district.

"2. Twenty-five miles per hour in any residence or school district.

"3. Forty miles per hour for any motor vehicle drawing another vehicle.

"4. Forty-five miles per hour in any suburban district. Each school district as defined in subsection 59 of section 321.1 shall be marked by

distinctive signs as provided by the current manual of uniform traffic control devices adopted by the state highway commission and placed on the highway at the limits of such school district.

"5. Sixty miles per hour from sunset to sunrise."

Chapter 228, Acts 58th G.A., amended §321.285. It provides:

"Section three hundred twenty-one point two hundred eighty-five (321.285), Code 1958, is hereby amended by adding thereto the following subsection:

" 'Reasonable and proper, but not greater than sixty (60) miles per hour at any time between sunrise and sunset, and not greater than fifty (50) miles per hour at any time between sunset and sunrise, on secondary roads. Whenever the board of supervisors of any county shall determine upon the basis of an engineering and traffic investigation conducted by the state highway commission when so requested by said board that the speed limit on any secondary road is greater than is reasonable and proper under the conditions found to exist at any intersection or other place or upon any part of a secondary road, said board shall determine and declare a reasonable and proper speed limit thereat. The speed limits provided and as determined in this subsection shall be effective when appropriate signs giving notice thereof are erected by the board of supervisors at such intersection or other place or part of the highway.' "

The amendment made to §321.285 by Chapter 228 is subsection 7 of §321.285 in the pocket supplement to West's Annotated Iowa Code, and I assume is the "subsection 7" to which you refer in your request.

Section 321.285, 1958 Code of Iowa, is the general speed law in Iowa. *Van Wie v. United States,* 77 F. Supp. 22, 38; *Dakovich v. City of Des Moines,* 241 Iowa 703, 707, 42 N.W. 2d 511; *Bonnett v. Oertwig,* 234 Iowa 864, 866, 14 N.W. 2d 739. It was enacted in 1937 by Chapter 134, §316, Acts 47th G.A. See *State v. Coppes,* 247 Iowa 1057, 1060, 78 N.W. 2d 10. As originally enacted, §321.285 did not set a general maximum miles-per-hour speed limit. A maximum miles-per-hour speed limit was established in certain defined areas, such as school and residence districts, but the general limit was "... a careful and prudent speed not greater than nor less than is reasonable and proper, having due regard to the traffic, surface and width of the highway and of other conditions then existing, ...", provided that "... no person shall drive any vehicle upon a highway at a speed greater than will permit him to bring it to a stop within the assured clear distance ahead, ..."

In 1957, a maximum miles-per-hour speed limit of sixty miles an hour from sunset to sunrise was enacted by Chapter 150, §1, Acts 57th G.A. Chapter 227, Acts 58th G.A., amended this to add a maximum limit of seventy miles per hour from sunrise to sunset. Of course, exceeding a maximum miles-per-hour speed limit is a violation. *Mongar v. Barnard,* 248 Iowa 899, 82 N.W. 2d 765; *State v. Gordon,* 144 Conn. 399, 132 A. 2d 568. A speed less than the maximum miles-per-hour limit is also a violation if it is not reasonable and proper, considering all the circumstances, and if the vehicle cannot be brought to a stop within the assured clear distance ahead. *Law v. Hemmingsen,* 249 Iowa 820, 89 N.W. 2d 386; *Christensen v. Sheldon,* 245 Iowa 674, 63 N.W. 2d 892; *Rozmaize v. Northland Greyhound Lines,* 242 Iowa 1135, 49 N.W. 2d 501; *Richards v. Begenstos,* 237 Iowa 398, 21 N.W. 2d 23. Therefore, the general limit on Iowa highways is a reasonable and proper speed, considering all the circumstances, including traffic, surface and width of the highway, no greater than will enable the vehicle to be stopped within the assured clear distance ahead, and in no case greater than the maximum miles-per-hour; i.e., sixty miles per hour from sunset to sunrise and seventy miles per hour from sunrise to sunset.

As a general rule, the motor vehicle laws of Iowa are applicable on secondary roads. See *Beck v. Dubishar,* 240 Iowa 267, 36 N.W. 2d 438. An exception to this general rule is made by Chapter 228, Acts 58th G.A., which places secondary roads in a special class in regard to speed restrictions and imposes a special maximum miles-per-hour limit when appropriate signs giving notice thereof are posted. A letter opinion from this office to A. Richard Tow, Deputy Commissioner of Public Safety, dated August 27, 1959, stated that the special speed limits for secondary roads set out in Chapter 228 are *not* effective when appropriate signs giving notice of the limits are not posted. A copy of said opinion is enclosed.

The dispositive question thus is: What speed limits are effective on secondary roads which have not been posted?

In *State v. Graff,* 228 Iowa 159, 163, 290 N.W. 97, and *Pilgrim v. Brown,* 168 Iowa 177, 184, 150 N.W. 1, the Iowa Supreme Court indicated that on roads where a specific maximum miles-per-hour speed limit is applicable and would be effective if signs giving notice as required by statutes were posted, when such signs are not posted the general speed standard applies.

In *People v. Shapiro,* 7 N.Y. 2d 370, 165 N.E. 2d 564, 197 N.Y.S. 2d 715, in a situation similar to this case, the New York Court of Appeals held that where new legislation provided that speed limits on certain roads outside cities and towns could be changed by the action of a political subdivision, but that the speed limits would not be effective until signs were posted; that until the signs were posted the speed limits on those roads were the general speed limits.

On the basis of the above authority, it is my opinion that the effective speed limit on secondary roads which have not been posted in accordance with the provisions of Chapter 228, Acts 58th G.A., is the general speed limit; that is, reasonable and proper, having due regard to the traffic, surface and width of the highway and other conditions, not greater than will enable the vehicle to be brought to a stop within the assured clear distance ahead, and in no case greater than the maximum miles-per-hour limit of sixty miles per hour from sunset to sunrise and seventy miles per hour from sunrise to sunset.

17.20

MOTOR VEHICLES: Signal when passing—§321.299, 1958 Code. Failure of driver to give audible signal when overtaking on the left of the passed vehicle is a misdemeanor.

June 6, 1961

Mr. J. T. Snyder
Buena Vista County Attorney
Storm Lake, Iowa

Dear Mr. Snyder:

This will acknowledge receipt of your recent opinion request, wherein you state:

> "The question is whether or not it is a misdemeanor to fail to give an audible signal when overtaking and passing another vehicle proceeding in the same direction."

Section 321.299 of the 1958 Code of Iowa sets out requirements when one vehicle is overtaking another. That section states:

> "The following rules shall govern the overtaking and passing of ve-

hicles proceeding in the same direction, subject to those limitations, exceptions, and special rules hereinafter stated:

"The driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left thereof at a safe distance and shall not again drive to the right side of the roadway until safely clear of the overtaken vehicle.

"Except when overtaking and passing on the right is permitted, the driver of an overtaken vehicle shall give way to the right in favor of the overtaking vehicle on audible signal and shall not increase the speed of his vehicle until completely passed by the overtaking vehicle."

Although §321.299 does not specifically state that the driver of the overtaking vehicle is required to give an audible signal, the Iowa Supreme Court has indicated that such is the law. In *Clayton v. McIlrath,* 241 Iowa 1162, 44 N. W. 2d 741 (1950), the trial court refused defendant's requested instruction that the driver of an overtaking vehicle must not only sound his horn before attempting to pass but must be reasonably assured that the driver ahead heard the signal and if the overtaking driver proceeds without such assurance he would be negligent. The Iowa Supreme Court held that the refusal of the instruction was not error, noting that no statute requires the overtaking driver to assure himself his signal has been heard. Section 321.300 of the 1958 Code provides for a failure to recognize a signal as follows:

"Any driver of a vehicle that is overtaken by a faster moving vehicle who fails to heed the signal of the overtaking vehicle when it is given under such circumstances that he could, by the exercise of ordinary care and observation and precaution, hear such signal and who fails to yield that part of the traveled way as herein provided, shall be guilty of a misdemeanor punishable as provided in section 321.482."

On the question of whether the signal was heard by the driver of the overtaken vehicle, §321.301 places the burden upon the accused to prove he did not hear the signal, upon the accuser's giving proof that he gave a signal as contemplated under §321.300.

In *Clayton v. McIlrath,* the Court cited on page 1171 of the Iowa Report *Johnson v. Kinnan,* 195 Iowa 720, 192 N. W. 863 (1923), where the Court said:

"The driver of an automobile is not necessarily negligent because he may fail to make the driver of a vehicle in advance of him 'hear' his warning signal. Circumstances may arise where it is quite impossible for him to know that he has done so. * * * he is not required, at his peril, to know that the driver of the car in front of him shall 'hear' the signal."

Also cited with apparent approval were statements made in *Corpus Juris Secundum* on the duty of the passing driver. On page 1171, the Court stated:

"As stated in 60 C.J.S., Motor Vehicles, section 326c, page 761, 'The driver of the passing car need not assure himself that his signals were heard and understood by the driver of the preceding car, although if he is aware of the fact that his signals were not heard he is negligent if he proceeds to pass without further signal.' And from the same authority, section 326a(1), pages 756, 757, 'The driver of the overtaking vehicle may assume that the * * * overtaken vehicle * * * will remain on the right side of the road after warnings * * * until such time as the motorist, exercising ordinary prudence, can see that such assumption is unwarranted.' "

Since it would be negligence to proceed without further signal when the

passing driver is aware that his signals were not heard, it obviously would be negligent to proceed to pass without ever having given a signal.

In *Johnson v. McVicker,* 216 Iowa 654, 247 N. W. 488 (1933), the Court held that it was not error for the trial court to instruct on the duty of the defendant driver as to blowing or sounding his horn where the driver of the passed car was told by a passenger that defendant's car was approaching or going around.

Johnson v. Kinnan, although concerned with passing at an intersection and with statutes that are worded differently from the present §321.299, but from which said section is derived, sets forth the passing driver's duty on pages 729-30 of 195 Iowa:

> "* * * It is his duty to give a signal, and the distance at which it is given from the advanced vehicle, the loudness of the signal, and all of the circumstances surrounding the situation enter into the question as to whether or not the driver of the rear vehicle has been guilty of negligence in regard to the warning. Obviously, he cannot be a guarantor that the driver of an advance vehicle will hear the signal which he has given. His signaling device may produce the plaintive squawk characteristic of the ubiquitous Ford, or the more blatant blast that heralds the presence of the aristocratic Rolls-Royce; but in either event, he is not required, at his peril, to know that the driver of the car in front of him shall 'hear' the signal. He must exercise all such due care on his part as a man of ordinary care and prudence would use under similar circumstances, to give a warning of his approach and communicate the said warning to the driver of the advance vehicle. If such proper, timely, and sufficient warning has been given, it cannot be said, as a matter of law, that the driver is still guilty of negligence because the operator of the vehicle to whom the warning is directed has, as a matter of fact, failed to hear the same. * * *"

But cf. *Stiefel v. Wando,* 246 Iowa 807, 68 N. W. 2d 53 (1955); *Bishard v. Engelbeck,* 180 Iowa 1132, 164 N. W. 203 (1917). Therefore, on the basis of the above authority, I am of the opinion that §321.299 has been deemed by the Iowa Supreme Court to require a driver overtaking another vehicle on the left of the passed vehicle to give an audible signal.

Section 321.482 of the 1958 Code of Iowa provides:

> "It is a misdemeanor for any person to do any act forbidden or to fail to perform any act required by any of the provisions of this chapter unless any such violation is by this chapter or other law of this state declared to be a felony. Chapter 232 shall have no application in the prosecution of offenses committted in violation of this chapter which are punishable by a fine of not more than one hundred dollars, or by imprisonment for not more than thirty days.
>
> "Every person convicted of a misdemeanor for a violation of any of the provisions of this chapter for which another penalty is not provided shall be punished by a fine of not more than one hundred dollars or by imprisonment for not more than thirty days."

Thus, in answer to your question, it is a misdemeanor for a passing driver to fail to give an audible signal when overtaking on the left of the passed vehicle. However, it should be noted that the difficulties involved in proving that the driver of the passing vehicle did not, in fact, give an audible signal are considerable.

17.21

MOTOR VEHICLES: Speed limits on interstate highways—Ch. 225, 58th

G.A.; §§321.285, 321.286, 321.287, 321.377, 1958 Code. Chapter 225, 58th G.A. establishes the speed limits for a truck and for a bus, except school buses, on interstate highway. Speed limits for a motor vehicle in *use* as a school bus on an interstate highway are established by §321.377. Speed limits for a motor vehicle not in use as a school bus are established by other statutes above cited.

February 14, 1962

Mr. Edward F. Samore
Woodbury County Attorney
204 Court Houe
Sioux City, Iowa

Dear Mr. Samore:

This is to acknowledge receipt of your opinion request in which you state:

"... your opinion is respectfully requested that wherein the Code of Iowa provides, or may provide, speed regulations applying to specific classes of motor vehicles, do such Code provisions regulating such speeds take precedence over those Code sections which generally regulate the speed of motor vehicles on the highways of the State of Iowa?

"Specifically, we respectfully request this opinion in order that it be determined what are the maximum speeds on the interstate highways within this state applying to passenger buses, school buses, and trucks."

Chapter 225, 58th G.A., etablishes the speed limit on interstate highways as follows:

"Notwithstanding any other speed restrictions, the speed limits for all vehicular traffic on fully controlled access divided multi-laned highways included in, and as a part of, the national system of interstate highways designated by the federal bureau of public roads and this state (23 U.S.C. 103 (d)) shall be seventy-five (75) miles per hour from sunrise to sunset and sixty-five (65) miles per hour from sunset to sunrise.

"For the purposes of this subsection a fully controlled access highway is a highway that gives preference to through traffic by providing access connections with selected public roads only and by prohibiting crossings at grade or direct private driveway connections."

Section 2 of Chapter 225 provides a minimum speed on the interstate highways. That section reads:

"It is further provided that a minimum speed of forty (40) miles per hour, road conditions permitting, shall be established on the highways referred to in section one (1) of this Act."

The 58th G.A., which enacted the interstate highway speed statute, also enacted a number of other statutes on speed limits. Chapter 223 established speed limits in alleys, Chapter 226 established speed limits for certain trailers, Chapter 227 provides a daytime speed limit, Chapter 228 provides a speed limit on secondary roads and Chapter 229 establishes a speed limit for buses. Chapter 229 repealed the former statute, §321.287, 1958 Code, and provided the following in lieu thereof:

"No passenger-carrying motor vehicle used as a common carrier, except school busses, shall be driven upon the highways at a greater speed than sixty (60) miles per hour at any time. No school bus shall be operated in violation of section three hundred twenty-one point three hundred seventy-seven (321.377)."

It is noted that Chapter 225 provides for the speed limit for all vehicular traffic on interstate highways notwithstanding any other speed restrictions. We think that the phrase "notwithstanding any other speed restrictions" was intended by the legislature to refer to the speed restrictions contained in §§321.285 through 321.287, 1958 Code of Iowa, as amended. Since Chapter 225 applies only to the speed limits on interstate highways, it is consistent with and merely provides an exception to the general speed laws that apply on other highways throughout the state. It is a rule of statutory construction that if by any fair and reasonable construction prior and later statutes which could be construed as conflicting can instead be reconciled, both shall stand. *In re Klug's Estate,* 104 N. W. 2d 600 (Iowa); *Yarn v. City of Des Moines,* 243 Iowa 991, 54 N. W. 2d 439. It is also an accepted rule of statutory construction that in case of conflict, the later-enacted statute prevails. *Curlew Consolidated School District v. Palo Alto County Board of Education,* 247 Iowa 112, 73 N. W. 2d 20.

On the basis of the above authority, it is our opinion that the speed limits on interstate highways within this state applying to a truck and to a bus, except school buses, are established by Chapter 225, 58th G.A.

We have heretofore considered the question of the speed limit for a school bus when operated on an interstate highway. In an opinion to Carl H. Pesch, Commissioner of Public Safety, dated April 10, 1961, we stated that a motor vehicle in *use* as a school bus when operating on an interstate system is no less a school bus than when operating on any other highway. For this reason, the opinion was given that §321.377 applies to a motor vehicle in *use* as a school bus when operated on an interstate highway.

The Iowa legislature has for many years considered legislation concerning school buses separately from other legislation. School buses are placed in a special classification and must meet several requirements under the motor vehicle law. School bus drivers must have a special license and the vehicle must meet special construction standards. See §§231.376 and 321.373, 1958 Code of Iowa. In addition, the speed statute for a school bus is found among the statutes concerning school buses rather than among the general speed statutes heretofore cited. Moreover, the legislature has consistently indicated its special interest in the speed limit for vehicles in use as school buses by specifically excepting this matter from the general statutes establishing speed limits. School buses were excepted from §321.287, which established bus speed limits and were again excepted by the 58th G.A. from the amendment to that section, Chapter 229. For these reasons, it is our belief that the legislature intended that §321.377, 1958 Code of Iowa, rather than Chapter 229, 58th G.A., governs the speed limit for a motor vehicle in use as a school bus on an interstate highway.

Our previous opinion to Commissioner Pesch noted that §321.377 regulates the speed of a school bus only when the motor vehicle is in use as school bus. If the motor vehicle is not in use as a school bus, §321.377 would not apply and the speed limit applicable would be established by the other statutes herein referenced.

17.22

MOTOR VEHICLES: Taxation of mobile homes—Ch. 135D, 1962 Code. 1. Monthly occupancy fee under Ch. 135D is assessed against mobile home park licensee. 2. Licensee may collect monthly occupancy fee from occupier of mobile home. 3. Personal property tax payment on a mobile home provides no exemption from liability for monthly occupancy fee. 4. Payment of a monthly occupancy fee for one month provides an exemption from assessment for property tax. 5. Owner of mobile home harbored outside mobile home park owes occupancy fee for period of occupancy which is payable semiannually. 6. Payment of one month's occupancy fee during

year preceding Jan. 1, the property tax assessment date, provides an exemption from personal property tax assessment on a mobile home.

November 9, 1961

Mr. John W. Shafer
Allamakee County Attorney
Waukon, Iowa
and
Mr. Harry Perkins
Polk County Attorney
Room 406, Court House
Des Moines, Iowa

Dear Messrs. Shafer and Perkins:

This will acknowledge receipt of your recent requests for opinions from this office on several problems respectively stated by you as follows:

(Letter from John W. Shafer):

"'A' is the owner of a mobile home as of January 1, 1961 and not having paid a monthly fee said home was assessed as personal property in accordance to State Tax Commission #10, page 15. As of July 1st, or thereabout 'A' sold this mobile home to 'B' who in turn is placing it in a licensed trailer court owned by 'C'. 'A' has purchased a new mobile home and is also placing it in the trailer court owned by 'C'.

"1. Is 'B' required to pay monthly fee to 'C' for balance of 1961 since said mobile home is assessed to 'A' as of January 1st?

"2. Does the assessment relieve or affect the responsibility of 'C' to collect the monthly fee?

"3. Does the fact that 'A' was assessed for a mobile home January 1st have any effect on his requirement to pay or 'C's' requirement to collect the monthly fee on another mobile home now located in 'C's' Trailer Court?

"4. If the answer to Ques. 1 is 'yes' and to Ques. 2 is 'no' then should the assessment to 'A' as of January 1st of 1961 be cancelled in full or in part or not at all?"

(Letter from Harry Perkins):

/5/ "The question has been raised: Under the new law, could a person owning a house trailer which is not lived in, come to the Treasurer's Office and, by paying a six-months' fee, declare the trailer as a mobile home which he claims to live in, and thereby receive exemption from personal property assessment by the assessor's office? (The assessment on house trailers as personal property is greater than the amount of the monthly fees paid by those persons who use mobile homes for the purpose of living in them and who are subject to only the monthly fee.)

/6/ "Another question: A house trailer is being lived in on January 1 and subject to the monthly fee; but on February 1 the trailer is no longer used as a home. Has the assessor then the power to assess this trailer for the current year? Or, is *January 1* the determining date of assessment the same as for other personal property assessments?

This is a subject on which a number of questions have been submitted to this office. Two opinions have already been written regarding the recent legislation affecting mobile homes and house trailers, and for informational purposes are hereby referenced. On June 30, 1961, an opinion was issued

to Representative Harry R. Gittins of Pottawattamie County, Underwood, Iowa. Also on June 30, 1961, an opinion was issued to Commissioner Carl H. Pesch, Department of Public Safety, State Office Building, Des Moines, Iowa.

Section 135D.3 of the 1958 Code of Iowa sets out the procedure for obtaining an annual license to operate and maintain a mobile home park. This section provides for the issuance of an annual license by the State Department of Health. Amended §135D.9 further provides, in part, as follows:

"135D.9 Monthly fees. In addition to the primary and annual license fee provided for in section 135D.5 each licensee is hereby required to pay for each occupied mobile home occupying space within such licensed mobile home park a monthly fee as follows: For trailers up to thirty feet in length, three dollars per month or major fraction thereof; for trailers from thirty to thirty-five feet in length four dollars per month or major fraction thereof; and for all trailers over thirty-five feet in length, five dollars per month or major fraction thereof which monthly fee shall be paid by the licensee on or before the tenth day of the month, following the month for which such additional fee is due, in the manner herein prescribed."

The monthly fee specified in §135D.9 must be paid by each licensee of a mobile home park for each occupied mobile home occupying space within the park. This fee is an occupancy fee, which the licensee is required to pay without regard to ownership of the mobile home for which the fee is paid, Consequently, in answer to your questions 1 and 2, the monthly fee specified in §135D.9 must be paid by 'C' in your question, who is the mobile home park licensee, without regard to the fact that a personal property tax assessment was made against the prior owner of the mobile home, 'A'. Section 135D.9 makes 'C' responsible for payment of the monthly fees, but indicates that 'C' has the right to collect the monthly fee from 'B', the occupier of the mobile home.

In answer to question 3, the fact that 'A' was assessed a personal property tax on a mobile home would have no effect on 'C's' requirement to collect and pay a monthly fee on another mobile home now owned by 'A' and occupied in 'C's' mobile home park. As heretofore noted, the fee assessed under §135D.9 is an occupancy fee, payable by the licensee of the mobile home park, regardless of who may own the mobile home.

The 4th question asked by your opinion request involves an interpretation of §135D.21. That section provides as follows:

"135D.21 Fee in lieu of property tax. All mobile homes for which a monthly fee is collected under the provisions of this chapter shall not be assessed for property tax but this exception shall not apply to the property contained in any mobile home."

It will be seen from an examination of this section that an assessment of personal property tax against an owner of a mobile home does not provide an exemption from the payment of the monthly occupancy fee assessed under §135D.9. Rather, the inverse is the case, since if a monthly fee is collected under the provisions of Chapter 135D, the mobile home for which the fee is collected shall not be assessed for personal property tax. Prior to amendment by the 59th G.A., a broad exemption from all taxes, general or local, including personal property taxes was provided by §321.130 if a house trailer was registered under Chapter 321. Section 321.130, prior to amendment by the 59th G.A. did not apply, however, to occupied mobile homes. The 59th G.A. deleted house trailers from the provisions of §321.130. See Chapter 108, §4, Laws 59th G.A. The result of this amendment is that the payment of the $5.00 registration fee on mobile homes does not exempt the owner from any other taxes.

An examination of the language used by the legislature in §135D.21 discloses that the reference to the monthly occupancy fee is in the singular form. Said section provides that, if a "monthly fee" is collected, a property tax shall not be assessed. Although the statutory intent to be drawn therefrom is nebulous, I am of the opinion that the phrase, "a monthly fee" as used in §135D.21 means the fee collected for one month as provided by Chapter 135D. Thus, in answer to your question 4, the payment of a monthly occupancy fee under Chapter 135D for one month will provide an exemption from the assessment for property tax. Further, the property tax assessment made against 'A' in your question should be cancelled if a monthly fee for one month is collected as provided by Chapter 135D.

Section 135D.9 was also amended by the 59th G.A. to provide that the monthly occupancy fee assessed against the owner of a mobile home located outside of a mobile home park shall be paid on a semi-annual basis. The pertinent part of §135D.9 now reads as follows:

> "In the event that an occupied mobile home is not harbored in a mobile home park the owner of said mobile home shall pay the fee provided in this section. Such fee shall be paid semiannually. The fee due for April through September shall be paid by the tenth day of April. The fee due for October through March shall be paid by the tenth day of October. On the tenth day of May and on the tenth day of November said semiannual fees become delinquent and on the tenth of each month thereafter that the fee remains unpaid a ten percent penalty shall be added and the county treasurer shall not renew the motor vehicle registration until such delinquent fees and penalties, if any, have been paid. If any mobile home is moved during the six-month period for which a fee has been paid, the county treasurer shall, upon request of the owner, refund his pro rata share of the fee paid. If said fee is not paid, the amount of the unpaid fee shall become a tax and the tax shall be assessed against the land from which the mobile home was removed."

The fee provided in §135D.9 is the fee levied for each month that a mobile home is occupied. Although the amendment provides for the semi-annual payment of the fees owed on a mobile home harbored outside a mobile home park, the amendment does not provide that fees for six months must be paid. Since no change in the prior law in this respect has been made, a monthly occupancy fee may be owed for only one month which shall be paid semi-annually as provided in the statute. It should be further noted that the provision for refund of a pro rata share of the fee paid during the six-month period applies only if the mobile home is moved. Since it appears that the monthly fees payable during the six-month period are payable for only those months of occupancy during that period, there is no need for a refund provision and none has been provided except in the case of a mobile home that is moved.

Thus, in answer to the first question by Mr. Perkins, our No. 5, I am of the opinion that the owner of a mobile home harbored outside the mobile home park may pay the monthly occupancy fee and thereby receive an exemption from personal property tax.

Personal property tax assessments are made on January 1 as provided in §428.4. The 59th G.A. did not provide for any other assessment period concerning the personal property tax on mobile homes. For this reason, I am of the opinion that January 1 is the assessment date for property tax on mobile homes, the same as for other personal property assessments.

On January 1, the date of assessment, it should be determined by the tax assessor if a monthly fee has been paid as provided in Chapter 135D for any month in the preceding year. If a monthly fee has been so paid, then the payment would provide an exemption from the personal property tax assessment on January 1.

17.23

MOTOR VEHICLES: Testing stations—§§321.238, 321.241, 321.242, 321.245, 1958 Code. Department of Public Safety's responsibilities toward motor vehicles testing stations are mandatory and are exceptions to the duties of cities and towns regarding said testing stations.

March 1, 1962

Mr. Carl H. Pesch
Commissioner
Department of Public Safety
LOCAL

Dear Mr. Pesch:

This is to acknowledge receipt of your request for an opinion from this department in which you state as follows:

"The Iowa Department of Public Safety has certain obligations under the motor vehicle law pertaining to vehicle testing stations. . . . Section 321.245 provides that 'the Department of Public Safety shall have supervision and control over the type of tests and the facilities therefor in any such motor vehicle testing station'.

"Section 321.242, Code of Iowa 1958, provides 'any city which has set up a traffic safety council, or other body, by ordinance for the construction, operation, and maintenance of any such testing station, shall continue to so operate, maintain, supervise, and control said station through said traffic safety council.' This may raise a conflict between Section 321.242 and Section 321.245.

"I, therefore, respectfully request your opinion as to what the duties and obligations of this department are concerning the vehicle inspection station located here in the city of Des Moines, Iowa."

The pertinent sections of the Iowa Code involved in this question are found in Chapter 321 and read as follows:

"321.238 Testing stations. All cities and towns shall have the power to acquire, establish, erect, equip, operate and maintain motor vehicle testing stations therein and to pay for the same out of the allocations from the public safety fund. Cities and towns operating and maintaining motor vehicle testing stations may enact ordinances authorizing and providing for the inspection and testing of motor vehicles owned or operated by an owner or operator of a fleet of five (5) or more motor vehicles by such owner or operator. Such ordinances may impose such conditions and requirements as the city or town may deem appropriate in connection with the granting of such authority to fleet owners or operators." (Amended by the 58th General Assembly)

"321.241 Stickers. The department of public safety shall prescribe the shape, size, color and inscription of a sticker to be placed, by any such city or town so operating a motor vehicle testing station hereunder, upon the windshield of any motor vehicle so passing the tests herein provided. Said city or town shall insert the name thereof and the date said sticker was issued.

"Said sticker when so prepared, issued, and placed shall exempt the owner and driver of the automobile so passing said test from any other tests hereunder at any place in the state for the period for which said sticker was issued."

"321.242 Traffic council. Any city which has set up a traffic safety council, or other body, by ordinance, for the construction, operation, and maintenance of any such testing station, shall continue to so operate, maintain, supervise, and control said station through said traffic safety council."

"321.245 Control by department. The department of public safety shall have supervision and control over the type of tests and the facilities therefor in any such motor vehicle testing station, and any such city or town desiring to establish any such station shall first procure the approval thereof by the department of public safety."

Section 321.242 has been considered by the Iowa Supreme Court in the case of *Dyer v. City of Des Moines,* 230 Iowa 1246 (1942). In the *Dyer* case, the Court considered the question of whether the fees acquired by the City of Des Moines for testing motor vehicles were to be paid into the treasury of the City of Des Moines or administered by the Traffic Safety Council appointed by the city. Section 321.242, which set up the Traffic Safety Council, does not exempt the funds received from the testing station from being included in the city's budget. Therefore, the Court held that it was the duty of the City of Des Moines to take over the funds of the Traffic Safety Council and handle them as provided for by the statutes governing city finances.

Similarly, §321.242 must be considered with other statutes in determining the question of responsibility between a city and the Department of Public Safety for operating a motor vehicle testing station. Section 321.245 provides that the department of public safety *shall* supervise and control the *type* of tests and facilities in a testing station, and that a city desiring to establish such a station *shall* first procure approval from the Department of Public Safety. It has been held that the word "shall" when used in a statute directing that a public body do certain acts is to be construed as mandatory and not permissive, and when addressed to public officials the term is mandatory and excludes the idea of discretion. See *Hansen v. Henderson,* 244 Iowa 650, 56 N. W. 2d 59 (1953), and *City of Newton v. Board of Supervisors,* 135 Iowa 27 (1907). Furthermore, an opinion on motor vehicle testing stations by this department, at 1936 *O.A.G.* 284, stated as follows:

"... A city may by purchase acquire a testing station or it may erect one and it may operate and maintain such station without acquiring legal title to the premises and without erecting or constructing a building or plant in which to operate said station. The Motor Vehicle Department shall have supervision and control over the type of tests and facilities therefore in any motor vehicle testing station, and such city or town desiring to establish such station shall have first to procure the approval thereof by the State Motor Vehicle Department. The City Council must use its own judgment as to the terms of the ordinance to be passed, having in mind always that the ordinance must be in harmony with the law of the state ..."

It does not appear that there is necessarily a conflict between §§321.242 and 321.245 concerning the respective duties of a city and the Iowa Department of Public Safety regarding motor vehicle testing stations. Under §321.-245, the Department of Public Safety is responsible for the supervision and control of the *type* of tests and facilities for conducting those tests in any motor vehicle testing station. The State's responsibility and authority thereunder is limited to the type of tests and facilities therefor. Under §321.242, the Traffic Safety Council of a city has the responsibility to operate, maintain, supervise and control the testing station. Nothing thereunder is specifically said regarding the type of tests and facilities therefor, which is the responsibility of the Department of Public Safety under §321.245. Section 321.241 also makes the Department of Public Safety responsible for prescribing the shape, size, color and inscription of a sticker used for vehicles passing the tests provided. But except where specific duties are delegated to the Department of

Public Safety, the responsibility for a motor vehicle testing station lies with the city or town establishing it.

If it is thought that §321.242 conflicts with §321.245, the result above indicated still obtains. It is well settled that where a general statute, if standing alone, would include the same matter as a special statute and thus conflict with it, the special statute will be considered an exception to the general statute. *Gade v. City of Waverly*, 251 Iowa 473, 101 N. W. 2d 525 (1960). Thus §§321.241 and 321.245, prescribing duties of the Department of Public Safety, are exceptions to the responsibilities of cities and towns regarding motor vehicle testing stations set out in the general statutes, §§321.238 and 321.242.

17.24

MOTOR VEHICLES: Testing stations—§§321.4, 321.5, 321.236, 321.245, 321.247, 1962 Code. Department of Public Safety is obligated, in the exercise of its sound discretion, to promulgate rules and regulations establishing type of tests and facilities used therefor in motor vehicle testing stations; this does not affect powers of municipal traffic safety council under §321.242 to operate, maintain, supervise and control testing station in accordance with such rules and regulations.

September 17, 1962

Mr. Carl H. Pesch
Commissioner of Public Safety
State Office Building
LOCAL

Dear Mr. Pesch:

We have your recent letter in which you request the opinion of this office in regard to the following:

"Reference is made to the opinion under date of March 1, 1962 answering specific questions propounded to you by this department with respect to the obligations and responsibilities of the Iowa Department of Public Safety pertaining to motor vehicle testing stations.

"The opinion states on page 4 that under section 321.245 the Department of Public Safety is responsible for the supervision and control of the type of tests and facilities for conducting those tests in any motor vehicle testing station. Continuing, this opinion states the state's responsibilities and authority thereunder is limited to the type of tests and the facilities therefor.

"Additionally, section 321.241, as stated in the opinion, makes the Department of Public Safety responsible for prescribing the shape, size, color and inscription of the sticker for the vehicles passing the tests provided.

"In order that we might benefit from further clarification of our obligations and responsibilities, I am requesting a further opinion on the following question: Does the language 'supervision and control of the type of tests and facilities for conducting those tests' contemplate the actual establishment by rules and regulations by this department of the types of tests to be administered?"

A copy of the opinion of March 1, 1962 is attached hereto for reference. Under the language in §321.245 and under the above opinion, the Department of Public Safety shall have supervision and control over the *type* of tests

and the facilities therefor in any motor vehicle testing station established by any city or town in the state. Iowa Code §321.236 further provides:

"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, however the provisions of this chapter shall not be deemed to prevent local authorities with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power from:

1. Regulating the standing or parking of vehicles.
2. Regulating traffic by means of police officers or traffic-control signals.
3. Regulating or prohibiting processions or assemblages on the highways.
4. Designating particular highways as one-way highways and requiring that all vehicles thereon be moved in one specific direction.
5. Regulating the speed of vehicles in public parks.
6. Designating any highway as a through highway and requiring that all vehicles stop or yield the right of way before entering or crossing the same or designating any intersection as a stop intersection and requiring all vehicles to stop at one or more entrances to such intersections.
7. Licensing and regulating the operation of vehicles offered to the public for hire and used principally in intracity operation.
8. Restricting the use of highways as authorized in sections 321.471 to 321.473, inclusive.
9. Regulating or prohibiting the turning of vehicles at intersections.
10. Regulating the operation of bicycles and requiring the registration and licensing of the same, including the requirement of a registration fee.
11. Establishing speed limits in public alleys and providing the penalty for violation thereof."

A number of authorities have held that the inclusion of one power in a statute excludes all powers not expressly mentioned. *Archer v. Board of Education,* 251 Iowa 1077, 104 N.W. 2d 621 (1960); *Dotson v. City of Ames,* 251 Iowa 467, 101 N.W. 2d 711 (1960). Under these authorities, it appears that the express inclusion of the eleven powers mentioned in the above statute impliedly withholds from local authorities all powers not mentioned. As the first paragraph of the statute states, local authorities have no power to enact any ordinance, rule or regulation inconsistent with the provisions of Chapter 321. Since supervision and control over the type of tests and facilities to be used therefor in any motor vehicle testing station has been specifically delegated to the Department of Public Safety, ordinances or rules and regulations attempting to fulfill this function would, in our opinion, be inconsistent with the provisions of §321.245 and therefore invalid under §321.236.

Iowa Code §321.247 provides:

"All ordinances, rules and regulations which may have been or which may be hereafter enacted in pursuance of the above enumerated powers, shall remain in full force and effect.",

but ordinances, or rules and regulations, which may have been previously enacted were not promulgated in pursuance of the enumerated powers contained in §§321.236, 321.238, 321.239, 321.240, 321.241, 321.242, 321.243, 321.244 and 321.246. Therefore, §321.247 does not affect our conclusion.

The next phase of your question is directed to whether the Department of Public Safety is by §321.245 obligated to promulgate rules and regulations establishing or defining the type of tests to be given and the equipment to be used therefor. Iowa Code §321.4 provides:

"The commissioner is hereby authorized to adopt and enforce such departmental rules and regulations governing procedure as may be necessary to carry out the provisions of this chapter; also to carry out any other laws the enforcement of which is vested in the department."

In connection therewith, under §321.5, "all local officials charged with the administration and enforcement of this chapter shall be governed in their official acts by the rules promulgated by the department." The general rule-making power thus clearly exists and in our opinion may be utilized in carrying out the provisions of Iowa Code §321.245, *supra.*

While the motor vehicle code does contain requirements as to brakes, headlights, turn signals, etc. with which motor vehicles must comply, nothing in the safety equipment statutes either expressly or impliedly sets up a general system of inspection of motor vehicles, and in the light of §321.245 it appears that the legislature intended this matter to be under the administration, supervision and control of the Department of Public Safety. Therefore, in our opinion, the Department of Public Safety is obligated, in the exercise of its sound discretion, to promulgate rules and regulations establishing the type of tests to be used in carrying out these tests. This conclusion does not affect the powers of the municipal traffic safety council under §321.242 to operate, maintain, supervise and control the testing station in accordance with the rules and regulations established by the Department of Public Safety.

17.25

MOTOR VEHICLES: Traffic-control devices—§§321.253, 321.304(2), 1958 Code. Legislature has authorized State Highway Commission to determine what signs are deemed necessary to carry out the provisions of Chapter 321.

June 30, 1961

Mr. William N. Dunn
Hardin County Attorney
Eldora, Iowa

Dear Mr. Dunn:

This will acknowledge receipt of your recent letter stating:

"I am in receipt of the opinion of Mr. Frank Craig, Assistant Attorney General, in answer to my question of the interpretation of Section 321.-204 of the 1958 Code of Iowa. * * *

"The problem was the Section reads 'when so sign-posted', and I would like to know whether this calls for the placing of a 'no passing' sign or a 'narrow bridge' sign."

Section 321.304(2) of the 1958 Code of Iowa reads as follows:

"*Prohibited passing.* No vehicle shall in overtaking and passing another vehicle or at any other time, be driven to the left side of the roadway under the following conditions: * * *

"2. When approaching within one hundred feet of any narrow bridge, viaduct, or tunnel, when so sign-posted, or when approaching within one hundred feet of or traversing any intersection or railroad grade crossing."

The Iowa legislature, by §321.252, granted authority to the State Highway Commission to adopt a manual for a uniform system of traffic-control devices.

"*Highway commission to adopt sign manual.* The state highway commission shall adopt a manual and specifications for a uniform system of traffic-control devices consistent with the provisions of this chapter for use upon highways within this state. Such uniform system shall correlate with and so far as possible conform to the system then current as approved by the American association of state highway officials."

Signs are included in the definition of traffic-control devices given in §321.1(62), which reads as follows:

"*Definitions of words and phrases.* The following words and phrases when used in this chapter shall, for the purpose of this chaper, have the meanings respectively ascribed to them.

"62. 'Official traffic control devices' mean all signs, signals, markings, and devices not inconsistent with this chapter placed or erected by authority of a public body or official having jurisdiction, for the purpose of regulating, warning, or guiding traffic."

The Iowa State Highway Commission is granted authority to erect signs by §321.253.

"*Highway commission to erect signs.* The state highway commission shall place and maintain such traffic-control devices, conforming to its manual and specifications, upon all primary highways as it shall deem necessary to indicate and to carry out the provisions of this chapter or to regulate, warn, or guide traffic. Whenever practical, said devices or signs shall be purchased from the board of control."

For a discussion of the authority of the Highway Commission and that of local authorities with respect to traffic-control devices, see Attorney General's opinion dated August 23, 1955 in a letter to Mr. John Butter, Chief Engineer, Iowa State Highway Commission, Ames, Iowa, copy of which is enclosed.

Regarding the specific type of sign to be erected for a narrow bridge, §321.253 appears to grant to the Highway Commission the responsibility for this determination. The Commission is to place such signs "as it shall deem necessary to indicate and to carry out the provisions of this chapter or to regulate, warn, or guide traffic." In the "Manual of Uniform Traffic Control Devices for Streets and Highways" adopted by the Iowa State Highway Commission in July, 1950, the circumstances under which the warning sign "narrow bridge" is to be used are set out on page 22.

"Narrow Bridge (W-160, W-161)

"To be used to indicate a bridge with a clear roadway width from 18 feet and including 20 feet on the primary road system and from 16 feet and including 20 feet on the secondary system measured between curbs, or on any other bridge having a roadway clearance less than the width of the approach pavement."

For the most recent data, the Iowa State Highway Commission should be

consulted. Thus, based on the above authority, it is my opinion that the legislature has authorized the Iowa State Highway Commission to determine what sign is deemed necessary to carry out the provisions of Chapter 321, which includes §321.304.

17.26

MOTOR VEHICLES: Truck rates schedule—§327.2, 1958 Code. Commerce Commission has the right to fix rate schedule for truck operators.

March 20, 1961

Honorable Dewey E. Goode
House of Representatives
Statehouse
LOCAL

My dear Dewey:

Reference is herein made to your request as follows:

"Does the State Commerce Commission have the right under Section 327.2 - 1 to require a truck operator to file a rate schedule unless a complaint has been filed against that truck operator? If no rate schedule is required, can the commission require the truck operator to carry a receipt book stating the rate charged to see if it is the same as the one on file?"

I find that your question has had the consideration of the Supreme Court in the case of *Heuer Truck Lines v. Brownlee,* 239 Iowa 267, 31 N.W. 2d 375, which provides answer to your question. There it was said:

"The defendants argue that the court erred in holding that the plaintiff was required to make charges for the hauling of Coca Cola from Marshalltown to Ames, and the returning of empties according to the rates and schedules on file with the Commerce Commission at the time of the haul. Defendants cite section 327.2 of the 1946 Code. So far as is material here the section provides that:

'The commission is hereby vested with power and authority and it shall be its duty to:

1. Fix or approve the rates, charges, classifications, and rules and regulations pertaining thereto, of each truck operator, after complaint has been filed in accordance with rules established by the commission.'

"If defendants' argument were valid, that is, if no jurisdiction were acquired over the rates until complaint had been filed, the commission would be shorn of one of the most important reasons for its existence. We do not believe that the legislature so intended, or that the commission's jurisdiction is limited to Section 327.2, Code 1946. The reason for the requirements as to charges is to prevent favoritism among shippers, by the giving of preferences, or in other ways. The control of motor carriers or common carriers of the state is designed to prevent just such preferences, not only for the protection of the shipper but of carrier. Where a controversy does arise this section applies, but the power of the commission is provided for in another section to which reference is made. Section 327.4, Code 1946, recites that: 'All control, power, and authority over railroads and railroad companies, motor vehicles and motor carriers now vested in the commission, insofar as the same are applicable, are hereby specifically extended to include truck operators.' "

17.27

Auxiliary truck wheels, trailers—§§321.1(9), 321.1(24), 321.119, 321.123, 1958 Code. Auxiliary truck wheels pinned to straight truck need not be registered as a trailer, but must be considered in computing truck registration fee. (Craig to Cady, Franklin Co. Atty., 2/21/61) #61-2-8

17.28

Certificates of title—§321.123, 1962 Code. The Department of Public Safety has no authority, express or implied, to issue "permissive" certificates of title for trailers which are declared exempt from the certificate of title laws by §321.123. (Snell to Pesch, Com'r. Public Safety, 9/4/62) #62-9-1

17.29

Delinquent registration, penalty—§321.134, 1958 Code. Unless payable in two equal semi-annual installments, the penalty is computed on the basis of the annual registration fee as provided in this section. (Pesch to Carlson, Dept. of Public Safety, 1/17/61) #61-1-7

17.30

Disposal of abandoned vehicles—§§321.85 to 321.91, 1962 Code. The procedures set forth in §§321.85 to 321.91, inclusive, relating to abandoned motor vehicles, are inapplicable to the situation where a private individual is in possession of such a vehicle. (Snell to Ball, Black Hawk Co. Atty., 9/11/62) #62-9-3

17.31

Examinations for driver's license—§321.186, 1958 Code. §321.186 does not authorize the Department of Public Safety to require a physical examination of every new applicant for an operator's or chauffeur's license. (Snell to Pesch, Com'r. Public Safety, 11/22/61) #61-11-17

17.32

House trailers and mobile homes—§§321.1, 321.123, 321.105, 321.106, 321.126, 321.134, 1958 Code. Registration fee is not proratable nor refundable under H.F. 402, 59th G.A., and penalty commences on August 1, 1961; registration fee paid under prior law is not refundable; definition does not apply to small camping trailers used to haul equipment unless a dwelling place, living abode, or sleeping place is physically provided by the vehicle. (Snell to Pesch, Com'r. Public Safety, 6/30/61) #61-6-21

17.33

House trailers and mobile homes, H.F. 402, 59th *G.A.*—§§135D.1(1), 135D.9, 135D.10, 135D.21, 321.130, 1958 Code. Whether a unit is equipped for use as a conveyance under the definition of "house trailer and mobile home" is a fact determination for local officials; owner of mobile home not situated in mobile home park—fees payable monthly until October 1961, semiannually thereafter; owner of unoccupied mobile home not relieved from property tax; house trailer and mobile home registration fee under Ch. 321 not in lieu of other taxes. (Snell to Gittins, St. Rep., 6/30/61) #61-6-23

17.34

Licenses or permits deposited as bail—§321.216(5), 1958 Code. Licenses or

permits voluntarily given in lieu of other security by persons charged with a traffic violation are not "lost", and a licensee who files an application for a duplicate after so voluntarily giving up his license or permit and knowingly makes false statements in such application is subject to prosecution under §321.216(5). (Craig to Statton, Com'r. Public Safety, 12/29/60) #61-1-1

17.35

Mobile homes, homestead and military service tax credit—§§135D.1(1), 135D.-21, 425.2, 425.11(1)(3), 427.3, 1958 Code. A mobile home on a permanent structure, if determined as such by the local county assessor, shall be treated as real estate and shall qualify for the homestead and military service tax credit if the specific statutory requirements are satisfied. (Staff to Schill, Asst. Webster Co. Atty., 11/9/61) See 21.16 under Taxation for full text.

17.36

Mobile homes, taxation of nonresident servicemen—§135D.9, 1958 Code, as amended by Ch. 108, 59th G.A. Monthly fee is a property tax from which nonresident servicemen are exempted by the Soldiers' and Sailors' Relief Act of 1940, 50 U.S.C.A., §574. (Berenstein to Samore, Woodbury Co. Atty., 10/30/61) See 21.17 under Taxation for full text of opinion.

17.37

Operator's license, two-color system—§§321.8, 321.89, 1958 Code. Commissioner of Public Safety may, by administrative order, adopt a system whereby operator's and chauffeur's licenses issued to persons under 21 years of age are a different color than those issued to persons over 21 years of age if Commissioner believes such program requisite or necessary to enforce laws Department of Public Safety enforces. (Craig to Pesch, Com'r. of Public Safety, 2/21/61) #61-2-15

17.38

Operator's license—§§321.196, 321.197, 321.198, 1962 Code. Department of Public Safety has no authority to grant extensions of Iowa operator's licenses except to qualified military personnel under §321.198. (Snell to Pesch, Com'r. of Public Safety, 12/14/62 #62-12-2

17.39

Point system—§§321.208, 766.1, 777.19, 1958 Code. Points may be added to a driver's record for convictions for traffic offenses when the defendant driver fails to appear for trial and bail is forfeited. (Snell to Saur, Fayette Co. Atty., 7/24/61) #61-7-20

17.40

Registration—Ch. 176, 59th G.A., amending §321.310, 1958 Code. Registration fee for truck towing four-wheeled trailer is based on the combined gross weight of the truck and said trailer. (Snell to Boyce, Reciprocity Bd., 4/16/62) #62-4-5

17.41

Speed limits—§§321.230, 321.286, 1962 Code. §321.286 applies to mail-carrying post-office units if such units have a gross weight of over five thousand pounds. (Craig to Cady, Franklin Co. Atty., 3/8/61) #61-3-5

17.42

State parks—§§80.9(2), 306.1, 306.2, 306.3, 1958 Code. (1) Conservation Commission has not promulgated traffic regulations for state parks, (2) assessment of points under Ch. 222, 58th G.A., within discretion of Department of Public Safety, (3) jurisdiction of Conservation Commission over public highways through state parks not exclusive. (Craig to Charlton, Delaware Co. Atty., 2/21/61) #61-2-9

17.43

Taxation of mobile homes—§321.130, 1958 Code. Mobile homes and house trailers in the hands of dealers or manufacturers are exempt as provided in §321.130, 1958 Code, as amended. (Snell to Shafer and Perkins, 12/22/61)

CHAPTER 18

PERMITS—BEER AND CIGARETTES

STAFF OPINIONS

LETTER OPINIONS

18.1

PERMITS—BEER AND CIGARETTES: Closing hours, effect on restaurant operations—§§124.20, 124.34, 124.35, 1958 Code. The closing hours as established by §§124.20, 124.34 and 124.35 of the Code, under class 'B" permits for sale and consumption of beer, does not preclude the continued operation of the public restaurant portion of the business after said closing hours.

June 30, 1961

Mr. Mervin J. Flander
Bremer County Attorney
Waverly, Iowa

Dear Mr. Flander:

Receipt is acknowledged of your favor of May 15, 1961 requesting opinion as follows:

"Several of the taverns in Bremer County holding class 'B" beer permits also hold a restaurant license and operate a restaurant in connection with the tavern operation.

"Provisions relating to the closing hours of class 'B" permitees are found in Sections 124.20, 124.34 and 124.35.

"The question has arisen as to whether or not these closing hour statutes require the closing of the establishments completely at the specified time or whether they merely require the closing of the tavern portion of the operation, permitting the owner or operator to continue his restaurant operation on the same premises after the prescribed closing times, and I therefore request your opinion in this matter."

The operation of a public restaurant can only be undertaken after the procurement of a license under the provisions of Chapter 170 of the Code. To operate a place of business for the retail sale of beer for consumption on and off the premises, one must secure a class "B" permit under the provisions of Chapter 124 of the Code.

Within the purview of these two provisions of the law, the operation of a restaurant and a place of business to dispense beer are two separate and distinct businesses.

They can be operated, one in conjunction with the other, in view of the provisions of §124.12, which provides *inter alia*:

"* * * provided, however, that unless otherwise provided in this chapter, no sale of beer shall be made for consumption on the premises unless food is served and consumed therewith, and unless such place

where such service is made is equipped with tables and seats sufficient to accommodate not less than twenty-five persons at one time. It shall be unlawful for any licensee hereunder to give away beer, or to promote the sale of beer by the gift of any lunch, meal, or articles of food except pretzels, cheese or crackers." (See 1934 *O.A.G.* 588.)

The legislature intended that under no circumstances could beer be sold between 1:00 a.m. and 6:00 a.m., with the exception of sales by a club under specific provisions of §124.35. 1950 *O.A.G.* 178.

One may not consume beer on the premises of a class "B" permittee after closing hour regardless of when it was purchased and paid for. 1948 *O.A.G.* 184.

Therefore, it is our considered opinion that the closing hours as established by §§124.20, 124.34 and 124.35 of the Code, under class "B" permits for sale and consumption of beer, does not preclude the continued operation of the public restaurant portion of the business after said closing hours.

18.2

Class B and C permits, revocation—§124.20, 1958 Code. The conviction of a minor for buying beer on the premises of a class B permit holder constitutes mandatory grounds for revocation of said permit under the provisions of §124.20. (Bianco to Jenkins, Monroe Co. Atty., 5/12/61) #61-5-6

18.3

Fingerprinting applicants—§124.23, 1958 Code. There is no authority under §124.23 whereby local authorities can require an applicant for beer permit to be fingerprinted for purposes of investigation. (Bianco to Jenkins, Monroe Co. Atty., 12/7/61) #61-12-3

18.4

Illegal vending machine—§98.36(6), 1958 Code. Under stated facts, a cigarette machine used within an industrial plant for the exclusive use of the employees, wherein the employee is given a key which is inserted before the machine will dispense cigarettes upon payment of price, is a wholly automatic type and prohibited under the provisions of §98.36(6). (Bianco to Samore, Woodbury Co. Atty., 9/13/61) #61-9-6

CHAPTER 19

SCHOOLS

STAFF OPINIONS

LETTER OPINIONS

19.1

SCHOOLS: Audit of school district—§11.18, 1962 Code. There is no authority in §11.18 for a community school district to expend public money for two audits. One may be made by either the Auditor of State or a certified accountant, but not both.

September 11, 1962

Mr. Paul D. Strand
Winneshiek County Attorney
Decorah, Iowa

Dear Mr. Strand:

This is in response to your letter of August 1, 1962, in which you submitted the following:

> "I have a question regarding Section 11.18 of the Iowa Code as to the examination of cities, townships and schools. The question is if a community school district which maintains a high school has an audit by a certified public accountant or a registered public accountant which they hire each year, may 100 taxpayers on application to the State Auditor still in spite of a private audit request and/or have the State conduct an audit of the books? This question has come up as several taxpayers had indicated an interest to have the State audit the books of a local community school district and it is not clear in the law whether or not they can have this done if the community school district has in fact employed private certified public accountants for their audit. I would appreciate an immediate opinion herein."

I find no authority in §11.18, 1962 Code, for a community school district to expend public money for two separate audits, one by a certified accountant and one by the Auditor of State. The audit may be made by one or the other, but not by both.

In this connection, I am advised by the Auditor of State that your board of education has arranged for a state audit of the Decorah Community School District and the Decorah High School Activity Account and the Hot Lunch

Account for the school year ending June 30, 1962.

19.2

SCHOOLS: Buildings and grounds—§§257.18(10), 297.7, 1958 Code. "Plan submitted" in §297.7 refers to architect's plan, not to complete building program of school district, and any attempt by county superintendent to indirectly control those areas under jurisdicion of board of education by disapproving architect's plan would exceed his jurisdiction. Board of education may appeal from action of county superintendent to State Superintendent of Public Instruction under §257.18(10).

April 12, 1962

Mr. Harlan W. Bainter
Henry County Attorney
118½ South Main
Mt. Pleasant, Iowa

Dear Mr. Bainter:

This will acknowledge receipt of your letter in which you ask the following questions:

"Under Code section 297.7 do the words 'the plan submitted' refer to the architect's plan for the schoolhouse building or to the complete building program decided upon by the school district board of education?

"May the board of education take an appeal from the action of the county superintendent to the state superintendent of public instruction?"

Section 297.7 provides in pertinent part:

"Before erecting a schoolhouse, the board of directors shall consult with the county superintendent as to the most approved plan for such building, and secure his approval of the plan submitted. * * * "

In order to ascertain whether or not the words, "the plan submitted" refer to just the physical plans or to a complete building program, one must first make a brief examination of the respective duties and obligations of the board of directors and the county superintendent of schools.

The location and site of a schoolhouse is within the power of the board of directors to decide. However, the electors of the school district have the right to appeal the decision of the board of directors to the county superintendent. *Smith v. Maresh,* 226 Iowa 552, 555, 284 N.W. 390. It is well settled that on an appeal the jurisdiction of the county superintendent and the state superintendent is limited to a review of the action of the board of directors, and they have no authority to establish a new site nor to impose conditions. *Doubet v. Ind. Dist. of Clearfield,* 135 Iowa 95, 97, 111 N.W. 326.

Section 279.11 provides:

"The board of directors shall determine the number of schools to be taught, divide the corporation into such wards or other divisions for school purposes as may be proper, determine the particular school which each child shall attend, and designate the period each school shall be held beyond the time required by law."

However, Chapter 278 of the Code gives the electors the power to direct a change of textbooks, the disposition of property, the transfer of funds, and to vote a schoolhouse tax, among other things, at their regular election. *Casey v. Ind. Dist.,* 64 Iowa 659, 21 N.W. 22; *James v. Gettinger,* 123 Iowa 199, 98 N.W. 723; *Marshall v. Sloan,* 35 Iowa 445.

The word "plan" may include all aspects of a contemplated building, including location, character, and purpose, as well as financial ability to acquire such building. However, the interest of all these aspects of planning is already statutorily imposed upon the board of directors, which is discretionary except as directed by the electors, and under the jurisdiction of the board. On the other hand, the word "plan" has been defined to mean a design or delineation or projection of a structure which is reduced in size, the relative positions and proportions of which are preserved. *Jenney v. City of Des Moines,* 103 Iowa 347, 350, 72 N.W. 550.

In examining §273.18 of the Code, it is to be noted that the primary duty of the county superintendent is to advise and counsel and make recommendations to the local board of directors under his jurisdiction. The section fails to disclose any regulatory power in areas over which the board of directors has jurisdiction. Thus, in answer to your first question, the words "plan submitted" refer to the architect's plan and not to the complete building program of the school district. Any attempt by the county superintendent to indirectly control those areas under the jurisdiction of the board of education by disapproving the architect's plan of a proposed school building would therefore be in excess of his jurisdiction.

Section 257.18(10) provides:

> "It shall be the responsibility of the state superintendent of public instruction to exercise all powers and perform all duties hereinafter listed . . .
>
> "10. Advise and counsel concerning the interpretation and meaning of school laws and the rules and regulations adopted pursuant thereto; and, when practicable, amicably adjust and settle such controversies arising thereunder as may be submitted to him, directly or by appeal, by all persons directly concerned, to hear and decide appeals as provided by law."

The above-quoted portion of the statute relates to one of the responsibilities and duties of the State Superintendent of Public Instruction. The language is clear and unambiguous and the State Superintendent has the discretionary power, whenever practicable, to settle directly any controversy arising under the school laws and rules and regulations adopted pursuant thereto.

However, this does not preclude the board of directors of any school district from taking an appeal from the action of the county superintendent to the State Superintendent of Public Instruction under the provisions of §257.18(10).

19.3

SCHOOLS: Board of education—§§273.8, 273.13, 1958 Code. Member of the county board of education cannot contract to furnish services and supplies to the board of education.

August 1, 1961

Mr. Harry Perkins
Polk County Attorney
Room 406, Polk County Courthouse
Des Moines, Iowa

Dear Mr. Perkins:

Reference is made to your letter of June 1, in which you enclose a request from the county board of education which states the following:

> "An important function of this office is to distribute on a loan basis thousands of library books annually to the public schools throughout

Polk County. The County Board of Education voted to discontinue handling basic textbooks directly or indirectly two years ago. A large bookmobile with shelves and space for books is in constant use. This bookmobile has never been used to distribute basic textbooks. This bookmobile is long and high, and fairly wide and heavy. It is tailor made by Gerstenslager of Ohio. Because of its size and otherwise, we have had difficulty in getting someone to house, service and care for this vehicle. Garages and service stations are reluctant to set aside this much space and to do the necessary work when required and to have the vehicle available and in good condition when needed. It is also necessary to avoid excessive charges.

"Recently one of the County Board of Education members began housing, servicing, cleaning and keeping in repair and in good condition the bookmobile at a cost that is an absolute minimum. Before this it was kept outside because garages and gasoline service stations refused to keep it inside. In common with the rest of the Board he has taken a real interest in the proper distribution of books and in the availability, workability, looks and cleanliness of this bookmobile, which is attractive and makes a good impression upon the school personnel and other citizens throughout the county.

"Thus, the County Board would appreciate an attorney general's opinion whether the Board of Education may continue, under the laws of the State, to have a member of the County Board perform this service."

Section 273.8, Code 1958, in pertinent part, provides:

"The members of the board * * * shall serve without compensation, but shall be paid their actual and necessary expenses including travel, in performing their duties * * * ."

An examination of §273.13, relating to the specific duty of the board members, fails to disclose any statutory authorization for a member of the county board of education to maintain a bookmobile. Thus the problem resolves to the ultimate question of whether a member of the county board of education can contract to furnish services and supplies to the county board of education.

The county board of education acts through its directors. In regard to school board members, the Supreme Court said, in the case of *Weitz v. Ind. Dist. of Des Moines,* 78 Iowa 37, at 39, 42 N. W. 577, when commenting on a contract for services to be rendered by a board member, the following:

"It was the first duty of Whiting (a board member) to favor such a contract (his contract), and to oppose all others * * * . His interests, and those of the district, were therefore of a nature to conflict. The district was entitled to have the disinterested judgment of each member of the board of directors in the transaction in question. In our opinion, it would be most unwise and contrary to public policy to permit a board of directors to contract with one of its members in the name of the district." (phrases added)

A general principle is set out in 43 *Am. Jur.,* Public Officers, §299, as follows: A contract entered into by a board with one of its members is void irrespective of the fact his private interests are subservient to his public duty. This principle was recognized in the case of *Bay v. Davidson,* 133 Iowa 688, 111 N. W. 25. In the *Bay* case, *supra,* at page 692 of the Iowa Reports, the Court expressed its view for invoking this principle in regard to public contracts, by quoting from *Smith v. City,* 61 N. Y. 444, as follows:

" 'It matters not if he did in fact make his private interest subservient to his public duties. It is the relation that the law condemns, not the results. It might be that in this individual case public duty triumphed in the struggle with private interest, but such might not be the case

again or with another officer, and the law will not increase the temptation nor multiply opportunity for malfeasance. Neither will it take the trouble to determine whether in any case the results show a wrong or crime, but it absolutely and unequivocally refuses its sanction to any contract of any kind whatever when such relation exists.' "

The above basic principle was discussed recently in 10 *Drake Law Review,* No. 1, at page 63. The article cites as one of the sources of defective public contracts a prohibited interest in the contract.

Therefore, it is our considered opinion that a member of the county board of education cannot contract to furnish services and supplies to the board of education.

19.4

SCHOOLS: Contracts prohibited—§§279.3, 285.5(7), 1962 Code. The secretary of a school board is an officer of the school district and is precluded from receiving compensation for any labor or material furnished to said district. A board member cannot legally receive any compensation for contracts entered into between himself and the board. Under §285.5(7), a school board member cannot legally receive compensation as a bus driver.

November 6, 1962

Mr. E. L. Carroll
Union County Attorney
Creston, Iowa

Dear Mr. Carroll:

This is to acknowledge receipt of your request for an opinion, wherein you pose the following questions:

"1. Can a secretary of a School Board legally receive compensation for labor and material furnished for his particular school by him?

"2. Can a member of the Board of Education of that District legally receive such compensation?

"3. Can a Board member legally receive compensation as a bus driver in his own District?"

In answer to your first question, the secretary of a school board is an officer of the school district and not an employee by virtue of §279.3, Code 1962. If any labor or material is furnished to the school district by the said secretary, the said secretary could not receive compensation for the items furnished for his particular school district. Your attention is directed to 1934 *O.A.G.* 443.

The question of whether or not a member of the board of education can receive compensation from a school district for material and labor furnished to said school district is a question whether or not a board member can have an interest in a contract executed by the school district. The authorities holding that a board member may not have an interest in the contracts of the school district are numerous. In this connection I refer you to the following official opinions of this office. 1940 *O.A.G.* 105, 1932 *O.A.G.* 110, 1930 *O.A.G.* 335, 1928 *O.A.G.* 399, 1928 *O.A.G.* 75, and 1912 *O.A.G.* 521.

In answer to your third question, §285.5(7), 1962 Code, specifically precludes the board from entering into any contract with one of its board members for the transportation of children except where no transportation is available, and then the board member can transport only his own children.

19.5

SCHOOLS: Disposition of property, reversionary interest—§§297.15-18, inclusive, 1962 Code. Under the provisions of §297.15, the grantees of the original owner of a tract may avail themselves of the statutory reversionary interest, but must pay present-day value therefor.

September 11, 1962

Mr. Robert A. Maddocks
Wright County Attorney
Clarion, Iowa

Dear Mr. Maddocks:

This is to acknowledge receipt of your letter of April 9, 1962 wherein you state the following:

"On the 8th day of May, 1885, a married couple conveyed one acre of land to the district township for a school house site with the following clause in the deed, 'said land to revert to grantors when said township ceases to occupy said land for a school house site.' The consideration paid for this one acre of land was $20.00. The acre of land has not been occupied for a school house site for approximately three years, with the personal property being sold, leaving a bare acre. Naturally the original grantors are deceased and no one has any knowledge of heirs, if any. All conveyances and mortgages after 1885 have excepted this one acre of land.

"May this school house site now revert per Iowa Code section 297.15 (1958) or must the land revert to the original grantors' heirs, if any?

"When this land reverts, may the price of the land be established per Iowa Code section 297.15-19 or must the price be the same as the original sales price?"

The disposition of land under the provisions of §§297.15 to 297.19 inclusive is statutorily for the benefit of the public, and is mandatory, not merely discretionary. In the case of *Suck v. Benton Twp.*, 246 Iowa 1, 66 N.W. 2d 434, the Supreme Court said the following at page 7 of the Iowa report:

"The trial court correctly held that there are but three ways by which the value of such a site may be determined prior to a sale. They are, it said, first, by agreement between the owner of the tract from which it was originally taken and the school district . . .; second, by an appraisement secured through the county superintendent of schools, if they cannot agree . . .; and third, by the highest bid received at a public auction . . ."

The trial court went on to say that neither the plaintiffs nor their grantors had exercised this option under the provisions of §§297.15 to 297.18 and the value of the site therefore remained undetermined. From the *dicta* established in this case, it would appear that the grantees of the original owner would have the right of this reversionary interest subject to the aforementioned conditions.

The trial court in the *Suck* case, *supra,* on page 8 of the Iowa report, went on to hold that there would be no conveyance to the reversionary interest unless full value is paid at the time the reversion is to take place. If the present-day market value is not paid to the school district for this reversionary interest, then any conveyance by the school district is invalid.

Thus, in answer to your question, the grantees of the original owner are

entitled to avail themselves of the statutory reversionary interest to the school site as provided in §297.15, but must pay the present-day value of the property.

19.6

SCHOOLS: Lease-purchase agreements—§§274.7, 279.12, 1958 Code. Neither §274.7 nor §279.12 authorizes the board of directors of a school district to lease equipment or to enter into a lease-purchase agreement for equipment.

March 7, 1962

Mr. Carroll G. Henneberg
Lyon County Attorney
Rock Rapids, Iowa

Dear Sir:

This is to acknowledge receipt of your recent letter in which you stated the following:

"Has the Board of Directors of a School District authority under the law to enter into a lease contract for the purchase of school equipment such as bleachers for use in a gym, chairs, furniture, and other items of like nature, said lease covering a period of years providing for the payment of an annual rental and with an option running to the school to purchase said equipment at a specified time and apply the rental paid on the purchase price?

"I find no direct statutory authority authorizing a school to lease equipment and the question would seem to be whether Sections 274.7 and 279.12, which provide, respectively, that the business shall be conducted by the Board of Directors and that they shall make all contracts necessary or proper for exercising the powers granted by law, gives such Board implied power to lease necessary equipment for the operation of the school."

It is fundamental that school districts are creatures of statute, with only those powers expressly conferred by statute or reasonably and necessarily implied incident to exercise of a power or performance of a duty expressly conferred or imposed. *Silver Lake Cons. Sch. Dist. v. Parker,* 238 Iowa 984, 29 N.W. 2d 219; *Ind. Sch. Dist. of Danbury v. Christiansen,* 242 Iowa 963, 49 N.W. 2d 263. Therefore, if the district in question has the power to lease equipment and subsequently apply the rental fee to the purchase of the equipment, such authority must be derived from the express provisions of some statute.

The statutes authorizing the acquisition of equipment are §274.1, 1958 Code, which states in pertinent part: "Each school district * * * may * * * hold property and exercise all the powers granted by law * * * ."; and §274.7, providing in part: "The affairs of each school corporation shall be conducted by a board of directors * * * ."

The two funds which are available for the acquisition of equipment for a school district are the General Fund, provided for in §298.1, and the Schoolhouse Fund, provided for in §298.9. The expenditures which can be made from these funds are for the most part limited. *Cons. Sch. Dist. of Dows v. Crawford Co. Bk.,* 230 Iowa 506, 248 N.W. 669.

In regard to the General Fund, if necessity requires additional equipment because of increased enrollment or replacement of old equipment, such expenditures are normally considered part of the necessary operating cost for

the safety and welfare of the children. *Williams v. Peinny,* 25 Iowa 436. However, even though the board of directors of a school district has authority to make purchases for a school district which are necessities for a school year, no contract can be executed for new equipment without the express vote of the electors. *Manning v. Dist. Twp. of Van Buren,* 28 Iowa 332. These basic concepts underlying expenditures from the General Fund of a school district are of long standing. Thus, expenditures from the General Fund for equipment contemplates purchase of the item by the school district with funds which are available and not the leasing or renting of equipment. There is one statutory exception to this rule, which is found in §285.10(3) having to do with schoolbusses.

The Schoolhouse Fund is created by a tax as provided in §278.1(7), by bonds as provided in §298.21, or by transfer from the General Fund as provided in §279.31. A general purpose of the Schoolhouse Fund is to acquire new equipment. If surplus funds are available or a tax levy is sufficient, then the school district may purchase the desired equipment. However, if financing is required, the provisions of Chapter 296 are controlling. There is no express provision for the leasing of equipment to be paid for from the Schoolhouse Fund.

Generally speaking, lease-purchase or option to purchase leased equipment are nothing more than ingenious plans of financing which have evolved to enable political subdivisions which have reached their limit of indebtedness to acquire equipment without pledging their credit beyond the constitutional limit. The general view in this State in a situation where a municipality has the authority to lease equipment and the rent covers or is applied on the purchase price is that it is not regarded as constituting an indebtedness. *Johnston v. City of Stuart,* (Iowa), 226 N.W. 164. The restriction as to the use of tax money is discussed at length in the case of *Swanson v. City of Ottumwa,* 118 Iowa 161, 91 N.W. 1048. The Court held that where money is to be expended on a contract in which the payment of the money can be enforced, if there is a fixed or definite method of payment provided for by statute, such a contract or lease is not an indebtedness contemplated by the constitutional limitation. This construction has for the most part been overruled by *Brunk v. Des Moines,* 228 Iowa 287, 291 N.W. 395. However, the Court in the *Swanson* case, *supra,* went on to hold at page 175 of the Iowa Report that if the municipality were to enter into a contract such as a lease-purchase agreement, in the absence of specific statutory authority establishing a method of payment such contract would constitute an indebtedness for the purchase of said equipment. As shown above, Chapter 296 of the Code is the only provision for the indebtedness of a school district, with one exception not applicable here, and there are no provisions for incurring such a contract.

In addition, your attention is directed to 1940 *O.A.G.* 538, which discusses generally the authority of the board of supervisors as an instrumentality of the State to enter into an installment contract for the purchase of a building. Enclosed herewith is an opinion under the date of July 25, 1961, Creger to Wenger, which discusses the authority of a county board of supervisors to lease a portion of a county farm to the conservation board. The leasing of property is also discussed in 1925-26 *O.A.G.* 219, which relates to the authority of the various municipalities to exercise their right to contract, as well as 1930 *O.A.G.* 292. Also see 1936 *O.A.G.* 413 and 1940 *O.A.G.* 458, which discuss leasing of school property by school districts to other agencies of the State. For your convenience, there is also enclosed herewith an opinion under the date of August 9, 1961, Strauss to DeButts, and an opinion under the date of June 8, 1956, Abels to Walsh, which discuss generally the power to purchase and contract by other means than those specifically set out by the statute.

Therefore, from the above authority, it is our considered opinion that in the absence of specific statutory authority school districts, like any other municipality in the State, do not have the authority to execute a contract

for the lease of equipment for school purposes, nor to enter into negotiations for the acquisition of equipment by the rental of such equipment with an option running to the district to purchase same at a specific time and apply the rental paid on the purchase price.

19.7

SCHOOLS: Notice of election—§§4.1, 277.3, 1962 Code. Secretary shall publish notice once weekly for two consecutive weeks or 14 days next preceding the day of election in those school corporations where registration is required or where there is more than one voting precinct.

October 24, 1962

Honorable David O. Shaff
State Senator
406 South Second Street
Clinton, Iowa

Dear Senator Shaff:

This is to acknowledge receipt of your opinion request in which you state the following:

"Code section 277.3 provides that notice shall be published once each week for two consecutive weeks preceding the election. The Code section also in the first paragraph provides that notice of regular or special election shall be given not less than ten days next preceding the day of the election. If a school election is held early in a given week and ten days were to elapse from the date of last publication until the date of the election, the last notice would not be in a week immediately preceding the election. Therefore, our question is, in connection with corporations in which registration of voters is required, does the ten-day provision of Code Section 277.3 apply, or is it to be assumed that it does not and that the second notice is to be published in the week next preceding the election, even though such publication might be less than ten days before the date of the election?"

Section 277.3, Code of 1962, provides in pertinent part as follows:

"There shall be a written notice of all regular or special elections, which notice shall be given not less than ten days next preceding the day of the election, except as otherwise provided in this section, and shall contain the date, the polling place, the hours during which the polls will be open, the number of directors or officers to be elected and the terms thereof, and such propositions as will be submitted to and be determined by the voters. * * *

"In those corporations in which registration of voters is required or in which more than one voting precinct has been established the secretary shall publish it once each week for two consecutive weeks preceding the election in some newspaper published in the county and of general circulation in the corporation."

The Supreme Court of Iowa had an opportunity to review briefly, in the case of *McLeland et al. v. Marshall Cty.*, 199 Iowa 1244, 201 N. W. 406, the phrase "once a week for two weeks", and held that such a phrase required only a sufficient number of weekly publications and a period of seven days between publications. In *dicta,* the Court held that in order to allow 14 days the legislature could include such terms as consecutive, as in the instant case. Thus the phrase "once each week for two consecutive weeks" must mean a period of 14 days.

In examining the phrase "preceding the election", we find that the word "preceding" has been defined in *Webster's New International Dictionary,* 2d Ed., on page 1943, as follows: "That precedes; going before, as in order, rank, time; foregoing." Therefore, the 14 days' notice must be given before the election. A question then arises as to the necessary length of time before the election that notice must be given. An examination of the first paragraph discloses that notice of the election "shall be given not less than 10 days next preceding the day of the election", which clearly indicates that the day of election shall be excluded in determining the length of time that notice shall be given. General computation of time should be similar in order to preserve the continuity of the section. Under the provisions of §4.1, the general rule is that time should be computed by excluding the first day and including the last, in the absence of statutory authority to the contrary. A general rule is also cited in the case of *McLeland v. Marshall Cty., supra,* on page 1252 of the Iowa report:

> "It is also the general rule, in the absence of statute, in computing time for the publication of notice, not to reckon with the first and last days, inclusive, but to include one and exclude the other."

In the first paragraph of §277.3 it is quite clear that the legislature did not intend to include the day of election in computing the time that the notices shall be given.

Therefore, in those corporations where voters are required to register or where there is more than one voting precinct, the secretary shall have published notice once each week for two consecutive weeks, or 14 days, next preceding the day of election in a newspaper published in the county and of general circulation in the corporation.

19.8

SCHOOLS: Reimbursement for Interstate Highway land—§284.1, 1958 Code. Land purchased by State for Interstate Highways that is unplatted in a school district qualifies for reimbursement purposes under Ch. 284.

February 28, 1962

Mr. Gary S. Gill, Secretary
Executive Council of Iowa
L O C A L

Dear Mr. Gill:

This will acknowledge receipt of your letter in which you submitted the following:

> "Under Chapter 284, Code of Iowa, 1958, reimbursement is made to School Districts for taxes lost due to the unplatted lands contained therein that are owned by the State.
>
> "Since it is apparent that the Interstate will cross many school districts in the State of Iowa and would be of state-wide interest, an opinion is respectfully requested as to whether land purchased for the Interstate Highway System is within the scope of Chapter 284, Code of Iowa, 1958, and therefore the State of Iowa must reimburse this school district for these lands taken off the tax list."

Land purchased for the Interstate Highway System, which is now owned by the State of Iowa and which is unplatted land, qualifies the school district for reimbursement in accordance with Chapter 284, Code of 1958. Section 284.1 provides:

"284.1 Reimbursement—by whom computed. When unplatted lands within the boundaries of a school district are owned by the government of the United States, by the state, by a county, or by a municipal corporation located wholly outside said school district, and such lands have been removed from taxation for school purposes, said school district shall be reimbursed, as hereinafter provided, in an amount which shall be computed by the county board of supervisors in the county in which such lands are located, which computation shall be made on or before the first day of September in the year in which said deductions are to be made."

19.9

SCHOOLS: Reorganization, agricultural land tax credit—§275.1, 1958 Code. County board of education cannot accomplish statutory policy of attaching area not maintaining 12-grade system when the agricultural land tax credit has not been fully paid in any year subsequent to the statutory amendment by the 57th G.A.

April 2, 1962

Honorable Richard C. Turner
State Senator
Honorable Edward A. Wearin
State Senator
Honorable Henry C. Nelson
Speaker of the House
Honorable John A. Baumhover
State Representative
Honorable Richard L. Stephens
State Representative
Mr. Paul F. Johnston
State Superintendent of Public Instruction
Mr. Earl E. Hoover
Clay County Attorney

Dear Sirs:

This is to acknowledge receipt of your several inquiries which are concisely summarized in the questions propounded by Earl E. Hoover, Clay County Attorney, as follows:

"1. 'With reference to Chapter 275.1, 1958 Code of Iowa, has the Agricultural Land Tax Credit as provided for in Chapter 426 been paid for at least one year prior to July 1, 1962 within the meaning of said Section?'

"2. 'As of July 1, 1962, with respect to any district not maintaining 12 grades, is it mandatory for our county board of education to attach them to some district so maintaining a 12 grade system?'

"3. 'Can our county board of education safely proceed on the assumption that such Agricultural Land Tax Credit has been paid for at least one full year prior to July 1, 1962?' "

Section 275.1, as amended by the 57th G.A., with specific reference to the third paragraph thereof, is as follows:

"... it is further declared to be the policy of the state that all the area of the state shall be in a district maintaining twelve grades by July 1, 1962. If any area of the state is not in such a district by July 1,

1962, it shall be attached by the county board of education to some such district, provided, however, that such attachment has the approval of the state board of public instruction before becoming effective and the full payment of the agricultural land tax credit as provided for in chapter 426, has been made for at least one year prior to July 1, 1962. Any such district or part thereof attached by the county board of education, with the approval of the state board of public instruction, shall have the right to appeal this attachment to a court of record in the county in which said district or part thereof is located within twenty days after the date of the approval by the state board of public instruction. . . ."

The above-quoted section has been under litigation in the courts of the State of Iowa since Chapter 275 became effective on May 1, 1953. *Grant v. Norris,* 249 Iowa 236, 85 N.W. 2d 261. The provisions of §275.1 have been found constitutional when challenged on the theory that there is an undefined discretion vested in the county boards of education, that its operation violates due process of law, or that there is lack of uniform operation. *Wall v. County Board of Education,* 249 Iowa 209, 86 N.W. 2d 231.

In addition, in the case of *Robrock v. County Board of Education,* 250 Iowa 422, 425, 94 N.W. 2d 101, the Supreme Court said, after quoting the above portion of §275.1:

"It will be observed that '* * * *no existing district or part thereof* shall be included in such twelve-grade district prior to July 1, 1962 without the electors of such existing district or part thereof having an opportunity to vote the proposition to include such existing district or part thereof in said twelve-grade district.' (emphasis supplied) The lands of the plaintiffs were a 'part thereof' of an existing district.

"It is our conclusion it was the intention of the legislature to give to electors of an existing district or 'part thereof' the right to vote on the proposition whether they wished to be included in a twelve-grade district prior to July 1, 1962."

Thus it is established that, as a declared policy of the State of Iowa, all the areas in the State of Iowa shall be in a twelve-grade school district prior to July 1, 1962, and the electors of this state have the right to petition and determine for themselves the twelve-grade district to which they wish to belong. Under the basic principles established, as set out in the *Robrock* case, *supra,* it would appear the electors have the right to make this determination as to the twelve-grade district if their petition is on file prior to July 1, 1962. However, if the electors fail to avail themselves of their statutory privilege, then the county boards of education have the duty to attach areas in order to accomplish the policy of the State of Iowa. *Peterson v. Board of Education,* 251 Iowa 1306.

An examination of the latter proposition shows a duty of the county board of education to attach those areas not in a twelve-grade system, but not without certain restrictions. Aside from the problem of attachment prior to July 1, 1962 (Staff to Johnston, 12/18/61), there are three other restrictions placed upon the action of the county board of education, as to (1) the time the board may act, (2) the effect of the board action, and (3) when the board may act.

Briefly, as to the first restriction, it is well settled in this state that the date set for the performance of a duty by a governmental body (July 1, 1962), is directory for the orderly disposition of the duty imposed. *Yengel v. Allen,* 179 Iowa 633, 640, 161 N.W. 631.

The latter two restrictions are in the nature of a condition to the attach-

ment, as well as a limitation to the attachment. The third restriction relating to when the board may act is of primary importance. The word "provided" as used in the statute has never been defined by the Supreme Court of Iowa as such. However, the case of *United States v. Babbit,* 66 U.S. 55, 1 Black 55, 75 L. Ed. 94, an appeal from the United States District Court for the District of Iowa to the Supreme Court of the United States, held that the term "provided" could mean a condition placed upon an act as well as a limitation placed upon an act. While the Supreme Court of Iowa has not adopted such a rule, it was stated in *Mote v. Town of Carlisle,* 211 Iowa 392, 396, 233 N.W. 695:

> "... the acknowledged rule of construction is that a proviso will generally be considered not to enlarge, but rather to restrain, qualify, or explain the clause to which it refers."

Also see *Boone Biblical College v. Forrest,* 223 Iowa 1260, 275 N.W. 132, in which the Court discussed generally the distinction between a restriction by a condition and a restriction by a limitation.

Consequently, the true inquiry as imposed by this limitation or condition is whether "the full payment of the agricultural land tax credit ... has been made for at least one year prior to July 1, 1962."

The additional language incorporated into §275.1 regarding the agricultural land tax credit was imposed by the 57th G.A. Prior to the passage of this amendment, it was ruled that "the condition stated will operate only prospectively and will not be deemed satisfied by the full payment of agricultural land tax credit reported to have been made in the year 1949." (Informal opinion #57-4-29). The prior ruling was later confirmed in the *Grant* case, *supra,* which held that Chapter 275 was prospective in operation. It must therefore be determined whether the agricultural land tax credit has been paid in full for any year subsequent to the amendment of §275.1 by Chapter 128, §5, Acts 57th G.A., effective May 9, 1957. Examination of the records of the State Comptroller indicate that full payment of this credit has not been made in any year subsequent to the amendment.

In summary, it is our considered opinion that the agricultural land tax credit, being a limitation to the attachment of those areas not maintaining a twelve-grade system, has not been met and the policy of the section cannot be carried out.

19.10

SCHOOLS: Reorganization—§275.1, 1958 Code. Attachment to twelve-grade district by county board of education may not be effected prior to July 1, 1962.

December 18, 1961

Mr. Paul F. Johnston
Superintendent of Public Instruction
State Office Building
LOCAL

Dear Mr. Johnston:

This is to acknowledge receipt of your letter of October 27, wherein you state the following:

> "Chapter 275.1 contains the following provision: 'It is further declared to be the policy of the state that all the area of the state shall be in a district maintaining twelve grades by July 1, 1962. If any area of the state is not in such a district by July 1, 1962, it shall be attached by

the county board of education to some such district, provided, however, that such attachment has the approval of the state board of public instruction . . .'

"The Webster County Board of Education in a board meeting held on September 11, 1961, attached all areas of Webster County not maintaining an approved four-year high school program to districts now maintaining an approved twelve-year program. Following this action they officially certified such action to the State Board of Public Instruction requesting their approval of such an attachment as required by statute.

"The question that the State Board specifically requests an opinion on is the following: * * * Is the action taken by the Webster County Board premature in that these areas could complete a reorganization prior to July 1, 1962? Is this action timely, or should a county board take this action on or near July 1, 1962?"

Section 275.1, Code 1958, in pertinent part provides, to wit:

"It is further declared to be the policy of the state that all the area of the state shall be in a district maintaining twelve grades by July 1, 1962. If any area of the state is not in such a district by July 1, 1962, it shall be attached by the county board of education to some such district, provided, however, that such attachment has the approval of the state board of public instruction before becoming effective and the full payment of the agriculture land tax credit as provided for in Chapter 426, has been made for at least one year prior to July 1, 1962. Any such district or part thereof attached by the county board of education, with the approval of the state board of public instruction, shall have the right to appeal this attachment to a court of record in the county in which said district or part thereof is located within twenty days after the date of the approval by the state board of public instruction.

"It is further declared to be the policy of the state that no existing district or part thereof shall be included in such twelve-grade district prior to July 1, 1962 without the electors of such existing district or part thereof having an opportunity to vote the proposition to include such existing district or part thereof in said twelve-grade district. * * *"

Your attention is directed to a prior opinion of this office under the date of April 24, 1957, Abels to Molison, State Senator, which discusses the above quoted portion of §275.1. As indicated in said opinion, the presumption is that the legislature has not enacted a statute which is meaningless.

The present duties of the county board of education with respect to fulfilling the legislative mandate of school reorganization are clear and unquestioned. The primary duty of the board prior to July 1, 1962 is to review petitions for reorganization and establish boundaries or dismiss such petitions as provided in §275.12 et seq., Code 1958, as amended. *Anderson v. Hadley,* 245 Iowa 550, 63 N.W. 2d 234; *Springville Community School District v. Department of Public Instruction,* 252 Iowa 907, 109 N.W. 2d 213. The county board of education must approve or disapprove a proposed merger as provided in Chapter 192, Acts 58th G.A. In addition, there is a duty which is clearly set out in the case of *Independent School District of Osprey v. County Board of Education,* which was filed on November 14, 1961, wherein the Supreme Court held that the county boards of education cannot be deprived of their statutory duty to attach those areas of less than four sections as defined by statute by any action of the electors who reside within that area. Based upon the above cases, the wording of §275.1 is clear and unambiguous.

However, on the other hand, the electors of a school district not within a twelve-grade system have certain statutory rights which cannot be adjudged by the county boards of education prior to July 1, 1962. The electors have the right to vote on all proposed reorganizations commenced prior to July 1, 1962. *Robrock v. County Board of Education,* 250 Iowa 422, 94 N.W. 2d 101. They also have the right to petition, prior to July 1, 1962, for a reorganization under §275.12 and should be given the opportunity to declare by election whether such reorganization should take place. *Wall v. County Board of Education,* 249 Iowa 209, 86 N.W. 2d 231. In addition, the electors have the right to file objections to any petition of reorganization as provided in §§275.15 and 275.16, Code 1958. *Hubka v. County Board of Education,* 251 Iowa 659, 102 N.W. 2d 167.

The county boards of education can acquire jurisdiction over those areas which are not in a twelve-grade system after July 1, 1962, provided that the area in question is not involved in a reorganization by a petition filed prior to July 1, 1962. *State ex rel Harberts v. Klemme Community School District,* 247 Iowa 48, 72 N.W. 2d 512. However, those areas excluded from a proposed reorganization, on or after July 1, 1962, and not maintaining a twelve-grade system may be attached. (§4, Ch. 189, Acts 58th G.A.)

Therefore, based upon the foregoing authority, we are constrained to hold that the action taken by the above-mentioned county board of education was premature.

19.11

SCHOOLS: Secretary to board—§279.3, 1962 Code. Same person cannot act as secretary of the board of directors of a school district as well as secretary to the superintendent of schools of the same school district.

October 16, 1962

Mr. Peter J. Peters
Pottawattamie County Attorney
Council Bluffs, Iowa

Attn: Manning Walker, Assistant County Attorney

Dear Mr. Peters:

This is to acknowledge receipt of your request for an opinion wherein you state as follows:

> "This office has received several complaints regarding the local community school district hiring the same individual as secretary to the board of directors and as secretary to the superintendent of schools. * * * The difficulty in determining the legality of the instant situation would in my opinion depend upon whether or not the secretary of the superintendent can be considered an employee of the board. * * *"

Section 279.3, Code 1962, in pertinent part, provides:

> "At the meeting of the board the first secular day after the seventh day in July the board shall appoint a secretary who shall not be a teacher or other employee of the board. * * *"

The secretary to the superintendent of schools is, in fact, an employee of said school district and would be an employee of the board of directors by operation of law. Such person would be precluded from acting as secretary to the board of directors of said school district.

19.12

SCHOOLS: Special education—§§281.2, 282.3, 1962 Code. A child requiring special education, within the meaning of Chapter 281 of the Code, is subject to the minimum age limitations of §282.3 and may not be admitted to school work at a chronological age below that specified therein.

June 26, 1962

Mr. Martin D. Leir
Scott County Attorney
Third Floor, Courthouse
Davenport, Iowa

Dear Mr. Leir:

This is in response to your request for opinion dated February 21, 1962, in which it is stated:

"There is a vast body of research findings which indicate that certain handicapped children in order to receive the maximum benefit of their educational opportunities should be provided with special educational progress at the chronological age of two or three years. This is particularly true of deaf, blind, cerebral palsied and mentally retarded children.

"In view of the above, those of us in special education work have long been concerned that we apparently have not been able to provide special education programs for handicapped children within the framework of the public schools until the child reaches the age of five years. We have been guided in this practice due to the school entrance age requirements of so-called 'normal' children as defined in Chapter 282 of the Code of Iowa.

"However, when one scrutinizes Chapter 281 of the Code (the chapter setting forth the provisions for the education of children requiring special education) there seems to be a question as to whether or not we are right in assuming we *cannot* provide special education for children under the chronological age of five.

"I specifically call your attention to Section 281.2 under Chapter 281. This section defines handicapped children who might be served under the provisions of the chapters. It states that 'children under 21 years of age' may be served but does not state that they must be 5 years of age. In other words, it spells out an upper age limit but says nothing about a lower age limit. I feel that there is sufficient question as to the legality of serving children under the age of five years within the provisions of Chapter 281 as it is written to request an attorney general's opinion on the matter."

In relation to this problem, §282.3(5), 1962 Code, in pertinent part states:

"On and after July 1, 1962, the conditions of admission to *public schools* for work in the school year immediately preceding the first grade and in the first grade shall be as follows: *No child* shall be admitted to *school work* for the year immediately preceding the first grade unless he is five years of age on or before the fifteenth of October of the current school year." (Emphasis added)

The term "public school" as used in the above-quoted section has been defined as a school "which the state undertakes, through various boards and officers, to direct, manage, and control . . .". *Silver Lake Consol. Sch. Dist. v. Parker,* 238 Iowa 984, 997, 29 N.W. 2d 214, 221 (1947). The special education division created by Chapter 281 fits within the generic term "public

school", thereby making the minimum age limitations of §282.3(5) applicable.

Lending further support to this position is §282.1, which states in part: "Persons between five and twenty-one shall be of school age.", and Iowa Constitution, Article IX, §7, which states:

"The money subject to the support and maintenance of common schools shall be distributed to the districts in proportion to the number of youths, between the ages of five and twenty-one years, in such manner as provided by the General Assembly."

All of the above provisions indicate that it is the intention of legislature that *no* child should be admitted in the public school systems below the chronological age of five years.

19.13

SCHOOLS: Storage of busses—§278.1(7), 1958 Code. When the electors of a school district have authorized the school board to levy a tax as provided in §278.1(7), such moneys so collected may be expended for grounds to be used for the storage of busses without further approval of the electors of the district. However, they cannot build a bus garage with such funds.

March 5, 1962

Mr. Stanley R. Simpson
Boone County Attorney
913 Eighth Street
Boone, Iowa

Dear Mr. Simpson:

This will acknowledge receipt of your recent letter in which you request an opinion on the following:

"The Boone Community School District has been authorized to levy, not to exceed 2½ mills on the dollar, for the purchase of grounds, construction of schoolhouses, etc., pursuant to Sec. 278.1, Subsection 7, Code of Iowa 1958.

"The legal proposition involves whether or not the local Board can use some of this money out of this particular fund to purchase land for a bus garage (to house school busses), without putting the proposition to the vote of the people."

Section 285.1, 1958 Code, provides in pertinent part:

"The board of directors in every school district shall provide transportation or the costs thereof for all resident pupils attending public school, kindergarten through twelfth grade, who reside more than one mile from the school designated by the board for attendance . . . "

Section 285.10 provides in part:

"The powers and duties of the local school boards shall be to:

"1. Provide transportation for each pupil who attends public school, and who is entitled to transportation under the laws of this state.

"2. * * *

"3. Purchase or lease busses and other transportation facilities, and

maintain same, and to enter into contracts for transportation subject to any provisions of law affecting same."

The above-quoted statutes impose upon a school district a specific duty to provide transportation. A complete examination of Chapter 285 fails to disclose any specific statutory direction as to the care, maintenance and storage of school busses except the general authority to contract for "transportation facilities" and to "maintain same" found in §285.10 as quoted above. Therefore, by a general reference as to the care, maintenance and storage of school busses, it is reasonably and necessarily implied that such matters are incident to the exercise of the duty of providing transportation which has been expressly conferred by statute. *Silver Lake Cons. Sch. Dist. v. Parker,* 238 Iowa 984, 29 N.W. 2d 214; *Ind. Sch. Dist. of Danbury v. Christiansen,* 242 Iowa 963, 49 N.W. 2d 263.

The right of a school district to enforce a contract has been held to extend to a contract made for its benefit by a municipality. In the case of *Ind. Sch. Dist. v. LeMars Water and Light Co.,* 131 Iowa 14, 107 N.W. 944, the Court held in essence that a school district could maintain an action in mandamus to enforce a contract made by the school district with a water company for furnishing a water supply, because it was incident to the operation of a school. Thus the power of a school district to enter a contract which would be binding beyond the term of the present board is based upon the subject matter of the contract, whether the function is legislative or proprietary. 37 *Am. Jur.,* §66, page 679. This rule has been cited with approval in *Des Moines v. West Des Moines,* 239 Iowa 1, 30 N.W. 2d 500.

The acquisition and disposal of school property by contract is for the most part a proprietary function of a school district, provided such function is carried on within the limits set out by the statutes. *Munn v. Ind. Sch Dist.,* 188 Iowa 757, 176 N.W. 811; *Maxwell v. Custer,* 238 Iowa 1306, 30 N.W. 2d 177. A discretionary determination must first be made to ascertain whether or not land should be acquired for a school purpose.

The statute confers upon the board the discretionary power to contract to maintain facilities for transportation; thus the acquisition of ground for storage of school busses is a proper function to carry out the duty of providing transportation.

While the power to contract for the acquisition of transportation facilities is discretionary for the most part with the school board, there are certain limitations placed upon this discretion by statute and prior opinions of the Attorney General have discussed these limitations. In 1928 *O.A.G.* 159, the school board cannot borrow money in order to contract. Also, in 1934 *O.A.G.* 223, the school board is vested with the necessary authorization of the electors to purchase ground for school purposes without any further election, and may build the necessary school buildings when possessed with sufficient funds. However, in 1938 *O.A.G.* 169, unless specific authorization is given for the construction of buildings other than school buildings, the school district is without authority to construct such buildings in the absence of express authorization by the elector. But in 1958 *O.A.G.* 123, this office held that the board has the power to contract for the necessary insurance to cover transportation facilities which the school district has acquired.

Based upon the above authority, it is our opinion that when the electors of a school district have authorized the school board to levy a tax as provided in §278.1(7), 1958 Code, such moneys so collected may be expended for grounds to be used for the storage of busses without further approval of the electors of the district. However, the school district is without authority to expend the funds so allocated for building a bus garage.

19.14

SCHOOLS: Teacher retirement—§294.15, 1958 Code. 1. Retirement benefits from other retirement systems accrued after July 4, 1957 are not affected by the amendment of the 59th G.A. to §294.15. 2. Those who were receiving benefits from other State retirement systems on July 4, 1957 will receive the benefits of §294.15 as amended in the sum of $75 only. Allowance by the State to such persons of $75 is the maximum of retirement benefits that such persons may receive from the State. 3. Maximum limit of $75 per month allowance from all State sources became effective on the 7th day of April, 1951, and therefore the new reduced benefit payment will be computed from that date.

June 7, 1961

Mr. Don G. Allen, General Counsel
Iowa Employment Security Commission
112-116 Eleventh Street
Des Moines 8, Iowa

Dear Mr. Allen:

This will acknowledge receipt of yours of May 3, 1961, in which you submitted the following:

"The Iowa Employment Security Commission has directed me to solicit your opinion relative to the payment of benefits under the provisions of section 294.15 of the Code of Iowa, 1958, as amended by House File 65, 59th General Assembly.

"Section 294.15 of the Code is a state teachers' pension law. The present General Assembly amended it by House File 65 which became effective upon publication. The last publication date was April 6, 1961, in the Sac Sun, a newspaper published at Sac City, Iowa. The pertinent part of this amendment is an addition to the first paragraph of the said Code section, such addition reading as follows: 'No such person shall receive retirement benefits from the state of more than seventy-five dollars ($75.00) per month.' For your convenience I enclose herewith a copy of section 294.15 as thus amended.

"When section 294.15 was enacted, many questions as to its administration arose by reason of the fact that it was a very brief and incomplete pension system separate and apart from all other state retirement systems. Some of these questions were answered in an Attorney General's opinion dated June 19, 1957, a copy of which I enclose with this letter for your convenience. I might add that this agency has had no disagreement with this opinion.

"There are four sources of retirement benefits from which, under various circumstances, a retired Iowa school teacher might be entitled to draw: to wit, the Iowa Old Age and Survivor Insurance System, the Iowa Public Employees' Retirement System, the supplementary benefits under the so-called 30-year provision of the Iowa Public Employees' Retirement System Law which is set out in section 97B.43 of the Code of 1958, and the state teacher's pension system set out in section 294.15.

"Under the Attorney General's opinion of June 19, 1957, some teachers were entitled to draw $75.00 monthly from the state teachers' pension plan plus benefits from two of the other plans which gave to a few of them benefits totaling more than $75.00 per month. Our questions are these:

"1. Under section 294.15 as amended by the 59th General Assembly, do we reduce the payment of these teachers who are drawing more than $75.00, and of whom there are presently 34 in the

state, so that the total amount each receives from the other systems plus the addition of benefits under section 294.15 is the sum of $75.00, or do we continue to pay such individual the amount now being received which exceeds $75.00 per month?

"2. The payroll to beneficiaries under all of the systems is on a monthly basis, and the benefits for a calendar month are paid the last of that month. If it is your opinion that all that these 34 teachers can receive is $75.00 per month from all state sources, shall we pay them the full amount they have been receiving for the calendar month of April, or will we compute the new reduced benefit payments, beginning April 7, 1961, which is the day following the last date of publication of the said amendment?

"Inasmuch as the director of the Iowa Public Employees' Retirement System will not make any payments of benefits to these 34 retired teachers until we hear from you, may I impose upon you and ask for an early opinion."

Accompanying your request is a copy of an opinion issued by this department June 19, 1957, to J. C. Blodgett, Chairman of the Iowa Employment Security Commission, paragraph four of which has immediate pertinency to the problem under consideration and which stated the following:

"4. In answer to your fourth question, House File 599 expressly provides that the objects of its bounty:

'* * * shall be entitled to receive retirement allowances from the state of Iowa of *not less than* seventy-five (75) dollars per month. Such sums as are necessary to meet this *minimum* requirement *shall* be added to the retirement allowance payments, if any, now being received. * * *' (Emphasis ours)

"The word 'now' presents the chief obstacle to construing the statute. Its inherent ambiguity is such that its use in the drafting of statutes is an abomination. There is no satisfactory way of determining whether the word 'now' was intended to identify the time the draftsman set down his thoughts on paper, or the time the bill was introduced, or the time the bill completed passage in both houses, or the time the governor signed, or July 4, 1957, or the time thereafter when some interested party happens to read it. However, ambiguous as the word is on its face, certain clues as to its probable intended meaning may be gleaned from perusal of the complete text of the Act. It is significant that the operation of the Act is confined by Section 1 to a closed class determined as of July 4, 1953. It is further significant that under Section 2 of the Act money appropriated for its effectuation is identified with the biennium 1957-1959 and that the effective date of the Act falls on July 4, 1957, nearly coincident with the beginning of said biennium. It would, therefore, appear that 'now' refers to July 4, 1957, and 'sums ... necessary to meet this minimum requirement' should be computed as of that time. Once so determined such 'sums' would remain unchanged without reference to subsequent reduction in the retirement allowance payments upon which such computation was made. The 'sums' would not be reduced in proportion to reduction in the basic allowance under the conditions described in your fourth question for the reason that House File 599 makes no provision for such reduction and for the reason that such 'sums' are unknown to the prior-existing statutes under which reduction of the basic allowance occurs. Neither would such sums be increased in order to maintain the seventy-five dollar minimum total under such subsequent reduction of the basic allowance for the reason that the computation based upon seventy-five dollars is made 'now' which means July 4, 1957 rather than the time of such subsequent reduction in basic retirement allowance."

Also accompanying your request is an exhibit of §294.15, Code of 1958, as amended by both the 58th and 59th General Assemblies, copy of which Coded section appears as follows:

"294.15 State teachers' pension. Any person having attained the age of sixty-five who shall have been an employee, holding a valid teaching certificate, in the public schools of this state with a record of service of twenty-five years or more, including a maximum of five years out-of-state service followed by at least ten years service in this state prior to retirement and who shall have retired prior to July 4, 1953, shall be entitled to receive retirement allowance payments from the state of Iowa of seventy-five dollars per month. Such sums as are necessary to meet this requirement shall be added to the retirement allowance payments, if any, now being received from the state of Iowa by individuals covered by the provisions of this section. No such person shall receive retirement benefits from the state of more than seventy-five dollars ($75.00) per month.

"Application for such retirement allowance payments shall be made to the employment security commission under such rules and regulations as the commission may prescribe. Eligible persons shall be entitled to receive such retirement allowance payments effective from the date of application to the commission, provided such application is approved, and such payments shall be continued on the first day of each month thereafter during the lifetime of any such person.

"For the purpose of paying the teachers' retirement allowance payments granted under this section, there is hereby appropriated out of any funds in the state treasury not otherwise appropriated, a sum sufficient therefor."

In addition to the foregoing, I exhibit the amendment made to §294.15 by the 59th G.A., being H.F. 65 which has occasioned this request.

"Sec. 2. Section two hundred ninety-four point fifteen (294.15), Code 1958, is amended by striking from line twelve (12) the words 'not less than'.

"Said section is further amended by striking from line fourteen (14) the word 'minimum'.

"Said section is further amended by adding at the end of the first paragraph the following:

'No such person shall receive retirement benefits from the state of more than seventy-five dollars ($75.00) per month.' "

In view of the §294.15, Code 1958, as interpreted by the foregoing-described opinion of this Department, the status of those persons qualified to receive the benefits of said §294.15, as amended, was fixed as of July 4, 1957.

1. In answer to Question No. 1, I am of the opinion:

   a. That those whose retirement benefits from other retirement systems accrued after July 4, 1957, are not affected by the amendment of the 59th G.A. to §294.15, Code of 1958.

   b. That those who were receiving benefits from other State retirement systems on July 4, 1957 will receive the benefits of §294.15, Code 1958, as amended, in the sum of $75.00 only. Allowance by the State to such persons, of $75.00, is the maximum of retirement benefits that such persons may receive from the State of Iowa.

2. In answer to Question No. 2, I am of the opinion that the maximum limit of $75.00 per month allowance from all State sources became effective on the 7th day of April, 1961, and therefore the new reduced benefit payment will be computed from that date.

19.15

SCHOOLS: Transfer of funds to Schoolhouse fund from General Fund— §279.31, 1958 Code. The only transfer of funds from the General Fund to the Schoolhouse Fund is that authorized by §279.31 and, therefore, transfers from that fund of moneys in the General Fund accumulated during the year subsequent are only subject to transfer under that same §279.31 on the following July 1.

February 21, 1962

Honorable David O. Shaff
State Senator
406 South Second Street
Clinton, Iowa

Dear Senator Shaff:

This will acknowledge receipt of yours of the 4th, ult., in which you submitted the following:

"By reason of increased tax collections resulting from enforcement of the money and credit tax, the Clinton Community School District expects to receive tax revenues during 1962 which are substantially in excess of its current budget.

"Code Section 279.31 makes provision for the transfer of a surplus in the General Fund to the Schoolhouse Fund, if, following the annual settlement, it shall appear that there is a surplus in the General Fund.

"The Clinton Community School District is interested in the possibility of making such a transfer after July 1, 1962 in order that such funds might be used in connection with its school building program.

"Inasmuch as the propriety of such transfers might have an effect on proposed changes in the statutory maximums under Code Sections 298.1 and 298.2, and also since determination of the matter is material to the Clinton Community School District, it is requested that your office issue an opinion as to whether a surplus in the General Fund of the School District which has resulted from unanticipated collections of the money and credit tax can be transferred after the July 1st meeting, under the provisions of Code Section 279.31, when an emergency increase has been secured under the provisions of Code Section 298.2 for the previous year's school budget and will also be requested for the next year's school budget."

Section 279.31, Code of 1958, referred to by you, in its present form was enacted by the 40th G.A., S.F. 101, paragraph 18, and appears in the 1924 Code, §4241. This section was interpreted by an opinion of this Department issued December 10, 1926, a copy of which is hereto attached and by this reference is made a part hereof. Note that with reference to any transfer from the General Fund to the Schoolhouse Fund, it is stated:

"The only provision for such a transfer is in Section 4241 which provides that if, after the annual settlement it shall appear that there is a surplus in the general fund, the board may at its discretion transfer any or all of such surplus to the schoolhouse fund."

This interpretation of that statute limiting the power of transfer from the General Fund to the Schoolhouse Fund has been followed by the Department of Public Instruction since that time, and that interpretation has been incorporated in the Manual on School Business for School Officials with respect to the transfer from the General Fund to the Schoolhouse Fund, where it is stated:

"If, after the annual settlement (on the first secular day in July), it appears that there is a surplus in the General Fund, the school board may, at its discretion, transfer any or all of such surplus to the Schoolhouse Fund. (279.31)

"The actual transfer indicated above may be made at the annual settlement meeting or at a subsequent meeting of the board, but if a surplus is declared and transferred to the Schoolhouse Fund, such money cannot then be spent without a vote of the electors. Ltr. O.A.G., Dec. 10, 1926.

"The board should make the decision regarding the existence and declaration of a surplus at the July first meeting, even though the actual transfer is not made at that time. Any existing surplus in the General Fund, over and above a reasonable reserve (encumbered balance), should either be transferred to the Schoolhouse Fund or used to apply on the current year's budget and thus reduce the amount to be raised by taxation for the General Fund.

"The school board cannot legally certify a high tax in order to build up a large surplus in the General Fund and then transfer that surplus to the Schoolhouse Fund and proceed to build a building without a vote of the electors. To do so '... would, in effect give the board power to do indirectly what it cannot do directly ...' 1926 Report, p. 403. New construction must be paid from the Schoolhouse Fund and must be authorized by a vote of the electors, regardless of the source of the money.

"It should be noted that there is no statutory provision for transferring money from the General Fund to the Schoolhouse Fund by a vote of the electors; consequently, the only method for making such transfer is that provided in Section 279.31 as described above."

Therefore, the only transfer that can be made is that provided by §279.31, which does not include authority for making a transfer after July 1, 1962, except for those funds declared to be surplus at the annual settlement provided by §279.30. Any emergency funds made available under §298.2 by the Comptroller is subject to the same rule, and, therefore, not transferable except as they may be included in the following July settlement.

19.16

Annual audit—§11.18, 1958 Code. Consolidated school districts maintaining a high school are subject to an annual audit, as provided in §11.18. (Rehmann to Akers, St. Aud., 7/25/61) #61-7-22

19.17

Boundary change—§§274.4, 275.12, 1958 Code. No boundary change can be effected unless a petition is signed by the requisite number of voters in the included portion under §275.12, and if the portion to be included in the boundary change is uninhabited, then such boundary change cannot be accomplished in the absence of specific statutory authority to the contrary. (Rehmann to Riley, St. Rep., 2/23/61) #61-2-17

19.18

Boundary changes—§§274.37, 274.38, 1962 Code. The electors of a school district cannot petition the respective school boards in order to force an adjustment of the boundary line between two contiguous school districts. (Rehmann to Levis, Audubon Co. Atty., 6/26/62) #62-6-2

19.19

Boundary changes—Ch. 275, 1958 Code. S.F. 469 provides an alternate method of adjusting boundaries, irrespective of the provisions of Ch. 275. (Rehmann to Shaff, St. Sen., 7/14/61) #61-7-15

19.20

County superintendents—Ch. 272, 1958 Code. County superintendents are not entitled to expenses from school districts incurred for the purpose of promoting legislation. (Rehmann to Ford, Des Moines Co. Atty., 11/22/61) #61-11-21

19.21

Discipline—§285.1, 1962 Code. A school district may punish unruly pupil by keeping him after school even though said pupil will miss transportation provided by school district. School district is not responsible for providing other transportation after disciplinary action is completed. (Rehmann to Maddocks, Wright Co. Atty., 12/17/62) #62-12-3

19.22

Disposition of property—§297.22, 1962 Code. The daily average attendance in the school district (not in the high school) is a condition precedent to the authority of the school board to dispose of property without the vote of the electors. (Rehmann to Winkel, Kossuth Co. Atty., 10/16/62) #62-10-2

19.23

Disposition of schoolhouse—§297.20, 1958 Code. School district has no duty to fill the hole left when a schoolhouse has been removed by a third party. The provisions of §297.15 et seq. are mandatory upon the school district and cannot be bypassed. (Rehmann to Rasche, Clinton Co. Atty., 11/22/61) #61-11-19

19.24

Officers—§63.1, 1958 Code. A person elected to the county board of supervisors while being a member of a school board does not create any incompatibility until a person is qualified under §63.1, which automatically creates a vacancy in the first office held by the person. (Rehmann to Barlow, Palo Alto Co. Atty., 2/21/61) #61-2-14

19.25

Reorganization—§§275.11, 275.20, 1958 Code. A consolidated school district not maintaining a high school organized prior to May 10, 1957, which still maintains a school, is eligible to vote under §275.20. Two or more school districts are not contiguous which merely touch at a common point and have no common boundaries and therefore cannot be united. (Rehmann to Snyder, Buena Vista Co. Atty., 3/10/61) #61-3-7

19.26

Reorganization—§§275.12, 275.14, 275.15, 1958 Code. Failure of a portion of a petition for reorganization to contain the requisite number of signers would constitute a jurisdictional bar to the county board of education from considering the petition, even though all other school districts or portions thereof had the requisite number of signers. (Rehmann to McGrath, Van Buren Co. Atty., 5/24/62) #62-5-7

19.27

Schoolhouses—§278.1(7), 1958 Code. Taxes derived under §278.1(7) can be used for the remodeling of an existing schoolhouse. (Rehmann to Perkins, Polk Co. Atty., 3/17/61) #61-3-12

19.28

State Board expenses—§257.6, 1958 Code. A member of the State Board of Public Instruction who is a resident of Des Moines is entitled to payment of expenses incurred in Des Moines as elsewhere. (Strauss to Johnston, Supt. of Public Instruction, 2/21/61) #61-2-11

19.29

Tuition—§282.17, 1958 Code. A school board cannot pay tuition to an out-of-state school board unless the conditions of §282.17 have been complied with. (Rehmann to Bruner, Carroll Co. Atty., 6/7/61) #61-6-8

19.30

Tuition—§§275.28, 282.7, 1958 Code. School districts can only incur liability to pay tuition based upon the statutory duty imposed upon them under §282.7. When such liability occurs it must be taken into consideration in the division of assets and liabilities under §275.28. (Rehmann to Cady, Franklin Co. Atty., 11/22/61) #61-11-18

CHAPTER 20

STATE OFFICERS AND DEPARTMENTS

STAFF OPINIONS

LETTER OPINIONS

20.1

STATE OFFICERS AND DEPARTMENTS: Auditor of State, examinations of financial condition of cities and schools—§11.19, 1962 Code. Where, under the provisions of §11.19, the examination of the financial condition in townships and municipalities and school districts is made under contract with a certified or registered public accountant, notice of the filing of the report of such examination by such contractor shall be made by the Auditor of State, and not by the contractor.

October 24, 1962

Honorable C. B. Akers
Auditor of State
L O C A L

Attention: C. W. Ward, Supervisor

Dear Mr. Akers:

This will acknowledge receipt of your recent letter, in which you submitted the following:

"Should the Auditor of State file said notice (required in §11.10) with the newspapers, radio stations and television stations or should the certified or registered public accountant who has made said examination under contract with the city, town, school district or township?"

The following portion of §11.19, 1962 Code of Iowa, is pertinent in order to ascertain the legislative intent:

"Examiner's powers and duties. Where an examination is made under contract with, or employment of, certified or registered public accountants, the examiner shall, in all matters pertaining to an authorized examination, have all of the powers and be vested with all the authority of state examiners employed by the auditor of state, and the cost and expense of the examination shall be paid by the city, town, school district, or township procuring the examination. An itemized sworn statement of the per diem and expense of the examiner shall be filed with the clerk of the city, town, township, or school district, before payment thereof. Upon completion of such examination, a signed copy thereof shall be filed by the accountant employed with the auditor of state. * * *

"In addition to the foregoing, notice that the report has been filed shall be forwarded immediately to each newspaper, radio station or television station located in the city, town, school district or township which is under investigation or audit; except that if there is no newspaper, radio station or television station located therein, the notice shall be sent to the official newspapers of the county. * * *"

The only specific duty in addition to the examination is this: "Upon completion of such examination, a signed copy thereof shall be filed by the accountant employed with the auditor of state." At that point, the official duty of the contractor ceases. This is confirmed by the fact that the compensation of the contractor is limited to the cost of the examination and evidences an intention that the contractor would have no other duty after the completion of the examination and its filing.

Pertinent to any duty imposed upon the contractor is this controlling comment appearing in 1946 *O.A.G.* 97, where it is said:

"It would be anomalous to permit municipalities to contract away by this alternative method the statutory supervisory powers of the Auditor of State over these examinations."

I am of the opinion, therefore, that the duty to notify the several parties entitled to a notice of such a filing is in the Auditor of State and not in the contractor.

20.2

STATE OFFICERS AND DEPARTMENTS: **Board of Accountancy**—§116.-9, 1958 Code. Since there is no authority under the powers granted the Iowa

Board of Accountancy to investigate the qualifications of "a college or university commerce department", no such power could be granted to a committee acting in their behalf.

April 18, 1962

Mr. Donald R. Denman, Secretary-Treasurer
Iowa Board of Accountancy
924 Insurance Exchange Building
Des Moines 9, Iowa

Dear Mr. Denman:

This will acknowledge receipt of your letter requesting an opinion from this office, in which you state:

"The Iowa Board of Accountancy has the responsibility under the Iowa accountancy law of determining whether an Iowa candidate has the educational requirements to sit for the Iowa CPA examination after one year's experience with a registered practitioner, i.e., whether he has had an acceptable commerce course with a major in accounting. This requires that the Board must be able to evaluate the qualitative and quantitative factors of the commerce departments in many schools other than the ones traditionally accepted, such as the University of Iowa and Drake University. Therefore, the Board intends to appoint a committee of educators whom we feel will be qualified to assess the aforementioned qualifications of the various schools and assist the Board in determining whether they meet the requirements of the law.

"With this background in mind, we desire an opinion from you on the following questions:

"1. May the Board pay the committee members from the fund which has accumulated from fees charged by the Board

(a) remuneration for time (if so, how much)?

(b) reimbursement for expenses?

"2. If a member of the committee is employed as an educator by one of the state universities of Iowa, may he receive the foregoing remuneration and/or reimbursement while he is at the same time so employed?"

In relation to this problem, §116.9, Iowa Code, 1958, provides:

"116.9 Qualifications for examination. Every applicant for the examination provided for in section 116.8 must be ... a graduate of a college or university commerce course of at least three years, majoring in accounting, ..."

An administrative agency is vested only with those powers which are expressly conferred on them by statute or which can fairly be implied from the express powers actually given. E.g., *Merchants Motor Freight, Inc. v. State Highway Commission,* 239 Iowa 888, 32 N.W. 2d 773 (1948); *State v. F. W. Fitch Co.,* 236 Iowa 208, 17 N.W. 2d 380.

The legislature in §116.9 has delegated no power either expressly or impliedly which would allow an investigation by the Iowa Board of Accountancy into the *quality* of the commerce departments of the various colleges and universities, and any administrative interpretation to the contrary cannot prevail. *School Dist. v. Moeller,* 247 Iowa 239, 73 N.W. 2d 43 (1956); *Iowa Mutual Tornado Ins. Ass'n. v. Fischer,* 245 Iowa 951, 65 N.W. 2d 162 (1954); and *Iowa Farm Serum Co. v. Board of Pharmacy Examiners,* 240 Iowa 734, 35

N.W. 2d 848 (1949). On the contrary, where the statute merely requires graduation from a university or college commerce course, without any reference to the standing or quality thereof, the Board of Accountancy can have no discretion in this regard. *Berkeley Chiropractic College v. Compton,* 97 Cal. App. 790, 276 P. 361 (1929).

An administrative agency can, however, affix a *reasonable* interpretation to terms in a statute which are ambiguous. *Bodinson Mfg. Co. v. California Employment Commission,* 17 Cal. 2d 321, 109 P. 2d 935 (1941); *Washington Twp. v. Hart,* 168 Kan. 650, 215 P. 2d 180 (1950). The term "commerce course" as used in §116.9, without stating what must be included *quantitatively,* is ambiguous. Therefore, the Board of Accountancy, in establishing the meaning thereof, may set up quantitative standards applicable, uniformly, to all prospective applicants. Compare *State ex rel. Thoman v. State Board of Certified Public Accountants,* 164 La. 42, 113 So. 757 (1927); *State v. DeVerges,* 153 La. 349, 95 So. 805 (1923). However, investigation of college or university commerce departments to determine if these quantitative standards are being complied with is unnecessary since each applicant has the burden of proving compliance before the examination can be taken. *State ex rel. Thoman v. State Board of Certified Public Accountants,* supra; *Dubin v. State Board of Medical Examiners,* 222 Wis. 227, 268 N.W. 116 (1936).

Thus, since there is no authority under the powers granted to the Board of Accountancy to examine a college or university commerce department, no such authority could be exercised by a committee acting in their behalf.

20.3

STATE OFFICERS AND DEPARTMENTS: Board of Accountancy—§116.10(2), 1962 Code. The Iowa Board of Accountancy may refuse to register an unrevoked certificate to practice accountancy granted by another state *only* if the applicant has not passed an examination equal to the standard established by the Board and the applicant has not been in continuous practice for at least seven years.

July 13, 1962

Mr. Donald R. Denman, Secretary-Treasurer
Iowa Board of Accountancy
924 Insurance Exchange Building
Des Moines 9, Iowa

Dear Mr. Denman:

This is in response to your recent inquiry in which you state:

"... the Wisconsin Board of Accountancy denies certificates to practice to Iowa CPAs based on their policy that no such certificate will be issued unless the CPA has an office in the state of Wisconsin.

"This is to request an opinion from you as to whether the Iowa Board of Accountancy may deny reciprocal certificates to Wisconsin CPAs who may request them from the Board; and if so, the reasons available for making such denials."

Section 116.10(2), in pertinent part, states:

"The holders of unrevoked certified public accountant certificates granted by other states ... may register their certificates, provided such certificates were issued as the result of an examination which, in the judgment of the board of accountancy, was equivalent, to the standard set by it, or the holders thereof shall have been in continuous practice thereunder for at least seven years."

An administrative agency is vested only with those powers which are expressly conferred on them by statute or which can fairly be implied from the express powers actually given. E.g., *Merchants Motor Freight, Inc. v. State Highway Commission,* 239 Iowa 888, 32 N.W. 2d 773 (1948); *State v. F. W. Fitch Co.,* 236 Iowa 208, 17 N.W. 2d 380.

Under §116.10(2), the Iowa Board of Accountancy has the authority to refuse to register an unrevoked certificate granted by another state *only* if in their judgment the applicant has not passed an examination equal to the standard established by the Board. If the holder of the unrevoked certificate granted by another state has been in continuous practice for at least seven years, then there is no authority under §116.10(2) for a refusal to register his certificate in Iowa. 1930 *O.A.G.* 210.

20.4

STATE OFFICERS AND DEPARTMENTS: Board of Accountancy, expense reimbursement—§116.4, 1962 Code. The hiring of a committee by the Iowa Board of Accountancy to assist in the evaluation, quantitatively, of requirements necessary for applicants to take the Iowa C.P.A. constitutes an expense "incident" to the discharge of the Board's duties under §116.4. However, a State-employed educator, in the absence of statute, cannot receive additional salary for serving on this committee but may receive expenses necessarily incurred.

July 18, 1962

Mr. Donald R. Denman
Secretary-Treasurer
Iowa Board of Accountancy
924 Insurance Exchange Bldg.
Des Moines 9, Iowa

Dear Mr. Denman:

This will acknowledge receipt of your recent inquiry in which you state:

"The Iowa Board of Accountancy has the responsibility under the Iowa Accountancy Law of determining whether an Iowa candidate has the educational requirements to sit for the Iowa C.P.A. examination after one year's experience with a registered practitioner, i.e. whether he has had a commerce course with a major in accounting.

"To assist in the evaluation of the quantitative factors included in these commerce courses, the Board intends to appoint a committee of three educators whom we feel will be qualified to assist it in the assessment of the aforementioned quantitative factors.

"We desire an opinion from you on the following question:

"1. May the Board pay the committee members from the fund which it has accumulated from the fees charged by the Board:

"(a) Remuneration for time (if so, how much)?

"(b) Reimbursement for expenses

"2. If a member of the committee is employed as an educator by one of the state universities of Iowa, may he receive the foregoing remuneration and/or reimbursement while he is at the same time so employed?"

In the situation herein considered, the question is whether the hiring of

this committee is *incident* to the discharge of the Board's duties and is a reasonable and necessary expense within the meaning of §116.4, Iowa Code, 1962. On the basis of an opinion dated August 18, 1961, from Snell to Denman, a copy of which is enclosed, it would seem that the employment of this committee is an expense incident to the duties imposed on the Board by Chapter 116, as is a reimbursement to this committee of reasonable expense incurred in the course of their duties.

The amount of salary cannot be determined by this office beyond stating that it must be reasonable.

Persons in the employ of the State, working for a stated salary, are not entitled to other compensation from the State unless it is expressly provided for by statute. 1922 *O.A.G.* 286. This is not to say, however, that such a person could not be reimbursed for any reasonable expense incurred while serving on such a committee. *Ibid.*

20.5

STATE OFFICERS AND DEPARTMENTS: Board of Control—§§218.10, 218.13, 1958 Code. The power to determine and fix salaries remains in the Board of Control.

September 19, 1961

Board of Control of State Institutions
State of Iowa
LOCAL

Gentlemen:

Reference is made to yours of the 6th inst. in which you submitted the following:

> "Please qualify the Board's responsibility and position as set forth in Section 19 of Chapter 2, Acts of the 59th General Assembly, in view of the powers vested in the Board by Sections 218.13 and 218.10, Code of Iowa, as amended.
>
> "This request arises out of the action of the Budget and Financial Control Committee in limiting in certain particulars the authority vested in the Board by the foregoing Sections."

I approach this situation bearing in mind that the fixing of salaries of public officers and employees is a subject of vital public interest. Such views are expressed in the case of *Combs v. Knott County Fiscal Court,* 141 S.W. 2d 859, where it was said:

> "(1) It is argued by appellant that the salary fixed by the fiscal court, and affirmed by judgment of the circuit court, is unreasonable and wholly inadequate to compensate him fairly and reasonably for his services as county judge. Text authorities and cases from foreign jurisdictions are cited which set forth as a general principle, the soundness of which cannot be questioned, that the matter of fixing the salaries of public officials is impressed with public interest and that officials invested with authority to fix such salaries should act justly and reasonably and not arbitrarily in so doing, because inadequacy of salary tends toward lessening the vigor and efficiency of public service and discourages competent persons to seek or accept public positions. On the other hand it is axiomatic that officials are not entitled to public largess or bounty but only to compensation commensurate with the duties of their office."

Further, in the case of *Broschart et al v. City of New York,* 3 N.Y.S. 2d 18,

where reduction in the office of sheriff in New York State was in question, it was said at page 22:

> "The power to fix salaries, like the power to tax, is a power to destroy. The state Legislature created these offices, prescribed the duties of their incumbents, and specified the salaries to be paid. Without enabling state legislation the city could no more change these salaries than it could abolish the offices ..." *Broschart v. City of New York,* 7 N.Y.S. 2d 646 (affirmed without opinion).

Insofar as this situation is controlled by pertinent statutes, it is to be observed that only the legislature and the Board of Control have authority to establish salaries under the provisions of §218.13, Code of Iowa, 1958, as amended by §4 of Chapter 127, Acts 59th G.A., which provides as follows:

> "218.13 Salaries. The board shall, annually, on each employee's employment anniversary date, review and fix the annual, monthly, or semimonthly salaries of said employees, *except such salaries as are fixed by the general assembly.* The board shall classify the officers and employees into grades and the salary and wages to be paid in each grade shall be uniform in similar institutions." (emphasis added)

This section is the recodification of previous, similar statutes appearing in the 1913 Supplement of the Code of Iowa as §2727-a38.

In addition, the foregoing control is vested in the Board under §218.10, providing as follows:

> "218.10 Subordinate officers and employees. The board shall determine the number and compensation of subordinate officers and employees for each institution ..."

Under the plain, unambiguous language of the foregoing sections, the power of fixing salaries of employees of the Board of Control is vested solely in the Board, except such salaries as may be fixed by the legislature. However, the situation that you have presented raises the question whether this power remains solely in the hands of the Board of Control, or whether it has been delegated to the Budget and Financial Control Committee through the enactment of Ch. 2, §19, 59th G.A., as follows:

> "Sec. 19. A table of organization of all employees earning twelve thousand dollars ($12,000.00) or more annually for each institution must be approved by the budget and financial control committee before such salaries may be paid from these funds. Any change in said table of organization must likewise be approved by said committee before being placed in effect."

The above chapter provides funds to the Board of Control for salaries, support, maintenance, repairs, replacements, alterations or equipment, and is denominated "Board of Control Appropriations". (Ch. 2, §19, 59th G.A.)

Nowhere in the title of this Act nor in the explanation thereof was it contemplated that such power would be vested in the Budget and Financial Control Committee as appears in the foregoing quoted Ch. 2, §19, 59th G.A.

It must be determined what effect the enactment of this special power, within an appropriation Act, has upon the power of the Board of Control to fix salaries. Article III, §29, Iowa Constitution, provides:

> "Acts—one subject—expressed in title. Sec. 29. Every act shall embrace but one subject, and matters properly connected therewith; which subject shall be expressed in the title. But if any subject shall be embraced in

an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."

When making an appropriation the legislature acts in its administrative rather than its legislative capacity. This administrative function is for the purpose of effectuating the execution and administration of laws that have been passed by the legislature acting in its legislative capacity. 1936 *O.A.G.* 687.

As previously observed, the present enactment pertains only to the appropriation of funds to the Board of Control, as set forth in its title. Consequently, since Ch. 2, §19 deals with no matter consistent with an appropriation act, it is of no force and effect. It is clear that appropriation is to follow the existing laws of the State and, as limited by its title and the constitutional mandate, was not intended by the legislature to contain new legislation, repealing, amending or modifying any existing laws of the state. *Ibid.*, at page 689.

The legislature has expressly reserved to itself the power to determine and fix salaries of employees of the Board of Control. §218.13, Iowa Code of 1958. However, in the enactment of Chapter 2, §19, 59th G.A., it has not constitutionally exercised that power in its sovereign, legislative capacity and for that reason §19 is void and of no force and effect. Further, §§2.41 through 2.45 inclusive, Iowa Code, 1958, do not empower the Budget and Financial Control Committee to perform this legislative function, nor could it be so empowered under the Iowa Constitution. In the absence of a legislative enactment, the power to fix and determine salaries is the sole prerogative of the executive branch under the doctrine of separation of powers.

The power to determine and fix salaries remains in the Board of Control pursuant to §§218.10 and 218.13, Iowa Code of 1958.

20.6

STATE OFFICERS AND DEPARTMENTS: Board of Control—§218.52, 1958 Code. Board of Control may reform terms of agreement with supplier without resubmitting subject matter for bid when supplier is not benefited thereby, and when an emergency situation exists.

May 1, 1961

Board of Control of State Institutions
L O C A L

Attention: Mr. Jim Gay, Chief, Business Services

Gentlemen:

We are in receipt of your letter of April 26, 1961, in which you state the following circumstances:

"A public letting was held on November 29, 1960, at 10:00 A.M. to determine the successful bidder on 425,000 pounds of .020 gauge No. 1 license plate aluminum. No award was made at this time due to the fact that Iowa State Industries did not have available funds to pay for shipments that would be made prior to July 1, 1961. It was Industries' intent to accept delivery of the entire amount prior to July 1, 1961.

"Because of the necessity for Iowa State Industries to start production of license plates for the year 1962, but not later than January 15, 1961, it was decided that they (Iowa State Industries) should determine how much aluminum stock they could pay for out of their current funds. This information was obtained and bids requested on 100,000 pounds of .020 gauge No. 1 license plate stock, with said bids due on December 19, 1960. On this date two purchase orders were issued to the low bidder, Revere

Copper & Brass Company, each purchase order in the amount of 50,000 pounds, one for delivery in January and one for delivery in February.

"On February 15, 1961, bids were received on 308,000 pounds of .020 gauge No. 1 license plate aluminum, and contract awarded to Aluminum Corporation of America, on the basis of their low bid of 35¢ per pound. As of this date, April 27, Aluminum Corporation of America has delivered 100,000 pounds of aluminum stock, and is now in the process of manufacturing an additional 50,000 pounds to apply against our contract with it.

"Upon receipt of complaints from the Department of Public Safety that license plates manufactured from .020 gauge No. 1 license plate aluminum were not satisfactory and said plates were easily damaged, the production of automobile license plates was halted. For your information, the 100,000 pounds of license plate aluminum stock purchased from Revere Copper & Brass, was used in production of truck and commercial license plates, which will be issued for use in the year 1962.

"The Department of Public Safety has advised the Board of Control that, due to the complaints and damaged plates received to date, they have expended two and one-half times the normal amount of money for replacement of the 1961 plates.

"The aluminum used in the manufacture of these plates that have caused the difficulties, was purchased from Aluminum Corporation of America on a contract issued December 16, 1959, and represents delivery of stock made during the year 1960.

"It should be noted that the Board of Control authorized their Central Purchasing Division to obtain bids on the type of license plate aluminum tested and recommended by the Iowa State Industries Metals Division, Anamosa, Iowa.

"In consultation with engineers from Aluminum Corporation of America, they advised the Board of Control, as well as the Commissioner of Public Safety and representatives of Iowa State Industries, that .025 gauge No. 1 aluminum license plate stock would produce a plate that would overcome the compaints now being received.

"It is necessary that we either be permitted to re-negotiate our contract with the Aluminum Corporation of America to supply us with .025 gauge aluminum stock on our present contract, or obtain bids by telegraph on the .025 grade stock so production will not be held up past May 15, 1961, and we therefore request the opinion of your office as to the proper method of dealing with this matter.

"For your information, Iowa State Industries will have to be in production by May 15, 1961, in order to meet the delivery deadline of December 1, 1961. This is the date the Department of Public Safety has set that 1962 plates are to be made available, and our deliveries must be made to each of the 99 counties by this time."

In our opinion, the contract may be reformed to conform with the newly required specifications; that is, under the original contract as reformed, the Board may purchase 308,000 pounds of .025 gauge aluminum at 35¢ per pound for a total contract price of $104,740.00, including scrap allowance. In the alternative, the Board may purchase 308,000 pounds of aluminum, consisting partially of that .020 gauge material which has already been produced, the remainder being .025 gauge stock. However, since the aluminum stock in question is somewhat thicker than that originally ordered, it appears that 308,000 pounds of aluminum will no longer satisfy total production requirements, and these additional requirements must be submitted for bid in the ordinary manner.

This opinion is dictated by the following considerations. Iowa Code §218.52 provides:

> "The (Board of Control) shall, in the purchase of supplies, afford all reasonable opportunity for competition, and shall give preference to local dealers and Iowa producers when such can be done without loss to the state."

Under this section, the Board of Control has requested bids and has let the contract as stated in your letter. Thus, at the time of letting of this contract, reasonable opportunity for competition was afforded.

It is generally the rule that a governmental agency cannot circumvent a statute requiring competitive bidding in order to favor a particular supplier by first entering into a contract with the supplier and thereafter renegotiating or reforming the contract to the benefit of the supplier, *Lassiter and Co. v. Taylor,* 128 So. 14 (Fla. 1930); *McHugh v. Tacoma,* 135 Pac. 1011 (Wash. 1913); see also annotation at 69 *A.L.R.* 697 and cases discussed therein. This rule has, however, been altered and modified when additional circumstances are present. In *Capital City Brick & Pipe Co. v. City of Des Moines,* 127 N.W. 66 (Iowa 1910), the City requested bids on a construction project, and the contract was let to the brick and pipe company. Due to circumstances not apparent at the time of the letting, the company was forced to expend more money, time and labor than it had originally agreed upon. After the completion of the contract, the company brought action against the city for extra work and material. An addendum to the contract provided that, "in case the surface of said rock is found to be otherwise than as shown by the plans and borings . . . then the party of the first part shall be compensated for the extra work and material . . ." The company recovered in the lower court, but on appeal the Supreme Court reversed. On the second trial, the court sustained the city's motion for a directed verdict, and the case was once more appealed to the Supreme Court. The city contended that the addendum was added without authority of law. In reversing the ruling of the trial court, the Supreme Court said:

> "It may be conceded that under statutes requiring contracts to be let to the lowest bidder, the city council cannot substantially vary the terms and conditions of a contract entered into under competitive bids, for to do so would be to destroy the advantage intended to be secured by such method of entering into the contract. Hedge v. Des Moines, 141 Iowa 4, 119 N.W. 276. * * *
>
> "As already suggested, the city would have been liable without any contract for the extra expense resulting from the finding of rock, above the bed rock indicated in the borings, and which would have been indicated, had the representation as to what was disclosed by such borings been truthfully made; therefore, the provision above referred to in the addendum related not to the obligations of the contract, but to obligations of the city which might arise from a breach of its contract or warranty that the borings truthfully disclosed the conditions represented. This was not then a modification of the contract arising on the acceptance of the plaintiff's proposals under the plans and specifications, but an agreement as to how the damages accruing to the plaintiff out of a failure to represent correctly to it the conditions which should have been shown by the borings should be determined. *We see no reason why such a stipulation might not have been entered into between the parties at any time. It did not relate to the obligations assumed by the plaintiff in its proposals. We reach the conclusion therefore, that the addendum did not contain terms more favorable to the plaintiff than those which were involved in its proposals for work."* (Italics supplied)

While the precise facts of this case are not in point to the situation you suggest, it effectively illustrates the tendency of the courts to allow alterations

in contracts after letting when the supplier is not benefited by the alterations in such a way as to give him an unfair advantage in relation to the relative positions of the various bidders at the time of letting. Here the company had been forced to do extra work and was simply compensated for it. In the situation you set out, it appears that no benefit would accrue to Alcoa by reason of the proposed reformation. That company would still supply 308,000 pounds of aluminum for the same price as originally agreed upon between the parties. Only the specifications of the product are to be altered. Also, if the contract is performed in its present substance, the Board will be forced to accept a large quantity of aluminum which is totally unsatisfactory for its purposes. Thus, the proposed reformation benefits the Board rather than Alcoa. In these circumstances, it would, in our opinion, be unreasonable to require the Board to resubmit its total aluminum requirements for bid. Further, any other result would be contrary to one of the purposes of Iowa Code §218.52, *supra,* that being to obtain the best possible bargain for the money of the State of Iowa.

The general rule has been broadened still further in another direction. Competitive bids and the letting of contracts to low bidders have for their object insuring economy and excluding favoritism in the awarding of public contracts. It has been held that statutes of this nature should not be construed in ways which would defeat these objects. See *Los Angeles Dredging Co. v. Long Beach,* 291 P. 839. Thus, in an emergency situation, when prompt performance of an agreement is necessary, competitive bidding should not be required. *American Smelting and Refining Co. v. U. S.,* 259 U. S. 75, 66 L. Ed. 833, 42 S. Ct. 420; *Los Angeles Dredging Co. v. Long Beach, supra; Tobin v. Sundance,* 45 Wyo. 219, 17 P. 2d 666. You state that Iowa State Industries will have to be in production by May 15, 1961, if it is to meet its delivery deadline of December 1, 1961. Since the production deadline of May 15, 1961 is only thirteen days away, it is evident that the Board must take immediate action if it is to be met. In such a situation, submission of total requirements for bid would, in our opinion, be inadvisable, if it would create any possibility that the production deadline could not be met. Such an emergency is contemplated in regard to federal contracts. 41 *U.S.C.A.,* §5, provides:

> "Unless otherwise provided in the appropriation concerned or other law, purchases and contracts for supplies or services for the Government may be made or entered into only after advertising a sufficient time previously for proposals, except ... (2) when the public exigencies require the immediate delivery of the articles or performance of the service."

These considerations do not, however, apply to the total requirements of Iowa State Industries. Reforming the contract in such a manner as to allow Alcoa to furnish the total requirements would act to the unfair advantage of that supplier, and all aluminum requirements in excess of 308,000 pounds should, in our opinion, be submitted for bid. No emergency exists as to this excess, since Iowa State Industries can meet the production deadline with the 308,000 pounds of aluminum from Alcoa.

20.7

STATE OFFICERS AND DEPARTMENTS: Board of Control, convalescent leave of inmates in mental health institutes—§§226.6(1), 226.9, 226.23, 1962 Code. In order for the Board of Control to place a patient of a mental institution on convalescent leave, it must comply with the statutory mandates of §226.23. These statutory mandates apply not only to patients committed by the commissioners of hospitalization but also apply to those committed by court order.

November 1, 1962

Mr. M. J. Brown
Administrative Assistant
Board of Control of State Institutions
L O C A L

Dear Mr. Brown:

This will acknowledge receipt of your recent letter wherein you request an opinion of this office on the following:

"We have received a request from Dr. W. B. Brown, Superintendent of the Mental Health Institute, Mt. Pleasant, for a legal opinion on patients who come into the institution on a court order directing the institution to receive and perhaps hold such patient until further order of the court. The institution in due time makes certain recommendations and the patients are then released on court order.

"Our question is, can we, with consent of the court, place such patients on convalescent leave, or is the convalescent leave authorized in Section 226.23 limited to those patients committed by the Commissioners of Hospitalization only?"

Section 226.9, 1962 Code of Iowa, provides:

"Custody of patient. The superintendent, upon the receipt of a duly executed order of admission of a patient into the hospital for the mentally ill, accompanied by the physician's certificate provided by law, shall take such patient into custody and restrain him as provided by law and the rules of the board of control, without liability on the part of such superintendent and all other officers of the hospital to prosecution of any kind on account thereof, but no person shall be detained in the hospital who is found by the superintendent to be in good mental health."

Once a person is legally committed to a mental health institute, it is the duty of the superintendent thereof to restrain such person as provided by law and by the rules of the Board of Control.

Section 226.23, 1962 Code of Iowa, provides:

"Convalescent leave of patients. Upon the recommendation of the superintendent, and the written consent of the commissioners of hospitalization of the county which is the legal settlement of a patient, the board of control may place on convalescent leave said patient for a period not to exceed one year, under such conditions as are prescribed by said board."

It is to be noted that under the above section, the commissioners of hospitalization must give their written consent to the proposed convalescent leave. The Iowa Supreme Court, in *Hazen v. Donahoe,* 208 Iowa 582, held to the effect that the question of convalescent leave of mentally ill patients from a State mental health institute was not under the jurisdiction of the district courts. The question of convalescent leave for the inmates of mental institutions is a matter solely within the discretion of the various superintendents, conditioned on the approval and written consent of the commissioners of hospitalization of the county which is the legal settlement of the patient.

There is nothing in the Code indicating that the written consent of the commissioners of hospitalization would not be required where the patient was committed by court order. The language of the court order would be of material significance in deciding whether a person so committed could be placed on convalescent leave. Absent express language forbidding a patient

so committed from being placed on convalescent leave, it would appear that the Board of Control, subject to a recommendation of the superintendent and written consent of the commissioners of hospitalization, could place such a patient on convalescent leave pending further court order.

When the court does make a further order, the superintendent must comply therewith. The superintendent could not, contrary to the court order, place a patient on convalescent leave, if the court ordered the patient's discharge. See also: §226.6(1), 1962 Code of Iowa.

In conclusion, the Board of Control cannot place a patient on convalescent leave except in compliance with the statutory mandates set forth in §226.23. However, §226.23 is not limited solely to those patients who have been committed by the commissioners of hospitalization, and absent express language in the court order, a patient committed by the court could be placed on convalescent leave pending further court order.

20.8

STATE OFFICERS AND DEPARTMENTS: Board of Control, employees of State institutions as police officers—§§218.71, 748.4, 755.4, 1962 Code. Although the Board has delegated authority to commission certain of its employees at State institutions as special police officers, there is no statutory authority for a mayor or chief of police to deputize such institutional employees.

September 5, 1962

Mr. M. J. Brown
Administrative Assistant
Board of Control of State Institutions
L O C A L

Dear Mr. Brown:

This is in response to your letter of July 18, 1962, wherein you requested an opinion on the following:

"1. May the mayor and/or chief of police of the city of Cherokee deputize three or four of our employees who we designate and give them the same power of arrest and issuing summons as those of the regular city policemen?

"2. If so, would it be legal for the city to provide badges, guns, and uniforms for these police officers although they remained on our payroll?

"3. Would it be legal for these cases to be tried in mayor's court with whatever fines are assessed going to the general fund of the city of Cherokee as are all other fines assessed by the mayor's court?"

There is no statutory authority for a mayor or chief of police to deputize State institutional employees and give them the same power of arrest and issuing summons as other police officers of the city on the institutional grounds.

The Board of Control has been delegated the authority to commission certain of its employees at the various State institutions as special police officers. Those employees so commissioned would have the same powers as a *peace officer* on the institutional grounds or when taking an inmate into custody. Those persons apprehended violating the laws of the State of Iowa on the institutional grounds by these special police would be turned over to the county authorities for disposition.

Section 218.71 of the 1962 Code of Iowa provides:

"The board may, by order entered of record, commission one or more of the employees at each of said institutions as special police. Such police shall, on the premises of the institution of which they are employees, and in taking an inmate into custody, have and exercise the powers of regular peace officers. No additional salary shall be granted by reason of such appointment."

Also see §§748.4 and 755.4 of the 1962 Code of Iowa.

Should the Board of Control commission any institutional employees as special police, those commissioned should be fully instructed as to the duties and authority of a *peace officer*. Only competent men capable of assuming and performing these duties should be appointed. Since the institution could be liable for injury caused by such a special policeman in the performance of his duties, those men commissioned should also be bonded. 1936 *O.A.G.* 339.

In view of the above answer, questions 2 and 3 need not be answered.

20.9

STATE OFFICERS AND DEPARTMENTS: Board of Control, mental health institutes—§§226.32, 444.12, 1962 Code. The county may pay for the cost of care of patients transferred to the county home or hospital directly from the State institutional fund, but the county may not transfer any part of the State institutional fund to any other county fund.

October 17, 1962

Mr. Walter J. Willett
Tama County Attorney
215 West Third Street
Tama, Iowa

Dear Mr. Willett:

This is in response to your letter in which you request an opinion on the following:

"Tama County in conjunction with the State Mental Institute has been returning mental patients under Chapter 226.32 of the 1958 Code of Iowa to the Tama County Home where they now have 25 patients and are contemplating bringing 15 more back in the near future. The County receives $3.00 per week per patient which money is placed in the Mental Health Fund of the County.

"Due to the limitation in the levy for mental health plus the $3.00 per week received from the State per patient the amount raised in the Mental Health Fund is less than the cost per patient at our County Home which has been determined during the past year at $100.00 per month, making the Mental Health Fund short through no fault of the County. The transfer is then made at the end of the year from the Mental Health Fund to the Poor Fund.

"Due to the fact that we have transferred so many patients, the Mental Health Fund is running short and whereby the figures will run $70,000.00 which should be transferred back to the poor fund from the Mental Health Fund on a cost per patient basis, there is only available $55,000.00. As a result of these transfers of patients to the County Home, our State Institutional Fund has risen due to the fact that we are saving approximately $100.00 to $125.00 per month per patient which means we are building up the State Institutional Fund and depleting our Mental Health Fund and Poor Fund.

"Section (4)44.12 of State Institutional Fund, starting at line 26 states and I quote: 'Said fund shall not be diverted to any other purpose.' The amendment then added this, 'except that if patients are returned to a County from any of the four State Mental Health Institutes under the provisions of Section 226.32 of the Code, *costs of the care* for such patients may be paid from the State Institutional Fund in an amount commensurate with the costs of patients in the County Hospital and County Home and not to exceed the amount of costs per patient in the State Institution.' In my opinion this amendment was passed to correct this very situation which we have here in our County because of bringing back a large number of patients that it has presented a problem how this is to be interpreted or handled by the county.

"The questions then are:

"1. What is your interpretation of the word 'care' in line 7 of said amendment?

"2. If the costs of all patients have been determined in the County Home to be $100.00 per month for the year 1961, is this the interpretation (of the amount) to be paid on the 'cost of care' as set forth in this amendment to the Statute?

"3. Can the difference between the amount received in the Mental Health Fund for payment of patients and the tax levy, and the actual costs due the County per patient, be transferred from the State Institutional Fund to the Poor Fund? If not, can you transfer the difference in cost to the Mental Health Fund which is later then transferred to the Poor Fund?"

Section 226.32 of the 1962 Code of Iowa provides:

"The board shall order the discharge or removal from the hospital of incurable and harmless patients whenever it is necessary to make room for recent cases, and shall notify the auditor of the county interested at least ten days in advance of the day of actual discharge."

Section 444.12 provides in pertinent part:

"The board of supervisors for each county shall establish a state institution fund and shall at the time of levying other taxes, estimate the amount necessary to meet the expense in the coming year of maintaining county patients, including cost of commitment and transportation of patients at the Mount Pleasant Mental Health Institute, Independence Mental Health Institute, Cherokee Mental Health Institute, Clarinda Mental Health Institute, * * * Said fund shall not be diverted to any other purpose *except that if patients are returned to a county from any of the four state mental health institutes under the provisions of section 226.32, cost of the care for such patients may be paid from the state institution fund in an amount commensurate with the cost of patients in the county hospital or county home and not to exceed the amount of cost per patient in the state institution.* Should any county fail to levy a tax sufficient to meet this expense the deficiency shall be paid from the county general fund, same to be transferred to the state institution fund."

1. The words "cost of care" as used in the amendment to §444.12 would mean the expenses of *supporting* and *maintaining* the patient in the county home or county hospital. The cost of care would include food and clothing as well as medical care and attention. It would include any charge of any nature which could legally be made in connection with the patient from the time of his confinement in the county home or hospital, until his discharge.

See: *People v. New York Central Railroad Co.,* 64 N.E. 2d 895, 901; *People v. Board of Supervisors,* 121 N.Y.S. 372, 373; *Foster v. Yates County,* 298 N.Y.S. 862, 865. In the case of *Emery v. Wheeler,* 152 A. 624 (Maine, 1930) the court stated:

> " 'Care' is not a word of rigid and inflexible meaning, but is one of broad comprehension admitting of a variation in its application to different persons and circumstances. It has no fixed and limited significance in the law, nor in its common use."

2. If in accordance with (1) above, the cost or expense of all patients has been determined to be $100.00 per month in the county home, and this sum is not in excess of the cost or expense of supporting the patient at the State institution, then this sum could be paid directly from the State institutional fund.

3. There is no statutory authority authorizing the transfer of any amount or part of the State institutional fund provided by §444.12 of the Code to the county poor fund, nor is there any statutory authority authorizing the transfer of any amount or part of the State institutional fund to the county mental health fund.

The amendment to §444.12 was enacted by the 58th General Assembly as House File 672. The explanation to the enactment reads:

> "Some counties have facilities for caring for the insane at less than the cost of care in the state mental health institutes. Under section 226.32 of the Code, the mental health institutes may turn patients back to the county of their settlement if the patients are incurable and harmless and the hospital is crowded. Payment is made from the state institution fund of the county for the care of patients in the state mental health institutes. However, under the present law they must, when returned to the county, be cared for from the county insane fund, and there is a 3/4 mill limit on the levy for this purpose.*There is no levy limit for the state institution fund. This bill if passed would allow these patients to be cared for in their home counties from the same fund from which they were cared for in the state institutes."* (Emphasis ours)

It is to be noted that the explanation evidences a legislative intent that patients transferred pursuant to §226.32 should be cared for from the State institutional fund. There is, however, no intent indicated by the Act itself, nor the explanation, that any part of the State institutional fund would be transferred to any other county fund.

Therefore, you are advised that the county may pay for the cost of care of patients transferred under §226.32 to the county home or hospital directly from the State institutional fund, but the county may not transfer any part of the State institutional fund to any other county fund.

20.10

STATE OFFICERS AND DEPARTMENTS: Board of Control, Prison Industries—§§218.73, 246.21, 246.23, 246.25, 1958 Code. Prison Industries may contract with the State Highway Commission to furnish road signs for interstate highways, but cannot engage in business as a prime contractor who furnishes goods and subcontracts labor. Prison labor may not be used to install said signs.

April 20, 1962

Board of Control of State Institutions
State Office Building
L O C A L

Attention: M. J. Brown, Administrative Assistant

Gentlemen:

We have your letter of March 6, 1962, in which you state:

"Will you please give us an opinion as to the legality of the Iowa State Industries entering into a contract with the Iowa State Highway Commission to furnish and install signs on the new interstate highway system?

"Can we legally enter into an agreement to furnish the above items as a prime contractor subletting the installation? Likewise, may we enter into such an agreement as a subcontractor to furnish the prime contractor signs for his installation on such highway projects?"

Iowa Code §218.73 provides:

"Industries. The board may establish such industries as it may deem advisable at or in connection with any of said institutions.",

and the Director of Industries is vested with the responsibility of supervising and directing the sale and distribution of products made by such industries. §218.82(6). The power to sell goods thus being impliedly given, we find no limitations imposed on this power and Prison Industries may, therefore, in our opinion, act as a supplier of goods in any instance.

Further, §§246.21 and 246.23 provide respectively:

"246.21 Price lists to public officials. The board of control shall, from time to time, prepare classified and itemized price lists of articles and things manufactured at the state institutions controlled by it, and furnish such lists to all boards of supervisors, boards of school directors, city and town councils and commissions, township trustees, and all other departments and officials of the state, county, cities, and towns empowered to make purchase of supplies for public purposes."

"246.23 Purchase mandatory. No articles or supplies so listed, except in case of emergency, shall be purchased for public use by the aforesaid public officials, bodies, and departments from any private source unless the board of control is unable to promptly furnish such articles or supplies. Any public officer who willfully refuses or willfully neglects to comply with this section shall be punished by a fine of not more than one hundred dollars."

Under these sections, it is mandatory that articles needed by public agencies be purchased from Prison Industries if such articles are available from this source at competitive prices.

As to the installation of signs, your attention is directed to §246.25, which provides:

"246.25 Limitation on contract. The board of control or the warden of the state penitentiary or the warden of the reformatory shall not, nor shall any other person employed by the state, make any contract by which the labor or time of any prisoner or inmate in such penitentiary or reformatory shall be contracted, let, farmed out, given, or sold to any person, firm, association, or corporation."

Under this section, prison labor may not, in our opinion, be used to install signs for the Highway Commission, whether Prison Industries acts as a prime or a subcontractor. As to whether Prison Industries may operate as a prime contractor supplying goods and subcontracting for labor, we find no statutory authorization for Prison Industries to engage in the contracting business and must, therefore, answer this portion of your inquiry in the negative.

20.11

STATE OFFICERS AND DEPARTMENTS: Board of Control, wage assignments and garnishments of state employees—§§8.16, 8.17, 97B.39, 442.2, 1962 Code. State agencies and other subdivisions of the State cannot recognize or accept garnishments for wage assignments of their employees, but must honor federal tax levies of the U. S. Treasury.

September 27, 1962

Mr. M. J. Brown
Administrative Assistant
Board of Control of State Institutions
L O C A L

Dear Mr. Brown:

This will acknowledge receipt of your recent letter wherein you requested an opinion on the following:

"We are encountering inquiries from institutions as to the legal responsibility in accepting garnishment and assignments of wages of employees.

"Will you please give us a written opinion on this matter as authorization for institutional refusal to not accept service of legal papers in such garnishment and assignment of wage cases?"

In an opinion dated February 25, 1957, Abels to Lappen, Board of Control, it was stated that Iowa has no statute authorizing the garnishment of the State and its officers in their official capacities. The effect of a judgment against a garnishee in such case would be a judgment against the State, and as the State may not be sued without its consent, state officials cannot be garnished. Section 442.2, 1962 Code of Iowa, sets out specifically that a municipal or a political corporation shall not be garnished. Also see: *Sims v. United States,* 255 F. 2d 434 (1959) and 1958 *O.A.G.* 21, 26.

Wage assignments of State employees are unauthorized since every warrant must be drawn to the order of the person who performed the service. See §§8.16 and 8.17, 1962 Code.

However, see Staff to Ball, Black Hawk County Attorney, dated September 14, 1961, a copy of which is attached, where it was determined that a levy by the Internal Revenue Service, U. S. Treasury, upon a salary of a county employee or official is authorized and permissible, and that there is no defense to the levy according to statute.

In §97B.39, the legislature has specifically set forth that rights of State employees provided by IPERS are not transferable, assignable, attachable, garnishable, or otherwise subject to legal process or to the operation of bankruptcy or insolvency laws. See also: 4 *Am. Jur.* 641, 38 *C.J.S.* 244, and Annotation 114 *A.L.R.* 261.

It is therefore the opinion of this office that State agencies and other subdivisions of the State cannot recognize or accept garnishments or wage assignments of their employees, but that they must honor federal tax levies of the U. S. Treasury.

20.12

STATE OFFICERS AND DEPARTMENTS: Board of Eugenics, sterilization—§§145.13, 145.14, 1962 Code. A wife capable of consenting may consent to a sterilization operation without being joined by her husband, but the husband's consent should also be secured if practical, although not legally required.

September 26, 1962

Miss Norma Casserly
Executive Secretary
State Board of Eugenics
LOCAL

Dear Miss Casserly:

This will acknowledge receipt of your recent letter wherein you requested an opinion on the following:

"May I have a written opinion regarding the signature on an application for sterilization.

"The woman and her husband are separated. The woman has four illegitimate children, three of whom have been taken from her. The woman works as a dishwasher and her sister-in-law provides most of the care for the child.

"According to the social worker who wants to refer the case, the woman has a low I.Q. She does not have the results of the examination as yet. The husband is in his seventy's and living in Mason City. When the social worker in Mason City attempted to secure his signature, he learned that the man had had a stroke. His right side is paralyzed and he is unable to talk. He is unable to understand the situation and unable to write. Since he is unable to sign as next of kin because of his condition, is it legal if the woman's brother signs the application?"

The pertinent Code sections provide:

"145.13 Consent to operation. If any person whose condition has been examined and reported upon by said board, as hereinbefore provided, shall consent in writing to have the operation specified in the order of said board performed, such operation shall thereupon be performed upon said person by or under the direction of the superintendent of the institution in which he is confined, if such person be an inmate of any of the state institutions herein mentioned, or if he is not an inmate of any of said institutions, such operation shall be performed by or under the direction of the state board of eugenics. All such operations shall be performed with due regard for the physical condition of the person upon whom it is performed and in a safe and humane manner."

"145.14 'Consent' defined. In case the person to be operated upon is mentally ill or retarded, the consent hereinbefore mentioned in section 145.13 shall be construed to mean the written consent of such person's legal guardian, or if such person has no legal guardian, then the written consent of such person's nearest known kin or personal friend within the state of Iowa, or if such person is mentally ill or retarded, and has neither legal guardian nor known kin or personal friend within the state of Iowa, then the written consent of the guardian appointed by the court for such person as provided in this chapter."

Generally, the person concerned must consent to the operation. However,

if such person is mentally ill or retarded, the necessary "consent" may be derived in the manner provided in §145.14 above.

This office in 1932 *O.A.G.* 35, a copy of which is attached, held that a competent individual may consent to sterilization. The question of whether a person is mentally capable to give consent is certainly a factual one which must be determined in each situation.

The necessity of a husband's consent to an operation upon his wife has on occasion received the consideration of the courts.

Volume 1, *Lawyers Medical Cyclopedia,* §210, page 62, states:

> "The consent of the husband to an operation on his wife is not necessary; the consent of the wife is sufficient authority. Nevertheless, it is advisable to have the spouse join in the consent whenever practicable. It is particularly desirable to do so if the operation involves danger to life, may destroy or limit sex functions, or may result in the death of an unborn child."

Footnote 51 at page 62 contains the following:

> "The rule is, of course, the same where the one to be operated on is the husband and he has given his consent. *The rule applies even when it is likely the operation will have some effect upon the sexual life of the individual, as, for example, in the case of a sterilization operation.*" (Emphasis ours)

In *Kritzer v. Citron,* 244 P. 2d 808, which involved the sterilization of a woman, the California Court stated at page 811:

> "Although appellants also assert that the consent of both husband and wife are necessary, they cite no authority in support of such proposition. On the contrary, the consent of the patient alone is sufficient."

In *State v. Housekeeper,* 16 A. 382, a case where the wife was operated upon (not sterilized), the Maryland Court, at page 384, stated: "The consent of the wife, not that of the husband, was necessary."

The Texas Court in *Banker v. Heaney,* 82 S.W. 2d 417, at page 420, stated:

> "It is true that a physician must secure the consent of the parent to operate upon a minor child, (citing authoriy) but the wife is not the guardian of the husband and her consent is not necessary before a physician is authorized to perform an operation upon him."

In light of the above authorities, it appears that a wife, capable of consenting, may consent to a sterilization operation without being joined by her husband. As a matter of policy, however, the husband's consent should also be secured if practical, although not legally required.

If the woman is not capable of consenting because she is mentally ill or retarded, a person who qualifies within the authorization of §145.14 should be the consenting party. Note that §145.14 is of such latitude to allow even a "personal friend within the state of Iowa" to provide the necessary consent. Assuming that the person is, in fact, mentally incompetent and without a legal guardian, it may be concluded that the consent of a person's brother is sufficient in an instance where the person's husband is, in fact, also incapable of giving consent.

20.13

STATE OFFICERS AND DEPARTMENTS: Board of Regents, authority to grant easements—§262.55, 1962 Code. Board is authorized to grant easements under said section when a showing is made that in the Board's judgment it is desirable and will benefit the state.

August 8, 1962

Mr. Gary S. Gill, Secretary
Executive Council of Iowa
LOCAL

Dear Mr. Gill:

Reference is herein made to yours of the 26th of April with attached request from the Board of Regents for approval of three separate contracts for right of way to widen a local county road, said contracts to be entered into by and between the board of supervisors of Story County and the State of Iowa. Accompanying your letter is a letter of David Dancer, Secretary of the Board of Regents, to the Council.

The statute under which the Board of Regents may grant easements for right of way is §262.55, Code of 1962, providing as follows:

> "Approval of executive council. With the approval of the executive council, the Board is hereby authorized to grant easements for rights of way over, across, and under the surface of public lands under its jurisdiction when in its judgment such easements are desirable and will benefit the state of Iowa."

Clearly this statute gives the Board of Regents power to grant easements for right of way across and under the surface of public lands under its jurisdiction. However, the easements proposed lack compliance with this statute in two respects: (1) the easements are grants of the State of Iowa instead of grants by the Board of Regents, and (2) there is no showing that in the judgment of the Board of Regents the easements are desirable and will benefit the State of Iowa. These are prerequisite to a valid authorization.

20.14

STATE OFFICERS AND DEPARTMENTS: Board of Regents, exchange of property—§262.9(5), 1962 Code. Board has the power to acquire and dispose of realty; however, the word "dispose" as used in said statute does not authorize an exchange.

May 2, 1962

Mr. David Dancer, Secretary
Board of Regents
LOCAL

Dear Mr. Dancer:

Reference is herein made to correspondence relating to a possible exchange of properties between the Iowa State University and one Joseph H. Buchanan, involving property of the State University on the one hand and a fifteen-acre tract on Beech Avenue owned by Mr. Buchanan.

In this connection, I would call your attention to the power of the Board of Regents over real estate. This power is provided by §262.9(5), 1958 Code of Iowa, providing as follows:

> "262.9 Powers and duties. The board shall:

"5. With the approval of the executive council, acquire real estate for the proper uses of said institutions, and dispose of real estate belonging to said institutions when not necessary for their purposes. A disposal of such real estate shall be made upon such terms, conditions and consideration as the board may recommend and subject to the approval of the executive council. All transfers shall be by state patent in the manner provided by law."

Thus, the power of the Board over realty is to acquire and dispose. The transaction in question, of course, raises the question as to whether an exchange of properties is an authorized power of the Board of Regents within the term "dispose". This word has had the consideration of the Supreme Court in the case of *Carpenter v. Lothringer,* 224 Iowa 439, 275 N.W. 98, where it is defined:

"To 'dispose of' means to get rid of; to put out of the way; to finish with; to transfer to the control of someone else, as by selling; to alienate; part with; relinquish, bargain away."

In treating its meaning as synonymous with "sell", the Supreme Court of Iowa in the case of *Iowa Serv. Co. v. City of Villisca,* 203 Iowa 610, at page 613, has defined "sell" in the following terms:

"What is a 'sale' is a question which has much flexibility, and may be answered variably, in accord with the particular circumstances surrounding the transaction under consideration. There is a certain broad sense in which the term 'sale' may be applied to any transaction, even though it involve an exchange of properties, where the specific money value of each article is mutually agreed upon. Such transactions are usually those had between persons who are sui juris, and who have plenary authority to deal with each other, and who are unhampered in such dealing by the limited scope of an agency or by a limited official power. It is a trite illustration of this distinction that an agent who has power only to sell may accept no other consideration than money or its equivalent. Such is the primary and the literal meaning of the word 'sell'. Such is the meaning usually ascribed to it when a question of power or authority is involved. Authority of an agent or official is not presumptively expanded to conform to the broader sense of the term herein first suggested. If we turn to the statute, Section 6258, it will be noted that it deals specifically with the question of an exchange of bonds."

In reliance upon the foregoing, I am of the opinion that the word "dispose" used in the foregoing statute, does not authorize an exchange.

20.15

STATE OFFICERS AND DEPARTMENTS: Budget and Financial Control Committee—Ch. 8, 1962 Code; Art. III, Constitution of Iowa. The only source of funds available to pay judges' salaries, other than funds of the Budget and Financial Control Committee, is a deficiency appropriation made by the legislature. The use of unexpended funds in the appropriations of departments or agencies under §8.39 does not include the courts.

August 7, 1962

Mr. Marvin Selden, Comptroller
State of Iowa
LOCAL

Dear Mr. Selden:

Reference is herein made to your letter dated July 31, 1962, which includes

a request from Honorable John D. Shoeman, Chairman, Budget & Financial Control Committee, for securing an opinion of this Department to "determine if sources of funds might be available to you, other than from the Interim Committee's contingent fund, to pay the increase in judges' salaries."

The only source of funds available to pay a judge's salary, other than the funds of the Budget & Financial Control Committee, is a deficiency appropriation made by the legislature. The use of unexpended balances in the appropriations of departments, institutions or agencies of the State, authorized by §8.39, Code of 1962, does not include the courts as agencies to which this provision is applicable. This conclusion is reached because: (1) §8.1 excludes the courts from the operations of Chapter 8, (2) the provisions of §8.1, heretofore referred to, are legislative recognition and application of the separation of powers between the judicial, the legislative and the executive branches of the government provided by Article III, §1, of the Constitution of the State of Iowa, to wit:

> "The powers of the government of Iowa shall be divided into three separate departments—the Legislative, the Executive, and the Judicial: and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted."

20.16

STATE OFFICERS AND DEPARTMENTS: Budget and Financial Control Committee—§§6.5, 6.6, 58th G.A. Excess appropriated funds cannot be used by Committee for new construction which does not constitute repairs or a supplement to a prior appropriation.

August 7, 1962

Mr. H. Dwaine Wicker
Legislative Fiscal Director
LOCAL

Dear Mr. Wicker:

Reference is herein made to yours of the 1st, inst., in which you submitted the following:

> "It has been determined by the Board of Regents that there is an excess of funds in the appropriation of $1,418,000.00 for the 'Pharmacy building without equipment', made by Chapter 6.1 of the 58th General Assembly. The Board of Regents has now requested approval, by the Budget and Financial Control Committee, to transfer $60,000.00 for the construction of a botany greenhouse on the roof of the University of Iowa Chemistry Building.
>
> "I respectfully request an opinion as to whether it is within the prerogative of the Budget and Financial Control Committee to approve such a transfer in view of the above sections."

It appears from the foregoing that there is a surplus of $60,000 resulting from previous appropriation of $1,418,000 for the pharmacy building without equipment. Sections 6.5 and 6.6, Acts 58th G.A., provide:

> "Sec. 5. Upon the completion of any project as set forth in this Act, any unobligated balance remaining may be used for any repairs as needed at the respective institution and to supplement at such institution any current or prior appropriations for buildings, repairs, improvements, replacements, alterations and equipment.

"Sec. 6. Before any of the funds hereinabove appropriated shall be expended, it shall be determined by the state board of regents, with the approval of the budget and financial control committee, that the expenditure shall be for the best interests of the state."

According to the terms of §6.6 of the 58th G.A., this balance of $60,000 can be devoted to supplementing a current or prior appropriation for buildings, repairs, improvements, etc. Supplementing a previous appropriation is one thing, and using the excess money for new construction is another. The Committee may act upon a request to supplement a prior appropriation. It has no power to act upon a request to use such balance to construct a new building for which no previous appropriation has been made.

Where the request for transfer of excess appropriated funds is for new construction and not for repairs or to supplement a prior appropriation, the Committee is without power to act.

20.17

STATE OFFICERS AND DEPARTMENTS: Constitutional conventions— Art. X, §§1, 3, Const. of Iowa. The General Assembly is without power to deprive the people of their right to revise or reform the Constitution, and H.J.R. 5 submitting to the people a proposition whether a convention should be held to amend the Constitution, repealing the former provision of convening for the purpose of revising and amending the constitution, is therefore unauthorized.

April 18, 1961

Honorable John M. Ely, Jr.
House of Representatives
Statehouse
BUILDING

Dear Mr. Ely:

Reference is herein made to yours of February 16, 1961, in which you submitted the following:

"This is a request of your office for an opinion relating to House Joint Resolution 5 as amended by the Committee on Constitutional Amendments, which measure passed the House yesterday by a unanimous vote.

"Section 3 of Article X in the State constitution states the wording of the question which shall be put to a vote every ten years as follows: 'Shall there be a Convention to revise the Constitution, and amend the same?'

"Lines 11 and 12 of yesterday's amendment change the wording of this question to: 'Shall there be a convention to propose amendment or amendments to the Constitution?'

"I would appreciate an opinion on the following points:

"1. Does the new wording by itself rule out the possibility of a Convention completely revising or rewriting the Constitution such as was done recently in Missouri?

"2. Several lawyers in both the House and Senate tell me they think a Convention could submit an entirely new Constitution to the people for a vote by presenting the proposed Constitution simply as an amendment to the existing Constitution. Is this possible?

"3. If the answers to 1 and 2 above are 'no', then if a new Constitution were proposed would every Article have to be presented separately as an amendment and hence each article voted on separately by the people?

"4. If the answer to 3 above is 'yes', then is it possible that the ballot could legally carry a separate question, 'Shall the proposed Constitution be accepted in entirety?', followed by the separate questions on each article? (The idea here would be similar to a straight party vote as compared with the alternative of individual votes for candidates in regular elections. A voter would then have opportunity to vote his opinion by a single 'X', in preference to marking a separate 'X' for each article, although either alternative would be available to him.)

"I have already spoken briefly to Mr. Strauss on this matter and we agreed that I should ask for an opinion in writing, securing in return a written opinion."

In the view we take of this situation, answer *seriatim* to your questions is not required. In that aspect, we observe to you with respect to making changes in the constitution, the following:

ART. X, Sec. 1, provides the following:

"*How proposed—submission.* Any amendment or amendments to this Constitution may be proposed in either House of the General Assembly; and if the same shall be agreed to by a majority of the members elected to each of the two Houses, such proposed amendment shall be entered on their journals, with the yeas and nays taken thereon, and referred to the Legislature to be chosen at the next general election, and shall be published, as provided by law, for three months previous to the time of making such choice; and if, in the General Assembly so next chosen as aforesaid, such proposed amendment or amendments shall be agreed to, by a majority of all the members elected to each House, then it shall be the duty of the General Assembly to submit such proposed amendment or amendments to the people in such manner, and at such time as the General Assembly shall provide; and if the people shall approve and ratify such amendment or amendments, by a majority of the electors qualified to vote for members of the General Assembly, voting thereon, such amendment or amendments shall become a part of the Constitution of this State."

ART. X, Sec. 3, provides the following:

"*Convention.* At the general election to be held in the year one thousand eight hundred and seventy, and in each tenth year thereafter, and also at such times as the General Assembly may, by law, provide, the question, 'Shall there be a Convention to revise the Constitution, and amend the same?' shall be decided by the electors qualified to vote for members of the General Assembly; and in case a majority of the electors so qualified, voting at such election, for and against such proposition, shall decide in favor of a Convention for such purpose, the General Assembly, at its next session, shall provide by law for the election of delegates to such Convention."

According to the foregoing, §1 provides for changes therein by amendments; §3 provides for changes therein by revision and amendments. It appears also that insofar as amendments are concerned, they are initiated by the legislature, and subsequently, in accordance with the section, submitted to the people for approval and ratification.

On the other hand, revision is the prerogative of the people, initiated by them by their vote to have a convention, in which decision to have a convention the legislature has no part. After the people have spoken and decided

that a convention be provided for, the legislature then is authorized to proceed to set up the machinery of such convention and its procedures.

House Joint Resolution 5, as passed by the House, and which is now under consideration, provides the following: (Journal of the House, page 388)

"House Joint Resolution 5, a joint resolution proposing a Constitutional amendment relating to constitutional convention.

"Be It Resolved by the General Assembly of the State of Iowa:

"Section 1. The following amendment to the Constitution of the State of Iowa is hereby proposed:

'Section three (3) of Article ten (X) of the Constitution of the State of Iowa is repealed and the following adopted in lieu thereof:

"Section 3. At the general election to be held in the year one thousand nine hundred and seventy, and in each tenth year thereafter, and also at such times as the General Assembly may, by law, provide, the question, 'Shall there be a Convention to propose amendment or amendments to the Constitution?' shall be decided by the electors qualified to vote for members of the General Assembly; and in case a majority of the electors so qualified, voting at such election, for and against such proposition, shall decide in favor of a Convention for such purpose, the General Assembly, at its next session, shall provide by law for the election of delegates to such Convention, and for submitting the results of said Convention to the people, in such manner and at such time as the General Assembly shall provide; and if the people shall approve and ratify such amendment or amendments, by a majority of the electors qualified to vote for members of the General Assembly, voting thereon, such amendment or amendments shall become a part of the constitution of this state. If two or more amendments shall be submitted at the same time, they shall be submitted in such a manner that electors may vote for or against each such amendment separately."

House Joint Resolution 5, as filed January 16, 1961, appeared as follows:

"House Joint Resolution 5

"A joint Resolution proposing a Constitutional amendment relating to constitutional convention.

"Be It Resolved by the General Assembly of the State of Iowa:

"Section 1. The following amendment to the Constitution of the state of Iowa is hereby proposed:

'Section three (3) of Article Ten (X) of the Constitution of the State of Iowa is hereby amended by adding at the end thereof the following:

", and for submitting the results of said Convention to the people, in such manner and at such time as the General Assembly shall provide; and if the people shall approve and ratify such amendment or amendments, by a majority of the electors qualified to vote for members of the General Assembly, voting thereon, such amendment or amendments shall become a part of the constitution of this state. If two or more amendments shall be submitted at the same time, they shall be submitted in such manner that electors may vote for or against each such amendment separately."

The Resolution in the form passed is an amendment to the original filed.

The record discloses that such amendment was introduced as:

"Amend House Joint Resolution 5 by striking all after the Resolving Clause and substituting in lieu thereof the following:"

Thus the legislative history of House Joint Resolution 5 shows no changes proposed in §1 of Article X, but that §3 of Article X is amended by repeal and substitution of the proposed amendment as was passed by the House and hereinbefore exhibited. As thus proposed, amendments of the constitution are initiated still by the legislature, under §1, Art. X, but the Resolution as passed by the House, amends §3, Art. X, provides that a general election be held in the year 1970 and every tenth year thereafter, and at such other times as the General Assembly may by law provide, proposing a convention not to revise and amend, but to propose amendment or amendments to the Constitution.

Thus, in concluding answer to your problem, it is apparent that amending the Constitution and revision thereof are two different things, and so understood not only by the framers thereof and the people who adopted it, but by the House of Representatives in passing House Joint Resolution 5.

This differentiation as applied to the foregoing Resolution results in this situation. The proposed amendment in one aspect thereof recognizes this differentiation in that it provides for the holding of a convention of the electorate, but the convention, in the proposed amendment, is limited in its deliberations to amending the Constitution. Revision by amendment is a contradiction. This view of differentiation between amending the constitution and revising it has case and textbook support:

AMERICAN JURISPRUDENCE, Volume 11

Constitutional Law

Section 22—State Constitutions—states the general rule:

Under our institutions sovereignty resides in or with the people and may be exercised in the manner they have provided by the Constitution. The power to change a state Constitution is generally exercised in either one of two methods—namely, by a convention of delegates chosen by the people for the express purpose of revising the entire instrument or through the adoption by the people of propositions for specific amendments that have been previously submitted to it by the legislature. It can be neither revised nor amended, except in the manner prescribed by itself, and the power which it has conferred on the legislature in reference to proposing amendments, as well as to calling a convention, must be strictly pursued.

Footnotes:

The term "amendment" referring to the state Constitution implies such an addition or change within the lines of the original instrument as will effect an improvement or better carrying out of the purpose for which it was framed. Livermore v. Waite, 102 Cal. 113, 36 P. 424, 25 L.R.A. 312.

Livermore v. Waite, 102 Cal. 113, 36 P. 424, 25 L.R.A. 312;

Ellingham v. Dye, 178 Ind. 336, 99 N.E. 1, Ann. Cas. 1915C 200, writ of error dismissed in 231 U.S. 250, 58 L. 3d. 206, 34 S. Ct. 92;

State v. Powell, 77 Miss. 543, 27 So. 927, 48 L.R.A. 652;

State v. Roach, 230 Mo. 408, 130 S.W. 689, 139 Am. St. Rep. 639;

State v. Tufly, 19 Nev. 391, 12 P. 835, 3 Am. St. Rep. 895;

Bott v. Wurts, 63 N.J.L. 289, 43 A. 744, 881, 45 L.R.A. 251;

Simpson v. Hill, 128 Okla. 269, 263 P. 635, 56 A.L.R. 706;

McAlister v. State, 95 Okla. 200, 219 P. 134, 33 A.L.R. 1370.

Cumulative Supplement:

Am. Jur. cited in Moore v. Brown, 350 Mo. 256, 165 S.W. 2d 657;

Staples v. Gilmer, 183 Va. 613, 33 S.E. 2d 49, 158 A.L.R. 495;

RCL quoted in Houston County v. Martin, 232 Ala. 511, 169 So. 13;

Egbert v. Dunseith, 74 N.D. 1, 24 N.W. 2d 907, 168 A.L.R. 621.

16 C. J. S., page 36, states:

"Distinction between amendment and revision.

Every proposition which effects a change in a constitution, or adds or takes away from it, is an amendment, and remains as such until the authority which voted it in shall vote it out, while a revision implies a re-examination and restatement of the constitution, or some part of it, in a corrected or improved form. The adoption by the people of a state of a complete and new constitution is not an amendment of earlier constitutions."

McFADDEN V. JORDAN, Pac. Reporter, 2d Series, Volume 196:

Page 790:

"A familiar and fundamental rule for the interpretation of a legislative statute is that it is presumed to have been enacted in the light of such existing judicial decisions as have a direct bearing upon it." (See also, to the same effect, In re Halcomb (1942), 21 Cal. 2d 126, 129, 130 P. 2d 384, and cases there cited.) It is thus clear that a revision of the Constitution may be accomplished only through ratification by the people of a revised constitution proposed by a convention called for that purpose as outlined hereinabove. Consequently if the scope of the proposed initiative measure (hereinafter termed "the measure") now before us is so broad that if such measure became law a substantial revision of our present state Constitution would be effected, then the measure may not properly be submitted to the electorate until and unless it is first agreed upon by a constitutional convention, and the writ sought by petitioner should issue. (See Livermore v. Waite (1894), supra, 102 Cal. 113, 36 P. 424, 25 L.R.A. 312.)

Page 797:

Intervenors concede also that "When our Constitution was framed different procedures were provided for amendments and revisions, and therefore some distinction between the two must have been contemplated." Certainly it cannot be solemnly announced as a general rule of thumb that an initiative measure which would affect all the articles of the Constitution would constitute a revision thereof, whereas a measure which would affect all except one (or all, less two-fifths) of the articles would thereby be reduced to the status of an amendment. Yet that is, in substance, the position taken by the intervenors. They urge that if any less than all sections of the Constitution are altered, and if any less than all old sections are discarded, the change is merely an amendment. We cannot accept such an arbitrary and strained minimization of difference between amend and revise. The differentiation required is not merely

between two words; more accurately it is between two procedures and between their respective fields of application. Each procedure, if we follow elementary principles of statutory construction, must be understood to have a substantial field of application, not to be (as argued in intervenors' Answering Memorandum) a mere alternative procedure in the same field. Each of the two words, then, must be understood to denote, respectively, not only a procedure but also a field of application appropriate to its procedure. The people of this state have spoken; they made it clear when they adopted article XVIII and made amendment relatively simple but provided the formidable bulwark of a constitutional convention as a protection against improvident or hasty (or any other) revision, that they understood that there was a real difference between amendment and revision.

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RAFAEL A. RIVERA-CRUZ, Appellant
v.
R. A. GRAY, as Secretary of State of the State of Florida, Appellee

Page 501:

Separate suits were brought against the Secretary of State of the State of Florida to enjoin him from placing on ballots to be used in the general election of 1958 a proposed revision of the Constitution. The Circuit Court for Leon County, W. May Walker, J., entered a decree adverse to the plaintiffs, and they appealed. The Supreme Court, Thomas, J., held that where proposed amendments of the Constitution, as embodied in 14 joint resolutions of the Legislature, were intended to revise the preamble and every article of the Constitution except one, and each resolution provided that the particular proposed amendment referred to therein shall not be effective unless all proposed amendments are approved, section of the Constitution dealing with method of amendment of the Constitution was being improperly used to circumvent section of the Constitution dealing with method of revision of the Constitution.

Page 502:

Sec. 2 of Article XVII relates to "Method of revising constitution." Under this portion of the Constitution the members of the Senate and House of Representatives may by a two-thirds vote determine that a revision is necessary and note the action upon their respective journals.

It is specified that notice of such action be given for three months before the next election of representatives and that at the election the electors be given the opportunity to vote for or against the revision. If a majority vote favorably, the legislature is charged to provide by law for a convention to revise the Constitution.

The appellants take the position that what is intended to be submitted to the electors at the next general election is a revision of the Constitution in the guise of amendments. Of course, no attempt has been made to follow the procedure outlined in Sec. 2, Article XVII, supra.

* * *

It was the amendment adopted in 1948 that the word "revision" was introduced into Sec. 1. We do not discover in the language of the section as it now stands any intention to abandon or interfere with Sec. 2 dealing solely with "revision." Nor do we find after careful study of both sections that Sec. 1, after amendment, prescribed an alternative way to revise the constitution.

So we decide that two methods of changing the Constitution still obtain and that they may not be intermingled. We are convinced that in

the use of the two words "revision" and "amendment" there was no intention so to distinguish them within the section that the revision contemplated by the adoption of Sec. 2 could be accomplished under Sec. 1.

Whereas Sec. 1, before amendment, contained the provision that either branch of the legislature could propose "amendments" after the adoption in 1948 either branch was empowered to "Propose the revision or amendment of any portion or portions of (the) Constitution." The "revision or amendment," could affect one or more subjects, but no "amendment" could consist of more than one revised article. In the second paragraph, as in the first, "revision" and "amendment" are used interchangeably and are always in the singular.

* * *

Page 503:

Any process of changing the Constitution is cumbersome, made so purposely in order that the organic law may not be easily re-molded to fit situations and sentiments that are relatively transitory and fleeting. This probably was a compelling reason for the procedure specified in Sec. 2 of Article XVII for revision of the Constitution. Nevertheless, the complicated and protracted method of revision would not be adequate for changes of parts of the organic law to meet the needs of progress so amendments of portions were made possible by a comparatively simple procedure. Even this process is so involved that the electors in 1942 adopted an amendment, Sec. 3, Article XVII, providing for emergency alteration of the Constitution. In the Constitutions of 1861 and 1865 even amendments could not originate in the legislature for they contained provisions that '(n)o part of this Constitution shall be altered except by a Convention duly elected." Sec. 1 of the present Constitution, before and after amendment, in our opinion, was meant to deal with the change of parts, not the whole, of the Constitution. Were this not so there would seem to be no need of provisions for a convention.

* * *

We realize the confusion that would result if some of the present proposed amendments were accepted and some were rejected and the practicability therefore of linking them together. But practicalities cannot, however sound, justify a circumvention of a provision of the Constitution for creation and organization of a convention. If the changes attempted are so sweeping that it is necessary to include the provisions interlocking them, then it is plain that the plan would constitute a recasting of the whole Constitution and this, we think, it was purposed to accomplish only by a convention under Sec. 2 which has not yet been disturbed.

Another feature that, in our opinion, renders invalid the "daisy chain" method is the difference in origin of complete and partial changes. Amendments originate in the legislature and the people have the choice only of acceptance or rejection of the ones the legislature submits; in the case of revision, the legislature has primarily only the power of determining that a revision is "necessary." As we have written, the people themselves decide whether or not they desire a revision. If they approve, the legislature then has the duty to enact a law providing for a convention consisting of a membership equal in numbers to the membership of the House of Representatives. But in such instance, the law-making body has no voice in formulation of the new Constitution. In other words, under the former system the legislature proposes; under the latter the legislature only expresses a need and, if the declaration is approved by the electorate, carries into effect the will of the people to create a convention.

Page 504:

The people's delegates, elected for the purpose, then weigh proposed pro-

visions, debate their merits, decide what should become and what should not become the organic law. If the method now attempted should be sanctioned, the right of the people to form and develop ideas and forge them into organic rights, guaranties, privileges and immunities would be transferred from the people, or the people's delegates, to the legislature. The right of origination by persons set to the task by the electors would be completely eliminated.

A situation similar to the present one was considered by the Supreme Court of California. The constitution of that state contained provisions very much like ours for revision of the constitution by a convention called for the purpose. An attempt was made to effect extensive changes by resorting to provisions governing amendments. The court disapproved the procedure discussing at considerable length the sharp difference between amendment and revision and the reasons the two should not be confused. *McFadden v. Jordan,* 32 Cal. 2d 330, 196 P. 2d 787, 789. We disagree with the claim of the Attorney General that there is no analogy between that case and this one. The underlying fundamental principles of amendment and revision with which that Court dealt are present in this controversy and the opinion of the California court that they are so unrelated that they cannot be blended coincides with our view on the subject. And it is because of the clear distinction that we reject the argument that the language in Sec. 1, as amended, can be construed as an intention to provide an alternative manner of revising the whole Constitution.

STAPLES V. GILMER, 33 S.E. 2d 49, 53:

An amendment of a Constitution and a revision of a Constitution are defined in this language in 16 C.J.S., Constitutional Law, sec. 7, p. 31: "Every proposition which effects a change in a constitution, or adds or takes away from it, is an amendment * * *, while a revision implies a re-examination and restatement of the constitution, or some part of it, in a corrected or improved form * * *." As authority for this statement the author cites State ex rel. Corry v. Cooney, 70 Mont. 355, 225 P. 1007. Revision and amendment have been held synonymous terms. See State v. Taylor, 22 N.D. 362, 133 N.W. 1046.

In submitting the question to the electors whether there shall be a convention, the legislature is performing an exclusive function for the people delegated to it in section 197. In no other way may a convention be initiated in Virginia. If the legislature refused to submit the question to the electors whether there shall be a convention, nothing can be done about it except for the electors to replace its membership by others who will admit the question.

The sovereign power being in the people, it can be exercised only through an agency of the people. Colley's Constitutional Limitations, 8th Ed., Vol. 1, p. 87. The constitutional convention is an agency of the people to formulate or amend and revise a Constitution. The convention does not possess all of the powers of the people but it can exercise only such powers as may be conferred upon it by the people. The people may confer upon it limited powers.

The foregoing points up not only the essential difference between amending the Constitution and revising it, but to the effect that such difference has in making changes in the constitution one way or another—one by amending parts in the manner provided by the Constitution. Revision, on the other hand, consists in alteration or reformation by the people in the manner provided by the Constitution. Such power to change by revision is always retained by the people and such retention is confirmed by the provisions of Article 1, §2, of the Constitution, which states:

"Political Power. All political power is inherent in the people. Govern-

ment is instituted for the protection, security, and benefit of the people, and they have the right, at all times, to alter or reform the same, whenever the public good may require it."

The same observation may be made of the situation as it develops in the form of the proposed amendment, and its passage by the House of Representatives.

Article X of the Constitution, as it appears in the Code of 1958, contains two methods of change in the Constitution: one by a proposal initiated and submitted by the legislature of amendment or amendments of the Constitution; the other by submitting to the electors the question of holding a convention for the purpose of revising and amending the Constitution.

House Joint Resolution 5 repeals §3, Article X providing for the submission to the electorate of the question of providing for a convention to revise and amend the Constitution and substituting therefor a question of providing a convention for the purpose of amending the Constitution. Thus, if the electorate decides that an election be called, it will be only for amending the Constitution and not for revising it.

Applying textbook rules of construction providing for a repeal of the provision for a constitutional convention to revise the Constitution, and substituting a convention to amend the Constitution, it is clear that the power previously existing to revise, terminated. If the amendment be adopted, the Constitution may be amended by the legislature or by the electorate. The only difference between §1, Article X and §3, Article X is that the Constitution may be amended, on one hand, by the legislature and submitted to the electorate, and on the other, the Constitution may be amended by the convention and submitted to the electorate.

The inalienability of such power in the people is the subject of the following from the case *Koehler v. Hill,* 60 Iowa 543, 614, 15 N.W. 609:

" 'Appellants' counsel cite and rely upon section 2, art. 1 of the constitution of the state. * * * Abstractly considered, there can be no doubt of the correctness of the propositions embraced in this section. These principles are older than constitutions and older than governments. The people did not derive the rights referred to from the constitution, and, in their nature, they are such that the people cannot surrender them. The people would have retained them if they had not been specifically recognized in the constitution. But let us consider how these rights are to be exercised in an organized government. The people of this state have adopted a constitution which specifically designates the modes for its own amendment. But this section declares the people have the right, at all times, to alter or reform the government whenever the public good may require it. If the people unanimously agree respecting an alteration in the government, there could be no trouble, for there would be no one to object. Suppose, however, a part of the people conclude that the public good requires an alteration or reformation in the government, and they set about the adoption of a new constitution in a manner not authorized in the old one. Suppose, also, as would most likely prove to be the case, that a part of the people are content with the existing government and will not consent to the change, and that the governor, who, under the constitution, is the 'commander in chief of the militia, the army, and the navy of the state,' determines to maintain the existing government by force.

"It is evident that the people who think the public good requires a change, can establish these changes only by superior force. If they are powerful enough to succeed, well: they will have altered or reformed the government; but if they are not powerful enough to succeed, their attempt to overthrow the government is treason, and they are liable to punishment as traitors. They have the right to alter their government in a manner

not recognized in the constitution only when they can maintain that right by superior force. It follows then, after all, that the much-boasted right claimed under this section is simply the right to alter the government in the manner prescribed in the existing constitution, or the right of revolution, which is a right to be exercised not under the constitution, but in disregard and independently of it.

"For a very valuable case upon this subject, see *Wells v. Bain,* 75 Pa. St. 39. In commenting upon a reservation in the bill of rights the same as that contained in our own constitution, the court says: 'The words "in such manner as they may think proper," in the declaration of rights, embrace but three known recognized modes by which the whole people, the state, can give their consent to an alteration of an existing lawful form of government, viz. (1) the mode provided in the existing constitution; (2) a law as the instrumental process of raising the body for revision and conveying to it the powers of the people; (3) a revolution.' In the progress of the opinion the court employ the following language, which is most applicable to the question now under consideration: 'In considering this question of delegated power, some are apt to forget that the people are already under a constitution and an existing frame of government instituted by themselves, which stand as barriers to the exercise of the original powers of the people, unless in an unauthorized form.' "

Staples v. Gilmer, 32 SE 2d 49, 53:

"Undoubtedly the people have a right to 'reform, alter or abolish', within democratic principles, a part or parts of their fundamental law without reforming, altering or abolishing all of it. The first finding declaration of this fundamental principle was made on the 6th day of May, 1776, since which time it has been retained in the Constitution without substantial change as sections 2 and 3 of the Bill of Rights. The pertinent part, as originally approved, reads: '* * *, whenever any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter or abolish it, in such manner as shall be judged most conducive to the public weal.'

"The people did not destroy their right to reform or alter a part or parts of the Constitution by means of a convention when they approved the provisions of section 197 of the present Constitution. If by section 197 the entire Constitution may be revised and amended, certainly the people, the source of all power, could exercise the lesser power and revise and amend only a part of it 'in such manner as shall be judged (by the people) most conducive to the public weal.' "

Thus the effect of House Joint Resolution 5, if adopted, would be to authorize a convention to amend the Constitution, a right which already exists in §1 of Article X, but provides the people with no method of reformation which they possess under §3, Article X of the Constitution.

The mandatory character of our constitution is stated in *Smith v. Thompson,* 219 Iowa 888, 904, as follows:

"In Taft Co. v. Alber (185 Iowa 1069, 171 N.W. 719) in discussing the state constitution, this court said:

'The people are sovereign, and speak through their Constitution, and, when they thus speak, its mandates are binding upon all people, and on the legislature, which is but one of the agencies of government. * * * All departments of government and officers are only the instrumentalities through which the government acts. They are, in one sense, the agencies through which the government acts, and all the power and authority to act and the manner of acting are controlled by the

fundamental law found in the constitution. We start, then, with the proposition that the provisions of our constitution are mandatory, and that their mandates bind as closely and as firmly the legislative branch of the government as they do the citizen of the commonwealth. The legislative branch must obey the constitution or fundamental law, and must follow and obey its requirements and directions. It is true some courts have held that constitutional provisions are not mandatory. This court, however, has held consistently that the provisions of the constitution are mandatory and binding upon the legislature, and that any act that contravenes the provisions of the constitution, or fails to come up to the measurement of the constitutional requirements is not binding upon the people or any of the agencies of government. Citing *Koehler & Lange v. Hill,* 60 Iowa 543, 14 N.W. 738, 15 N.W. 609; *State v. Lynch,* 169 Iowa 148, 151 N.W. 81, L.R.A. 1915D 119."

In view of the foregoing, we are of the opinion that the legislature may not deprive the people of the right to reform or revise the Constitution, and this is what we think House Joint Resolution 5 does.

20.18

STATE OFFICERS AND DEPARTMENTS: Department of Agriculture, powers of Marketing Division—§§8.13(2), 19.20, 19.25, 159.20, 159.25, 159.26, 1962 Code. Marketing Division must request Executive Council to take bids on supply purchases of over $200. It need not take bids on contracts for advertising and promotional counsel. Marketing Board cannot authorize out-of-state travel at public expense without Executive Council approval.

June 15, 1962

Mr. L. B. Liddy, Secretary
Department of Agriculture
L O C A L

Dear Mr. Liddy:

In your oral request for an opinion, you posed the following questions:

"(1) Does the Marketing Division of the Iowa Department of Agriculture (hereinafter referred to as the Marketing Division) have authority to contract for supplies in excess of $200 without competitive bidding pursuant to Section 19.20, 1962 Code of Iowa?

"(2) Does the Marketing Division have authority to contract for advertising counsel in excess of $200 without competitive bidding pursuant to Section 19.20, 1962 Code of Iowa?

"(3) Does the Marketing Division director or the Marketing Division Board have authority to authorize out-of-state travel for board members and/or employees without prior approval of the Executive Council pursuant to Section 8.13 (2), 1962 Code of Iowa?"

Your attention is directed to §159.20, et seq., which set out the powers and duties of the Agricultural Marketing Division. See also §19.20 *Advertisement for bids;* §19.25, *Officers entitled to supplies;* and §8.13(2), *Claims-limitations-convention expenses.*

(1) The Marketing Division, being an integral part of the Department of Agriculture, is subject to the limitations of §19.20 and §19.25, and, therefore, on purchases of equipment and supplies in excess of $200 must submit specifications to the Executive Council for the purpose of taking bids.

(2) Contracting for a service such as advertising counsel is not controlled by §19.20 inasmuch as a service is not "supplies or equipment". Specifications for competitive bidding on services such as advertising and promotional ideas cannot be intelligently drafted. Therefore, contracts for advertising *counsel* in excess of $200 may be entered into by the Marketing Board without competitive bidding. See §159.26, 1962 Code of Iowa. This opinion pertains only to contracts for services and does not include contracts for printing in connection with such promotional work which printing is the province of the State Printing Board.

(3) The Marketing Division Board members and employees are subject to the same limitations as other employees and officials under §8.13(2). See 1926 *O.A.G.* 372. Thus, they must have prior approval of out-of-state travel at public expense from the Executive Council. It is noted in passing that the Executive Council is limited in a travel authorization for an appointive member of the Marketing Board to seven cents per mile no matter what mode of travel is used. §159.25, 1962 Code of Iowa.

20.19

STATE OFFICERS AND DEPARTMENTS: Employment Security Commission—The appropriation of $1,406,442.43 provided by §1 of S.F. 447, 59th G.A., is "to be used, under the direction of the Iowa employment security commission, subject to the approval of the executive council of the state.", which language does not invest the Executive Council with original power to substitute its own judgment for that of the Iowa Employment Security Commission. The Council's power within the area of approval or disapproval does not include the application of §19.21, Code 1958, to the situation.

July 6, 1961

Executive Council of Iowa
Statehouse
LOCAL

Attention: Gary S. Gill, Secretary

Dear Mr. Gill:

This will acknowledge receipt of your letter of June 30, 1961, in which you submitted the following:

"The Employment Security Commission is in the process of building a building on the capitol grounds under authority of Senate Files 445, 446 and 447, Acts of the 59th General Assembly.

"Since approximately $300,000 of the amount appropriated would revert to the Federal Government if not obligated by July 1, 1961, the Commission and the Architects, with the approval of the Executive Council, have had a bid letting on a number of the fixtures that will be used in the building prior to the letting of the General Contract.

"One of the items bid was for two boilers. After the bid opening, the Commission decided they desired the Cleaver-Brooks boilers which have two doors. Nevertheless they were not the low bidder. The low bidder met the specifications sent out by the Commission and approved by the Council, but this boiler has only one door.

"The Council respectfully requests an opinion as to whether the Council can approve a purchase for something other than the low bid when the low bidder met specifications, in view of Section 19.21, Code of Iowa."

Senate Files 445, 446 and 447, Acts of the 59th General Assembly, embrace

the appropriation made either to the Iowa Employment Security Commission or for its use, the money required for the purchase of a site and the erection of a building for the use of the Iowa Employment Security Commission in the administration of Chapters 96, 97B and 97C, Code 1958. These sections being in *pari materia* are treated here as a basis for the authority of the expenditure of the total amount appropriated by the foregoing-numbered Senate Files.

Section 1 of S.F. 447 provides the following:

> "There is hereby appropriated out of the funds made available to this state under section nine hundred three (903) of the Social Security Act, as amended, the sum of one million four hundred six thousand four hundred forty-two dollars and forty-three cents ($1,406,442.43), or so much thereof as may be necessary, to be used, under the direction of the Iowa employment security commission, subject to the approval of the executive council of the state, for the purpose of acquiring land the purchase or the erection of a building or buildings thereon, and for such improvements, facilities, paving, landscaping, furnishings and fixed equipment as may be required for the use of the Iowa employment security commission in the performance of its functions under chapter ninety-six (96), Code 1958."

Answer to your question inheres in the following language contained in the foregoing §1, to wit:

> "subject to the approval of the executive council of the state,".

After making the appropriation of $1,406,442.43, it is, according to the Act, "to be used, under the direction of the Iowa employment security commission, subject to the approval of the executive council of the state,".

I am of the opinion that such language does not invest the Executive Council with original power to substitute its own judgment as opposed to that of the Iowa Employment Security Commission in the purchase of the boilers described in your letter. Their power, under the provisions of S.F. 447 heretofore quoted is described therein as "an approval" of the expenditure of the money under the direction of the Iowa Employment Security Commission. Such language, "subject to the approval", has had the consideration and judgment of the Supreme Court of Iowa in the case of *State v. Rhein, Treasurer,* 149 Iowa 76, 81, wherein it was stated:

> "It is a very common expedient in the making of Constitutions and statutes to vest power to appoint or designate in one officer or board subject to the approval of another officer or board, and, so far as we know, no single instance has ever arisen where it has been held that the officer or body which is given the power of approval only may assume or exercise the power of selection or appointment. To 'approve' or give 'approval' is in its essential and most obvious meaning to confirm, ratify, sanction, or consent to some act or thing done by another. See Webster's International Dictionary. Also, illustrating in some measure the meaning of 'approval' as used in statutes, see State v. Smith, 23 Mont. 44 (57 Pac. 449); Cosner v. Supervisors, 58 Cal. 274; Thaw v. Ritchie, 5 Mackey (D.C.) 200; Board v. City, 5 Okla. 82 (48 Pac. 103). To arrive at any other conclusion than we have indicated requires a reading into the statute of much that is neither expressed nor necessarily implied, and to treat, as obscure and ambiguous language which seems to us to be reasonably clear and perspicuous."

The foregoing appears to be the general rule according to Words and Phrases, Vol. 3A, page 505, where, on the authority of *In re Rooney,* 11 N. E. 2d 591, 592, 298 Mass. 430, it is said:

> " 'Approval', when it appears in statutes, generally means affirmative sanction by one person or by a body of persons of precedent act of another person or body of persons."

In view of the foregoing, I am of the opinion that the Council's authority in the situation described is to approve or disapprove the action of the Iowa Employment Security Commission. Its power within the area of approval or disapproval does not include the application of §19.21, Code 1958 to the situation.

20.20

STATE OFFICERS AND DEPARTMENTS: Employment Security Commission, refund of sales tax on goods, wares and merchandise—§422.5, 1958 Code. The Employment Security Commission is an agency of the State and not a subdivision thereof or a certifying or tax levying body, and therefore a refund of sales tax on goods, wares and merchandise used by contractors in the fulfillment of a contract with the Employment Security Commission is not available to it.

December 13, 1961

Mr. Don G. Allen, General Counsel
Iowa Employment Security Commission
112-116 Eleventh Street
Des Moines 8, Iowa

Dear Mr. Allen:

This will acknowledge receipt of your letter in which you submitted the following:

"The Iowa Employment Security Commission faces a serious problem in connection with the construction of the State's proposed new employment security administration building. This question has arisen due to the application of the provisions of section 422.45(6) of our Sales Tax Law. (i.e., whether or not the Employment Security Commission qualifies for the exemption set forth therein on the construction of its new building.)

"Section 903(c)(2) of Title IX of the Social Security Act provides that a state may, pursuant to a specific appropriation made by a legislative body of such state, use what is commonly referred to as 'Reed Act money' for the construction and furnishing of such buildings as the proposed new employment security administration building. The obligation of this money for such purposes is limited to the fiscal year in which it was credited to the account of the state and the four succeeding fiscal years. In other words, during this period the money so appropriated must be spent or the payment of it obligated by a legitimate contract.

"$733,702.00 of Reed Act money was credited to the state of Iowa in 1957, and any portion of this said credited sum which has not been obligated by June 30, 1962, will revert to the trust fund and likewise cannot be used for the purposes of the new building.

"$340,578.00 of the Reed Act money was credited to Iowa in 1958 for building purposes, and if not spent or obligated by June 30, 1963, will revert to the general trust fund.

"It has been estimated that on the purchase of materials by the contractor in connection with the construction of the proposed administration building, the sales or use tax, if one were due, would amount to a sum between $14,000.00 or $15,000.00 . . .

"We respectfully submit for your earnest consideration this problem with which we are faced and hope that a solution can be reached that will avoid the necessity of paying a sales tax when none could possibly be due and then being forced to recoup the amount paid at a date too

late to permit its use for the purposes for which the legislature made the original appropriation."

The statute under which the foregoing question arises is §422.45(6) which, so far as is applicable, provides the following:

"6. Any tax certifying or tax levying body of the state of Iowa or governmental subdivision thereof may make application to the state tax commission for the refund of any sales or use tax upon the gross receipts of all sales of goods, wares or merchandise to any contractor, used in the fulfillment of any written contract with the state of Iowa or any political subdivision thereof, which property becomes an integral part of the project under contract and at the completion thereof becomes public property, except goods, wares or merchandise used in connection with the operation of any municipal utility engaged in selling gas, electricity, or heat to the general public."

Note that the refund of sales tax upon the gross receipts of all sales of goods, wares and merchandise of any contractor is available only to "any tax certifying or tax levying body of the state of Iowa or governmental subdivision thereof." Therefore, if the Employment Security Commission is not a tax certifying or tax levying body of the state of Iowa or a governmental subdivision thereof, the statute has no application to the situation described in your letter.

1. A tax levying or tax certifying body is defined in §24.2, subsections 2 and 3, Code of Iowa 1958, which provides as follows:

"2. The words 'levying board' shall mean board of supervisors of the county and any other public body or corporation that has the power to levy a tax.

"3. The words 'certifying board' shall mean any public body which has the power or duty to certify any tax to be levied or sum of money to be collected by taxation."

The Employment Security Commission obviously is neither a tax certifying nor a tax levying body.

2. Insofar as the question as to whether the Employment Security Commission is a governmental subdivision is concerned, it is to be observed that the Commission is created under the provisions of §96.10, subsection 1, which provides the following:

"1. . . . The commission shall consist of three members who shall devote their entire time to the duties of their office; one of whom shall be a representative of labor, one of whom shall be a representative of employers, and one of whom shall be impartial and shall represent the public generally. During his term of membership on the commission no member shall serve as an officer or committee member of any political party organization, and not more than two members of the commission shall be members of the same political party. . . . "

The Commission as thus created, other than its prescribed powers and duties set forth in Chapter 196, Code of 1958, represents the legislative directive to carry out the following purpose of the chapter as contained in §96.2, as follows:

"96.2 . . . The legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state require the enactment of this measure, under the police powers of the state, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own."

In this connection it is to be observed that the 59th G.A., by Chapters 57 and 58, appropriated to the Employment Security Commission three hundred thousand dollars ($300,000.00) out of the General Fund of the State and the Iowa Public Employees Retirement Fund to be used by the Commission for its proportionate share with the federal government in the cost of erecting a building for its use in administering Chapter 96, 97B and 97C, Code of 1958. It is significant that these appropriations are made not to the State, but to the Employment Security Commission.

Section 422.45 provides that the refund of sales and use tax is to be made to the State, or any of its political subdivisions, as parties to a written contract wherein the sales and use tax is imposed upon goods, wares and merchandise involved in the performance of the contract.

It is assumed that the words governmental subdivision or political subdivision are used interchangeably in §422.45, and mean a subdivision of the State. The question presented, then, is what constitutes a subdivision of the State.

The word, "subdivision", as a governmental or political unit, means a governmental corporation or other public body created by the legislature, which is delegated state sovereign powers. See 11 *Am. Jur.*, Constitutional Law, §223, discussing the delegation of sovereign power to local governmental subdivisions.

In this regard, where there was a discussion of a similar exemption problem, in the case of *The Southern Cross, The Pan American, The Western World,* (C.C.A. 2d), June 9, 1941, 120 F. 2d 466, the Court made the following statement:

> "(2) Section 502, subd. 3(3)(d) of the New York Labor Law, Consol. Laws, c. 31, exempts from unemployment insurance taxes 'The state of New York, municipal corporations and other governmental subdivisions * * *' Plainly a receiver operating for the account of the United States cannot be described as a 'governmental subdivision' without ascribing to those words a most strained, unnatural meaning and disregarding utterly the rule of ejusdem generis in statutory construction."

Similarly, in §422.45(6) where the exemption extends to a "tax certifying or tax levying body or, ... governmental subdivision" there must be an application of the rule of *ejusdem generis* as a rule of interpretation. See 2 Sutherland, *Statutory Construction,* 3rd Ed. at page 395. In the case of *Hull Hospital v. Wheeler,* 216 Iowa 1394 (1933), the term "hotel" was held not to include hospital within its definition of hotel. It was stated at page 1398:

> " 'A fundamental rule of construction is that, where particular words are followed by general ones, the general are restricted in meaning to objects of a like kind with those specified.' "

The distinction is thus apparent between governmental or political subdivisions and governmental agents. As between such governmental instrumentalities, it would appear that a governmental subdivision possesses sovereign power delegated to it by the legislature as opposed to governmental agents which do not possess the sovereign power but are instrumentalities by which the sovereign powers are enforced and exercised. Thus, the Employment Security Commission is an authorized agency of the State created under the police power of the State to enforce the purposes of Chapter 96 and constitutes an agency and not a governmental or political subdivision. Such distinction of this description of an agency is described in 1 David, *Adm. Law Treatise,* §1.01, in terms as follows:

> "Administrative law is the law concerning the powers and procedures of administrative agencies, including especially the law governing judicial

review of administrative action. An administrative agency is a governmental authority, other than a court and other than a legislative body, which affects the rights of private parties through either adjudication or rule making. An administrative agency may be called a commission, board, authority, bureau, office, officer, administrator, department, corporation, administration, division, or agency. Nothing of substance hinges on the choice of name, and usually the choices have been entirely haphazard."

By reason of the foregoing, the Employment Security Commission is not a certifying or levying political or governmental subdivision of the State of Iowa and, therefore, the exemption from taxes provided in §422.45 (6) is not applicable to the Employment Security Commission. See also opinion of the Attorney General dated February 22, 1961, holding that a contractor cannot be reimbursed for taxes paid on work done for State.

20.21

STATE OFFICERS AND DEPARTMENTS: Elections—§§6.5, 39.5, 39.6, Ch. 43, 1958 Code. Governor has duty to issue a proclamation of special election to vote upon the submission of the judiciary amendment to the Constitution, which shall be issued at least thirty (30) days before the primary day, June 4, 1962. Said duty does not extend to the primary election provided by Chapter 43.

March 1, 1962

Honorable Norman A. Erbe
Governor of Iowa
L O C A L

My dear Governor:

This will acknowledge receipt of yours of the 29th, ult., in which you submitted the following:

"By the authority in Chapters 6 and 39, Iowa Code of 1958, the Governor 'shall issue a proclamation at least 30 days before any general election'.

"Specifically, I would like to obtain details and procedure for issuing this proclamation, as a forthcoming proclamation in the June elections will be necessary because of the judiciary amendment to the constitution.

"Will the proclamation be for the purpose of only proclaiming the proposed amendment, or is a primary election considered the same as a general election under Chapter 39.3, Iowa Code of 1958?"

Your duty in the issuance of a proclamation of a general election is set forth in §39.3, Code of 1958, in terms as follows:

"39.3 Proclamation concerning election. At least thirty days before any general election, the governor shall issue his proclamation, designating all the offices to be filled by the vote of all the electors of the state, or by those of any congressional, legislative or judicial district, and transmit a copy thereof to the sheriff of each county. Said proclamation shall designate by number the several districts in which congressional and judicial officers are to be chosen without other description.

"The office of senator in the state legislature shall be designated substantially as follows:

'In the senatorial districts numbered (giving the number of each senatorial district in which a senator is to be chosen), each one senator.'

"The office of representative in the state legislature shall be designated as follows:

'In the counties of (naming the counties in which two representatives are to be chosen) each two representatives. In all other counties of the state, each one representative.' "

Insofar as such duty extends to a proclamation by you concerning special elections, it is provided by §39.6 the following:

"39.6 Notice of special election. A similar proclamation shall be issued before any special election ordered by the governor, designating the time at which such special election shall be held; and the sheriff of each county in which such election is to be held shall give notice thereof, as provided in section 39.5".

Insofar as such duty concerns the submission of a constitutional amendment at a special election (which is the situation with which you are now presented), §6.5 provides the following:

"6.5 Submission at special election. The general assembly may provide for the submission of a constitutional amendment to the people at a special election for that purpose, at such time as it may prescribe, proclamation for which election shall be made by the governor, and the same shall in all respects be governed and conducted as prescribed by law for the submission of a constitutional amendment at a general election."

Therefore, in pursuance of the foregoing statute, your duty will be to issue a proclamation at least thirty days before the special election to be held on the primary day, June 4, 1962. It will be the duty of the sheriff of each county to give notice of such proclamation of special election in accordance with the provisions of §39.5, Code of 1958, providing as follows:

"39.5 Notice of election. The sheriff shall give at least ten days notice thereof, by causing a copy of such proclamation to be published in some newspaper printed in the county; or, if there be no such paper, by posting such a copy in at least five of the most public places in the county."

However, your duty does not extend to issuing such proclamation concerning the primary election of June, 1962. The primary election is not a constitutional or common law election, according to *State v. Carrington,* 194 Iowa 785, 190 N.W. 390. The primary election is limited to the making of nominations to office by political parties. At page 786 of the *State v. Carrington* case, it is stated:

"A primary election is not an election, within the meaning of the Constitution; nor is it such within any meaning known to the common law. It is purely a legislative creation, that involves neither life, liberty, property, nor franchise. It is enacted solely for the benefit of orderly procedure in the administration of political parties, respectively, whereby each may select candidates for office, to be submitted to the consideration of all the electors at the general election. In its creation, the legislature was subjected to no constitutional inhibition; nor are its imperfections, if any, subject to attack on constitutional grounds. Prior to its legislative creation, the primary election never was or could be the subject of judicial cognizance; nor in its creation has the legislature conferred or taken away any right which has been heretofore, or can be hereafter, the subject of judicial cognizance, except so far as such right may be later conferred by legislation."

20.22

STATE OFFICERS AND DEPARTMENTS: Executive Council—§29.27(5), Code 1958, amended by Ch. 65, Acts of the 59th G.A. Executive Council can transfer unappropriated money from the State Treasury to the Contingent Fund to pay claims under §29.27. Warrants may be issued under said section upon approval of the Adjutant General without further Executive Council approval of specific claims.

February 28, 1962

Mr. Gary S. Gill, Secretary
Executive Council of Iowa
LOCAL

Dear Mr. Gill:

This will acknowledge receipt of your recent letter in which you submitted the following:

"Chapter 29.27, Paragraph 5 of the Code of Iowa, 1958, read as follows, prior to the last Session of the legislature.

'All payments herein provided for shall be paid on the approval of the adjutant general by warrant drawn against any state funds not otherwise appropriated.'

"The 59th General Assembly amended the aforementioned statute in Chapter 65, Acts of the 59th G.A. Therefore the present Section 29.27, reads as follows:

'All payments herein provided for shall be paid on the approval of the adjutant general from the contingent fund of the executive council.'

"The Contingent Fund of the Executive Council is authorized by Section 19.7, Code of Iowa, 1958; nevertheless, the Legislature did not appropriate any money for this fund. The Council, in the past, has used Section 19.29, Code of Iowa, 1958, to place money in the Contingent Fund when it was necessary.

"1. Can the Executive Council draw, by resolution, from the unappropriated money in the State Treasury and transfer it to the Contingent Fund for the specific purpose of paying the claims arising under Chapter 29.27 and provide, thereafter, warrants may be drawn on this fund with the approval of the Adjutant General without further action on the part of the Executive Council, *or*

"2. Must the Executive Council pass on each individual claim as it arises under Chapter 29.27 and thereafter, by resolution, transfer money to the Contingent Fund for the specific claim."

The practice described by you in question 1 is an authorized practice of the Council to enable it to meet its statutory duties. A transfer to meet the obligations of the Council under Chapter 65, Acts 59th G.A., is not required, and implication that the Council shall pass upon each claim as presented is not justified. The fact is that the transfers made from the State Treasury are merely a method of complying with legislative direction for the use of the fund, and there appears to be neither express nor implied authority or direction to the Executive Council to make a transfer of money from the General Fund to meet the obligation of each claim as approved. It would appear from a comparison of the language of §29.27, paragraph 5 of the Code, and Chapter 65, Acts 59th G.A., that all the legislature intended to do was to change

the fund from which the claims approved by the Adjutant General should be paid. Under that section such payments are made from the General Fund. Under the amendment of the 59th G.A., the funds are drawn from the Contingent Fund of the Council.

Therefore, the Executive Council can transfer unappropriated money from the State Treasury to the Contingent Fund for the purpose of paying claims arising under §29.27 providing for the issuance of warrants upon the approval of the Adjutant General, without further action by the Executive Council on specific claims.

20.23

STATE OFFICERS AND DEPARTMENTS: Fire Marshal's hearings— §§100.6, 100.7, 622.14, 1962 Code. 1. No constitutional rights are infringed by exclusion of counsel prior to accusation; 2. exercise of privilege against self-incrimination as to one question does not prevent continuation of hearing as to other matters; 3. privilege may be exercised by witness whether or not he has been charged with criminal offense; 4. no immunity from criminal prosecution can be granted a witness at a Fire Marshal's hearing; 5. involuntary admissions made at hearing would not be admissible at future criminal prosecution.

September 26, 1962

Mr. Carl H. Pesch
Commissioner of Public Safety
State Office Building
LOCAL

Dear Mr. Pesch:

This will acknowledge receipt of your letter concerning Fire Marshal's hearings under Chapter 100 of the Iowa Code, in which you ask the following questions:

"1. Can all persons, including the legal counsel of a witness, be excluded during the time that witnesses are testifying at a Fire Marshal's hearing?

"2. If a witness invokes the Fifth Amendment at any time during his appearance at a Fire Marshal's hearing, must all questions stop and the witness be dismissed or can the hearing continue?

"3. Can a witness invoke the Fifth Amendment if he has not been charged with a criminal act for which he is appearing as a witness at a Fire Marshal's hearing?

"4. Can immunity be granted, and if so by whom, to any person subpoenaed to appear as a witness at a Fire Marshal's hearing?

"5. Can arson charges be filed on a witness who has admitted setting a fire in the testimony given at a Fire Marshal's hearing and the witness was testifying under oath?"

1. In answer to your first question, it seems to be clearly established that there is no constitutional right to counsel prior to accusation. The case of *Petition of Groban*, 352 U.S. 330, 77 S. Ct. 510, 1 L. Ed. 2d 376, involved the question of whether witnesses in a Fire Marshal's hearing in Ohio were entitled to the assistance of counsel. In 352 U. S. at pages 332-333, the court stated:

"The fact that appellants were under a legal duty to speak and that their testimony might provide a basis for criminal charges against them

does not mean that they had a constitutional right to the assistance of their counsel. Appellants here are witnesses from whom information was sought as to the cause of the fire. A witness before the grand jury cannot insist, as a matter of constitutional right, on being represented by his counsel, nor can a witness before other investigatory bodies. There is no more reason to allow the presence of counsel before a Fire Marshal trying in the public interest to determine the cause of a fire. Obviously in these situations evidence obtained may possibly lay a witness open to criminal charges. When such charges are made in a criminal proceeding, he then may demand the presence of his counsel for his defense. Until then his protection is the privilege against self-incrimination."

See 23 *C.J.S.*, Criminal Law, §979(6), p. 935.

Under §§100.6 and 100.7, 1962 Code of Iowa, the Fire Marshal or his designated subordinate is empowered to compel attendance of witnesses and to take testimony under oath in conducting his investigations of fires. There is no statutory requirement that such investigation be public and, as indicated by the *Groban* case, *supra,* no constitutional rights are infringed by the exclusion of counsel. We must, therefore, answer your first question in the affirmative.

2. In order to answer your second question, it is necessary to examine §622.14, 1962 Code of Iowa, which provides as follows:

"When the matter sought to be elicited would tend to render a witness criminally liable, or to expose him to public ignominy, he is not compelled to answer, except as otherwise provided."

If a witness should decline to answer a question on the grounds set forth in the above section, there would appear to be no reason why he could not be asked other questions about matters which might not be incriminating. See *State v. Lewis,* 96 Iowa 286, 290, 65 N.W. 295. The privilege of the witness is exercised when he is asked a question, and the fact that it has been invoked as to one question should not prevent continuation of the Fire Marshal's hearing. Our answer to your second question, therefore, is that the hearing may continue.

3. In answer to your third question, it is clear that the privilege against self-incrimination is available in investigative proceedings as well as in criminal proceedings after the accused has been charged. See *Petition of Groban,* supra; *Duckworth v. District Court of Woodbury County,* 220 Iowa 1350, 1354, 264 N.W. 715. The privilege may therefore be exercised by a witness at a Fire Marshal's hearing, whether or not he has been charged with a criminal offense.

4. In answer to your fourth question, legal immunity from prosecution can only be granted when authorized by statute. In the *Duckworth* case, *supra,* at page 1356 of the Iowa report, the Supreme Court of Iowa said:

"While the witness Duckworth was at least by implication promised immunity by the special prosecutor and the grand jury, it was not a legal immunity, as neither the prosecuting attorney nor the grand jury had any legal authority to grant or guarantee immunity from prosecution as a basis for gaining the consent of the witness to testify before the grand jury, the question not being one concerning matters contained in section 11268 (now 622.15) of the Code, for which the statute furnished immunity."

See, *Koenck v. Cooney,* 244 Iowa 153, 158, 55 N.W. 2d 269.

Here, the Fire Marshal has no authority to grant legal immunity from prosecution and an investigation of a fire would not fall within any of the

exceptions listed in §622.15 of the Code. It therefore appears that no immunity from criminal prosecution could be granted a witness at a Fire Marshal's hearing.

5. In answer to your fifth question, it seems clear that the testimony of one who is called as a witness by subpoena at a Fire Marshal's hearing would be considered as compelled testimony under §622.14, 1962 Code of Iowa. See *State v. Meyer,* 181 Iowa 440, 449, 450, 451, 164 N.W. 794, 797 (defendant called before coroner's jury). Such testimony could not then be used against the witness in a criminal prosecution for the crime investigated. See *State v. Harriott,* 248 Iowa 25, 79 N.W. 2d 332, and cases cited therein. This does not mean, however, that the witness could not be charged and prosecuted. It merely means that his involuntary confession or admission would not be admissible in such prosecution. *State v. Harriott, supra.* See *Doyle v. Willcockson,* 184 Iowa 757, 762, 169 N.W. 241. We must therefore answer your fifth question in the affirmative.

20.24

STATE OFFICERS AND DEPARTMENTS: Interstate Cooperation Commission—Art. III, §24, Constitution of Iowa; §28B.4, 1962 Code. 1. Where members of the Interstate Cooperation Commission are entitled to their necessary expenses in carrying out their obligations under the statute, there is no appropriation made from which these expenses may be paid. 2. There are no other funds which might be available for the payment of their expenses. 3. The claim may not be paid also because there appears to be no limit to the amount of expenses to be claimed by any member, either as individuals or in the aggregate of the claims of all the members.

December 3, 1962

Mr. Marvin R. Selden, Jr.
Comptroller
State of Iowa
L O C A L

Dear Mr. Selden:

Reference is herein made to yours of the 19th, ult., in which you submitted the following:

"Your attention is called to Chapter 28B.4 of the Code of Iowa, 1962, relating to the establishment of the Interstate Cooperation Commission. Section 4 thereof reads as follows:

" 'The commission shall report to the governor and to the legislature within fifteen (15) days after the convening of each general assembly, and at such other time as it deems appropriate. Its members and the members of all committees which it establishes shall serve without compensation for such service, but they shall be paid their necessary expenses in carrying out their obligations under this Act.'

"It is noted that according to the Act that the commissioners serve without compensation but shall be paid their necessary expenses. Specifically, we request the following opinion:

"1. May these expenses be paid as incurred under an unlimited appropriation from funds not otherwise appropriated?

"2. If the answer to the first question is in the negative, are there any other funds which might be available for these items?

"3. Are there any limitations as to the total expenses which might be incurred, either by individuals or in total?"

(1) It is to be noted that according to Article III, §24 of the Constitution, "No money shall be drawn from the treasury but in consequence of appropriations made by law." There being neither expressly nor by implication an appropriation from which these expenses may be paid, the answer to your question 1 is in the negative. For authority upon which the foregoing conclusion is based, see 1946 *O.A.G.* 87, a copy of which is hereto attached.

(2) In answer to question 2, I would advise that there are no other funds which might be available for the items specified.

(3) In answer to your question 3, there appears to be no limit to the amount of expense to be claimed by any member, and therefore another reason why the claim may not be paid, even if the money with which to pay is available. For authority of this conclusion, see opinion previously referred to.

20.25

STATE OFFICERS AND DEPARTMENTS: IPERS withholding—§§97B.-10, 97B.11, 97B.14, 97B.41, 1962 Code. An employer must withhold from an employee's salary moneys for IPERS even though the said employee has contributed the maximum amount previously during the current calendar year, and recovery can only be made as provided in 97B.10.

November 7, 1962

Mr. H. K. Roggensack
Clayton County Attorney
Elkader, Iowa

Dear Mr. Roggensack:

This is to acknowledge receipt of your request for an opinion in which you state as follows:

"The following problem has arisen in our county and inasmuch as it is one which is universal in Iowa, I believe we should have a formal ruling on it if you have not already made such a ruling. The facts are as follows: A teacher teaches in Town A from January 1, 1962 until June 1962 and during that period of time draws $4,000 in salary upon which the tax has been paid to the Iowa Public Employee's Retirement System. The maximum therefore has been paid. This teacher now will teach in the Granavillo School System from September to December. Must the Garnavillo School System withhold and pay the I.P.E.R.S. tax?"

Under the provisions of §97B.41, Code 1962, it is the duty of an employer to withhold from that part of remuneration of an employee up to $4,000 an amount not to exceed 3½% of the wages as provided in §97B.11. It is also the duty of the employer to match said funds as provided in §97B.14 on the first $4,000 of wages paid to said employee. There is no exception to this rule even though the person in question may be employed by two different employers during a given calendar year.

A careful examination of this chapter fails to disclose a provision for any exceptions for those persons who have previously contributed during any calendar year to the Iowa Public Employees' Retirement System.

Therefore, in answer to your question, a school district must withhold from a teacher's salary moneys to pay into the Iowa Public Employees' Retirement System even though said teacher has contributed the maximum as set out in the statute previously during the current calendar year. The payments made

under the employment beginning September, 1962, are subject to refund under the provisions of §97B.10, Code 1962.

20.26

STATE OFFICERS AND DEPARTMENTS: Korean Service Compensation Board—§§35B.4 and 35B.8, 1962 Code. Claimant for service compensation of a deceased soldier who has made timely application should be paid the compensation entitled, even though other persons who have not timely filed an application have a higher statutory preference and are still living.

July 10, 1962

Mr. Ray J. Kauffman
Executive Secretary
Service Compensation Board
LOCAL

Dear Mr. Kauffman:

This is to acknowledge receipt of your request, dated May 31, 1962, for an opinion on the following question. Your letter states:

"Reference is made to numerous beneficiary applications, on file at this office, for Korean Service Compensation, whereby said filing was not made by immediate beneficiary, in order named, as per Chapter 35B, 1962 Code of Iowa.

"Above applications, in question, were filed on or before December 31, 1960, . . .

"Section 35B.4, 1962 Code of Iowa lists the beneficiaries entitled to receive the service compensation of a deceased person and establishes the order of preference for each claimant. Section 35B.8, 1962 Code of Iowa, states that a claimant's application must be filed on or before December 31, 1960. Thereafter, may the service compensation of the deceased person be paid to a claimant who has made a timely application, even though a person who has not made a timely application is still living and has a higher order of preference under Section 35B.4 than has the claimant?"

Authority for payment of the "Korean Veterans' Bonus" is found in Chapter 35B, 1962 Code of Iowa. This chapter is manifestly similar to Chapter 35A regarding World War II, both of which provide for the payment of service compensation to designated beneficiaries.

Section 35B.4 provides that the immediate beneficiary of the service compensation is the veteran. If the veteran is deceased the statute provides for payment to a survivor. In pertinent part, it provides:

"The surviving unremarried widow or widower, child or children, mother, father, or person standing in loco parentis, in the order named and none other, of any deceased person, shall be paid the compensation that such deceased person would be entitled to under this chapter, if living; but, if any person has heretofore died or shall hereafter die, from service-connected causes incurred between June 27, 1950 and July 27, 1953, both dates inclusive, and who has not received the benefits of this chapter, the first of survivors as hereinbefore designated and in the order named, shall be paid five hundred dollars, regardless of the length of such service, . . ."

Section 35B.4, in all respects material to this question, is worded the same as is §35A.4.

Section 35B.8 provides that an application for compensation under Chapter 35B must be filed with the Service Compensation Board on or before December 31, 1960. A similar procedure for filing applications for World War II service compensation is established by §35A.8.

A similar question to that considered herein regarding the "Korean Veterans' Bonus" under Chapter 35B has been considered by the Iowa Supreme Court for World War II service compensation under Chapter 35A. In *Eastman v. World War II Service Compensation Board of Iowa,* 244 Iowa 1391, 60 N.W. 2d 856 (1953), an uncle who stood in *loco parentis* to a deceased soldier filed a timely application for service compensation. The mother of the soldier was still living but had never made application for the compensation and the time for filing application established by §35A.8 had expired. The order of preference of claimants established by §35A.4 gives priority to a mother before a person standing in *loco parentis.*

The Iowa Court in this case said that the service compensation statute should be liberally construed in favor of those entitled to the benefits. Sections 35A.4 and 35A.8 were found to be in *pari materia* and should be construed together. On page 1394 of the opinion in 244 Iowa is written:

> "Construing the two statutes together, they mean the compensation shall be paid *to applicants* in the designated class 'in the order named' and an applicant is a claimant with an application on file before December 31, 1950. The Board did right to hold up the uncle's application until after December 31, 1950, but after that date claimant was the only person, who, under the law, could receive the bonus. The mere fact that the mother is alive does not give her a superior position in the order of persons to whom payment is to be made. She must also be an applicant with an application on file before December 31, 1950. To hold otherwise would mean a natural father who had reared his son from infancy could not get the bonus, if the son were killed in action, and the mother was alive and had abandoned the boy and filed no claim.
>
> "The above construction means the uncle who stood in the position of a father to James should be paid the bonus involved."

Sections 35B.4 and 35B.8 are in *pari materia* as are §§35A.4 and 35A.8. As such they command the same conclusion that was reached in the *Eastman* case. On the basis of the above authority the answer to your question is, therefore, "yes". A claimant under Chapter 35B who has made a timely application should be paid the compensation entitled, even though other persons who have not timely filed an application have a higher statutory preference and are still living.

20.27

STATE OFFICERS AND DEPARTMENTS: Merit System Council—Art. I, §6, Constitution of Iowa. Council has authority to advise and recommend an amendment to regulations of the Merit System Agency prohibiting discrimination based on race, as well as on political and religious opinions.

October 29, 1962

Mr. J. H. Thurau, Director
Merit System Council
Insurance Exchange Building
Des Moines 9, Iowa

Dear Mr. Thurau:

This will acknowledge receipt of yours of the 16th, inst., in which you submitted the following:

"The Merit System Council has been advised that the Federal 'Standards for a Merit System of Personnel Administration' are to be amended in order to prohibit discrimination because of race. The Standards now read, 'Disqualification of any person from taking an examination, from appointment to a position, from promotion, or from holding a position because of political or religious opinions or affiliations, will be prohibited.'

"The Federal Standards at this point are satisfied by Article XVII, Section 2, of the Regulations for the Merit System, in the following sentence:

" 'No discrimination shall be exercised, threatened, or promised by any person in the employ of the agencies or the Council against or in favor of any applicant, eligible, or employee because of his political or religious affiliations.' On the accompanying page we are citing the complete paragraph of Article XVII, Section 2. Article XXII, explaining the 'Procedure for Making Amendments', and Article XXIII, stating that "... no article or section of these Regulations shall be construed as to conflict with the provisions of the Iowa Statutes', are also quoted in their entirety.

"The Merit System Council desires to advise and recommend an amendment and addition to the Regulations, for adoption by the agencies within its jurisdiction, which will prohibit discrimination based on race, as well as on political or religious opinions.

"It would seem that the authority upon which the politico-religious regulation is based extends to racial discrimination as well. However, in order to assure itself of a sound basis for such regulation, the Merit System Council requests an informal opinion of the Attorney General confirming its authority to issue such recommendation, and the authority on the part of the agencies to adopt the same."

On the authority of Article 1, §6, of the Bill of Rights of the Constitution of Iowa, providing as follows:

"Laws uniform. SEC. 6. All laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens.",

the Merit System Council would have the authority to advise and recommend an amendment to its regulations for adoption by the Merit System Agency within its jurisdiction a provision prohibiting discrimination based on race, as well as on political and religious opinions.

20.28

STATE OFFICERS AND DEPARTMENTS: Natural Resources Council— Ch. 1, §53, Acts 58th G.A. (§15.43, 1962 Code). Proposed "Procedural Guide" of Natural Resources Council is a "book or pamphlet" within the meaning of Ch. 1, §53, Acts 58th G.A., and before expending funds to have the guide printed, the Council must obtain approval of the Budget and Financial Control Committee and the State Printing Board.

November 9, 1961

Mr. Othie R. McMurry, Director
Iowa Natural Resources Council
LOCAL

Dear Mr. McMurry:

We have your letter of September 12, 1961 in which you request the opinion of this office in regard to the following:

"The Iowa Natural Resources Council request an opinion as to whether the printing of the proposed PROCEDURAL GUIDE, as prepared and assembled by the Iowa Natural Resources Council, is subject to the provisions of Chapter 1, Section 53, Acts of the 58th General Assembly.

"The completed set of assembled sections of the PROCEDURAL GUIDE will be furnished to only those individuals, groups or agencies such as consulting engineers, county engineers, and soil districts, having a continuing use for the instructions contained in the various sections. It is proposed that the pertinent sections of the guide will be furnished to individuals, groups and agencies needing detailed instructions on securing Iowa Natural Resources Council approval for various proposed water resources projects within the State of Iowa."

In our opinion, your inquiry must be answered in the affirmative. Chapter 1, §53, Acts 58th G.A., provides as follows:

"No department or commission of state located in the city of Des Moines shall expend any funds for the publication or distribution of books or pamphlets or reports unless the publication thereof be expressly required by law or approved by the budget and financial control committee and the state printing board. A violation of this section shall constitute misfeasance in office."

It follows that, if the Procedural Guide of which you speak is a book, pamphlet or report, the above-quoted section is applicable. Webster's New Collegiate Dictionary (1961) defines a book as, among other things, "a set of sheets, as of . . . paper, strung or bound together; as, a loose-leaf note*book*." The same source defines a pamphlet as a "book of a few sheets of printed matter, commonly with a paper cover."

Without deciding whether the Procedural Guide proposed by the Natural Resources Council constitutes a book or a pamphlet, the guide does, in the opinion of this office, fall under the provisions of Chapter 1, §53, *supra*; and it is therefore necessary that approval of the Budget and Financial Control Committee and the State Printing Board be obtained prior to printing of the Procedural Guide, since we find no authorization under Chapter 455A which grants the Iowa Natural Resources Council authority to print or have printed the guide in question.

20.29

STATE OFFICERS AND DEPARTMENTS: Public Safety—Ch. 222, §4, 58th G.A., §321.210, 1962 Code. Commissioner has no authority under said section to issue a temporary restricted license to a licensee charged with the offense of OMVI.

April 19, 1962

Mr. Carl H. Pesch
Commissioner
Department of Public Safety
L O C A L

Dear Mr. Pesch:

This will acknowledge receipt of your request for an opinion on the following question set out in your letter:

"The Department of Public Safety is currently operating pursuant to the following policy: To suspend the license of an individual for a period of one year if he has been charged with the offense of operating a motor vehicle while intoxicated.

"Pursuant to the provisions of Chapter 222, Acts of the 58th General Assembly, the Commissioner may issue a temporary restricted license to any person convicted whose regular employment is the operation of a motor vehicle, or who cannot perform the regular occupation without the use of a motor vehicle. In meritorious cases, a person may obtain a temporary restricted license for a maximum period of forty-five days if his license has been suspended due to his being charged with operating a motor vehicle while intoxicated. This 45 day period may be extended if there are extenuating circumstances, such as the individual being unable to obtain court disposition of the pending charge through no fault of his own. The policy further indicates that the issuance of a temporary restricted license is, in the majority of cases, limited to first offenders. In other words, persons who have been charged with second, third and fourth offenses while operating a motor vehicle will not be issued a temporary restricted license under any circumstances.

"Chapter 222, Acts of the 58th General Assembly, specifically Section 4, provides 'The Safety Commissioner may, on application, issue a temporary restricted license to any person convicted'.

". . . I, therefore, request your opinion as to whether this department, more specifically the Commissioner thereof, may issue on application a temporary restricted license to a person charged with operating a motor vehicle while intoxicated. In other words, does the legislative use of the word 'convicted' in Section 4 of Chapter 222, Acts of the 58th General Assembly, restrict issuance of a temporary restricted license to those persons who have been convicted as opposed to being charged with an offense."

The full text of the statute involved in this matter, Chapter 222, §4, Acts 58th G.A., reads as follows:

"SEC. 4. The safety commissioner may, on application, issue a temporary restricted license to any person convicted whose regular employment is the operation of a motor vehicle or who cannot perform his regular occupation without the use of a motor vehicle, but such person shall not operate a vehicle for pleasure while holding such restricted license. However, this section shall not apply to any person whose license is revoked under the provisions of section three hundred twenty-one point two hundred nine (321.209), Code 1958."

Other pertinent statutes for consideration on this question are §321.209(2), which provides:

"321.209 Mandatory revocation. 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:

"2. Driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug."

and §321.210(1), which provides:

"321.210 Authority to suspend. 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:

"1. Has committed an offense for which mandatory revocation of license is required upon conviction."

The word "conviction" has been defined statutorily for certain purposes in §321.208, which provides:

"321.208 'Conviction' defined. For the purposes of this chapter the term 'conviction' shall mean a final conviction. Also for the purposes 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."

The meaning of the word "conviction" as used in said §321.209 has previously been determined by this office in an opinion found in 1960 *O.A.G.* 144. In that opinion the Commissioner of Public Safety was advised that for purposes of §321.209, 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. Under §321.209 the consequence flowing from the conviction is that the license to operate a motor vehicle is revoked by the Department of Public Safety. This act of revocation has been deemed a purely ministerial act. In 1958 *O.A.G.* 190, in discussing this ministerial act, this office said:

"When a defendant-licensee has been convicted of driving a motor vehicle while under the influence of intoxicating liquor, a mandatory duty is imposed upon the Department of Public Safety to immediately revoke the operator's or chauffeur's license of defendant-licensee upon receipt of said license(s), the same having been surrendered to the court in which conviction was final, and the record of conviction. . . ."

It is clear that the Department of Public Safety has no power to grant a temporary restricted license to a person whose license has been revoked under the provisions of §321.209. If a temporary restricted license can be granted to a person whose license has been suspended by the Department of Public Safety, such power in the Department of Public Safety must, under the statute, be related to a suspension based upon a "conviction." This is established by the statutory language in §4 of Chapter 222, Acts 58th G.A., and has been so stated in an opinion by this office from Pesch to Brown, Commissioner of Public Safety, dated July 22, 1959. In that opinion it was pointed out that:

"In order that the aforesaid section 4 reads with meaning insofar as the word 'convicted' is concerned, it becomes necessary to think of the word 'convicted' as meaning a final conviction which has resulted in a suspension of a persons operator's or chauffeur's license to operate a motor vehicle. Unless the final conviction has resulted in a suspension of such license, Section 4 of the aforesaid act would not become operative and no apparent need for a temporary restricted license would ever arise."

Section 321.210(1) has been considered by the Supreme Court of Iowa in the case of *Spurbeck v. Statton,* 106 N.W. 2d 660 (1960). In that case the Supreme Court held that §321.210 not only empowers the Commissioner of Public Safety to act but directs him to act. Thus, in a case where a mandatory revocation of a license would occur on conviction for driving a motor vehicle while under the influence of intoxicating liquor, the legislature has directed the Commissioner to suspend the driver's license on a showing by the Department records or other sufficient evidence that the licensee has committed said offense. On page 664 of 106 N.W. 2d, the Supreme Court set forth the duty of the Department of Public Safety as follows:

". . . As we have pointed out, the act directs the department of public safety to suspend the license of an operator, without hearing, upon a showing by its records or other sufficient evidence that the licensee has committed an offense for which revocation of the license is mandatory. Driving while intoxicated is such an offense. This is the law; the only power delegated to the department, through the commissioner, is to determine 'some fact or state of things upon which the law makes, or intends to

make, its own action depend.' The department is told to suspend the license when it finds facts requiring it; and what these facts shall be is set forth in the statute; when the department finds, by sufficient evidence, that an offense for which revocation is mandatory has been committed."

It is apparent from this quoted language of the Supreme Court that a suspension of a driver's license for an offense which would result in a mandatory revocation has not been made to depend upon a conviction for that offense. Yet, the Commissioner's power to issue a temporary restricted license under §4 of Chapter 222 is limited to a situation where a conviction has occurred. The word "conviction," as defined by the legislature in §321.208 and as construed by this Department in the aforesaid opinions, has not been synonymous with the mere charging of the commission of an offense. Moreover, the legislature has made it entirely clear that the Commissioner of Public Safety has no power under §4 to grant a temporary restricted license when the license has been revoked upon conviction, under the provisions of §321.209.

The legislature has established a remedy for the driver who feels aggrieved by the suspension of his driver's license under §321.210 by the Department of Public Safety. A discussion of this right was included by the Iowa Supreme Court in the *Spurbeck* case on page 665 of the report in 106 N.W. 2d. There it was said:

"It is important to point out that, while the license may be suspended without notice under Section 321.210 subd. 1, notice and hearing after such suspension are provided for by Section 321.211. This section gives the licensee the right to a hearing before the commissioner or an authorized agent within twenty days after such hearing is requested. Section 321.215 provides for the right of appeal to a court of record in the county of the licensee's residence. So he has a right to appeal from the suspension to the commissioner; and also an expeditious appeal is provided for to the courts. . . ."

The relief in meritorious cases lies not with the Commissioner's power to issue a temporary restricted license, but in the direction noted by the Supreme Court. Thus, it is our conclusion, based on the above authorities, that the legislature has not granted to the Commissioner of Public Safety authority under §4, Chapter 222, Acts 58th G.A., to issue a temporary restricted license to a person whose license has been suspended under the provisions of §321.-210(1) of the 1958 Code.

20.30

STATE OFFICERS AND DEPARTMENTS: Public Safety—§80.9, 1962 Code. The term "statewide", referring to the jurisdiction of a member of the Department of Public Safety acting upon special assignment of the Commissioner, means in any portion of the State including within the limits of any city or town.

August 30, 1962

Mr. Carl H. Pesch
Commissioner of Public Safety
L O C A L

Dear Mr. Pesch:

This is in response to your opinion request in which you state:

"Section 80.9, Code of Iowa, 1958, sets forth the duties of the Department of Public Safety. You will note that the members of this Department, except clerical workers, shall have and exercise all the powers of any peace officer of the state.

"Subparagraph 1 of this Section states: 'They shall not exercise their general powers within the limits of any city or town, except: . . .' and then the statute sets forth in subparagraphs 'a' through 'f', inclusive, those exceptions. You will further note that following subparagraph 'f' of subsection 1 the following language appears stated for purposes of this request in pertinent part only, as follows: 'When acting on a special assignment by the Commissioner, his jurisdiction shall be statewide.'

"My question, therefore, is, when a member of this department is acting on a special assignment by the Commissioner, does a member of this Department have statewide jurisdiction irrespective of those exceptions set forth under subsection 1, subparagraphs 'a' through 'f', inclusive? Further, does the word 'statewide' comprehend or include a jurisdiction within the limits of any city or town?"

The term "statewide" as used in §80.9, referring to the jurisdiction of a member of the Department of Public Safety acting upon special assignment of the Commissioner, means in any portion of the State including within the limits of any city or town. *Luhrs v. Phoenix,* 83 P. 2d 283 (Ariz. 1938); *In re Condemnation of Blocks, 13, 14, 15, Koehler's Subdivision, City of Grand Island,* 144 Neb. 67, P. 12 N.W. 2d 540 (1943); *Van Gilder v. Madison,* 222 Wis. 58, 267 N.W. 25 (1936).

20.31

STATE OFFICERS AND DEPARTMENTS: Public Safety, Retirement— §97A.1(14), 1958 Code. "Average final compensation" under said section includes that compensation that would have been earned during one year of service notwithstanding said year was not completed.

February 15, 1962

Mr. Carl H. Pesch
Commissioner
Department of Public Safety
L O C A L

Dear Mr. Pesch:

This will acknowledge receipt of your request for an opinion in which you stated:

"This department has retired a District Lieutenant of the Iowa Highway Safety Patrol, such retirement having been effective August 15, 1961. In order to compute his average financial compensation, the question arises as to whether the months of January up to and including August 15, 1961, are to be considered as a full year of service for purposes of this compensation computation. In other words, would the last year of the five years be computed on the basis of eight and one half months of service, or counted and considered as 12 months of services as a member of the State Department of Public Safety, such compensation then being averaged with the prior four years to arrive at the average financial compensation figure?"

Your opinion request concerns the meaning of §97A.1(14), 1958 Code of Iowa, which reads as follows:

"97A.1 Definitions of words and phrases. The following words and phrases when used in this chapter shall, for the purpose 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:

"14. 'Average final compensation' shall mean the average earnable compensation of the member during his last five years of service as a member of the state department of public safety, or if he has had less than five years of such service, then the average earnable compensation of his entire period of service."

The phrase "earnable compensation" used in §97A.1(14) is defined by §97A.1(12) and reads as follows:

"12. 'Earnable compensation' or 'compensation earnable' shall mean the regular compensation which a member would earn during one year on the basis of the stated compensation for his rank or position."

It is significant that the above definition has been stated by the legislature to mean the compensation that a member would earn during that year rather than compensation that a member had earned during that year. This same issue was before the Supreme Court, Appellate Division, of New York in *Moore v. Board of Education,* 84 N.Y.S. 2d 417 (1948). On pages 426 and 427 of the cited report, the New York Court stated:

"The issue is squarely between the view that the term means the amount capable of being earned by the member, unemployed, if he had worked for the same compensation as he received in the last previous year, when employed, taken by petitioner, and the view, taken by respondent, that an unemployed member's earnable compensation in a year in which he did not work was nil.

"The fallacy of the latter view is that the statute carefully speaks of 'earnable compensation', not of compensation 'earned' or 'paid' which it would have done if that was what it meant.

"Further, it used the words 'annual earnable compensation.'

" 'Earnable' definitely means possible of being earned.

"It involves futurity and was so used in presently fixing prospective rights and certifying contributions with which to meet them."

Based on the definition of "earnable compensation" and the cited authority, it is our opinion that §97A.1(14) means that the "average final compensation" includes that compensation that a member would have earned during one year of service as a member of the State Department of Public Safety, notwithstanding the fact that said year of service was not completed. The amount of service that shall be equivalent to one year of service has been left to the board of trustees under §97A.4 to determine. In order to be consistent with the definition of "earnable compensation", it is manifest that the period of service fixed by the board of trustees under §97A.4 shall be some period of time less than one year.

20.32

STATE OFFICERS AND DEPARTMENTS: Real estate license revocation—§§117.15, 117.34, 1958 Code. Citizenship of the United States is not lost by conviction of felony in federal court and therefore is not grounds for revocation of real estate license.

December 5, 1961

Mr. Earl Hart
Real Estate Commission
LOCAL

Dear Earl:

In connection with the question as to whether one Norman, a respondent

in a complaint pending in your office, lost his citizenship of the United States by reason of his conviction and subsequent probation in the federal court, I would advise as follws:

While §117.15, Code 1958, provides with respect to the qualification of applicants for real estate licenses the following:

"... Every applicant for a license as a real estate broker or salesman shall be of twenty-one years or over and a citizen of the United States ..."

and §117.34(11) provides the following with respect to revocation:

"11. Any other conduct, whether of the same or different character from that hereinbefore specified, or demonstrates such bad faith, improper, fraudulent, or dishonest dealings as would have disqualified him from securing a license under this chapter.",

it is my opinion, based upon the following authority, that the respondent Norman, by reason of his conviction of a felony and the order of probation, has not lost his citizenship of the United States and therefore his license may not be revoked upon that ground.

In an opinion of this department appearing in 1911-12 *O.A.G.* 823, where there was in question the effect of the conviction of a crime in the federal courts upon the citizenship of the defendant and his right to vote, it was said, as pertinent to the question under consideration, the following:

" 'All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States.'

"By section 1587 it is provided that persons deserting from military or naval service are deemed to have voluntarily relinquished and forfeited their rights of citizenship as well as their right to become citizens, upon certain conditions named in the section.

"I find no federal statute which forfeits the right of citizenship where one is convicted of a crime under the federal statutes. However, by section 5 of article II of the constitution of Iowa, it is provided:

" 'No idiot or insane person, or person convicted of any infamous crime shall be entitled to the privilege of an elector.'

"It will be observed that this provision does not operate to forfeit the citizenship of the person convicted, but simply his privilege as an elector."

In the case *State ex rel. Dean v. Haubrich,* 248 Iowa 978, wherein the defendant had been convicted in federal court of income tax evasion, and his status as citizen of either the United States or the State of Iowa is considered in connection with his right as an elector and office holder, it was stated as follows:

"(5) III. Appellants contend the trial court did not seem to distinguish between citizenship and suffrage. Suffrage is only one element in our rights as citizens. Defendant never lost his citizenship. There is no provision in the Constitution of the United States nor in any Federal statute which deprives a person, committing a crime such as the one committed by defendant, of his citizenship. On this point counsel for appellants and appellee agree. Appellants state in their argument: 'Conviction of an infamous crime does not deprive the criminal of his rights as a citizen. He is still a citizen unless convicted of treason.' The Constitution of the State of Iowa deprives him of only some of his rights and privileges as a citizen: voting and office holding."

20.33

STATE OFFICERS AND DEPARTMENTS: Secretary of State—§491.28, 1958 Code. Secretary of State, being a ministerial officer, has no power to waive statutory penalty in connection with filing of renewal articles of incorporation and paying of statutory fees.

January 13, 1961

Mr. Melvin D. Synhorst
Secretary of State
BUILDING

Attention: Berry Burt, Director, Corporation Section

Dear Mr. Synhorst:

This will acknowledge receipt of yours of December 20, 1960, which states the following:

"On or about February 7th, 1947, a company was incorporated entitled the Implement Dealers Company, Inc. and its articles provided a duration of ten years.

"Apparently, through error, this corporation was given a duration of twenty years instead of a duration expiring February 7th, 1957.

"It is the custom of this office to notify the corporation three months prior to its expiration date that if it desires to continue it must file renewal articles. I find no definite statute requiring this notice be given by this office. However, the second paragraph of Sec. 491.28 of the 1958 Code when referring to reinstatement of corporations and providing for the penalties to be paid commences with the statement: 'Whenever, after timely notice has been received' the corporation may reinstate by paying certain penalties. The question arises that inasmuch as the timely notice was not given may this office waive the penalty provided under the statute inasmuch as the error arises apparently from an employee in this office in 1947 having failed to properly record the correct expiration date on the files in this office. In fact, the card file until this matter was brought to our attention shows expiration date as being February 7th, 1967.

"This opinion is respectfully requested as to whether we may in view of these circumstances waive this upon the corporation filing renewal articles and paying the ordinary fee."

General statutory powers and duties of the Secretary of State are prescribed by Chapter 9, Code 1958. Additional specific powers and duties are bestowed upon him by various additional statutes. However, none, either general or specific, appears to confer upon him the power to waive a statutory penalty to be imposed by the Secretary of State. The right to impose the penalty is the right of the State, to be exercised by the Secretary of State as its agent. In other words, the penalty belongs to the State, and its waiver is the right of the State, and absent statutory authority to waive the penalty, the power does not exist. Generally the powers of the Secretary of State are ministerial and not judicial, although at times they may be quasi-judicial.

The rule of law concerning the status of the Secretary of State, insofar as his powers are concerned, is set forth in §64, 81 *C.J.S.*, States, page 986 in terms as follows:

"The secretary of state is a ministerial or administrative officer, and possesses no judicial powers. He exercises his powers and duties throughout the territorial boundaries of the state, and for the purpose of discharg-

ing his functions is deemed constructively present in every part thereof. The secretary of state must perform the duties of his office, but he possesses no substantive powers except such as are enumerated in the constitution or statute, cannot perform functions not falling within the authorized scope of his official duties, is without power to waive any constitutional or statutory requirement, and can be required to act only in compliance with an existing law."

In the case of *State ex rel. McPherson v. Snell,* 121 P. 2d 930, 935, 168 Or. 153, cited in the foregoing, it is said:

"The secretary of state is a ministerial officer and has no right to waive any constitutional or statutory requirement.",

and in the case of *State ex rel. Trindle v. Snell,* 155 Or. 300, 309, 60 P. 2d 964, 967, used as authority for the foregoing *McPherson* case, it is stated:

"Before the secretary of state could do other than file the petition presented to him by the defendants it was necessary that the petition be 'legally sufficient.' The secretary of state is a ministerial officer who has no right to waive any requirement set forth in section 36-2004. The requirements of that section of our laws are clearly expressed and contemplate that those who desire to avail themselves of the initiative and referendum powers must file petitions in compliance with that law. This petition, while legally sufficient in form, was not legally sufficient when the facts concerning it had become known. An untruthful affidavit does not suffice. It is worse than none whatever."

And in Iowa the Secretary of State as a ministerial officer is no exception to the foregoing rule. See *Lloyd v. Ramsay et al.,* 192 Iowa 103, 183 N.W. 333, and *State of Iowa ex rel McElhinney v. All-Iowa Agricultural Association,* 242 Iowa 860, 868, 33 *A.L.R.* 291.

Therefore, by reason of the foregoing, in my opinion, you as Secretary of State have no power to waive the statutory penalty in connection with the filing of renewal articles and the paying of the statutory fees.

20.34

STATE OFFICERS AND DEPARTMENTS: Labor—State employees may join and organize labor organizations, but neither the State, nor any agency thereof, has the power to enter into collective bargaining agreements in regard to wages, hours and working conditions, nor may any labor organization coerce the State or any subdivision thereof to bargain collectively by means of strike, boycott, picketing or any other coercive device.

August 16, 1961

Mr. J. C. Colburn, Commissioner
Iowa Liquor Control Commission
East 7th and Court
L O C A L

Dear Sir:

We have your letter of July 18, 1961, in which you request the opinion of this office in regard to the following:

"1. Whether or not state employees can organize with labor unions.

"2. If so, whether or not the State of Iowa has to recognize unions for bargaining purposes.

"3. Whether or not the State has the power to bargain collectively, regarding labor, hours, and working conditions.

"4. Whether a union has any power to force or coerce the State of Iowa into bargaining with it. This would include strikes, walk-outs, etc."

We have discovered little authority for the proposition that public employees may not organize and join labor organizations. While it has been held that a governmental body may forbid union membership on the part of certain specified classes of public employees, such as firemen and policemen (*King v. Priest,* 357 Mo. 68, 206 S. W. 2d 547, app. dismd. 333 U. S. 852, 92 L. ed. 1133, 68 S. Ct. 736, reh. den. 333 U. S. 878, 92 L. ed. 1154, 68 S. Ct. 901 (1947); *Perez v. Board of Police Comrs.,* 78 Cal. App. 2d 638, 178 P. 2d 537 (1947); *Carter v. Thompson,* 164 Va. 312, 180 S. E. 410 (1935)), the right of public employees in other job classifications to join labor groups has been generally upheld. See, for example, *Springfield v. Clouse,* 356 Mo. 1239, 206 S. W. 2d 539 (1947); cases cited in annotation at 31 *A. L. R.* 2d 1142. We find no authority which suggests a contrary rule in the State of Iowa, and your first question is therefore answered in the affirmative.

In regard to your second and third questions, your attention is directed to 1946 *O.A.G.* 163, in which the Attorney General ruled that a county board of supervisors had no power to enter into a collective bargaining agreement containing a closed shop provision, for the reason that the county could not be bound "... by contract, in any particular relative to hours, wages, or working conditions, either as to union employees or as to all employees in the same classification.", (quoting from *Mugford v. Mayor and City Council of Baltimore,* 44 A. 2d 745 (1945)). Following this opinion, the Attorney General's office ruled in 1957 that a city council had no power to sign a contract with a labor union governing wages, hours and working conditions of city employees, for the reason that "cities and towns are creatures of statute with only those powers conferred by statute or reasonably and necessarily implied as incident to exercise of an express power. *Central States Elec. Co. v. Randall,* 230 Iowa 276, 292 N. W. 562." It was then concluded that statutes conferring powers on municipalities reveal no authorization for an agreement with a union for the purpose of fixing wages, hours, and working conditions of public employees. An examination of the Code of Iowa and the Iowa Constitution fails to reveal any authority for the execution of any such agreement by any governmental entity, whether it be state, county, or local in nature and scope.

Federal policy against collective bargaining between unions and public employers is enunciated in §2 of the Labor Management Relations Act (29 *U.S.C.* 152 (2)), which exempts public employer-employee relations from the operation of the Act, by providing:

"The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof ..."

See also, in accord, *Indiana Toll Road Commission* 13-RC-6021 (NLRB); *Local 833, Automobile Workers,* 116 NLRB 268. This policy has been held to apply whether the state or subdivision thereof is engaged in a governmental or proprietary function. See *Blount Electric System,* 10-RC-3959 (NLRB); *Cleveland v. Division 268 of Amalgamated Assn.,* 84 Ohio App. 43, 81 N. E. 2d 310 (1948); *Nutter v. Santa Monica,* 74 Cal. App. 2d 292, 168 P. 2d 741 (1946); *State v. Bhd. of Railway Trainmen,* 37 Cal. 2d 412, 232 P. 2d 857, cert. den. 342 U. S. 876, 96 L. ed. 658, 72 S. Ct. 166 (1951).

In *State v. Brotherhood of Railway Trainmen, supra,* a declaratory judgment action to determine the validity of a collective bargaining agreement between the union and the employees of the government-owned and operated Belt Railroad, the Court said, at 232 P. 2d 863, holding the agreement invalid:

"We can find no legitimate reason for making any distinction in the present case between governmental and proprietary functions of the state. The fact that operation of the Belt Railroad may be described as a proprietary activity (see People v. Superior Court, 29 Cal. 2d 754, 763, 178 P. 2d 1) is immaterial in considering the characteristics of public employment or the intended scope of congressional legislation regulating interstate commerce. United States v. State of California, 297 U. S. 175, 183, 56 S. Ct. 421, 424, 80 L. ed. 567; City of Los Angeles v. Los Angeles etc. Council, 94 Cal. App. 2d 36, 45-46, 210 P. 305; Nutter v. City of Santa Monica, 74 Cal. App. 2d 292, 302, 168 P. 2d 741; see Rhyne, Labor Unions and Municipal Employee Law (1946 ed.) §7, p. 53-56; Rhyne, *id.*, Supp. Rep. (1949) §7, p. 31-32; 1 Teller, Labor Disputes and Collective Bargaining (1940 ed., 1947 Supp.) §171, pp. 117, 118)."

In state courts, it has been uniformly held in the absence of statute to the contrary that government employers have no power to bargain collectively with their employees in regard to wages, hours and working conditions. In *Mugford v. Mayor and City Council of Baltimore, supra,* the Court, in holding invalid a bargaining agreement between the city and a local teamsters union, said at page 747:

"To the extent that (hours, wages and working conditions) are covered by the provisions of the City Charter, creating a budgetary system and a civil service, those provisions of law are controlling. To the extent that they are left to the discretion of any City department or agency, the City authorities cannot delegate or abdicate their continuing discretion. Any exercise of such discretion by the establishment of hours, wages or working conditions is at all times subject to change or revocation in the exercise of the same discretion."

In *State v. Brotherhood of Railway Trainmen, supra,* a declaratory judgment action brought by the State of California to determine the validity of a collective bargaining agreement between employees of a state-owned and operated railroad and the union, the Court, holding that the contract was invalid and that the Railway Labor Act did not apply to a state-owned railroad, said at 232 P. 2d, 860-861:

"It is most significant that, while one of the major purposes of the Railway Labor Act is to secure the right of employees to bargain collectively with their employer with respect to rates of pay, rules and working conditions, the terms and conditions of government employment are traditionally fixed by legislation and administrative regulation, not by contract. See Railway Mail Ass'n. v. Corsi, 326 U. S. 88, 95, 65 S. Ct. 1483, 1488, 89 L. Ed. 2072; Nutter v. City of Santa Monica, 74 Cal. App. 2d 292, 298, 168 P. 2d 741; City of Springfield v. Clouse, 356 Mo. 1239, 206 S. W. 2d 539, 542-544. A concise statement of the characteristics distinguishing public from private employment in this regard appears in a letter from President Roosevelt to the National Federation of Federal Employees, dated August 16, 1937: 'All Government employees should realize that the process of collective bargaining, as usually understood, cannot be transplanted into the public service. It has its distinct and insurmountable limitations when applied to public personnel management. The very nature and purposes of Government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with Government employee organizations. The employer is the whole people, who speak by means of laws enacted by their representatives in Congress. Accordingly, administrative officials and employees alike are governed and guided, and in many instances restricted, by laws which establish policies, procedures, or rules in personnel matters.' Quoted in City of Springfield v. Clouse, 356 Mo. 1239, 206 S. W. 2d 539, 542-543; C. I. O. v. City of Dallas, Tex. Civ. App., 198 S. W. 2d 143, 144-145.

> "Recent authorities hold uniformly that the wages, hours and working conditions of government employees must be fixed by statute or ordinance and that state laws which, in general terms, secure the bargaining agreements with respect to those matters are not intended to apply to public employment. Nutter v. City of Santa Monica, 74 Cal. App. 2d 292, 168 P. 2d 741; City of Springfield v. Clouse, 356 Mo. 1239, 206 S. W. 2d 539, 545; Miami Water Works Local No. 654 v. City of Miami, 157 Fla. 445, 26 So. 2d 194, 195, 165 A.L.R. 967; see Mugford v. Mayor and City Council of Baltimore, 185 Md. 266, 44 A. 2d 745, 746-747, 162 A.L.R. 1101; Hagerman v. City of Dayton, 147 Ohio St. 313, 71 N. E. 2d 246, 253, 254, 170 A. L. R. 199; 1 Teller, Labor Disputes and Collective Bargaining (1940 ed., 1947 Supp.) §171. The Labor Relations Acts of several states expressly exclude public employees from their provisions relating to collective bargaining, and it has been held that such discrimination does not constitute a violation of equal protection. Railway Mail Ass'n. v. Corsi, 326 U. S. 88, 95, 65 S. Ct. 1483, 1488, 89 L. Ed. 2072."

And in *C. I. O. v. Dallas,* 198 S. W. 2d 143 (Tex. Civ. App. 1946), although employees of the City of Dallas were involved, the court recognized that the principles enunciated in *State v. Brotherhood of Railway Trainmen, supra,* should apply equally to municipal, county and state employees.

The reasoning behind the Attorney General's opinion of 1946, supra, is substantially the same, following the holding of *Gaddis v. Cherokee County Road Commission,* 195 N. C. 107, 141 S. E. 358, in which the Court said:

> "This court has held that administrative boards, exercising public functions, cannot by contract deprive themselves of the right to exercise the discretion delegated by law in the performance of public duties."

We find nothing of the contrary persuasion and the ruling of the opinion of 1946 is therefore reaffirmed and extended to all collective bargaining matters between all public employers and employees, whether or not closed shop provisions are involved. (On the validity of closed shop provisions, see Iowa Code Ch. 736A, 1958). Your second and third questions are therefore answered in the negative.

This does not, of course, deprive governmental employees of constitutional rights which they share with all citizens. Thus, while public employers may not engage in collective bargaining activities with their employees, the latter may exercise their constitutional right of petition, to the end that grievances may be presented to their employers.

In regard to your fourth question, it follows from the answers to questions two and three that no union or labor organization has power to force the State of Iowa, or any other public employer, into bargaining with it, by means of strike, picketing, boycott, or any other coercive device. In addition to this consideration, your attention is directed to the following authorities.

The Labor Management Relations Act expressly forbids strikes by employees of the Federal Government. See 29 *U. S. C.,* §188, which provides:

> "It shall be unlawful for any individual employed by the United States or any agency thereof . . . to participate in any strike . . ."

While this statute does not, of course, apply to employees of the state or subdivisions thereof, the same result has been uniformly reached in a number of states, with or without a statute to that effect. See, for example, *Los Angeles v. Los Angeles Building and Constr. Trades Council,* 94 Cal. App. 2d 36, 210 P. 2d 305 (1949); *Norwalk Teachers Assn. v. Board of Education,* 138 Conn. 269, 83 A. 2d 482, 31 A.L.R. 2d 1133 (1951); *Miami Water Works Local*

No. 654 v. Miami, 157 Fla. 445, 26 So. 2d 194, 165 A. L. R. 967 (1946). In the *Norwalk Teachers Assn. case, supra,* the Court, while recognizing collective bargaining between public employers and employees "within legal bounds", and at the option of the Board, held that public employees have no right to strike, saying, at page 1138:

> "Under our system, the government is established by and run for all of the people, not for the benefit of any person or group. The profit motive, inherent in the principle of free enterprise, is absent. It should be the aim of every employee of the government to do his or her part to make function as efficiently and economically as possible. *The drastic remedy of the organized strike to enforce the demands of unions of government employees is in direct contravention of this principle."* (Italics supplied)

In addition, injunctions against strikes or other coercive activities have frequently been granted public employers. See, for example, *Los Angeles v. Los Angeles Building Trades Council,* 94 Cal. App. 2d 36, 210 P. 2d 305 (1949); *Cleveland v. Division 268, Amalgamated Assn.,* 85 Ohio App. 153, 85 N. E. 2d 811 (1949); *United States v. United Mine Workers,* 330 U. S. 258, 91 L. Ed. 884, 67 S. Ct. 677 (1947).

Your fourth question is therefore answered in the negative.

20.35

STATE OFFICERS AND DEPARTMENTS: Motor vehicle fuel taxes— §324.38, 1962 Code. The supplier who sells or delivers special fuel to tax-paid dealers or users is primarily responsible for collecting and remitting the tax. Conversely, licensed (tax-free) special fuel dealers or users are primarily responsible for the payment of the tax. However, under special circumstances, any person who collects and converts to his own use or benefit tax funds becomes a trustee, and primarily responsible for the tax. (*See State vs. Hawkeye Oil Company, Inc.,* 110 N.W. 2d 641, (Iowa)).

March 7, 1962

Honorable M. L. Abrahamson
Treasurer of State
LOCAL

Dear Sir:

We refer to your opinion request of January 22, 1962, reading as follows:

> "We have a request for an Attorney General opinion on the following:
>
> (A)
>
> "Section 324.38, Paragraph 4, lines eleven (11) to seventeen (17) inclusive read as follows:
>
> 'Every supplier so licensed who sells or delivers special fuel on a tax-paid basis to special fuel users or special fuel dealers authorized as aforesaid shall make a return of these tax-paid sales to the treasurer accompanied by payment of the special fuel tax on the tax-paid gallonage so sold or delivered.'
>
> "Does this section of the law make the supplier who sells or delivers special fuel to licensed *tax-paid* special fuel dealers and licensed *tax-paid* special fuel users responsible for the collection and remitting to the state of the motor vehicle fuel tax from the *tax-paid* dealers and tax-paid users?

(B)

"Section 324.38, Paragraph 1.

'For the purpose of determining the amount of his liability for special fuel tax each special fuel dealer and each special fuel user shall file with the treasurer not later than the last day of the month next following the month in which this division becomes effective and not later than the last day of each calendar month thereafter a monthly tax return certified under penalties for false certificate.'

"Section 324.38, Paragraph 3.

'The return shall be accompanied by remittance in the amount of the tax due for the month in which the special fuel was placed in the fuel tanks of motor vehicles.'

"In view of the above the state has been requiring licensed *tax-free* dealers to report and remit directly to the state the motor vehicle fuel tax on all taxable gallons of diesel fuel dispensed through the dispensing pump regardless of whether the fuel was paid for by the purchasing consumer with cast, charge account or a credit card.

"Is the supplier, licensed as a distributor, liable for the tax if a *tax-free* special fuel dealer or a *tax-free* special fuel user licensed as *tax-free* by the treasurer fails to report and remit the motor vehicle fuel tax due on fuel sold by the *tax-free* dealer or *tax-free* user?"

The answer to Section A of your letter is in the affirmative. The statute is clear and unambiguous, and where a statute is plain and unambiguous, there is no room for construction. This is further confirmed by the additional provisions of the law, §324.38(4), which states:

"... A special fuel dealer or user shall be exempt from making *any return or tax payment* to the treasurer on special fuel, he acquires on a tax-paid basis from a *supplier* licensed as aforesaid." (Emphasis ours)

The answer to Section B of your letter is in the negative. Under the provisions of the statute as quoted, the licensed special fuel dealer or user, (tax-free) is primarily responsible for the payment of the tax to the state. However, special situations may arise in which a supplier or other third party may become liable for the payment of the tax as a trustee for the State, wherein said supplier or other third party comes into possession of the tax funds and converts the same to his particular use or benefit. For a case in point, see *State of Iowa vs. Hawkeye Oil Company, Inc., et al.,* (Iowa), 110 N.W. 2d 641, filed September 19, 1961.

20.36

STATE OFFICERS AND DEPARTMENTS: Public contracts, erroneous bids—§§218.60, 218.61, 1962 Code. Low bid on public contract can be withdrawn and bid deposit returned where bidder discovers mistake and reports it to Board, if bid was given in good faith and not to mislead, with no gross negligence and no detriment incurred by the State. Board is not required to reject all bids and readvertise where low bidder is permitted to withdraw erroneous bid unless best interest of the State requires that it be done.

October 5, 1962

Board of Control
State Office Building
LOCAL

Gentlemen:

This is in response to the oral questions you presented concerning bidding

procedures on bids received by the Board on a new building to be constructed at Glenwood School. According to the facts you related, the low bidder discovered that he had made an approximate $61,000 error in his gross bid. The error was reported on the morning following the bid-opening before the Board had accepted his bid, either informally or by resolution. The next lowest bid was approximately $21,000 higher than the erroneous bid.

Arising out of these facts are two questions:

(1) Whether the low bidder in this situation can be released from his obligation to the Board of Control or whether the Board must proceed against the bid bond.

(2) Whether the Board must reject all bids and call for new bids, or whether it can accept the next lowest of those bids received.

The general rule concerning the release of a bidder who has made a mistake in a bid is set forth in 43 *Am. Jur.,* Public Works and Contracts, §63, where it is stated:

"As a general rule, equitable relief will be granted a bidder for a public contract where he has made a material mistake of fact in the bid which he submitted, and upon the discovery of that mistake acts promptly in informing the public authorities and requesting withdrawal of his bid or opportunity to rectify his mistake, particularly where he does so before any formal contract is entered into."

Even though the erroneous bid was communicated in writing to the Board of Control, it appears that there has not been an acceptance of the offer of a contract by the Board. Further, prompt notice of the bidder's mistake was given to the Board. A similar situation involving a mistake in bidding was before the Iowa Supreme Court in *Cedar Rapids Lumber Company v. Fisher,* 129 Iowa 332, 105 N.W. 595 (1906), where the Court held that there must be an unqualified acceptance of the bid before there can be a forfeiture of a bid deposit. To the same effect, §318.61, 1962 Code of Iowa, provides in pertinent part as follows:

". . . a preliminary deposit . . . shall be required as an evidence of good faith . . . held under the direction of the board."

Consequently, if the Board is satisfied that the bid was given in good faith, that there was no intent to mislead, or gross negligence, and that no detriment has been incurred by the State, it would not only be within the discretion of the Board to return deposit to the bidder, but a court would undoubtedly require a return. (See generally, 52 *A.L.R.* 2d 792).

Should the Board decide that the bids presently received reflect a situation where full competitive bidding has been received, it may accept the next lowest bidder after releasing the bidder whose bid was in error. In this situation the Board can find that the lowest responsible bidder is in fact the next lowest bidder after release of the erroneous bid. See *Amodeo Co. v. Town of Woodward,* 192 Iowa 535, 537, 185 N.W. 94 (1921) (town council could have accepted next lowest bid if bidder had withdrawn erroneous bid). The Board is given authority to reject all bids and readvertise, but there is nothing to require it under these circumstances unless the Board should determine that it would be in the best interest of the State to do so. Section 218.60, 1962 Code of Iowa.

20.37

STATE OFFICERS AND DEPARTMENTS: Vacancy in General Assembly —§§43.82, 43.83, 43.97(4), 43.101(3), 69.14, 1962 Code; Ch. 69, 59th G.A. A vacancy in the Senate of the 59th G.A. is filled by the electors of

the senatorial district as it existed before the effective date of the reapportionment. Nomination for filling the vacancy of the senatorial district composed of two counties is made by district convention under the authority of §43.101. The number of delegates representing the foregoing counties is fixed by the county convention under the provisions of §43.97(4).

August 24, 1962

Mr. R. K. Richardson
Greene County Attorney
Jefferson, Iowa

Dear Mr. Richardson:

This will acknowledge receipt of yours of the 23rd, inst., in which you submitted the following:

"Question has arisen as to the proper procedure for filling the vacancy in the Office of State Senator in the Thirty-first Senatorial District and as to which counties are entitled to participate in the filling of this vacancy.

"Would you please advise the proper procedure for filling the vacancy and the counties to be affected? If the District Convention is to be represented by the delegates from the various counties, how is the number of delegates from each county to be determined?"

The foregoing vacancy should be filled by the electors of Boone and Story Counties, which constitute the senatorial district as it existed at the time the vacancy occurred. See Ch. 69, Acts 59th G.A.

This vacancy occurred in a senatorial district composed of more than one county, the filling of which is controlled by §43.101 (3). Section 43.82, a general section, is not pertinent because §43.101(3) specifically governs the filling of vacancies in nominations in senatorial districts composed of more than one county. The well-known rule of construction is that, between a general statute and a specific statute dealing with the same subject matter, the specific statute prevails. Section 43.83 is not pertinent because it provides for the making of a nomination to be voted upon at a special election. The present vacancy is not to be filled at a special election. (§69.14, 1962 Code of Iowa.)

In this regard, §43.101 provides:

"Each political party shall hold a senatorial or congressional convention in districts composed of more than one county:

"3. When a nomination is required to fill a vacancy in either of said offices, and when said vacancy occurred after said primary election, or, if before said election, too late for the filing of nomination papers."

The number of delegates representing the counties is fixed by the county convention, pursuant to the terms of §43.97(4), which provides as follows:

"The said county convention shall:

"4. Elect delegates to the next ensuing regular state convention, to the state judicial convention, and to all district conventions of that year, including judicial district convention, upon such ratio of representation as may be determined by the party organization for the state, district or districts of the state, as the case may be. Delegates to district conventions need not be selected in the absence of any apparent reason therefor."

20.38

STATE OFFICERS AND DEPARTMENTS: Vacations of state employees —§97.1, 1958 Code. Vacation entitlements are determined on the basis of collective, rather than consecutive, periods of employment.

November 9, 1961

Mr. Carl H. Pesch, Commissioner
Department of Public Safety
LOCAL

Dear Mr. Pesch:

This will acknowledge receipt of your recent opinion request in which you state:

"A question has arisen in this department as to whether vacation entitlement is cumulative. The facts are as follows:

" 'A' was employed by the Iowa State Tax Commission from March 1, 1949 to and including December 27, 1954; such employment being for a period of 5 years and 10 months in duration. 'A' was then employed by the Executive Council of the State of Iowa from May 16, 1955 to and including December 31, 1958 on which date 'A' resigned because of illness; such employment being for a period of 3 years and 7 months in duration. 'A' was then employed by the Department of Public Safety on February 1, 1961 and 'A' is currently under employment by this department.

"... 'A' will have worked 10 years or more and would be entitled if vacation entitlements are cumulative to a 3 weeks vacation."

The question that you raise has been answered in an opinion by the Polk County District Court. That court, in the case of *Kennedy, et al. v. State Board of Social Welfare, et al.*, held that a state employee who collectively and not consecutively has or will have 10 years or more of service in 1955 is entitled to 3 weeks' vacation with pay under §79.1 of the Code of Iowa. A copy of that decision is enclosed.

Consistent therewith, in a letter opinion dated August 11, 1942, from Mr. Don Hise to Mrs. Mary Huncke, Chairman, State Board of Social Welfare, this department advised that the vacation rights of a state employee should follow him from one department to another and that he should receive his vacation time with pay from the new state agency employing him.

By reason of the cited decision of the Polk County District Court, so much of the opinion in 1956 *O.A.G.* 46 as is in conflict herewith is withdrawn. Thus, in answer to your question, although the employment periods of a state employee are not consecutive, nevertheless, the vacation entitlements accumulate under §79.1, 1958 Code of Iowa.

20.39

Aeronautics Commission, instruction in aeronautics—§328.1(9), 1958 Code. An individual engaged in giving or offering to give instruction in aeronautics comes within the definition of "air school" as defined in §328.1(9), even though he is operating entirely alone and without the assistance of employees. (Bump to Berlin, Aero. Comm., 4/23/62) #62-4-8

20.40

Apportionment of funds—§422.62, 1958 Code. Apportionment of funds out of money from the fund established by §422.62 for the purpose of purchasing supplies, materials and the cost of manufacture of motor vehicle registration plates, as directed by Chs. 229 and 230, Acts 59th G.A., explained and detailed. (Strauss to Abrahamson, St. Treas., 9/27/61) #61-9-15

20.41

Apportionment of road use tax—Ch. 168, Acts 59th G.A. (Ch. 312, 1962 Code). Apportionment of road use tax under §13, Ch. 168, Acts 59th G.A., is to be made February 1, 1962 for road use tax collected during the month of January, 1962. (Strauss to Abrahamson, St. Treas., 9/27/61) #61-9-17

20.42

Apportionment of road use tax—§2, Ch. 168, Acts 59th G.A. (§312.3, 1962 Code). Apportionment of the road use tax money to the secondary roads is the statutory duty of the Treasurer of State. (Strauss to Abrahamson, Treas. of State, 5/4/62) #62-5-2

20.43

Awarding contracts—§§73.1, 73.7, 218.52, 397.18, 1958 Code. All purchasing agencies must prefer Iowa products and provisions when they can be secured without additional cost except where more explicit directions are set forth which require a judicial and discretionary determination to be made by the agencies. A qualitative judgment of the product or provision is to be made in all cases. (Bump to Knowles, St. Rep., 2-15-61) #61-4-29

20.44

Board of Control—§218.13, 1958 Code. Salaries of employees of Board of Control are only reviewable annually, when the salaries shall be fixed. (Creger to Brown, Board of Control, 5/26/61) #61-5-24

20.45

Board of Control—§8.5(6c), 1958 Code. Board of Control employees are not within the jurisdiction of the Division of Personnel. (Creger to Brown, Bd. of Control, 6/6/61) #61-6-4

20.47

Board of Control—§§218.22, 303.10, 303.11, 1958 Code. Board of Control has no authority to destroy or microfilm records of inmates, but can transmit the same to Archives. (Creger to Brown, Bd. of Control, 7/25/61) #61-7-21

20.48

Board of Control—§230.20, 1958 Code. Board of Control may determine a formula for certification to the Comptroller of amounts due the State from counties having patients in State institutions chargeable thereto. (Creger to Brown, Bd. of Control, 5/26/61) #61-5-20

20.49

Board of Control—Ch. 160, Laws 58th G.A., as amended by Ch. 130, Laws

59th G.A. (§218.94, 1962 Code). Board of Control has no power to make gifts of real property. (Creger to Bd. of Control, 3/13/62) #62-3-3

20.50

Board of Control— Ch. 160, Acts 58th G.A.; Ch. 130, Acts 59th G.A. (§218.94, 1962 Code). Board of Control may employ real estate agents if, in its discretion, it deems their services necessary to the advantageous sale of real estate, when such sale is approved by the Budget and Financial Control Committee. (Creger to Bd. of Control, 3/26/62) #62-3-5

20.51

Board of Regents, psychopathic hospital—§123.50, 1958 Code. The $25,000 provided in §2 of H.F. 288, 59th G.A., for the State Board of Regents for the psychopathic hospital at Iowa City, Iowa to further the research studies of alcoholism is an appropriation from the Liquor Control Act fund created and existing under the provisions of paragraph 2 of §123.50, Code 1958. The appropriation made to the Liquor Control Commission by H.F. 708, Acts 59th G.A., in the sum of $3,750,000 for each year of the biennium beginning July 1, 1961, is expendable for general administrative purposes. (Strauss to Selden, St. Compt., 6/27/61) #61-6-14

20.52

Budget and Financial Control Committee, authority—Ch. 51, Acts 59th G.A. The Budget and Financial Control Committee is a continuing body authorized to function during the legislative sessions and between such sessions, including authority to allocate its funds during legislative session. (Strauss to Wicker, Leg. Fiscal Dir., 8/7/62) #62-8-2

20.53

Civil Defense Administration—Iowa Civil Defense Administration has no responsibility to pay the cost of administering the Iowa Merit System for the benefit of county and municipal employees. (Creger to Fowler, Dir. Civ. Def. Adm., 10/4/61) #61-10-4

20.54

Code distribution—§16.24(5), 1958 Code. Under the provisions of §16.24(5), an alternate municipal court judge is entitled to a Code. (Strauss to Tennant, Supt., Printing Bd., 2/8/62) #62-2-1

20.55

Compatibility of office—Legislator may serve as trustee for municipal auditorium. There is neither statutory nor Constitutional provision barring a member of the legislature from occupying at the same time the position of member of the board of trustees of a municipal auditorium. (Strauss to Van Eaton, St. Sen., 11/6/61) #61-11-5

20.56

Compromise and settlement—§19.9, 1958 Code. The Executive Council is without power to approve release of lien upon certain property of the debtor of the Iowa Employment Security Commission, since the release of such property is neither a settlement nor a compromise under the provisions of §19.9. (Strauss to Gill, Sec'y. Exec. Council, 10/4/61) #61-10-2

20.57

Comptroller—§8.16, 1958 Code. Coding system directed by Ch. 68, Acts 58th G.A., to substitute for information required to be shown on warrants under the provisions of §8.16, Code 1958, held to apply, notwithstanding the literal terms of such Ch. 68. (Strauss to Selden, St. Comp., 8/31/61) #61-8-31

20.58

Conservation—§8.34, 1958 Code. Conservation Commission may release appropriated funds to a town to repair a road, when repairs were such a part of the sewer project for which the funds were appropriated that but for the project the repairs would not have been occasioned. (Creger to Brown, Sac Co. Atty., 12/22/61) #61-12-8

20.59

Employee pension plans—§97A.5, 1958 Code. Board of trustees of Public Safety Peace Officers' Retirement, Accident and Disability System have no power to administer proposed pension plan for fish-and-game conservation officers. (Creger to Jarvis, St. Rep., 4/19/61) #61-4-15

20.60

Employment Security Commission—§96.7(3)(d), 1958 Code. Where a statute is repealed and at the same time re-enacted in substantially the same terms, it is operative under its original terms. (Strauss to Empl. Sec. Comm., 11/21/61) #61-11-16

20.61

Endowment funds—§427.1(11), 1958 Code. 1. Net income of real estate held as an endowment fund used for university purposes does not constitute "pecuniary profit". 2. H.F. 404 as filed February 20, 1961, would apply to real estate now held by educational institutions as well as to any that is acquired subsequent to its enactment. Exemption from taxation now enjoyed is subject to revocation by the legislature at any time. (Strauss to Denman, St. Rep., 3/30/61) #61-3-16

20.62

Executive Council, property transfer authorization—S.F. 116, Acts 59th G.A. Agreement to transfer certain land in Lee County must meet the conditions of said Act by which a transfer is authorized. Consideration of $1.00 would constitute a gift unless Executive Council found that the State's interest in said land had only such value. (Strauss to Exec. Counc., 6/13/61) #61-6-10

20.63

Fair Board, architect—Ch. 49, 59th G.A. The State Fair Board may employ a competent architect to perform services incident to the construction authorized by Ch. 49, 59th G.A., and pay on a contract basis for such services out of the appropriated fund. (Strauss to Gill, Sec. Exec. Coun., 6/27/61) #61-6-12

20.64

Incompatibility of state senator and member of community school district board—The office of senator in the General Assembly and membership on

board of directors of a community school district are incompatible. However, there is neither constitutional nor statutory bar to such occupancy. (Strauss to Doran, St. Sen.-elect, 12/7/62) #62-12-5

20.65

Iowa Board of Accountancy—§116.4, 1958 Code. Board may hire investigators and pay them under §116.4, which authorizes necessary and reasonable expenses incident to the discharge of the Board's duties. (Snell to Denman, Bd. of Accty., 8/18/61) #61-8-28

20.66

Iowa Public Employees' Retirement System—§97B.39, 1958 Code. The interest of a member of IPERS is not subject to federal levy by distraint. (Strauss to Selden, St. Compt., 1/8/62) #62-1-1

20.67

Iowa Reciprocity Board—Ch. 326, 1962 Code. Ch. 250, Acts 58th G.A., establishes the Iowa Reciprocity Board as a separate part of the State government, not a part of any other department. (Snell to Pesch, Com'r Pub. Saf., 7/25/61) #61-7-27

20.68

Liquor Control Commission—§123.27(2c)(3), 1958 Code. Importation of bourbon, rum and brandy is authorized, provided that all regulatory provisions of the Iowa Liquor Control Act be first complied with. (Creger to Dawson, Liquor Comm., 5/17/61) #61-5-7

20.69

Liquor Control Commission—§§123.6, 123.11, 123.16, 123.17, 1958 Code. §48, H.F. 708, placing Liquor Control Commission under Budget and Financial Conrtol Act (Code, Ch. 8), does not abrogate the general powers of the Commission. (Creger to Burris, Liquor Comm., 7/17/61) #61-7-16

20.70

Liquor samples, ownership—§§123.16, 123.39, 1958 Code. Ownership of samples of liquor delivered to the Iowa Liquor Control Commission or to the members thereof in their official capacity is in the State of Iowa. (Strauss to Erbe, Governor, 5/24/61) #61-5-23

20.71

Materials and supplies—§§73.1, 73.7, 1958 Code. All purchases should be Iowa products "without additional cost" and all things being equal, the lowest bid should be accepted. (Bump to Knowles, St. Rep., 2/14/61) #61-2-5

20.72

Mine Inspector—§82.18, 1958 Code. §82.18 does not give the Mine Inspector authority to require that an abandoned mine be resealed or refilled if the original seal or fill proves inadequate. An owner, operator, lessee, or agent is not criminally liable for failing to reseal or refill said mine. (Snell to Jenkins, Monroe Co. Atty., 8/14/61) #61-8-16

20.73

New and unused equipment and supplies, authority of Executive Council to purchase—The Executive Council has the authority to purchase new and unused furniture, office equipment and supplies, but has no such power to purchase used equipment and supplies. (Strauss to Gill, Sec'y. Exec. Council, 8/3/62) #62-8-1

20.74

Paving improvement appeals—§§23.1, 23.16, 1958 Code. The State Appeal Board is without jurisdiction to hear and determine an appeal from the action of a city council in ordering improvement by paving payable partially from special assessments and partially from the avails of a general obligation bond issue. (Strauss to Elijah, St. Sen., 5/10/61) #61-5-5

20.75

Peace Officers' Retirement Fund—Ch. 97A, 1962 Code. Upon separation from the retirement system, the contributions made by the employee are payable on demand without interest. (Strauss to Pesch, Com'r. Public Safety, 9/4/62) #62-9-2

20.76

Powers of Attorney General—The Attorney General has neither the power nor the duty to pass upon the validity or invalidity of the contract between the executive board of the Iowa League of Municipalities and Max Conrad. The powers of the Attorney General would be only voluntary and not binding upon the parties. (Strauss to Akers, St. Aud., 10/18/61) #61-10-8

20.77

Reciprocity Board, exemption of motor vehicles from December fees—§321.106, 1958 Code. "New car" under §321.106 means a motor vehicle not previously registered in this or any other state. "New car" under said section does not include trailers. Annual registration fee under §321.106 means a fee for a 12-month period. Registration fees for December are assessed except to the owner of a new car in good faith delivered to him in December. Non-resident owners are subject to the payment of December registration fees as are resident owners. (Snell to Reciprocity Bd., 12/7/61) #61-12-4

20.78

Redistricting—Precedent for appropriate legislation reflecting the change in the number of congressional districts from eight to seven is contained in Ch. 76, Laws 49th G.A., redistricting the State from nine to eight congressional districts. (Strauss to Vance, St. Sen., 3/14/61) #61-3-10

20.79

Secretary of State—§491.15, 1958 Code. §491.15, conferring upon the Secretary of State the power of service agent for corporations in such section defined, restricts the power of the Secretary of State while acting as such agent to the service of original notice or process initiated or involved in civil suits in court. (Strauss to Synhorst, Sec'y. of State, 7/25/61) #61-7-25

20.80

State Conservation Commission—§107.24, 1958 Code. Commission has no power to convey real estate to private institutions. (Creger to Cons. Comm., 11/10/61) #61-11-10

20.81

State Fair Board, voting members—§173.1(2), 1958 Code. The Governor, Secretary of Agriculture, President of State University of Iowa, Secretary and Treasurer of the Fair Board, constitute a portion of the membership in the State Fair Board and are entitled to vote, the same as other members defined in §173.1(2). (Yost to Cory, Pres., Fair Bd., 11/8/61) #61-11-7

20.82

State Printing Board—Departments of the State located in Des Moines shall draw their supplies of paper stock, including carbon paper and copy paper, from the State Printing Board. (Strauss to Gill, Sec'y. Exec. Council, 12/6/61) #61-12-2

20.83

State Traveling Library, levy for library millage—§§24.2(2), 24.2(3), 378.11, 378.15, 1962 Code. (1) §378.15 provides power of levy of not more than one mill, meaning any millage not exceeding one mill. (2) §378.11 and §378.15 confer power of certifying and levying upon board of supervisors and not board of library trustees, which is not a levying board under §24.2(2) nor a certifying board under §24.2(3). (Strauss to Grafton, St. Trav. Libr., 8/10/62) #62-8-4

20.84

State Treasurer, transfer of funds to Public Safety Department—§422.62, 1962 Code. 1. The opinion of the Department issued September 27, 1961 is verified to the extent of holding Ch. 230, Acts 59th G.A., now part of §422.62, Code 1962, a permanent law and therefore authority to transfer $425,000 to the Motor Vehicle Registration Division of the Department of Public Safety is a continuing one and does not terminate on June 30, 1963. 2. Any unexpended balance of the composite amount of $850,000 allocated during the biennium is to be credited to the road use tax fund at the end of the current biennial period and thereafter at the end of future such periods. 3. The registration plates for each year after and including 1963 shall have reflectorized surface. (Strauss to Pesch, Commissioner of Public Safety, 12/28/62) #62-12-4

20.85

Taxation—§§357.2, 427.1, 1958 Code. State Conservation Commission has no authority to pay special assessments on its real estate property. (Creger to Faber, Cons. Comm., 5/24/61) #61-5-21

20.86

Transfer of lands—Money paid to the Board of Regents by the Highway Commission for transfer of jurisdiction of certain state property to that of the Commission, shall be distributed in part to the Board of Regents and in part to the general fund of the State. (Strauss to Dancer, Bd. of Regents, 9/27/61) #61-9-14

20.87

Treasurer, Gas Tax Division, refunds—§§324.2(1), 324.17, 324.33(1), 1958 Code. Within the terms of the statutes defining "motor fuel" and "special fuel", a user of special fuel cannot qualify for a refund under the provisions of §324.17, Code 1958, as amended. (Bianco to Abrahamson, St. Treas., 12/18/61) #61-12-7

20.88

Use of contingent fund—§19.7, 1958 Code. The use of the contingent fund set up by §19.7 for the purpose therein detailed is discretionary with the Executive Council; its use for the purpose of reimbursement to a State agency for losses within the terms of §19.7 is not authorized. (Strauss to Gill, Sec'y. Exec. Council, 10/27/61) #61-10-9, #61-10-10

CHAPTER 21

TAXATION

STAFF OPINIONS

LETTER OPINIONS

21.1

TAXATION: Casualty loss—§§441.33, 441.35, 1958 Code. A local board of review may reduce the valuation of property upon which a casualty has occurred at its regular May session when that casualty occurred in the same year.

July 9, 1962

Mr. E. L. Carroll
Union County Attorney
Court House
Creston, Iowa

Dear Mr. Carroll:

This will acknowledge your letter dated March 20, 1962, wherein you made the following inquiry:

"The question is, does a local board of review at its regular session in the month of May of any year after the year in which an assessment has been made of real estate under Section 428.4, Code 1958, have authority

under Section 35 of Chapter 291, Laws of the 58th G.A., to change the valuation of any taxpayer's real property where *subsequent* to January 1 of such year after the regular real estate assessment year a building of the taxpayer was destroyed by fire and the taxpayer had no plans to rebuild during that particular year, or does the local board of review only have authority to find there has been a change in value of the property in cases where the fire or other casualty that destroyed or damaged the building occurred *prior* to January 1 of the interim year in which the taxpayer applied to the local board of review to find there has been a change in value and requested a reduction in the valuation placed on the property in the prior regular real estate assessment year?"

Section 441.35, 1958 Code, as amended by Chapter 291, §35, Acts 58th G.A., provides as follows:

"441.35 Power of review board

The board of review shall have the power:

"In any year after the year in which an assessment has been made, all of the real estate in any taxing district, it shall be the duty of the board of review to meet as provided in section 441.33 of this Act, and where it finds the same has changed in value, to revalue and reassess any part or all of the real estate contained in such taxing district, and in such case, it shall determine the actual value and compute the taxable value thereof, and any aggrieved taxpayer may petition for a revaluation of his property, but no reduction or increase shall be made for *prior* years . . ."

Section 441.33 as amended, provides as follows:

"441.33 Sessions of board of review

"The board of review shall be in session from May 1 to May 31, both inclusive, each year and shall hold as many meetings as are necessary to discharge its duties. On June 1 said board shall return all books, records and papers to the assessor except undisposed of protests and records pertaining thereto. If it has not completed its work prior to June 1, the state tax commission may authorize the board of review to continue in session for such periods as is necessary to complete its work, but in no event shall the state tax commission approve a continuance extending beyond August 1. On June 1 or on the final day of any extended session authorized by the state tax commission as herein provided the board of review shall be adjourned until May 1 of the following year. It shall adopt its own rules of procedure, elect its own chairman from its membership, and keep minutes of its meetings. The assessor shall be clerk of said board. It may be reconvened by the state tax commission. All undisposed protests in its hands by August 1 shall be automatically overruled and returned to the assessor together with its other records."

It is my opinion that the Board of Review, at its regular May session, may revalue and reassess the property of any aggrieved taxpayer, upon which property a casualty has occurred in the preceding year or prior to the Board's May session in the present year. Under §441.35, the Board is empowered to revalue where a change in value has occurred, but no reduction or increase may be made for prior years. This qualification does not restrict the Board's power regarding the period from January 1, until its May session in the present year. Its effect is to permit the Board to revalue for the period from January 1 of the preceding year to May 1 of the present year.

If the casualty were to have occurred subsequent to the May session, the taxpayer's situation would be quite different. In such a case, his taxes for this year would become due and delinquent in 1963 at a time prior to the Board's May session, since §§445.37 and 445.39 provide that his taxes become delinquent on April 1, and interest as a penalty commences on that date. In

such a case, he could pay the taxes under protest and then apply for remittance under §445.62, which provides:

"445.62 Remission in case of loss. The board of supervisors shall have power to remit in whole or in part the taxes of any person whose buildings, crops, stock, or other property has been destroyed by fire, tornado, or other unavoidable casualty, if said property has not been sold for taxes, or if said taxes have not been delinquent for thirty days at the time of the destruction. The loss for which such remission is allowed shall be such only as is not covered by insurance. The loss of capital stock in a bank operated within the state and the making and paying of a stock assessment for the year such stock was assessed for taxation shall be a destruction within the meaning of this section."

In response to your inquiry, then, it is my conclusion that the casualty occurring in the current year may be considered by the local Board of Review in its May session of the same year and a lower value placed on that property for the purpose of taxation in a subsequent year.

It must be determined, of course, that the loss was uninsured.

21.2

TAXATION: Cigarette dispensing machines—§§98.2, 98.13(2), 98.22(2), 98.25(3), 98.36(6), 1958 Code. A machine which requires an intervening human agency between the customer and the sale is lawful when the remote control device is inaccessible to the general public and must be operated for each separate transaction and is located so as to permit a view of the customer. The regulation of cigarette machines is a matter for local law enforcement.

April 11, 1962

Honorable Ray C. Cunningham
State Representative
2218 Storm Street
Ames, Iowa

Dear Mr. Cunningham:

This will acknowledge receipt of your letter of February 12, 1962, wherein the following inquiries were made regarding the dispensing of cigarettes through certain machines.

1) What is the legal status of these machines?

2) What constitutes "control" over cigarette sales through dispensing machines?

3) What is the proper interpretation being placed on the regulation of these machines?

In response to question one, we advise that the recent cases of *Imperial Vendors, Inc. vs. City of Des Moines,* 107 N. W. 2d 61, and *Continental Industries, Inc. vs. Erbe* (1961), 107 N. W. 2d 57, copies of which are enclosed herewith for your convenience, distinguish between "cigarette dispensing machines" which are lawful and "vending machines" which are unlawful under §98.36(6), Code of Iowa (1958).

In order for a machine to qualify as lawful, it is necessary that an intervening human agency, with the power of discrimination as to the age and identity of the purchaser, be introduced into the transaction. Such a machine usually consists of two major components: the cabinet itself, wherein the

cigarettes are placed for sale, and a remote control device which must be put into operation before the cabinet can be activated and the sale culminated.

The cabinet must be locked in such a manner as to make its contents inaccessible to anyone who does not have keys which fit its locks. The remote control device *must* be so placed that the general public does not have access to it.

The illegal "vending machine" contemplated by §98.36(6) is the wholly automatic type which requires no human agency intervening between the customer and the completed sale and delivery of the cigarettes. Such a machine is wholly operable by the customer alone and the transaction is entirely out of the control of the owner, lessee, or custodian of the machine or its contents, or his agents or employees.

In response to question two, control over the sale depends upon the type of remote control device employed, its location relative to the cabinet, and its accessibility to the public.

The machine must require the operation of the remote control device for each separate transaction. If multiple cigarette sales may occur after a single operation of the remote control device, the machine is illegal. For example, a switch which activates the cabinet by turning the dispensing mechanisms on, thereby allowing repeated deposits of coins and receipt of several packages of cigarettes regardless of whether the remote control device has been operated in dispensing of each package, would be illegal. The sale of each package of cigarettes must require activation of the dispensing mechanism by the proprietor of the premises, or his employee.

The remote control devise must be so located that whoever operates it can identify the customer and ascertain his age.

Its location must be generally inaccessible to the public, or in a place on the premises where the general public is usually not permitted, and it should be as inconspicuous as possible.

In response to your third question, regulation of these machines is properly a matter for local authorities.

"98.25 Administration.

" * * *.

"3. The state tax commission is hereby authorized to appoint an assistant, whose sole duty it shall be to administer and enforce the provisions of this chapter, including the collection of all taxes provided for herein. In such enforcement the state tax commission may call to its aid the attorney general, the special agents of the state, *any county attorney or any peace officer*. The commission is authorized to appoint such clerks and additional help as may be needed to carry out the provisions of this chapter."

Local cigarette retailers are more directly under the surveillance and authority of local governmental bodies, and although the state is empowered to issue local retail permits, the local authorities *may and do* issue them.

"98.13 Distributor's wholesaler's and retailer's permits.

"* * *

"2. Issuance. The Commission shall issue state permits to distributors, wholesalers, and retailers subject to the condition hereinafter provided. Cities and towns may issue retail permits to dealers within their respective limits. County boards of supervisors may issue retail permits to dealers in their respective counties, outside of the corporate limits of cities and towns . . ."

As a matter of practice, retail permits are issued by local authorities rather than the Tax Commission. They are, therefore, better equipped to control applicants for retail permits.

Furthermore, under the decision of *Ford Hopkins Co. vs. City of Iowa City, et al.,* 216 Iowa 1286, 248 N. W. 668, the local authorities may exercise their discretion in issuing or denying permits to applicants as long as their exercise of that discretion is not arbitrary, capricious, nor discriminatory.

"98.22 Revocation of permit.

" * * *.

"2. If any retailer has violated any of the provisions of section ninety-eight point two (98.2) of the code, the board of supervisors or the city or town council which issued the permit shall revoke his permit or permits and if any such retailer violates any other provisions of this chapter, the board of supervisors or the city or town council which issued the permit may revoke his permit or permits upon the same hearing and notice as is prescribed in the preceding paragraph. As amended Acts 1959 (58 G.A.) ch. 119, §5."

This section was amended in 1959 and makes it compulsory for the local authorities to revoke the permit of a retailer who makes cigarettes available to minors and gives them the discretion to revoke for other violations of Chapter 98.

When improperly operated, cigarette dispensing machines offer the opportunity of purchasing cigarettes to minors. The 1959 amendment to §98.22(2) expressly directs the local issuing authorities to revoke the permit of any permitee who violates §98.2 by making cigarettes available to minors. Therefore, the policing and control of these machines is the responsibility of the local authorities. The retail permits are issued at this level and must be revoked by local authorities for violations of §98.2.

To summarize, a machine which requires an intervening human agency between the customer and the sale is lawful when the remote control device is inaccessible to the general public and must be operated for each separate transaction and is located so as to permit a view of the customer.

21.3

TAXATION: Cigarette dispensing machines, retail and wholesale cigarette permits—§§98.1(4), 98.1(13), 98.1(14), 98.13(3), 98.13(7), 1958 Code. Whether the owner of a cigarette dispensing machine is acting as a wholesaler or retailer, in any particular instance, it is necessary to determine whether he offers cigarettes for sale for consumption by the ultimate consumer, or for the purpose of resale. But his acting as a wholesaler in one relationship does not preclude the necessity of his having a retailer's permit if he acts in that capacity in another relationship. He must have a retailer's permit for each machine through which he dispenses cigarettes as a retailer, and a duplicate wholesaler's permit for each machine he owns where cigarettes are sold, stored or kept for purpose of sale or consumption.

April 12, 1962

Mr. A. L. George
Chairman
Iowa State Tax Commission
L O C A L

Dear Mr. George:

This will acknowledge receipt of your recent request for an opinion wherein you made the following inquiry:

"1. Under what situations will the owner of cigarette dispensing machines be required to have a retailer's permit, if any?

"2. Under what situations will the proprietor of the premises upon which such a machine is located be required to obtain a cigarette retailer's permit?

"3. Under what situations must a machine owner obtain a state wholesaler's permit?"

Your inquiry reduces itself to a question of who is a "retailer" under Iowa law, and required to purchase a retailer's permit, when sales through dispensing machines are involved.

The answer to this question requires an analysis of the definitions of "retailer" and "wholesaler" under §98.1(13) and (14) of the Code of Iowa (1958).

"98.1 Definition of words, terms, and phrases. The following words, terms, and phrases, when used in this chapter, shall, for the purpose of this chapter, have the meanings respectively ascribed to them.

" * * *.

"13. 'Wholesaler' shall mean and include every person other than a distributor or distributing agent who engages in the business of selling or distributing cigarettes within the state, for the purpose of resale.

"14. 'Retailer' shall mean and include every person in this state who shall sell, distribute, or offer for sale for consumption or possess for the purpose of sale for consumption, cigarettes irrespective of quantity or amount or the number of sales."

Under these definitions, the machine owner will be considered a "retailer" if he is the person who sells, possesses, distributes, or offers cigarettes "for sale for *consumption*" by the ultimate consumer.

If, on the other hand, the machine owner sells or distributes cigarettes "for the purpose of *resale*", he is a wholesaler, and not a retailer.

Where machine owners qualify as set forth in the preceding paragraphs as wholesalers and retailers as well, they must obtain both a wholesaler's and retailer's permit.

"98.13 Distributor's, wholesaler's and retailer's permits.

" * * *.

"8. Group business. Any person who operates both as a distributor and wholesaler in the same place of business shall only be required to obtain a state permit for the particular place of business where such operation of said business is conducted. A separate retail permit, however, shall be required if any distributor or wholesaler sells cigarettes at both retail and wholesale."

In order to determine whether the machine owner is a retailer, it is necessary to examine the relationship which exists between him and the owner or lessee of the premises, and the ultimate consumer. When the opinion hereinafter makes reference to "owner or lessee" of the premises, "owner" will be intended to mean the owner of the premises who operates it as his own business, and not an "owner-lessor" who owns the premises but lets it to a "lessee." If, in their relationship, the machine owner offers cigarettes for sale for *consumption*, he is a retailer. If he offers them for *resale* by the owner or lessee of the premises, he is a wholesaler. Thus, if the ultimate consumer purchases the machine owner's own cigarettes through his dispensing machine, a sale has

been made for consumption and the machine owner is a retailer and must purchase a retailer's permit; but, if the ultimate consumer purchases the cigarettes owned by the owner or lessee of the premises, it is that person who has sold the cigarettes for consumption and the machine owner is not a retailer.

If the machine owner has sold cigarettes to the owner or lessee of the premises, and has stocked his own machine with them, he has merely sold them "for the purpose of resale" and is a wholesaler.

Therefore, ownership of the cigarettes at the moment of sale to the consumer controls.

If the owner of the machine is not the person placing the cigarettes therein, he would nevertheless be a retailer if he has purchased them for the purpose of sale for consumption. If the owner or lessee of the premises has purchased them for sale for consumption from the person placing them in the machine owner's machine, then it is he who is the retailer, and not the machine owner. In such a situation, the machine owner would not be required to obtain any permit, since he is neither a wholesaler nor a retailer.

In the case where the cigarettes are owned by the machine owner and the owner or lessee of the premises merely activates the machine pursuant to some agreement between them, the owner or lessee of the premises is the machine owner's agent and the machine owner is the retailer.

Throughout the foregoing opinion, it should be kept in mind that regardless of whether the machine owner is engaged in business as a wholesaler or retailer, the owner or lessee of the premises upon which the machine is located must have a retailer's permit.

"98.13 Distributor's, wholesaler's and retailer's permits.

" * * *.

"10. Permit displayed ... The proprietor or keeper of any building or place wherein cigarettes shall be kept for sale, or with intent to sell, shall upon request of the commission or any peace officer exhibit his permit to so keep and sell."

In some situations, then, *both* the machine owner and the owner or lessee of the premises would be required to have a retailer's permit.

This is not to say that the owner-lessor of a building is required to have a permit; but the proprietor or keeper who operates the premises or any part of it as his own business is required to have his permit displayed if cigarettes are kept any place on those premises "for sale or with intent to sell."

The lessee is "the proprietor or keeper of any building or place wherein cigarettes are kept for sale or with intent to sell", and he must have a permit although he owns neither the cigarettes nor the machine and leases only a part of the building. Section 98.1(14) defines a "retailer" as a person who shall "possess for the purpose of sale or consumption." The requirement of display of permit and the fact of possession of the cigarettes, then, oblige the owner or lessee of the premises to purchase a retailer's permit without regard to who owns the cigarettes.

The question now arises as to the number of permits machine owners must obtain.

"98.13 Distributor's, wholesaler's and retailer's permits.

" * * *.

"7. Number of permits—trucks. An application shall be filed and

a permit obtained for each place of business *owned or operated* by a distributor, wholesaler, or retailer . . ." (Underlining ours.)

"98.1 Definition of words, terms and phrases. The following words, terms, and phrases, when used in this chapter, shall, for the purpose of this chapter, have the meanings respectively ascribed to them.

" * * *.

"4. 'Place of business' is construed to mean and include any place where cigarettes are sold or where cigarettes are stored or kept for the purpose of sale or consumption; or if sold from any vehicle or train, the vehicle or train on which or from which such cigarettes are sold shall constitute a place of business."

Where the machine owner is a retailer, as defined *supra,* he must obtain a retailer's permit for each machine through which he sells his cigarettes for sale for consumption, since under §98.1(4), a machine's location is a place of business, and §98.13(7) requires a permit for each place of business.

Where the machine owner is a wholesaler, as defined, supra, he must obtain a duplicate wholesaler's permit for each additional machine, or "place of business", as required by Chapter 98.

"98.13 Distributor's, wholesaler's and retailer's permits.

" * * *.

"3. Fees—expiration . . . provided that whenever a state permit holder shall operate more than one place of business, a duplicate state permit shall be issued for each additional place of business on payment of five dollars for each such duplicate state permit . . ."

Therefore, where a machine owner's relationships with the owners or lessees of several premises and his relationships with ultimate consumers gives him the status of "wholesaler" in some instances, and "retailer" in others, he must obtain the appropriate permit for each machine.

In summary, then, a machine owner whose own cigarettes are dispensed through his own machine must have a retailer's permit, since he offers cigarettes *"for sale for consumption"* by the ultimate consumer. If, however, he sells his cigarettes to the owner or lessee of the premises where his machine is located, he has sold his cigarettes *"for the purpose of resale"* and is not a retailer, but a wholesaler. Where, in his several relationships, he is a "retailer" in some instances and a "wholesaler" in others, he must obtain *both* permits. Where the machine owner's cigarettes are sold by the owner or lessee of the premises, who merely acts as his agent in activating the machine, the machine owner is a "retailer." Regardless of the relationship between the machine owner and the owner or lessee of the premises, the latter must display *his* retailer's permit.

The machine owner must have a retailer's permit for each machine through which he dispenses cigarettes as a "retailer" and a duplicate wholesaler's permit for each machine he owns where his cigarettes are sold, stored or kept for purpose of sale or consumption, since he operates each machine he owns as a "place of business."

21.4

TAXATION: Cities and towns—§§391.2(2), 391A.2, 1958 Code. Cities may not assess, for public improvements, real property outside the limits of the corporation.

January 13, 1961

Executive Council of Iowa
BUILDING

Attention: W. Grant Cunningham, Secretary

Gentlemen:

This will acknowledge receipt of yours of the 6th inst., with the attached letter and notice from the Conservation Commission of an assessment against state-owned property or improvements, described as follows:

"Assessment Notice"

"To Whom It May Concern"

"Notice is hereby given that a plat and schedule are now on file in the office of the City Clerk of the City of Clear Lake, Iowa, showing assessments proposed to be made for and on account of the cost of construction of concrete curb and gutter, together with incidental related work, construction of asphaltic concrete paving on rolled stone base, together with incidental related work, and construction of incidental street drainage facilities, on the following streets and avenues in the City of Clear Lake, Iowa, to-wit: * * *"

In view of the fact that the Conservation Commission, in the letter attached, has advised that Lots 24 and 25 Lake View Addition to Clear Lake do not lie within the limits of the City of Clear Lake, the City of Clear Lake is without authority to levy an assessment on property outside the limits of said city.

Section 391A.2 so provides, specifically, as follows:

"*Grant of power.* Municipalities shall have the power to construct, and repair all public improvements within their limits, and main sewers, sewage pumping stations, disposal and treatment plants, waterworks, water mains, and extensions, and drainage conduits extending outside their limits, and assess the cost thereof to private property within the municipality as hereinafter provided."

Chapter 391 so provides, insofar as paving is concerned, by the provisions of §391.2(2) as follows:

"*Street improvements.* Cities shall have power:

"1. * * *

"2. To establish districts, the boundaries of which may be changed as may be just and equitable, for the improvement or repair, by paving or graveling, of such streets within the corporation as in the judgment of the council constitute main-traveled ways into and out of such cities.",

and by plain implication of the foregoing-numbered chapters, the same rule applies to special assessments for other purposes against the foregoing-described lots.

At any rate, cities may tax only such property as is authorized by statute. No such authorization for taxing property outside the city limits exists. See *Polk Co. Savings Bank et al. v. State of Iowa et al.*, 69 Iowa 24.

In that respect, the applicable rule is stated in 64 *C.J.S.*, Municipal Corporations, page 695, par. 2003, as follows:

"As a general rule, municipal taxes may not be levied on land situated

beyond the corporate limits, and the legislature has no power to authorize a municipal corporation to tax for its own local purposes lands lying beyond the corporate limits. * * * "

21.5

TAXATION: Collection—§§445.8(4 and 5), 445.48, 445.49, 1958 Code. If county treasurer accepts payment of tax after issuing a distress warrant for its collection, he must also collect sheriff's collection fees, and these fees include the 5% to which a constable would be entitled.

March 9, 1961

Mr. Jack H. Bedell
Dickinson County Attorney
Antlers Hotel Building
Spirit Lake, Iowa

Dear Mr. Bedell:

Your request for an Attorney General's opinion dated January 25, 1961, has been referred to me for answer. You ask the following two questions:

"When distress warrants for the collection of personal property taxes are issued by the County Treasurer and turned over to the County Sheriff for service and when a warrant has, in fact, been served, does the Treasurer have authority to accept payment of the amount of the distress warrant without requiring the costs incurred by the Sheriff's office in the service of such distress warrant?

"There appears to be another question involved in this same dispute, and that is whether or not the 5% which is allowed a constable for the collection of taxes is allowable to the Sheriff's office, and how does the Sheriff's office account for the 5% if it is a proper charge?"

The applicable Code sections are §§445.8(4 and 5), 445.48, and 445.49, Code of Iowa (1958).

"445.8(4) The distress warrant so issued shall be collectible by any sheriff or constable or tax collector in the same manner as any other warrant for the distraint and sale of personal property. The amount to be collected shall include cost of publication of the notice, as herein provided, all interest and penalties upon such tax, and the fees of the collecting officer, as prescribed by law."

"445.8(5) Any taxpayer affected may at any time pay to the treasurer the amount of delinquent taxes and penalty, plus the cost of publication of the notice as shown by the personal property list, and any other costs prior to the issuance of the distress warrant herein provided."

"445.48 Compensation and accounting. Each collector appointed shall receive for his services and expenses the sum of five percent on the amount of all taxes collected and paid over by him, which percentage he shall collect from the delinquent, together with the whole amount of delinquent taxes and interest; and pay the same to the treasurer at the end of each month."

"445.49 Sheriff or constable as collector. In the discharge of his duties as collector, should it become necessary to make the delinquent taxes by distress and sale, or should no collector be appointed, or should the collector fail to institute proceedings to collect said delinquent taxes, the treasurer shall place the same in the hands of the sheriff, or a constable, who shall proceed to collect the same, and either shall be entitled

to receive the same compensation, in addition to the five percent, as constables are entitled to receive for the sale of property on execution."

In answer to your first question, we refer you to 1936 *O.A.G.* 164, 167. These opinions are written with specific reference to Iowa Code §445.50 dealing with personal property tax collections. They hold that once the delinquent accounts have been placed in the hands of the collector he is entitled to the collection fee even though the taxpayer pays the treasurer. We believe that this result would be applicable also to your problem. Therefore, the answer to your question is no. If the treasurer accepts payment, he must also collect the fees due the sheriff, once the distress warrant has been issued.

In answer to your second question, we refer you to 1938 *O.A.G.* 164, which holds that a sheriff is entitled to the additional 5% fee the same as the constable. Additionally, we refer you to 1940 *O.A.G.* 571, which holds that the sheriff shall account for such fees the same as any other fees which he collects which are not personally accountable to him but rather to the county.

Therefore, the answer to your second question is yes. The 5% fee is allowable to the sheriff, and the sheriff is to account for this fee to the county in the same manner as he accounts to the county for other fees which he collects which are accountable to the county.

21.6

TAXATION: §427.1(17), 1958 Code. Cotenants in farm equipment exempt under §427.1(17) may not each claim the statutory $300 exemption, since only a single exemption is applicable to such property.

June 28, 1962

Mr. James L. McDonald
Cherokee County Attorney
McDonald Building
Cherokee, Iowa

Dear Mr. McDonald:

This will acknowledge receipt of your letter of February 16, 1962, wherein you make the following inquiry:

". . . Are a farmer and his son, farming the same farm properties, using the identical machinery to which both acknowledge a joint interest entitled to a double exemption under this section on the theory that both are making their livelihood by farming?"

Section 427.1(17), Code of Iowa, 1958, provides:

"427.1 Exemptions. The following classes of property shall not be taxed:

"* * *.

"17. Farm equipment—drays—tools. The farming utensils of any person who makes his livelihood by farming, the team, wagon, and harness of the teamster or drayman who makes his living by their use in hauling for others, and the tools of any mechanic, not in any case to exceed three hundred dollars in taxable value."

It is my opinion that this exemption applies only to the property described without regard to its form of ownership, and is not personal to each owner. Farm equipment is a class of property exempted from taxation up to $300.00, and since the statute does not expressly grant that exemption to each cotenant,

its privilege does not inure to the benefit of each individually, but only to that of the cotenancy.

The rule is well established that "grants of tax exemptions are given a rigid interpretation against the taxpayer and in favor of the taxing power". Sutherland, *Statutory Construction,* §6702. 84 *C.J.S.,* §232, illustrates the principle underlying tax exemptions as follows:

> "... Under the constitutional and statutory provisions for exemption from taxation of property used for stated purposes, ordinarily it is the use and not the ownership which determines the right to the exemption. It has been held that where the property is so used as to exempt it from taxation, the ownership of the property is immaterial except as it may be of evidentiary significance in determining whether or not the use of the property is within the exemption; ..."

This principle seems to dictate that it is the farm equipment and not its owners which is the subject of the exemption and then, "not in any case to exceed $300". That single exemption is all that the statute contemplates. In *Boss vs. Polk County,* 236 Iowa 384, 19 N.W. 2d 225, the Court states:

> "In 51 Am. Jur. 509, 510, section 403, it is stated:
>
> " 'The grant of an exemption from taxation rests upon the theory that such exemption will benefit the body of the people, and not upon any idea of lessening the burdens of the individual owners of property.'
>
> "If the exemption is granted in this case the benefit will apply only to the appellant. That is not the theory upon which tax exemptions are granted. Further, it is the general rule of construction in Iowa that grants of immunity from taxation and tax-exemption statutes are to be strictly construed. Hale v. Iowa State Board of Assessment and Review, 223 Iowa 321, 271 N.W. 168, affirmed by United States Supreme Court, 302 U.S. 95, 58 S. Ct. 102, 82 L. Ed. 66; Samuelson v. Horn, 221 Iowa 208, 265 N.W. 168. It has also been stated that immunity from taxation by the state will not be recognized unless granted in terms too plain to be mistaken. Davenport National Bank v. Mittelbuscher, 8 Cir., Iowa, 15 F. 225; Morril v. Bentley, 150 Iowa 677, 130 N.W. 734. We do not believe that the statute under which the appellant claims exemption is so definite and explicit that we can say that the property in question is exempt from taxation. Neither can we so construe the statute as to give to it the meaning that the appellant now claims for it. If it is the desire of the legislature to exempt property under such a condition as is presented in this appeal we believe that it should so state the exemption in words that leave no question as to the intention of that body."

That language indicates that the legislature would have to clearly exempt individuals before they are entitled to the exemption.

This farm equipment, then, is susceptible only to a single exemption and cotenants in that property may not claim it individually.

21.7

TAXATION: Homestead credit—§§425.2, 425.11, 1958 Code. Under §§425.2 and 425.11, one occupying his home under trust instrument only is entitled to the homestead credit.

February 10, 1961

Mr. John J. O'Connor
Chairman, State Tax Commission
Local

Dear Mr. Connor:

This will acknowledge receipt of your request for an opinion in regard to allowing a homestead tax credit on property held in trust.

You ask the following questions:

"1. 'A' was the owner of a certain real estate in her own right and occupied as her home a dwelling house situated thereon. Early in the year 1960 she entered into a written Trust Agreement whereby she conveyed to a named Trustee all real estate owned by her at the time, including that on which her home was located. The Trustee agreed to accept the conveyance of said real estate and to hold same as Trustee. The net income from the property held as corpus of the Trust is payable each year to 'A'. The Trustee shall pay the taxes assessed against the property. At the death of 'A' the trust shall be terminated by the Trustee selling and converting into money all of the remaining corpus and shall divide the same among the heirs-at-law of 'A'. May there be a Homestead Tax Credit allowed on the home held in Trust and occupied as a home by 'A', the settlor, assuming a timely and proper application is made therefor?

"2. If it is held that there may be a Homestead Tax Credit allowed, then is it sufficient and proper for the Trustee alone to make and sign the application therefor, or shall the settlor 'A' be required alone to make and sign such application, or shall the Trustee and the settlor 'A' both be required to make and sign such application?"

The problem with which we are faced is, is 'A' an owner under the homestead credit law? The applicable statutory language is:

"425.11 Definitions. For the purpose of this chapter and wherever used in this chapter: * * *

"2. The word, 'owner', shall mean the person who holds the fee simple title to the homestead, * * *."

In answer to this problem, we refer to *Johnson v. Board of Supervisors of Jefferson County*, 237 Iowa 1103. The Court there said that a fee simple can be either equitable or legal. We feel that 'A' in your question has an equitable fee simple and, therefore, is the owner of the property for purposes of the homestead credit.

In regard to question two, §425.2, Code of Iowa (1958), says the person who wishes to avail himself of the homestead credit shall make the application of it. Under the facts of your problem, this person would be 'A' and, therefore, 'A' should sign the application.

21.8

TAXATION: Homestead exemption—§425.2, 1958 Code. Two brothers owning eighty acres as tenants in common cannot both claim the homestead exemption on separate forty-acre tracts of the eighty.

January 26, 1961

Mr. Robert W. Burdette
Decatur County Attorney
Box 61
Leon, Iowa

Dear Mr. Burdette:

This will acknowledge receipt of your letter of November 21, 1960, in which

you present the following question:

"Blood brothers own an 80 acre tract of land described as the East One-half of the Northwest Quarter, as tenants in common. Each brother is occupying a separate dwelling house with his family as their home, one dwelling being located on the East half and the other on the West half of said 80 acres.

"My question is this: Does each homestead site earn millage credit as provided in Section 425.2, 1958 Code of Iowa?"

We feel that 1944 *O.A.G.* 26 controls this question. The facts of that opinion are:

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

"Mr. 'A' and Mr. 'B' own a lot and house together, half of the house being occupied by Mr. 'A' and the other half by Mr. 'B', each of whom keeps up the repairs on their one-half of the house. The assessment on this property is made in the names of Mr. 'A' and Mr. 'B', with an assessed value of $4,400. Each has applied for and been granted a homestead credit on a valuation of $2,200.00."

We held there that, under those facts, no credit was allowable.

Only one homestead credit can be allowed per legally-described tract of land.

We feel that the principle of the 1944 opinion is applicable to the facts you present and, therefore, a credit can be allowed to only one of the brothers.

21.9

TAXATION: Homestead and military service tax credit—§§425.7, 426A.6, 1958 Code. Where State Tax Commission has disallowed either the homestead or military service tax credit and the taxpayer has failed to appeal from such disallowance and the county treasurer has not collected the disallowed credit, such county is not required to return the amount of the credit to the State Tax Commission. A distress warrant returned *nulla bona* is a sufficient showing that the county treasurer has made a diligent effort to collect the credit.

April 26, 1961

Mr. John J. O'Connor, Chairman
Iowa State Tax Commission
State Office Building
Des Moines, Iowa

Dear Mr. O'Connor:

This will acknowledge receipt of your recent letter in which you ask the following questions:

"In the Homestead Tax Credit law at subsection 3 of Section 425.7, Code of Iowa, 1958, it is provided that should the State Tax Commission determine, upon investigation, that any claim for Homestead Credit has been allowed by any Board of Supervisors which is not justifiable under the law and not substantiated by proper facts, the Commission may, at any time within one year after the receipt by the State Tax Commission of the certification of such credit by any County Treasurer, set aside such allowance. 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 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.

"The Military Service Tax Credit law at Section 426A.6, Code of Iowa, 1958, contains provisions that are substantially the same as those contained in the Homestead Tax Credit law at subsection 3 of Section 425.7.

"Inspection of Homestead Tax Credit claims and claims for Military Service Tax Exemption allowed by Boards of Supervisors throughout this state each year by field auditors of the Property Tax Division results in a number of such claims being disallowed by the State Tax Commission, and only a very few of those claimants appeal the disallowance of their claim to the district court of the county in which their claim was filed. Upon such disallowance of those Homestead Tax Credit claims and claims for Military Service Tax Exemption by the State Tax Commission and where no appeal is taken by the claimants, it is found that in some cases the original claimant has removed himself from the state and no longer owns the property on which he designated the credit or exemption, as the case might be, was to apply. In other such cases the property designated is no longer in the hands of the original claimant and is in the hands of a bona fide purchaser at the time of the disallowance of the claim by the State Tax Commission, and the original claimant does not have any property that would be subject to a distress warrant. In some cases where the designated property is no longer in the hands of the original claimant, it is found that it is in the hands of a bona fide purchaser, but the original claimant still resides in the county and does have other property that would be subject to a distress warrant. In other cases the County Treasurer of the county may in fact make no attempt to collect the amount of Homestead Tax Credit or Military Service Tax Credit that was erroneously paid, and makes no effort whatever to return to the State Tax Commission the amount of credit so erroneously paid.

"Question 1. If in any cases where a Homestead Tax Credit claim or claim for Military Service Tax Exemption is disallowed by the State Tax Commission and no appeal is taken to the district court, and if the County Treasurer is unable to or fails to collect the credit previously erroneously paid in such cases where the original claimant has removed himself from the state and no longer owns the property or for some other reason collection is not made, must the county in which the claim was filed stand the loss resulting from the allowance of the credit and return the amount to the State Tax Commission, or in such cases must the State Tax Commission stand the loss and thus no credit would be made to the Homestead Tax Credit Fund or the Military Service Tax Credit Fund, as the case might be?

"Question 2. If it be ruled in answer to Question 1 that the county must stand the loss, then what fund of the county would have to be drawn on, and what length of time should the county be given to return to the State Tax Commission the amount that was erroneously paid as is provided for in subsection 3 of Section 425.7 and in Section 426A.6? If the county neglected or failed to satisfy such loss within a reasonable period of time specified, is there some legal procedure to be followed by the State Tax Commission in requiring the county to make good the loss? If so, what procedure shall be followed?

"Question 3. If it is ruled that the State Tax Commission must stand the loss, either in the cases of Homestead Tax Credit claims or in the cases of claims for Military Service Tax Exemption, then shall the State Tax Commission before considering such cases closed require a competent showing by the County Treasurer of the county that he did make a diligent effort to collect in the same manner as other taxes any amount so erroneously paid from either the Homestead Tax Credit Fund or the Military Service Tax Credit Fund? If the answer to the foregoing question is 'yes', then should the County Treasurer be required to show that he had in each such case issued a distress warrant for the collection of the amount involved and that same had been returned to him by the County Sheriff or other officer to whom the distress warrant was issued and showing that no property was located to satisfy the amount?"

As noted in your letter, the pertinent statutory section involved in these questions is §425.7, Code of Iowa (1958), which reads as follows:

"425.7 Appeals permitted.

"1. Any person whose claim is denied under the provisions of this chapter may appeal from the action of the board of supervisors to the district court of the county in which said claimed homestead is situated by giving written notice of such appeal to the county auditor of said county within twenty days from the date of mailing of notice of such action by the board of supervisors.

"2. In the event any claim under this chapter is allowed, any owner of an eligible homestead may appeal from the action of the board of supervisors to the district court of the county in which said claimed homestead is situated, by giving written notice of such appeal to the county auditor of said county and such notice to the owner of said claimed homestead as a judge of the district court shall direct.

"3. Should the state tax commission determine, upon investigation, that any claim for homestead credit has been allowed by any board of supervisors which is not justifiable under the law and not substantiated by proper facts, the commission may, at any time within one year after the receipt by the state tax commission of the certification of such credit by any county treasurer, set aside such allowance. Notice of such disallowance shall be given to the county auditor of the county in which such claim has been improperly granted and a written notice of such disallowance shall also be addressed to the claimant at his last known address. Such claimant, or the board of supervisors, may appeal from the action of the state tax commission in the same manner, and in the same time, as provided by subsection 1. Where such appeal is taken by the claimant or by the board of supervisors, the appellant shall within ten days after the filing of such appeal, notify the chairman of the state tax commission by restricted certified mail of the filing of said appeal. 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.

"Said appeals shall be tried by equitable proceedings."

Section 426A.6, Code of Iowa (1958), dealing with the military service tax

credit, is substantially the same in form and content as the above statute.

In response to your first inquiry, the statute above set out provides that in case collection is made, such collection shall be returned to the State Tax Commission. No provisions are made in the statute for the situation where collection cannot be made because the property is sold to a good faith purchaser and the claimant has either removed himself from the State, or is unable to pay the amount of the disallowed credit. Since, however, the statute provides in the event collection is made the amount shall be returned, it would seem inconsistent to require that the county return the amount of the credit where it has not so collected the amount of the credit. This conclusion finds support in the fact that the statute recites that in the event the county is unable to collect the amount of the disallowed credit, the State Tax Commission is given authority to commence proceedings against the claimant for the collection of payments made on such disallowed credit. If the county were required to make good the amount paid to the State regardless of whether collection against the claimant or property was accomplished, no purpose would be served in permitting the State Tax Commission to institute proceedings for collection.

We conclude, therefore, that in the event the county has failed to make collection of the credit erroneously paid, it is not required to return the credits so given.

The above obviates the necessity of answering your second question.

As to your third inquiry, you will notice that the statute above quoted prescribes that the amount of credit erroneously paid "shall be collected by the county treasurer in the same manner as other taxes".

Chapter 445, Code of Iowa (1958), provides for the procedure to be followed in the collection of taxes. The procedure most commonly followed is collection by "distress and sale". In the case where the county treasurer encounters resistance in the collection of the erroneously allowed credit, his remedy would be to issue a distress warrant and sell any nonexempt property. A showing that the warrant is returned *nulla bona* would seem to be sufficient indication that he has made a diligent effort to collect the credit. As previously noted, the statute allows the Tax Commission to bring action where efforts of the county treasurer are unavailing.

21.10

TAXATION: Homestead and military service tax credit—§§425.7(3), 426A.6, 1962 Code. A person purchasing real property by warranty deed is a bona fide purchaser within §§425.7(3) and 426A.6, so that disallowance of a homestead exemption and military service tax exemption should not be entered as a lien by the county treasurer against the property of the bona fide purchaser in question.

December 18, 1962

Mr. H. T. Lewis
Assistant County Attorney
Scott County, Iowa

Dear Mr. Lewis:

This is in reply to your recent letter in which you request the opinion of this department as to whether a person purchasing real property by warranty deed is a bona fide purchaser within §§425.7(3) and 426A.6, Code of Iowa (1962), so that the disallowance of a homestead exemption and military service tax exemption should not be entered as a lien by the county treasurer against the property in question.

The following provision is contained in §425.7(3):

"3. Should the state tax commission determine, upon investigation, that any claim for homestead credit has been allowed by any board of supervisors which is not justifiable under the law and not substantiated by proper facts, the commission may, at any time within one year after the receipt by the state tax commission of the certification of such credit by any county treasurer, set aside such allowance. Notice of such disallowance shall be given to the county auditor of the county in which such claim has been improperly granted and a written notice of such disallowance shall also be addressed to the claimant at his last known address. Such claimant, or the board of supervisors, may appeal from the action of the state tax commission in the same manner, and in the same time, as provided by subsection 1. Where such appeal is taken by the claimant or by the board of supervisors, the appellant shall within ten days after the filing of such appeal, notify the chairman of the state tax commission by restricted certified mail of the filing of said appeal. 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.

"Said appeals shall be tried by equitable proceedings."

Section 426A.6 contains the following provision:

"426A.6 Setting aside allowance. Should the state tax commission determine, upon investigation, that any claim for military service tax exemption has been allowed by any board of supervisors which is not justifiable under the law and not substantiated by proper facts, the commission may, at any time within one year after the receipt by the state tax commission of the certification of such exemption by any county treasurer, set aside such allowance. Notice of such disallowance shall be given to the county auditor of the county in which such claim has been improperly granted and a written notice of such disallowance shall also be addressed to the claimant at his last known address. Such claimant, or the board of supervisors, may appeal from the action of the state tax commission in the same manner, and in the same time, as provided for appeals from disallowance by the board of supervisors. When such appeal is taken by claimant or by the board of supervisors, the appellant shall, within ten days after the filing of such appeal, notify the chairman of the state tax commission, by restricted certified mail of the filing of said appeal. 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 collections shall be returned to the state tax commission and credited to the military service tax 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. Said appeals shall be tried by equitable proceedings."

It is felt that the present situation differs from that considered in 1960

O.A.G. 250. This opinion stated that a person purchasing real property under installment contract was not a bona fide purchaser under §§425.7(3) and 426A.6, Code of Iowa (1958).

Cited here was 92 *C.J.S.* 216 which provides as follows:

> "The doctrine of bona fide purchaser applies only to the purchaser of 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."

It has been repeatedly held that actual payment of the purchase price before notice is necessary to constitute one a bona fide purchaser. 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. *Kitteridge v. Chapman,* 36 Iowa 348; *Morse v. Rhinehart,* 125 Iowa 419, 192 N.W. 142; *Reining v. Nevison,* 203 Iowa 995, 213 N.W. 609; *Egbert v. Duck,* 239 Iowa 646, 32 N.W. 2d 404.

Many of these authorities recognize that performance of the purchaser's obligation before notice of prior equities entitles him to protection therefrom, insofar as he has performed before notice, he is entitled to be protected. 124 *A.L.R.* 1259 states:

> "That payment in full of the consideration before notice, entitles the purchaser to protection to the full extent of the estate purchased."

The proof must be of actual payment before notice. *Sillyman v. King,* 36 Iowa 207; *Kitteridge v. Chapman,* 36 Iowa 348; *Nolan v. Grant,* 53 Iowa 392.

It is the duty of the county treasurer to make the determination whether the property on which the credit was originally granted is in the hands of a bona fide purchaser. 1958 *O.A.G.* 314. After the county treasurer has made his determination, and his determination happens to state that the purchaser is a bona fide purchaser, there is nothing to prevent the county treasurer from collecting the disallowed credits from the seller by issuing a distress warrant on any other property of the seller other than that specified.

From the present fact situation, a person purchasing real property by a warranty deed without notice of outstanding equities is a bona fide purchaser within §§425.7(3) and 426A.6, Code of Iowa (1962), so that disallowance of a homestead exemption and military service tax exemption should not be entered as a lien by the county treasurer against the property of the bona fide purchaser in question.

21.11

TAXATION: Income tax—§§422.4(1), 422.5, 422.9, 1962 Code; §7, Article VII, Iowa Constitution. Constitutional limitations prevent the fixing of State individual income tax as a percentage of the Federal individual income tax.

October 18, 1962

Honorable C. Edwin Gilmour
State Senator
Twelfth District
532 Ninth Avenue
Grinnell, Iowa

Dear Senator Gilmour:

We have your request of August 1, 1962, which is as follows:

"I wish to request of you an opinion on the following question: Is there any constitutional limitation on the discretion of the Iowa General Assembly to adjust, by legislative action, our State individual income tax to the Federal income tax: i.e., could the Iowa tax be made a percentage of the Federal net income tax?"

It is our opinion that there is a constitutional limitation on the General Assembly to fix the Iowa tax at a percentage of the Federal tax. Section 7, Article VII, of the Iowa Constitution states:

"Every law which imposes, continues, or revives a tax, shall distinctly state the tax, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such tax or object."

Section 422.5, Code of Iowa, 1962, imposes a State income tax upon every resident of the State and upon every non-resident having income derived from sources within the State. In imposing this tax, the section refers to "taxable income" as defined in §422.4(1). This subsection states that "taxable income" is the net income as defined in §422.7, less the deductions allowed in §422.9. Section 422.7 states that "net income" is the adjusted gross income as computed for Federal income tax purposes.

The present income tax law of Iowa does not arrive at its monetary result by use of a percentage of the Federal tax, but instead refers to its adjusted gross income and then follows with a list of deductions and adjustments to the base figures in the Federal law. The present method imposes a tax directly upon the individual and does not depend on the imposition of the tax by the Federal law. The reference is made to the Federal law for purposes only of definition and the income tax law of Iowa has been worded in such a way so that the objection to it, and provided for in the Constitution of Iowa, that the State legislature is delegating its legislative authority to another political body can not be made.

An examination of the present law was made by the Supreme Court of Iowa in the case of *Bank v. Tax Commission* (1960), 251 Iowa 603 at page 616, wherein it states:

"* * * the Iowa tax law simply refers to the Federal Act for the purpose of defining 'taxable income', and the object and amount of the tax is clearly set forth in what is now chapter 422, Code of Iowa, 1958. See chapter 208, Acts of Fifty-sixth General Assembly, sections 1, 4, 5 and 6." And on page 617, the Court further states:

"No attempt is made to make the construction or interpretation of such definitions by federal authorities the law in Iowa, and they are not given power to determine or fix the Iowa tax. In other words, the reference is not for the purpose of 'fixing such tax' and 'so long as this is not the purpose of the reference, the plaintiff has no complaint'. It was further pointed out in the Ballard-Hassett Company case that the right to cross-reference to statutes in other states or to federal statutes is quite uniformly recognized."

Also see the case of *Ballard-Hassett Co. v. Local Board of Review,* 215 Iowa 556, 246 N.W. 277, above referred to.

It is clear that if the Iowa tax were fixed at a percentage of the Federal income tax there would be the immediate objection that the legislature of Iowa was delegating its legislative authority to another body politic and further that the provision in the Iowa Constitution, §7, Article VII, quoted above would be violated.

21.12

TAXATION: §422.65, 1958 Code. The confidential nature of State income tax returns bars their examination by a county attorney since he does not qualify as a state officer.

June 19, 1962

Mr. William C. Ball
Black Hawk County Attorney
Suite 201
First National Building
Waterloo, Iowa

Dear Mr. Ball:

This will acknowledge your letter of April 26, 1962, wherein you make the following inquiry regarding the use of Iowa State income tax returns in your investigation of suspected welfare frauds:

"Would it be possible for the Iowa State Tax Commission to furnish copies of the Iowa State Income Tax returns to our office for use in such investigation? . . ."

Section 422.65(1), Code of Iowa (1958), provides as follows:

"422.65 Information deemed confidential.

"1. It shall be unlawful for the commission, or any person having an administrative duty under this chapter, to divulge or to make known in any manner whatever, the business affairs, operations, or information obtained by an investigation of records and equipment of any person or corporation visited or examined in the discharge of official duty, or the amount or source of income, profits, losses, expenditures or any particular thereof, set forth or disclosed in any return, or to permit any return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; *provided, however, that the commission may authorize examination of such returns by other state officers,* or, if a reciprocal arrangement exists, by tax officers of another state, or the federal government." (Underlining ours.)

The Commission may authorize the county attorney to examine State income tax returns, then, if the county attorney is a State officer. 27 *C.J.S.,* §1 states that "whether prosecuting attorneys are state officers or county officers would seem to depend on their classification in the constitutions and statutes of the various states".

The Constitution of this State provides in Article V, §13:

§13. County Attorneys—residence—election—term

"Sec. 13. The qualified electors of each county shall, at the general election in the year 1886, and every two years thereafter elect *a County Attorney,* who shall be a resident of the county for which he is elected, and shall hold his office for two years, and until his successor shall have been elected and qualified. Amended 1884." (Emphasis ours.)

The original §13 as it appeared in the Constitution of 1857 provided for the election of district attorneys, which term was dropped by Amendment 4 of 1884. In 1896 *O.A.G.* 196, we held that the effect of this change was to make the county attorney a county and not a State officer. Therefore, we do not feel that the county attorney can qualify under the exception in the statute.

In a recent opinion of the Attorney General dated April 11, 1962, we stressed the highly confidential nature of State income tax returns as reflected in the language of §422.65: "Its purpose is to protect taxpayers from the publishing, inspection, or divulging of information concerning their income taxes."

Therefore, since the county attorney does not qualify under any exception in the provisions of §422.65, we must conclude that he is not entitled to examine State income tax returns for the purpose of his investigation.

21.13

TAXATION: §404.15, 1962 Code. Lands located within the limits of a municipal corporation, although those lands are of smaller area than ten acres, are not taxable by municipalities if they are occupied and used in good faith for agricultural or horticultural purposes and have not been subdivided or platted for the purpose of laying out a city, town, or addition thereto.

August 14, 1962

Mr. Gary L. Cameron
Jefferson County Attorney
Gaumer Building
Fairfield, Iowa

Dear Mr. Cameron:

This is in response to your letter of June 19, 1962, wherein you make the following inquiry:

> "Taxpayer owns a farm which lies in three separate taxing districts. The land is continuous except where separated by roads. Less than ten acres of this farm lies within the corporate limits of the City of Batavia, Iowa. The land which lies within the corporate limits of the City of Batavia is occupied and used in good faith for agricultural purposes. The amount of land involved is 2.74 acres. The question is, would the 2.74 acres be eligible for the ten acres excess levy within city limits."

The question depends upon the proper interpretation to be placed on §404.15, Code of Iowa (1962), which provides:

> "404.15 Agricultural lands. No land included within the limits of any municipal corporation which is not laid off into lots of ten acres or less, and which is also in good faith occupied and used for agricultural or horticultural purposes nor the personal property used in connection therewith shall be taxable for any city or town purpose, except that said lands and all personal property necessary to the use and cultivation of said agricultural or horticultural lands, shall be liable to taxation, not to exceed one and one-fourth mills in any year, for municipal street purposes."

Because of the peculiar phrasing of this section, special consideration should be given to analysis of its content. Couched in more affirmative language, the statute exempts from taxation land which is used in good faith for agricultural or horticultural purposes *and* which remains unplatted and unsubdivided. The statute's exemption requirements are conjunctive, and, therefore, if land used in good faith for agricultural or horticultural purposes has been *"laid out* into lots of ten acres or less" (emphasis ours), the municipality may tax it. By a prior opinion in 1944 *O.A.G.* 76, we expressed this notion as follows:

> "It is our opinion that the size of the area embracing the lots is immaterial. For instance, if an eighty acre farm was situated within the boundaries of a city or town and said farm were laid off in lots of ten

acres or less, such eighty acre farm would be clearly subject to taxation for city and town purposes. This, notwithstanding the fact that such eighty acre farm is used exclusively for agricultural or horticultural purposes. As sustaining this view, see Leicht, et al, vs. the City of Burlington, 73 Iowa 29; Brooks vs. Polk County. * * *

"Recapitulating for the purpose of clarity, it is our opinion that agricultural lands situated within the boundaries of a city or town, irrespective of the area of such lands, are not exempt from taxation for any purpose if such lands are *laid off into lots* of ten acres or less." (Emphasis ours)

In your inquiry the fact of good faith use for agricultural or horticultural purposes is presumed, and the only question to be resolved is whether the size of the land involved bears on its eligibility for exemption under the statute. The statute states, in effect, that land *"laid off into lots* of ten acres or less" is taxable regardless of its use (emphasis ours). Although the land here involved is admittedly less than ten acres, it remains to be determined whether it has been "laid off into lots" or is included in a larger area which has been so laid off. In 1938 *O.A.G.* 127 we distinguished between "lot" as used simply in reference to a plot of ground and as used to define land legally described, insofar as that word is intended by the statute:

"In view of the fact that in a large number of instances arising under Section 6210 (now 404.15) the right to tax is determined by the use to which the property is put, the benefits which it derives from city improvement, and matters of like character, it is our opinion that the use of the word 'lots' in Section 6210 refers to the cutting up of property into small tracts of ten acres or less for the purpose of disposing of the same as city property and does not refer to property that is described, for the sake of convenience, as a lot or a sub-division of a lot."

Therefore, the size of land used for agricultural or horticultural purposes is immaterial unless it has been "laid off into lots", that is, subdivided and platted into legally described plots for the purpose of disposing of them as city property. Absent such laying off, the question of size is of no consequence.

In any given instance, then, after determining good faith use for agricultural or horticultural purposes, the assessor must ascertain whether the property has been "laid off into lots". If he finds it has been so laid off, he may then proceed to determine the size of those lots. If they are of ten acres or less, they are taxable; if they are more than ten acres, they are not taxable. Therefore, in cases where agricultural or horticultural lands are involved, the *sine qua non* of taxation is not that their size is of ten acres or less, but rather their having been *laid off into lots* of ten acres or less.

In answer to your question, then, since this land is used in good faith for agricultural purposes and has not been laid off into lots, its area is immaterial, and it is not taxable except for municipal street purposes.

21.14

TAXATION: Liens, real or personal property—§§428.4, 445.29. A building erected upon land owned by another under lease longer than three years duration is personal property, although assessed as real estate. No lien for taxes on the building attaches to the underlying real estate, but a lien does attach to the building and any real estate of the building's owner.

August 16, 1961

Mr. William C. Ball
Black Hawk County Attorney
Suite 201 First National Building
Waterloo, Iowa

Dear Mr. Ball:

In your recent letter the following problem was presented:

"Section 428.4 of the 1958 Code of Iowa entitled Personal Property-Real Estate-Buildings, sets forth two separate and distinct tax situations by which it is determined how such taxes shall be listed and assessed. The first situation is when the owner of real estate owns any buildings erected since the previous assessment. The second situation, and the one in which I am interested, is a situation where the buildings are erected by another than the owner of the real estate.

"Said Code Section provides as follows:

'But if such buildings are erected by another than the owner of the real estate, they shall be listed and assessed to the owner as personal property, but buildings and fixtures erected on real estate held under a lease longer than three years duration shall be assessed as real estate.'

"My question is in the event that the buildings and fixtures erected on the real estate are held under a lease longer than three years duration do the delinquent taxes on said buildings and fixtures become a lien on the real estate upon which they are situated? Further in the event said delinquent taxes do not become a lien on the real estate, is the owner of the real estate or the personal property owner liable for the taxes?"

The general rule applicable to buildings erected on land by a person who is not the owner of that land is that, in the absence of an agreement to the contrary, the building remains the personal property of the builder and does not become a part of the real estate. *Brown v. Turner,* 20 S.W. 660 (Mo. 1892), *Eisenzimmer v. Bell,* 32 N.W. 2d 891 (N.D. 1948). Section 428.4 recognizes this rule by calling for such a building to be assessed as personal property in the name of the owner thereof, nor does it abrogate the rule when a lease of longer duration than three years is involved because the language refers to assessment only. It is our opinion that the building remains in fact personalty although assessed as realty. See 1942 *O.A.G.* 160 and 1925-26 *O.A.G.* 152.

A lien does exist, however, on buildings erected on the land of another because of §445.29, as amended, which states in part the following:

"* * * 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. * * *."

This section also sets out the existence of a lien on other real estate owned by the personal property owner for personal taxes. There is no section of the Code, however, that allows the placing of a lien against real estate of one party for personal property taxes due from another. The language of §428.4 does not go so far as to place the land and building in one taxable unit whereby taxes levied on one would be collectible against the other. Therefore, delinquent taxes on buildings and fixtures held under a lease longer than three years duration and erected on land owned by another do not become a lien on the real estate on which they are situated.

As to your question on liability for the taxes on the building, we again refer to §428.4, which fixes the owner of the property, be it real or personal, as the proper party against whom the assessment should be made.

21.15

TAXATION: Microfilming services—§§422.20, 422.61(4), 422.65, 622.-30(2), 1958 Code. Independent microfilming services prevented from developing microfilms of State individual and corporate income tax returns;

however, the Commission may develop microfilm. Microfilm is as admissible into evidence as the original return would be. The original may be destroyed after microfilming in any manner prescribed by the Commission.

April 11, 1962

Mr. A. L. George, Chairman
Iowa State Tax Commission
L O C A L

Dear Mr. George:

This will acknowledge your letter of March 22, 1962, wherein you made the following inquiries regarding the microfilming of Iowa State individual and corporation income tax returns.

"1. Will the necessity of having these returns developed by an independent microfilming service violate the provisions of Section 422.65, Code of Iowa (1958), pertaining to the confidentiality of such returns?

"2. Will the microfilmed returns be allowed as evidence?

"3. Would it then be permissible to destroy the tax returns subsequent to their being microfilmed?"

In answer to question 1, §422.65 would be violated by having an independent microfilming service develop the microfilms. That section provides as follows:

"422.65 Information deemed confidential.

1. It shall be unlawful for the commission, or any person having an administrative duty under this chapter, to divulge or to make known in any manner whatever, the business affairs, operations, or information obtained by an investigation of records and equipment of any person or corporation visited or examined in the discharge of official duty, or the amount or source of income, profits, losses, expenditures or any particular thereof, set forth or disclosed in any return, or to permit any return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; provided, however, that the commission may authorize examination of such returns by other state officers, or, if a reciprocal arrangement exists, by tax officers of another state, or the federal government.

2. Any person violating the provisions of subsection 1 of this section shall be guilty of a misdemeanor and punishable by a fine not to exceed one thousand dollars."

Its purpose is to protect taxpayers from the publishing, inspection, or divulging of information concerning their income taxes. The privileged and confidential character of income tax returns must be respected even though §422.61(4) expressly provides that they may be microfilmed.

"422.61 Power and duties.

"* * *.

"4. The commission may, at its discretion, make photostat, microfilm or other photographic copies of records, reports and other papers either filed by the taxpayer or prepared by the state tax commission. When such photostat or microfilm copies have been made, the tax commission may, at its descretion, destroy such original records in such manner as prescribed by the commission. Such photostat or microfilm copies, when no longer of use, may be destroyed as provided in subsection 3. Such photostat, microfilm or other photographic records shall be admissible in

evidence when duly certified and authenticated by the officer having custody and control thereof."

It must be presumed that the microfilming processes are to be performed wholly within the Commission itself and directly under its supervision. Furthermore, §422.65(2) provides a sanction for violation of §422.65(1), and since an independent microfilming service would be neither "the commission, or any person having an administrative duty under this chapter" that sanction could not apply to it, and its intended deterrent effect would be lost.

Chapter 298, §5, Acts 58th G.A., provides as follows:

"Sec. 5 It shall be unlawful for any officer or employee of the state of Iowa to divulge or to make known in any manner whatever not provided by law to any person the amount or source of income, profits, losses, expenditures, of any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return, or any part thereof or source of income, profits, losses, or expenditures appearing in any income return; and any person committing an offense against the foregoing provision shall, upon conviction for each such offense, be punished by imprisonment in the county jail for a term not exceeding one (1) year, or by a fine of not more than one thousand (1,000) dollars, or both; and if the offender be an officer or employee of the state of Iowa he shall also be dismissed from office or discharged from employment. Nothing herein shall prohibit turning over to duly authorized officers of the United States information and income returns pursuant to agreement between the state tax commission and the Secretary of the Treasury of the United States or his delegate."

This section is under Division II, personal net income tax, and is also applicable to corporations under §422.38 of Division III, business tax on corporations, which section provides as follows:

"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 seems clear that the highly confidential nature of these returns is reflected in this language, and permitting any person not subject to the sanctions therein to examine them would be unlawful. Notice also the added severity of these §422.20 sanctions as compared to those under §422.65, in that they are penal and subject the offender to mandatory discharge as well as to a fine. Since this section specifically deals with personal and corporation income tax returns, its application to your first question is probably more meaningful than an application of §422.65(1).

The answer to question 2 depends upon the circumstances under which the microfilms are sought to be admitted into evidence, for §§422.65 and 422.20 treat the returns as confidential, while §422.61(4) expressly provides that, "Such photostat, microfilm, or other photographic records shall be admissible in evidence when duly certified and authenticated by the officer having custody and control thereof." This apparent incongruity is clarified by §622.30-(2) as amended by Chapter 214, §1, Acts 54th G.A.:

"If any ... department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry print, representation or combination thereof, of any act, transaction, occurence or event and in the regular course of business has caused any or all of the same to be recorded, copied or reproduced by any photo-

graphic, photostatic, microfilm, microcard, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original . . . Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement or facsimile, does not preclude admission of the original."

Therefore, we may conclude that the microfilm is as admissible as the original return and it remains now to determine the admissibility of the original. The problem may arise under two situations: (1) Where a party in litigation wishes to inspect another party's tax returns and offer them in evidence; (2) Where the State is a party and wishes to produce his tax returns in evidence in an action against the taxpayer.

In the former situation, the problem which must be overcome by the litigant who wishes to offer his opponent's tax returns in evidence is how to obtain them. This is not merely the problem where he has evidence available but which may be excluded by the taxpayer's objection that it is privileged. The initial problem here revolves around the privileged nature of the returns barring his acquiring knowledge of their contents in the first place. The Iowa statute forbidding any officer or employee to divulge any information obtained in the discharge of his duties and making it unlawful, under penalty, to make available any information regarding tax returns, establishes the secrecy concerning them and prevents parties from getting control of an opponent's return; nor can this obstacle be overcome by invoking RCP 129 (a):

"129. Production of books or documents.

(a) After issue is joined in any action, any party may file an application for the production or inspection of any books or papers, not privileged, which are in the control of any other party, which are material to a just determination of the cause, for the purpose of having them inspected or copied or photostated. The application shall state with reasonable particularity the papers or books which are called for, and state wherein they are material to a just determination of the cause, and state that they are under the control of the party from whom production is requested. The movant need not use such documents as evidence at the trial."

Although, as a matter of policy, the Tax Commission will furnish a taxpayer copies of his tax returns upon written request, it is doubtful that this could be regarded as placing them "in his control" so as to render him subject to an application under RCP 129. Since they are privileged, no officer or employee of the Commission may disclose their content and such officer or employee may not testify as to their content nor produce them under subpoena *duces tecum.*

Both §422.65 and §422.20 qualify the privilege by requiring secrecy "except as provided by law". This limitation on the confidential nature of income tax returns is expressed in certain enumerated exceptions set forth in the statutes themselves. Those exceptions are officers of the Federal Government, other State officers or officers of another state if a reciprocal agreement exists. Section 421.17(7) provides as follows:

"421.17 Powers and duties. In addition to the powers and duties transferred to the state tax commission, said commission shall have and assume the following powers and duties:

"* * *.

"7. To hold public hearings either at the seat of government or else-

where in the state, and tax the costs thereof; to summon and compel witnesses to appear and give testimony, to administer oaths to said witnesses, and to compel said witnesses to produce for examination records, books, papers, and documents relating to any manner which the commission shall have the authority to investigate or determine . . ."

This must necessarily include tax returns filed with the Commission, and they are not so privileged. Furthermore, they are not subject to the hearsay objection since they are admissions against interest. This has been held in *Greenboom vs. United States,* 80 F. 2d 113 (9th Cir. 1935), where Federal tax returns were involved.

The reason for §422.61(4) making microfilms admissible in evidence is not to circumvent the privilege requirements, but rather to avoid their exclusion under the best-evidence rule.

In answer to your third question, the original tax returns may be destroyed after having been microfilmed. Section 422.61(4) provides that ". . . When such photostat or microfilm copies have been made, the tax commission may, at its discretion, destroy such original records in such manner as prescribed by the commission . . ."

To summarize, permitting an independent microfilming service to develop microfilms of State individual and corporate income tax returns would violate §§422.65(1) and 422.20 of the Iowa Code. The microfilms may, however, be developed by the Commission itself, and they may be offered in evidence by the Tax Commission. They will be privileged, however, when sought to be examined or used in evidence by any parties to litigation other than the Commission. (With regard to the Federal Government and officers of foreign states where reciprocity exists, they must be governed by their own rules of evidence.) Once the original returns have been microfilmed, they may be destroyed in any manner prescribed by the Commission.

21.16

TAXATION: Mobile homes, homestead and military service tax credit—§§135D.1(1), 135D.9, 135D.21, 321.1, 321.123, 321.130, 425.11, 427.3, 441.17, 441.18, 441.21, 1958 Code. A mobile home on a permanent structure, if determined as such by the local county assessor, shall be treated as real estate and shall qualify for the homestead and military service tax credit if the specific statutory requirements are satisfied.

November 9, 1961

H. Andrew Schill
Assistant Webster County Attorney
220-222 Snell Building
Fort Dodge, Iowa

Dear Mr. Schill:

This will acknowledge your recent request in which you stated:

"House File No. 402 does not define 'Mobile Home' as pertaining to property taxation. We would appreciate, therefore, your opinion in regard to the following queries.

"1. If a 'Mobile Home' is set up as a permanent home on the owners property and installed on a permanent foundation with possible additions such as porches, additional rooms or a garage on the property does H.F. 402 still apply or is it subject only to a real estate assessment along with the land it is located on?

"2. If the 'Mobile Home' is assessed as real estate on the owners property does the assessment qualify for homestead credit and veteran's exemptions."

Sections 441.17(2), 441.18 and 441.21, as presented by Chapter 291 of the 58th G.A.:

"441.17 Duties of assessor. The assessor shall:

"2. Cause to be assessed, in accordance with section 441.21 of this Act, all the property, personal and real, in his county or city as the case may be, except such as is exempt from taxation, or the assessment of which is otherwise provided for by law."

"441.18 Listing and valuation.

"Each assessor shall, with the assistance of each person assessed, or who may be required by law to list property belonging to another, enter upon the assessment rolls the several items of property required to be entered for assessment. He shall personally affix values to all property assessed by him. Acts 1959 (58 G.A.) ch. 291, §18."

"441.21 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 (60) 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 (1 2/3) 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. Acts 1959 (58 G.A.) ch. 291, §21."

From the statute, it is the duty of the local assessor to determine what property is to be taxed and the specific nature of such property and its evaluation. Therefore, it must be concluded that the local assessor must decide and distinguish realty from personalty. There are many criteria which may be established as basing points to determine whether or not the structure has added the necessary degree of permanency.

It must be remembered that in dealing with mobile homes in the present situation, we are only considering the situation where the mobile home owner is also the land owner. We do not intend to include the mobile home which is located in a mobile home park. This is a distinct and separate area which must be dealt with on a different basis. We are only considering mobile homes and the structures upon which they sit. Generally, it must be stated that a mobile home located in a mobile home park is personalty to its owner and subject to the monthly fee as set out in the statute.

In a recent case, *Jones vs. Beiber,* 251 Iowa 969, 103 N.W. 2d 364, the Court discussed the establishment of a permanent foundation by the removal of the wheels and the structure of cement blocks as a foundation for the mobile home. The Court said, "It may be conceded that as this trailer now stands it may be classed as a building and probably could be so classed even though the wheels had not been removed and the cement blocks placed thereunder." In that situation, electricity had been run into the trailer, and there was also water and a septic tank used by the inhabitants. That case, dealing with re-

strictive covenants, held that the trailer was in violation of the covenant because of its size and that it still was a trailer in that "it still retains its basic characteristic of 'being designed to be hauled'." Therefore, the Supreme Court has not defined a "house trailer".

The distinction between a trailer and a building is a matter of factual determination. The local assessor is the person with the responsibility to establish the individual facts of each situation and decide how each separate piece of property should be treated.

135D.1(1), Code of Iowa, 1958:

"135D.1 Definitions. The following definitions shall apply to this chapter:

"1. 'Mobile home' shall mean any vehicle used or so constructed as to permit its being used as a conveyance upon the public streets or highways and duly licenseable as such, and shall include self-propelled or nonself-propelled vehicles, so designed, constructed, reconstructed or added to by means of an enclosed addition or room in such manner as will permit the occupancy thereof as a dwelling or sleeping place for one or more persons, having no permanent foundation and supported by wheels, jacks or similar supports."

135D.9, Code of Iowa 1958, as amended by the 59th G.A.:

"135D.9 Monthly fees. In addition to the primary and annual license fee provided for in section 135D.5, each licensee is hereby required to pay for each occupied mobile home occupying space within such licensed mobile home park a monthly fee as follows: For trailers up to thirty feet in length, three dollars per month or major fraction thereof; for trailers from thirty to thirty-five feet in length, four dollars per month or major fraction thereof; and for all trailers over thirty-five feet in length, five dollars per month or major fraction thereof which monthly fee shall be paid by the licensee on or before the tenth day of the month, following the month for which such additional fee is due, in the manner herein prescribed. In computing the length herein above described, the total length therein set out shall expressly include the trailer hitch or such other permanent extensions as may be attached to said trailer used or designed for use as a trailer hitch. Provided, however, that the licensee of a mobile home park shall not be required to collect or pay a monthly fee, as herein provided, for any space occupied by a mobile home accompanied by an automobile, if such mobile home and automobile bear license plates issued by any other state other than the state of Iowa, for an accumulated period not to exceed ninety days in any twelve-month period; provided, further, that all occupants of the said mobile home with accompanying automobile are tourists or vacationists. When one or more persons occupying a mobile home bearing a foreign license are employed within the state of Iowa, there shall be no exemption for monthly fees. In the event that an occupied mobile home is not harbored in a mobile home park the owner of said mobile home shall pay the fee provided in this section. Such fee shall be paid semi-annually. The fee due for April through September shall be paid by the tenth day of April. The fee due for October through March shall be paid by the tenth day of October. On the tenth day of May and on the tenth day of November said semiannual fees become delinquent and on the tenth day of each month thereafter that the fee remains unpaid a ten percent penalty shall be added and the county treasurer shall not renew the motor vehicle registration until such delinquent fees and penalties, if any, have been paid. If any mobile home is moved during the six-month period for which a fee has been paid, the county treasurer shall, upon request of the owner, refund his pro rata share of the fee paid. If said fee is not paid, the amount of the unpaid fee shall become a tax and the tax shall be assessed against the land from

which the mobile home was removed. Each mobile home park licensee is hereby required to keep an accurate and complete record of the number of units of mobile homes harbored in his park and to report such information on or before the tenth day of each month to the county assessor and the records of every such licensee shall be open to inspection by the county assessor."

135D.21, Code of Iowa, 1958.

"135D.21 Fee in lieu of property tax. All mobile homes for which a monthly fee is collected under the provisions of this chapter shall not be assessed for property tax but this exemption shall not apply to the property contained in any mobile home."

It must, therefore, be concluded that if the definition of a mobile home is satisfied then the monthly fee is collectible. "Dwelling place" has been defined in *Restatement,* Conflict of Laws, §13b, thusly:

"b. *Meaning of 'dwelling place'.* The word 'dwelling-place' is used as the most colorless word that can be employed; a word which has no legal connotation, and is not confined to any physical sort of living quarters. The dwelling-place may be fixed in a single room or apartment, or in a house or other building; or it may be no more definitely fixed than in a city or county or state. Thus, if a man's dwelling-place has been in a house, but the house has been burned, he may still have a dwelling-place in the city in which the house stood."

321.1, Code of Iowa, 1958, as amended by the 58th G.A.:

"SECTION 1. Section three hundred twnety-one point one (321.1), Code 1958, is hereby amended by adding thereto the following subsection:

" 'House trailer and mobile home' means a trailer or semi-trailer which is designed, constructed and equipped as a dwelling place, living abode or sleeping place, either permanently or temporarily, and is equipped for use as a conveyance on streets and highways."

321.123, Code of Iowa, 1958, as amended by the 59th G.A.: (New subsection added to the present section.)

"House trailers and mobile homes, regardless of whether or not they are used on the highways, five dollars."

321.130, Code of Iowa, 1958, as amended by the 59th G.A.: (The words "or house trailers" have been deleted from the following.)

"Fees in lieu of taxes. The registration fees imposed by this chapter upon private passenger motor vehicles or semi-trailers shall be in lieu of all taxes, general or local, to which motor vehicles or semi-trailers may be subject, and if a motor vehicle or semitrailer shall have been registered at any time under this chapter it shall not thereafter be subject to a personal property tax unless such motor vehicle or semitrailer shall have been in storage continuously as an unregistered motor vehicle or semitrailer during the preceding registration year."

Due to the inherent nature of a mobile home, it cannot lose its identity as a trailer. Under the definition in the statute, we find the words, "equipped for use on the highways" as the determining factor. Since a mobile home which is demobilized can be remobilized within a short period of time, we must, therefore, conclude that it is still "equipped for use on the highway" and thus, a registration fee must be paid. It must be remembered that under the new section of the Iowa Code, a registration fee does not preclude the collection of a monthly fee. "House trailers" was removed from the provision deal-

ing with fees in lieu of taxes under §321.130 of the Code of Iowa (1958). Therefore, a registration fee and a monthly fee are both collectible on a mobile home if, under the statute, the mobile home meets the definition. In this situation, we must remember that the mobile home is treated as personalty and not as realty. If the assessor did treat the property as realty, there would be no collectibility of a monthly fee, but it would be subject to a realty assessment. It must be further mentioned that even with a realty classification, a registration fee is still collectible due to the inherent nature of a mobile home.

"425.2 Qualifying for credit. Any person who desires to avail himself of the benefits provided hereunder shall each year on or before July 1 deliver to the assessor, on blank forms to be furnished by the assessor, a verified statement and designation of homestead as claimed by him, and the assessor shall return said statement and designation of homestead on July 2 of each year to the county auditor with his recommendation for allowance or disallowance indorsed thereon. * * * "

"425.11 Definitions. For the purpose of this chapter and wherever used in this chapter:

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

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

" * * *.

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

"2. The word, 'owner', shall mean the person who holds the fee simple title to the homestead, and in addition shall mean the person occupying as a surviving spouse or the person occupying under a contract of purchase where it is shown that not less than one-tenth of the purchase price named in the contract actually has been paid and which contract has been recorded in the office of the county recorder of the county in which the property is located, or the person occupying the homestead under devise or by operation of the inheritance laws where the whole interest passes or, where the divided interest is shared only by persons related or formally related to each other by blood, marriage or adoption, or the person occupying the homestead under a deed which conveys a divided interest where the divided interest is shared only by persons related or formerly related to each other by blood, marriage or adoption." (As amended by the 58th G.A.).

"3. The words 'assessed valuation' shall mean the taxable valuation of the homestead as fixed by the assessor, or by the board of review, under the provisions of section 441.13, without deducting therefrom the exemptions authorized in section 427.3.

"Where not in conflict with the terms of the definitions above set out, the provisions of chapter 561 shall control."

"427.3 Military service—exemptions. The following exemptions from taxation shall be allowed:

"1. The property, not to exceed three thousand dollars in taxable value, and poll tax of any honorably discharged union soldier, sailor, or marine of the Mexican war or the war of the rebellion.

"2. The property, not to exceed eighteen hundred dollars in taxable

value, and poll tax of any honorably discharged soldier, sailor, marine or nurse of the war with Spain, Tyler Rangers, Colorado volunteers in the war of the rebellion, 1861 to 1865, Indian wars, Chinese relief expedition or the Philippine insurrection.

"3. The property, not to exceed seven hundred fifty dollars in taxable value of any honorably discharged soldier, sailor, marine, or nurse of the first World War.

"4. The property, not to exceed five hundred dollars in taxable value of any honorably separated, retired, furloughed to a reserve, placed on inactive status, or discharged soldier, sailor, marine, or nurse of the second World War, army of occupation in Germany November 12, 1918 to July 11, 1923, American expeditionary forces in Siberia November 12, 1918 to April 30, 1920, second Nicaraguan campaign with the navy or marines in Nicaragua or on combatant ships 1926-1933, second Haitian suppressions of insurrections 1919-1920, navy and marine operations in China 1937-1939 and Yangtze service with navy and marines in Shanghai or in the Yangtze Valley 1926-1927 and 1930-1932 or of the Korean Conflict at any time between June 27, 1950 and July 27, 1953, both dates inclusive.

"For the purposes of this section, the second World War shall be from December 7, 1941, to September 2, 1945, both dates inclusive.

"5. The provisions of this section shall apply to personal property held in partnership but not in excess of the value of the veteran's share actually held."

In 1958 *O.A.G.* 261, it was stated that the monthly fees under the old §135D.9 were not subject to the homestead and military service tax credit. This is also true under the new provision for monthly fees. In effect, the monthly fee covers the mobile home that is considered personalty and the monthly fee is paid in lieu of a personal property tax where the mobile home is being used as a dwelling place. (See Staff to Shafer and Perkins, 11/9/61). The present consideration must be where the property is treated as realty and taxed not according to the monthly fee but the realty assessment.

It is, therefore, concluded that if the mobile home meets the standards for a permanent structure as determined by the local assessor, the property will be treated as realty and if all of the specific requirements of the exemption statute are satisfied, then the claimant will be entitled to the homestead and military service tax credits.

21.17

TAXATION: Mobile homes, nonresident servicemen—§135D.9, 1958 Code. Nonresidents stationed in Iowa are not subjected to property taxation for mobile homes.

October 30, 1961

Mr. Edward F. Samore
Woodbury County Attorney
204 Court House
Sioux City, Iowa

Dear Mr. Samore:

Your opinion request dated September 12, 1961, has come to my attention. It stated as follows:

"Your opinion is respectfully requested concerning the application of the tax levied under the provisions of the Mobile Home Trailer Law.

These provisions require the payment of taxes on Mobile Homes, commencing with $3.00 per month and graduated thereafter on a schedule dependent on the length of the trailer. Our question is, does this law apply to non-resident U.S. military personnel who own such trailers, use them as homes, and which trailers are located within Iowa, but not on a military reservation."

Code §135D.9, as amended by the 59th G.A., states:

"135D.9 Monthly fees. In addition to the primary and annual license fee provided for in section 135D.5, each licensee is hereby required to pay for each occupied mobile home occupying space within such licensed mobile home park a monthly fee as follows: For trailers up to thirty feet in length, three dollars per month or major fraction thereof; for trailers from thirty to thirty-five feet in length, four dollars per month or major fraction thereof; and for all trailers over thirty-five feet in length, five dollars per month or major fraction thereof which monthly fee shall be paid by the licensee on or before the tenth day of the month, following the month for which such additional fee is due, in the manner herein prescribed. In computing the length herein above described, the total length therein set out shall expressly include the trailer hitch or such other permanent extensions as may be attached to said trailer used or designed for use as a trailer hitch. Provided, however, that the licensee of a mobile home park shall not be required to collect or pay a monthly fee, as herein provided, for any space occupied by a mobile home accompanied by an automobile, if such mobile home and automobile bear license plates issued by any other state other than the state of Iowa, for an accumulated period not to exceed ninety days in any twelve-month period; provided, further, that all occupants of the said mobile home with accompanying automobile are tourists or vacationists. When one or more persons occupying a mobile home bearing a foreign license are employed within the state of Iowa, there shall be no exemption for monthly fees. In the event that an occupied mobile home is not harbored in a mobile home park the owner of said mobile home shall pay the fee provided in this section. Such fee shall be paid semi-annually. The fee due for April through September shall be paid by the tenth day of April. The fee due for October through March shall be paid by the tenth day of October. On the tenth day of May and on the tenth day of November said semi-annual fees become delinquent and on the tenth day of each month thereafter that the fee remains unpaid a ten percent penalty shall be added and the county treasurer shall not renew the motor vehicle registration until such delinquent fees and penalties, if any, have been paid. If any mobile home is moved during the six-month period for which a fee has been paid, the county treasurer shall, upon request of the owner, refund his pro rata share of the fee paid. If said fee is not paid, the amount of the unpaid fee shall become a tax and the tax shall be assessed against the land from which the mobile home was removed. Each mobile home park licensee is hereby required to keep an accurate and complete record of the number of units of mobile homes harbored in his park and to report such information on or before the tenth day of each month to the county assessor and the records of every such licensee shall be open to inspection by the county assessor."

It was established in an earlier Attorney General's opinion found at 1960 *O.A.G.* 264, that the monthly fee, as provided in 135D.9, must be classified as a tax as opposed to a license. Thus, we may conclude that the monthly fee would be collected in lieu of property tax.

With the determination that the monthly fee was a tax, the question arose, as in your case, whether it applied to nonresident servicemen. The earlier opinion refers to the Soldiers' & Sailors' Relief Act of 1940, 50 U.S.C.A., §574, which is set forth below:

"(1) For the purposes of taxation in respect of any person, or of his

personal property, income, or gross income, by any State, Territory, possession, or political subdivision of any of the foregoing, or by the District of Columbia, such person shall not be deemed to have lost a residence or domicile in any State, Territory, possession, or political subdivision of any of the foregoing, or in the District of Columbia, solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become resident in or a resident of, any other State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, while, and solely by reason of being, so absent. For the purposes of taxation in respect of the personal property, income, or gross income of any such person by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, of which such person is not a resident or in which he is not domiciled, compensation for military or naval service shall not be deemed income for services performed within, or from sources within, such State, Territory, possession, political subdivision, or District, and personal property shall not be deemed to be located or present in or to have a situs for taxation in such State, Territory, possession, or political subdivision, or district; * * *."

In the case of *Dameron v. Brodhead,* 345 U.S. 322, 97 L. Ed. 1041, 73 S. Ct. 721, 32 A.L.R. 2d 612 (1953), the constitutionality of §574 was upheld. That case involved an Air Force officer, a resident of Louisiana, who was assessed on personal property that he kept in his apartment in Denver, Colorado. The Court stated:

"In fact, though the evils of potential multiple taxation may have given rise to this provision, Congress appears to have chosen the broader technique of the statute carefully, freeing servicemen from both income and property taxes imposed by any state by virtue of their presence there as a result of military orders. It saved the sole right of taxation to the state of original residence whether or not that state exercised the right. Congress, manifestly, thought that compulsory presence in a state should not alter the benefits and burdens of our system of dual federalism during service with the armed forces."

In conclusion, since the monthly fee is a property tax, it cannot be collected from a nonresident serviceman on active duty stationed in Iowa.

21.18

TAXATION: Moneys and credits—§§429.4, 429.5, 429.10, 1958 Code. Bequests to be paid by an executor are not considered as debts deducted from moneys and credits in the hands of the executor on the levy date for moneys and credits.

March 7, 1962

Mr. James L. McDonald
Cherokee County Attorney
Cherokee, Iowa

Dear Mr. McDonald:

This will acknowledge your recent request concerning moneys and credits on property held by an executor. In this request you state as follows:

"I have a question concerning deductions from the moneys and credits assessment under Chapter 429 of the 1958 Code of the State of Iowa. If moneys in excess of the statutory exemption are held by an executor who is administering an estate pending on tax day, are specific bequests of money considered a deduction from the moneys and credits in the hands of the executor on tax day?

"It seems that this would be a common problem, but I can find nothing in the Annotations that covers the specific problem. There is a case that defines a debt as a good faith obligation entered into pursuant to an express and implied contract. Certainly a will is not a contract, yet the monetary bequests are obligations that must be satisfied by the executor if there are sufficient properties with which to satisfy them. I have advised our County Assessor not to consider a bequest as a debt on this philosophy. I am satisfied that Section 429.10 does not apply to this particular situation. I would appreciate your opinion on this specific matter."

Section 429.4, Code of Iowa (1958), provides as follows:

"429.4 Deductions from moneys and credits. In making up the amount of moneys and credits, corporation shares or stocks which any person is required to list, to have listed or assessed, including actual value of building and loan shares, he will be entitled to deduct from the actual value thereof the gross amount of all debts in good faith owing by him, and in addition thereto an amount of five thousand dollars.

"All noninterest-bearing moneys and credits and accounts receivable shall be tax exempt, but the five thousand dollar exemption as set out in this section shall not apply in the event such noninterest-bearing moneys and credits and accounts receivable exempted herein shall exceed five thousand dollars and if less than five thousand dollars then only so much thereof as shall amount to five thousand dollars when added to such noninterest-bearing moneys and credits and accounts receivable."

Section 429.5, Code of Iowa (1958), provides as follows:

"429.5 Good-faith debt required. No acknowledgment of indebtedness not founded on actual consideration, and no such acknowledgment made for the purpose of being so deducted, shall be considered a debt within the intent of section 429.4."

Section 429.10, Code of Iowa (1958), provides as follows:

"429.10 Deductions to fiduciary. In listing moneys and credits as provided in this chapter, any administrator, executor, trustee, or agent shall be entitled to deductions, as prescribed in sections 429.4 to 429.9, inclusive, of debts owing by the legatee, devisee, beneficiary, or principal to the same extent as such fund might be reduced if it were held by such legatee, devisee, beneficiary, or principal who may be entitled to the income on such trust or fiduciary fund."

In determining the debt to be deducted from the total moneys and credits on the levy date, one must consider whether or not the form is an actual debt or merely a distribution to be made by the executor. In the case of *Morril vs. Bentley*, 150 Iowa 677, 130 N.W. 734, a debt was defined as follows: "A debt is generally defined as a sum of money due by certain and express agreement. It is founded upon an express or implied contract to pay a certain amount at a certain time."

In analyzation of a specific bequest of a testamentary instrument, you may determine that it is not an actual debt of the estate based upon an express or implied contract. It is merely the distribution of the decedent's estate by a testamentary power granted by statute.

Another requirement for a debt would be actual consideration as a basis of the contract. In this situation there is no consideration paid by the beneficiary. This is only a gratuity presented by the decedent for the benefit of the beneficiary. The decedent was under no obligation to assume this duty and, therefore, it cannot be considered a debt of the estate.

It must, therefore, be concluded that for a debt to qualify as a deduction from the moneys and credits listed, it must be based upon an actual contract, express or implied for a valuable consideration. In determining the value of the moneys and credits, the executor must report his moneys and credits the same way that the individual beneficiary would report them. Therefore, a specific bequest is not a debt to be deducted.

21.19

TAXATION: Moneys and credits—§428.4, Ch. 429, 1958 Code. Controlling date for taxable status of personal property is January 1, the date of assessment.

December 27, 1961

Mr. Harry Perkins
Polk County Attorney
Room 406, Polk County Court House
Des Moines, Iowa

Dear Mr. Perkins:

We have your request in which you set forth the following:

"We have been requested by Mr. V. L. Browner, City Assessor, to secure an Attorney-General's Opinion on the following question:

"SUBJECT: Shall exemptions from moneys and credits tax, provided under Chapter 232, Acts of Regular Session, 59th General Assembly, apply to the 1961 assessments, for taxes payable in 1962?

"Chapter 232, Acts Regular Session 59th General Assembly, (Senate File 362) which became law July 4, 1961, provides that any property in pension funds, profit-sharing funds, etc., shall not be taxed, except for 1 mill, for Korean War Veteran's bonus fund.

"The question to be determined is the controlling date:

" 'Is it *January 1, 1961,* the regular assessment date, in which event the tax would be 6 mills, or,

" 'The date of levy, which occurs after enactment of the law, in which case the tax would be 1 mill?' "

Chapter 232 is as follows:

"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 thereto following subsection twenty-two (22) thereof a new subsection as follows:

"Property held pursuant to any pension, profit sharing, unemployment compensation, stock bonus or other retirement, deferred benefit or employee welfare plan the income from which is exempt from taxation under divisions two (II) and three (III) of chapter four hundred twenty-two (422) Code 1958, or as the same may hereafter be amended, provided that until the Korean War veteran's bonus bonds are retired and paid the one (1) mill tax imposed by section thirty-five B point eleven (35B.11), Code 1958, shall be levied and collected thereon.' "

Since a problem similar to the one you raise is also applicable to Chapter

234, 59th G.A., amending Chapter 429, Code 1958, we are including it in our discussion. It is as follows:

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

"Section 1. Chapter four hundred twenty-nine (429), Code 1958, is hereby amended by adding thereto a new section as follows:

" 'All interest-bearing savings accounts and other interest-bearing deposits in Iowa banks which have been in the custody of such banks for a period of three months or more immediately preceding the assessment date for assessment of moneys and credits shall be tax exempt, provided that until the Korean War veteran's bonus bonds are retired and paid the one (1) mill tax imposed by section thirty-five B point eleven (35B.11), Code 1958, shall be levied and collected thereon.' "

We are of the opinion that the controlling date for application of the moneys and credits tax is the assessment date, January 1, 1961.

The tax with which we are concerned is a tax applied to a class of personal property designated as moneys and credits. The tax itself is provided for in §429.2 which is as follows:

"429.2 Moneys—credits—annuities—bank notes—stock. Moneys, credits, * * * shall be assessed and, * * * 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."

In order to determine the amount of property against which we apply the tax there must be a listing and assessment. This is provided for by §428.4 which is as follows:

"428.4 Personal property—real estate—buildings. Property shall be taxed each year, and personal property shall be listed and assessed each year in the name of the owner thereof on the first day of January. * * *."

The finality of the date of January 1, for purposes of taxation was established as far back as 1881 in the case of *Wangler Brothers v. Black Hawk County,* 56 Iowa 384, 386, wherein the Court, in construing the exact language of §428.4, quoted above, said:

"Under the statute, as we construe it, personal property must be assessed and taxed in the name of the person owning it on the first day of January of each year. If assessed to any other person than such owner the assessor exceeds his jurisdiction, the assessment is illegal, and so are the taxes levied. In such case the rule in this State is that equity has jurisdiction and injunction is the proper remedy.

"Personal property not in this State on the first of January is not taxable for that year, therefore the second question must be answered in the negative, and the first that the assessment and levy of taxes was illegal."

Further justification for this approach was set out in the case of *In Re Kauffman's Estate,* 104 Iowa 639, 641, wherein the Court said:

" * * * The theory of the law is that all property not exempt therefrom shall be subject to taxation; and in order to accomplish this result, and at the same time avoid the imposition of this burden more than once, a specific date must be fixed when property shall be assessed, because of the many changes of ownership constantly occurring. For this reason the assessments of personal property in this state relate back to the first of January previous, under the provision of section 812 of the Code, 1873, that 'all taxable property shall be taxed each year, and personal property

shall be listed and assessed each year in the name of the owner thereof on the first day of January. * * *.'

Since these new laws have as their purpose the removal of property from a taxable status, their effect is to change the amount of property to be assessed on January 1. Inasmuch as it is established that assessment on any particular January 1 fixes for the entire year the amount of property to which a tax applies, any change in this valuation coming after January 1, would have no effect. Therefore, Chapters 232 and 234, 59th G.A., would only affect the January 1 assessments made in 1962 and subsequent years.

21.20

TAXATION: Moneys and credits—§429.4, 1958 Code. Interest-bearing bank deposits located in states other than Iowa and owned by Iowa domiciliaries are subject to the full moneys and credits tax.

November 20, 1961

Mr. Clay W. Stafford
Superintendent
Iowa Banking Department
500 Central National Building
Des Moines, Iowa

Dear Mr. Stafford:

This will acknowledge receipt of your request for an opinion dated August 16, 1961, on the following question:

"A large New York bank is soliciting deposits in the state of Iowa. In this connection we have been asked for an interpretation of legislation in the last two sessions of the Iowa General Assembly affecting the Monies and Credits Tax. We refer particularly to the second paragraph of Section 429.4 of the 1958 Code which exempts *non interest* bearing monies and Senate File 144 as passed in the 59th General Assembly which exempts 'all interest bearing savings accounts and other interest bearing deposits in Iowa banks.'

"The question arises whether either time or demand deposits belonging to an Iowa citizen or an Iowa Corporation would be subject to the tax if the deposit were in a bank *not* located in the state of Iowa.

"Since no reference is made to the state of Iowa in Section 429.4 it would be our opinion that the exemption on demand deposits is general and not *limited* to the state of Iowa, but that Senate File 144 enacted by the 59th General Assembly limits the exemption to time deposits in *Iowa banks.* A correct interpretation of the matter is probably of interest to many banks, businesses and individuals in Iowa and we will appreciate it very much if you will give us your opinion in this situation."

The applicable statutes are §429.4, Code of Iowa (1958), and Chapter 234, Acts 59th G.A., which read as follows:

"429.4 Deductions from moneys and credits.

"* * *.

"All noninterest-bearing moneys and credits and accounts receivable shall be tax exempt, but the five thousand dollar exemption as set out in this section shall not apply in the event such noninterest-bearing moneys and credits and accounts receivable exempted herein shall exceed five thousand dollars and if less than five thousand dollars then only so much

thereof as shall amount to five thousand dollars when added to such non-interest-bearing moneys and credits and accounts receivable."

Chapter 234, Acts 59th G.A.:

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

"Section 1. Chapter four hundred twenty-nine (429), Code 1958, is hereby amended by adding thereto a new section as follows:

"All interest-bearing savings accounts and other interest-bearing deposits in Iowa banks which have been in the custody of such banks for a period of three months or more immediately preceding the assessment date for assessment of moneys and credits shall be tax exempt, provided that until the Korean War veterans' bonus bonds are retired and paid the one (1) mill tax imposed by section thirty-five B point eleven (35B.11), Code 1958, shall be levied and collected thereon."

First, we note that you refer to "time" and "demand" deposits. For purposes of this opinion we are assuming that these would be equated to interest-bearing and noninterest-bearing deposits respectively. In answer to your question, moneys and credits which include bank deposits are considered intangible personal property in the law. Such property is taxable by the domiciliary state of the owner of the intangible personal property. In this respect, the Iowa Supreme Court, in 208 Iowa 167, said:

"Intangible personalty includes open accounts, credits, (whether or not evidenced by writing), promissory notes, mortgages, bonds, shares of stock, deposits in bank, judgments, etc., where the debt or obligation is the real thing which is sought to be taxed. The general rule is that the situs of intangible personal property for the purposes of taxation is the domicile of the owner. This rule is usually bottomed on the legal maxim 'mobilia sequuntur personam,'—i.e., 'movables follow the person;' or, as sometimes stated, the situs of personal property is the domicile of the owner. * * *."

Prior to the addition of paragraph two of §429.4, it was immaterial as to whether or not moneys and credits earned interest in regard to their taxability. However, when paragraph two was added, noninterest-bearing moneys and credits, including bank deposits, became exempt from taxation. As you have noted, there was no limitation as to the place where such deposits were made and, therefore, we concur with your thoughts that noninterest-bearing bank deposits, wherever located, would be exempt from moneys and credits tax.

The recent amendment by the 59th General Assembly, however, does limit the exemption as to interest-bearing deposits to those which are in Iowa banks.

In conclusion, we are of the opinion that noninterest-bearing bank deposits owned by Iowa domiciliaries are exempt wherever made, but interest-bearing bank deposits owned by Iowa domiciliaries are exempt only when the deposit is made in an Iowa bank. Of course, even the interest-bearing deposits located in Iowa banks are subject to one mill tax until such time as the Korean War veterans' bonus bonds are retired.

21.21

TAXATION: Moneys and credits—§§427.1(20), 429.2, 433.12, 436.1, 436.2, 1962 Code. Shares in telegraph and telephone companies organized under the laws of other states are, nevertheless, exempt from taxation as moneys and credits in the hands of Iowa residents. The term "express company" as used in §427.1(20) is governed by that definition in §436.2.

September 20, 1962

X. T. Prentis, Chairman
A. L. George, Vice Chairman
Fred H. Quiner, Member
Iowa State Tax Commission
L O C A L

Gentlemen:

This will acknowledge your letter of May 7, 1962, wherein you inquire as follows:

"(1) If a resident of the State of Iowa is the owner of capital stock in telegraph or telephone companies which are incorporated and operating entirely outside the State of Iowa, are those shares taxable as moneys and credits or are they exempt as would be those shares of such companies which operate within Iowa?

"(2) Does the exemption granted to express companies apply only to those as are defined in sections 436.1 and 436.2, Code of Iowa (1958)?"

In answer to question number one, it is my opinion that the shares held in a foreign corporation which is engaged in the telegraph and telephone business are not taxable. We hold thus notwithstanding 1930 *O.A.G.*, which states at page 336:

"You are advised that the stock in any foreign corporation, whether public utility or not, in the hands of a resident of this state is subject to tax under the laws of this state in accordance with the provisions of Chapter 332. Code of Iowa 1927; such stock being taxed as moneys and credits."

That opinion is withdrawn insofar as it may bear on telegraph and telephone companies. Chapter 332 is now Chapter 429, Moneys and Credits, and §429.2 of that chapter provides:

"429.2 Moneys—credits—annuities—bank notes—stock. Moneys, credits, and corporation shares or stocks, *except as otherwise provided* * * * shall be assessed and * * * 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." (emphasis ours)

Section 427.1(20), Code of Iowa, provides:

"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."

Section 433.12, Code of Iowa, provides:

"433.12 'Company' defined. The word 'company' as used in this chapter and section 427.1, subsection 20, shall be deemed and construed to mean and include any person, co-partnership, association, corporation, or syndicate that shall own or operate, or be engaged in operating,

any telegraph or telephone line, whether formed or organized under the laws of this state or elsewhere." (Emphasis ours)

We must conclude, then, that the opinion of the Attorney General referred to above is limited in its application regarding "the stock in *any* foreign corporation", since the fact of foreign corporation has no effect on telegraph and telephone companies.

Although these utilities provide no service in the State of Iowa, we can find no ambiguity in the exemption upon which a construction may be made in favor of the taxing body. Furthermore, an examination of the history of the exemption indicates that a broad interpretation must be placed on it. In Supplement Code of Iowa, 1913, §1304, the general exemption section provided no exemption to holders of stock in telegraph and telephone companies; however, §1330-8, by Acts 28th G.A., Ch. 42, §8, provided:

"Sec. 1330-8. Owners of capital stock exempt. The owner of the capital stock in any telegraph and telephone company operating any line or lines *in this state* shall not be assessed for taxation upon said capital stock." (Emphasis ours)

This section was subsequently deleted and the exemption was set forth in the general exemption section substantially as it now appears, and unchanged as regards telegraph and telephone companies. In Code of Iowa, 1924, §6944(20) provided that the shares of capital stock of telegraph and telephone companies were to be exempt from taxation. There was no condition that such companies operate within this state. This would seem to indicate that the deletion of that condition was deliberate. Within §427.1(20), transmission line companies are also exempted and their definition is determined by §437.1, which provides as follows:

"437.1 'Company' defined. The word 'company' as used in this chapter and section 427.1, subsection 20, shall be deemed and considered to mean and include any person, copartnership, association, corporation, or syndicate (except co-operative corporations or associations which are not organized or operated for profit) that shall own or operate transmission line or lines for the conducting of electric energy *located within the state* and wholly or partly outside cities and towns, whether formed or organized under the laws of this state or elsewhere." (Emphasis ours)

Sections 437.1 and 433.12, which define "company" as applied to transmission lines and telegraph and telephone companies respectively, seem to be on the same grounds regarding exemptions with the qualification, as pertains to transmission lines, that they must be "located within the state". Reading §427.1(20) as a whole, then, eliminates that qualification as regards telegraph and telephone companies.

In answer to your second question, it is my opinion that "express companies" as referred to by §427.1(20) must be such as are defined by §436.2, Code of Iowa, which provides:

"436.2 'Express company' defined. Every company engaged in conveying to, from, through, in, or across this state, or any part thereof, money, packages, gold, silver, plate, merchandise, or any other article, by express, under a contract, express or implied, with any railroad company, or the managers, lessees, agents, or receivers thereof, provided such company is not a railroad company, a freight-line company, nor an equipment company, shall be deemed and held to be an express company, within the meaning of this chapter."

Although that definition purports to apply only to Chapter 436, the doctrine of *pari materia* applies, since the subject matter, taxation, was the object of

the legislative intention in both statutes, there is no inconsistency between them, and whatever other definition could have been intended by the legislature is a matter of pure speculation.

Therefore, my opinion is that shares in telegraph and telephone companies organized under the laws of other states and having no operations within this state are, nevertheless, exempt from taxation as moneys and credits in the hands of Iowa residents.

It is also my opinion that the term "express company" as used in §427.1(20) is governed by that definition in §436.2.

21.22

TAXATION: Moneys and credits—§429.4, 1958 Code. $5,000.00 statutory exemption is not restricted to moneys and credits assessed at one mill (interest-bearing deposits and savings accounts in Iowa banks); uniformity requires $5,000.00 first be deducted from moneys and credits assessed at six mills.

August 16, 1961

Mr. Peter J. Peters
Pottawattamie County Attorney
Court House
Council Bluffs, Iowa

Dear Mr. Peters:

This will acknowledge your letter of May 19, 1961, wherein you propound the following:

"Recently the Iowa Legislature passed a bill reducing the levy from six mills to one mill on interest bearing savings accounts. As I understand the law, however, the legislature failed to specify whether the $5,000.00 statutory exemption should be deducted from the monies and credits assessed at six mills or the monies and credits assessed at one mill. Would you review this new law and advise me so that I can in turn advise my County and City Assessor."

The bill you refer to is S.F. 144, Acts 59th G.A., which is as follows:

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

"Section 1. Chapter four hundred twenty-nine (429), Code 1958, is hereby amended by adding thereto a new section as follows:

"All interest-bearing savings accounts and other interest-bearing deposits in Iowa banks which have been in the custody of such banks for a period of three months or more immediately preceding the assessment date for assessment of moneys and credits shall be tax exempt, provided that until the Korean War veterans' bonus bonds are retired and paid the one (1) mill tax imposed by section thirty-five B point eleven (35B.11), Code 1958, shall be levied and collected thereon."

Since you raise a question that is also applicable to another recently passed bill, S.F. 362, Acts 59th G.A., we are herein setting it forth and including it in discussion. It reads as follows:

"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 thereto following subsection twenty-two (22) thereof a new subsection as follows:

"Property held pursuant to any pension, profit sharing, unemployment compensation, stock bonus or other retirement, deferred benefit or employee welfare plan the income from which is exempt from taxation under divisions two (II) and three (III) of chapter four hundred twenty-two (422) Code 1958, or as the same may hereafter be amended, provided that until the Korean War veteran's bonus bonds are retired and paid the one (1) mill tax imposed by section thirty-five B point eleven (35B.11), Code 1958, shall be levied and collected thereon."

This bill refers to property held by the enumerated plans and exempts altogether from tax, including the money and credits tax of six mills, that property the income of which is exempt under divisions II and III of Chapter 422, Code 1958. Since one of these plans could own both exempt and nonexempt property, there exists the same problem of assessment.

We are of the opinion that the $5,000.00 statutory exemption should be applied first to the moneys and credits assessed at six mills, with any balance being applied to those funds assessed at one mill.

A synopsis of the moneys and credits tax law would be helpful at this point. Property subject thereto is first required to be listed. Listing of property in general is covered by Chapter 428. Property so listed is examined for exemption as set out in §427.1 to see if it has been removed from the taxable class of property. S.F. 362 enlarges this class and partially exempts certain property. The remaining property subject to the moneys and credits tax is granted by §429.4 an exemption and deduction to an amount not more than $5,000.00. The resultant list of moneys and credits is then taxed at five mills on the dollar by §429.2. To this five-mill assessment was added a one-mill assessment by §35B.11, with funds earmarked for the Korean War Veterans' Bonus Bonds. This latter section created in effect an additional moneys and credits tax which gave rise to no problems since it utilized the same tax base as the moneys and credits tax. However, by its partial removal by S.F.'s 144 and 362, Acts 59th G.A., two classes of taxable property are created with only the one exemption of $5,000.00, as allowed by §429.4, remaining. By the language of S.F. 144, the interest-bearing deposits and savings accounts in Iowa banks are exempt, subject to the event of retirement of the Korean War Veterans' Bonus Bonds. By the language of S.F. 362, property the income of which is exempt and held by the plans enumerated therein is also exempt, subject to the event of retirement of the Korean War Veteran's Bonus Bonds. Once these bonds have been retired, the deposits, savings accounts and previously described property will not be subject to the moneys and credits tax. It will then become expedient for taxpayers to shift their assets to such accounts as a tax avoidance measure. It is our opinion that the fact it will also be possible for taxpayers to take advantage of a lower tax on such funds and property now, instead of waiting until the bonds are retired, does not justify restriction of the $5,000.00 exemption to moneys and credits assessed at one mill. Any other approach without express direction from the legislature would be unwarranted.

The net effect of S.F.'s 144 and 362 is to require, for the sake of uniformity, that the $5,000.00 exemption first be applied to moneys and credits assessed at six mills, and any balance then applied to moneys and credits assessed at one mill.

21.23

TAXATION: Personal property—§404.15, 1958 Code, Ch. 217, 59th G.A., §441.17(2)(5), Ch. 291, §17, 58th G.A. Personal property located within a municipal corporation, to be exempt from taxation except for municipal street purposes, must be used in connection with agricultural or horticultural purposes.

May 1, 1962

Mr. R. T. Smith
O'Brien County Attorney
Primghar, Iowa

Dear Mr. Smith:

This will acknowledge your letter of April 2, 1962, wherein you submitted the following inquiry of your county auditor:

> Chapter 217, Laws of the Fifty-ninth General Assembly concerns tax exemption of certain personalty and is an act relating to the tax exemptions of personal property used for agricultural purposes. Is the land of more than ten acres located within the limits of a municipal corporation and used for agricultural purposes and personal property used in connection with said land for said purpose exempt from taxation for a city or town purpose except for municipal street purposes?

Section 6210 of the 1935 Code, which is substantially the same as §404.15 of the 1958 Code prior to the following amendment, was construed *not* to exempt any personal property from taxation. 1938 *O.A.G.* 305.

Chapter 217, Acts 59th G.A., amends §404.15, Code of Iowa, 1958, which now reads as follows:

> "404.15 Agricultural lands
>
> "No land included within the limits of any municipal corporation which is not laid off into lots of ten acres or less, and which is also in good faith occupied and used for agricultural or horticultural purposes ... nor the personal property used in connection therewith shall be taxable for any city or town purpose, except that said lands and all personal property necessary to the use and cultivation of said agricultural or horticultural lands, shall be liable to taxation, not to exceed one and one-fourth mills in any year, for municipal street purposes. Acts 1951 (54th G.A.) ch. 159, §15, as amended Acts 1961 (59th G.A.) ch. 217, §1."

The use of the word "therewith" makes the statute subject to two interpretations. It could mean personal property connected with land not laid off into lots of ten acres or less, or it could mean only personal property connected with using the land for agricultural or horticultural purposes. This is an exemption statute and should be strictly construed. *Theta Xi Bldg. Ass'n. of Iowa City v. Bd. of Rev.* (1933), 251 N.W. 76, 217 Iowa 1181. *Board of Directors of Fort Dodge, Independent School Dist. vs. Board of Supervisors of Webster County,* 228 Iowa 544, 293 N.W. 38.

Lamb vs. Kroeger, 1943, 233 Iowa 730, 8 N.W. 2d 405, held that any doubt as to whether a statute exempts property from taxation must be resolved against exemption and in favor of taxation. Therefore, the narrower interpretation should be adopted and only personal property used in connection with agricultural or horticultural purposes should be exempt from taxation under this section.

The question of the taxability of the personal property under consideration necessarily involves a determination of whether that item comes within the category of "personal property used in connection with the agricultural or horticultural purpose". It is clear that the facts of each case wherein an exemption is to be determined must be scrutinized *carefully* by the assessor.

Section 441.17(2)(5) reads as follows:

> "441.17 Duties of assessor

The assessor shall:

"* * *.

"2. Cause to be assessed, in accordance with section 441.21 of this Act, all the property, personal and real, in his county or city as the case may be, except such as is exempt from taxation, or the assessment of which is otherwise provided for by law."

"* * *.

"5. Have power to apply to the district court of the county for an order to examine witnesses and requiring the production of books and records of any person, firm association or corporation within the county, whenever he has reason to believe that such person, firm association or corporation has not listed his or its property as provided by law. The proceedings for the examination of witnesses and examination of the books and records of any such taxpayer, to determine the existence of taxable property, shall be instituted and conducted in the manner provided for the discovery of property under the provisions of chapter six hundred thirty (630) of the Code. The court shall make an appropriate finding as to the existence of taxable property not listed. All taxable property discovered thereby shall thereupon be assessed by the assessor in the manner provided by law . . ."

You will note that §441.17(2) makes it his duty to determine whether the item is exempt or not and §441.17(5) provides the assessor with the machinery to obtain the information to be used in making the determination. See Opinion dated November 9, 1961, and 1925 *O.A.G.* 496. The assessor can find some guides for making his determination in 1928 *O.A.G.* 427 and 1916 *O.A.G.* 58.

We, therefore, are of the opinion that land of more than ten acres, located within the limits of a municipal corporation and used for agricultural purposes, and personal property used in connection with said land and for said purpose, is exempt from taxation for any city or town purpose, but is subject to be taxed for municipal street purposes.

21.24

TAXATION: Personal property—§428.1, 1958 Code. An inhabitant of Iowa, who has land contracts in another state, is liable for payment of the Iowa moneys and credits tax on the contracts.

March 21, 1961

Mr. Robert A. Maddocks
Wright County Attorney
Clarion, Iowa

Dear Mr. Maddocks:

Your request for an Attorney General's opinion of February 9, 1961, has been referred to me for answer. You state your question as follows:

"Wright County has a minister of the gospel residing in Eagle Grove, Iowa who formerly lived in Moline, Illinois. While living in Illinois, he entered into three contracts for the sale of farm property in the total amount of $51,300.00 which is now the unpaid balance as of January 1, 1961.

"The minister claims that he came here merely for the purpose of missionary effort to help small churches and reopen closed ones and not to become permanently established and that as soon as these churches are opened he is to return to Illinois.

"1. Does a person engaged in a missionary effort in Iowa come under the terms of monies and credits law of taxation for Iowans?

"2. In the event that No. 1 is answered affirmatively, then will the contracts of purchase made and entered into in the State of Illinois be charged under Chapter 429 under the taxation of monies and credits by the aforementioned person?

"3. Is an organ placed in a church, that was purchased by the minister, property on which personal property tax will be charged or assessed by the Assessor?"

The applicable language of the Code is from §428.1 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, * * *."

First, it is fundamental that the situs of intangible personal property is where the owner resides.

Our statute places the burden of listing for taxation on the owner where he is an "inhabitant". The problem here then, is whether or not the minister in the instant case is an inhabitant of Iowa.

In *Harris v. Harris,* 205 Iowa 108, our Supreme Court discusses the word "inhabitant" without defining it. However, on page 112 of that report, the Court cites with approval the case of *State ex rel. Jeffries v. Kilroy,* 86 Ind. 118. The Indiana court there said, "The word 'inhabitant' means 'one who dwells or resides permanently in a place, or who has a fixed residence, as distinguished from an occasional lodger or visitor'."

We are of the opinion that the taxpayer in your problem has had a "fixed residence" and therefore comes within our statute. Therefore, your questions one and two are answered in the affirmative.

In regard to question three, if the organ remains the property of the taxpayer, it is assessable to him. If the organ is owned by the church, it would be exempt by virtue of §427.1(10), Code of Iowa (1958).

21.25

TAXATION: Personal property tax, merchandise inventory—§§428.4, 428.9, 428.16, 428.17, 1958 Code. (1) One engaged in the business of acquiring feeder cattle or pigs for immediate sale is a merchant within the provisions of §428.16, and (2) where such merchant has no inventory of livestock on the statutory assessment date, assessment on his average inventory may not properly be made.

May 4, 1961

Mr. John J. O'Connor, Chairman
Iowa State Tax Commission
State Office Building
Des Moines, Iowa

Dear Mr. O'Connor:

This will acknowledge your recent letter wherein you wish the opinion of this department on the following question:

"There are business establishments in the state of Iowa that handle feeder pigs and others that handle feeder cattle. Those handling feeder

pigs either buy the pigs outright and sell to farmers; or they are shipped on consignment and sold for a commission; or the farmer gives an order and the proprietor or employees of such a business go and buy the required pigs. Generally the pigs are about eight weeks of age, or so, at the time they are handled. As a rule, such a business does not actually have any inventory of livestock on hand on January 1, the assessment date, because of that date being a legal holiday, and in many cases though such businesses do have a livestock inventory right up to December 30 or 31, and right away again on January 2 or 3. They aren't entirely out of business on January 1 by any means. Generally the pigs do not remain in the hands of such dealer more than two or three days time, but in the course of a year the dealer will have handled thousands of feeder pigs of a substantial value. Such businesses handling feeder cattle buy and sell in a manner similar to those handling pigs. Generally they deal in young cattle or calves, and occasionally may handle older cattle. Because livestock is involved and as there is no business of that kind normally carried on on January 1, a legal holiday, there is no livestock inventory on hand on the statutory assessment date, January 1.

"Taking into consideration two prior opinions found in the 1916 Report of Attorney General at page 188, and in the 1922 Report at page 138, respectively, and also the provisions of Sections 428.16, 428.17, 427.1-13, and 427.13-2 & 3, the question is whether such businesses in Iowa, above mentioned, are subject to an assessment on livestock inventories, and if so, whether such assessments are to be made in accordance with the provisions of Section 428.17, 1958 Code of Iowa."

As pointed out in your letter, this office has previously held that one purchasing livestock for the purpose of immediate sale is a merchant within the provisions of §428.16, 1958 Code of Iowa, and should be assessed on his average inventory pursuant to §428.17. The distinction between "stock feeders" and "stock merchants" is ably pointed out in *Jewell v. Board of Trustees,* 113 *Iowa* 47, where the Court stated:

"There are, it is true, persons who trade and traffic in livestock the same as in ordinary merchandise, but they are not feeders. They feed simply to preserve life and flesh, not to add to the avoirdupois. They purchase with a view to immediate sale. The ordinary stock raiser buys, not for immediate sale, but to derive a profit from the produce that he feeds his stock. There is a manifest difference between a stock merchant or a buyer, or a stock feeder, and this distinction, we think, is preserved in the statutes. Section 1308 (427.13, Code 1958), provides that sheep and swine over six months are subject to taxation in the manner prescribed. If held by one with a view to traffic therein, as in merchandise, then they are to be taxed as provided in section 1318, (428.17, Code 1958) * * *." (Brackets added)

We hold, therefore, that persons engaged in the business of selling feeder cattle and pigs are "merchants" as that term is defined in §428.16, and should be assessed on the basis of their average inventory for the year last preceding pursuant to §428.17.

This leaves the question of whether the statutory provisions relating to the assessment of personal property require that a merchant own or have in his possession or control merchandise inventory on January 1, the assessment date, in order to sustain an assessment on such merchandise inventory.

The following statutory provisions of the 1958 Code of Iowa are relevant:

"428.4 Personal property—real estate—buildings. Property shall be taxed each year, and personal property shall be listed and assessed each year in the name of the owner thereof on the first day of January.

* * *."

"428.9 'Owner' defined. Commission merchants, and all persons, other than warehousemen as defined in section 542.58 trading and dealing on commission, and assignees authorized to sell, and persons having in their possession property belonging to another subject to taxation in the assessment district where said property is found, when the owner of the goods does not reside in the county, are, for the purpose of taxation, to be deemed the owners of the property in their possession."

"428.17 Stocks of merchandise. In assessing such stocks of merchandise, the assessor shall require the production of the last inventory and enter the date thereof in the assessment roll. If, in the judgment of the assessor, the inventory is not correct, or if it was taken at such time as to render it unreliable as to the amount or value of such merchandise, he shall assess the same by personal examination. The assessment shall be made at the same ratio of the average value of the stock during the year next preceding the time of assessment, as is provided by section 441.-21, and if the merchant has not been engaged in business for one year, then at a like ratio of the average value during such time as he shall have been so engaged, and if commencing on January 1, then at the same ratio of the value at that time."

Section 428.4, *supra,* provides that the personal property is to be assessed in the name of the owner of such personalty on the first of January. "Owner", of course, means such persons having a proprietory interest in the property as well as those persons specified by §428.9, *supra,* including the commission merchant. We must, therefore, conclude that the legislature in using the word "owner" in 428.4 included the merchant within that term, and under the plain language of that section, the assessment is to be made against the owner of the property on the assessment date. This is true even though the method of arriving at such assessment is to use the average inventory for the year prior to the assessment date.

The fact that an inventory existed during the year preceding the assessment is insufficient to base an assessment where such merchandise inventory does not exist on the statutory assessment date, *Cownie v. Local Board of Review,* 235 Iowa 318. Nor does the fact that property was acquired subsequent to the assessment date justify the making of the assessment under the statute.

Section 428.4, *supra,* requires the existence of the property in the hands of the "owner" on January 1 before an assessment may be made, regardless of the condition of the property before or after such date. See 1948 *O.A.G.* 200.

Our conclusion, therefore, is (1) that one engaged in the business of acquiring feeder cattle or pigs for immediate sale is a merchant within the provisions of §428.16, Code of Iowa (1958), and (2) unless he has an inventory of such stock on January 1, the statutory assessment day, an assessment cannot properly be made against him.

21.26

TAXATION: Personal property—§§427.13(13), 428.1, 428.4, 428.8, 428.9, 1958 Code. Situs of pleasure boats for purposes of assessment.

March 5, 1962

Mr. Ballard B. Tipton
Director of Property Tax
Iowa State Tax Commission
LOCAL

Dear Mr. Tipton:

Reference is made to your request of October 3, 1961, for an opinion on the following:

"The question posed is: can the provisions of subsection 13 of 1958 Code Section 427.13 be interpreted to mean that if a boat or vessel is kept in any other taxing district than that of the owner's residence, same may be taxed and assessed in the district where the owner lives; or where is the proper place to assess a boat or vessel subject to taxation in this state that is not found in the same taxing district where the owner resides?

" 'B' is the owner of a pleasure boat which he operates on the Mississippi River. His home is in and he is a resident of Scott County, Iowa, outside the city of Davenport. However, his pleasure craft when not in operation is kept at a boat club that is located within the city of Davenport, Iowa. It is kept at such boat club the year around. The city of Davenport has a city assessor and Scott County has a county assessor. In which assessor's jurisdiction is the craft to be assessed and taxed?

" 'C' is the owner of a pleasure boat and is a resident of the state of Iowa. He each year takes his craft to a lake in the state of Minnesota where he keeps and operates it for about four months of each year, then the remaining portion of the year has the boat at his place of residence in the state of Iowa where it is found on January 1. Is the boat subject to being assessed to 'C' as taxable property? Supposing that 'C' keeps the boat at the Minnesota lake the entire year and it is there on January 1. Is the boat to be assessed to him in his county of residence or in the Iowa county where it is found on January 1, the assessment date?

" 'D', a resident of the state of Minnesota, has a pleasure boat that he operates on Lake Okoboji in the state of Iowa and keeps the boat at such Iowa location the year around. Is that boat subject to being assessed as taxable property in Iowa or is it exempt from Iowa taxation because 'D' is a nonresident of Iowa?"

The following sections of the Code of Iowa (1958) are applicable to the problem:

"427.13 What taxable. All other property, real or personal is subject to taxation in the manner prescribed, and this section is also intended to embrace:

"* * *.

"13. Boats and vessels of every description, wherever registered or licensed, and whether navigating the waters of the state or not, if owned either wholly or in part by inhabitants of this state, to the amount owned in this state."

"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 * * *."

"428.4 Personal property—real estate—buildings. Property shall be taxed each year, and personal property shall be listed and assessed each year in the name of the owner thereof on the first day of January. * * *."

"428.8 Place of listing. * * * if personal property * * * has been kept in another assessment district during the greater part of the year preceding the first of January, or of the portion of that period during which it was owned by the person subject to taxation therefor, it shall be taxed where it has been so kept."

"428.9 'Owner' defined. Commission merchants, and all persons, other than warehousemen as defined in section 542.58 trading and deal-

ing on commission, and assignees authorized to sell, and persons having in their possession property belonging to another subject to taxation in the assessment district where said property is found, when the owner of the goods does not reside in the county, are, for the purpose of taxation, to be deemed the owners of the property in their possession."

It is a well-settled rule that the owner of taxable personal property as of January 1, the assessment date, is the party against whom the tax on such personal property is to be levied and collected. Inasmuch as pleasure boats are personalty, the primary consideration for purposes of assessment is the location on January 1. Sections 428.8 and 428.9 allow for the assessment of personalty in a district other than that where the owner lives or resides, provided the requirements of time have been met so as to establish a permanency of location outside the owner's district. Section 428.8 requires that if the property has been kept in another assessment district during the greater part of the year preceding January 1, it shall be taxed there. For property owned the entire year, the greater part of the year would have reference to a period of time longer than six months. This would establish that district as the proper district for assessment if it is present in the district on January 1. Otherwise, a permanency of location for the property outside the owner's assessment district has not been established. In this case the property would be assessed where the owner resides.

Applying the above to the situations set forth, it is apparent that §427.13-(13) is governed by §§428.8 and 428.9 so as to permit a boat to be assessed in an assessment district other than that of the owner.

In the case of a Scott County resident locating his boat in the City of Davenport, a permanent location for the boat has been established outside the owner's assessment district and the boat should be assessed by the city assessor to the owner thereof.

Where a resident of Iowa uses his boat outside his assessment district for four months of each year and returns it to his own district by January 1, it would be taxable property and is assessed in the district which is the owner's place of residence. In the event that the boat is kept year-round in Minnesota so as to be there on January 1, it then has a permanent location outside the state and is beyond its taxing jurisdiction. No assessment would be made to the owner in this case. In the event the boat is returned to Iowa, but to another assessment district, it would be assessed in that district to the owner thereof, provided that possession of the boat is not in another party. If this is the case, §428.9 requires assessment of the boat to be made to that party.

Where a nonresident of the State brings his boat into the State and locates it in Iowa on a permanent basis, he is subjecting it to the taxing powers of the State. In the case of a nonresident locating his boat on Lake Okoboji, a situs for the boat has been established for tax purposes and assessment would be made in Dickinson County to the owner thereof. *Fennell v. Pauley* (1900) 112 Iowa 94. Section 427.13(13) does not limit the State's power to tax in this instance as it only refers to that property which is definitely to be taxed. There is no explicit language in the Code that would affirmatively provide for an exemption to the boat of a nonresident in this situation, and this is required inasmuch as exemptions are to be strictly construed against the taxpayer.

21.27

TAXATION: Property exempt and taxable—§§427.1(9), 427.1(24), 427.-1(25), 1962 Code. It is within the discretion of the assessor, local board of review and the auditor, depending upon the time application is made, whether application for exemption will be approved.

October 19, 1962

Mr. Samuel O. Erhardt
Wapello County Attorney
Ottumwa, Iowa

Dear Mr. Erhardt:

This is to acknowledge receipt of your letter of August 11, 1962, in which you posed the following question:

"Whether or not a building built by the Animal Relief League as a shelter house for stray animals comes under the suspension of taxes under Section 427.1, subsection 9, Code of Iowa 1962."

The following provisions of the Iowa Code (1962) are particularly important, and as far as relevant, are herein set forth. Section 427.1(9) provides:

"427.1(9) Property of religious, literary and charitable societies. All grounds and buildings used by literary, scientific, charitable, benevolent, agricultural, and religious institutions and societies solely for their appropriate objects, not exceeding three hundred twenty acres in extent and not leased or otherwise used with a view to pecuniary profit. All deeds or leases by which such property is held shall be filed for record before the property herein described shall be omitted from the assessment."

Section 427.1(24) provides:

"427.1(24) Statement of objects and uses filed. Every society or organization claiming an exemption under the provisions of either subsection 6 or subsection 9 of this section *shall file with the assessor not later than February 1* of the year for which such exemption is requested, a statement upon forms to be prescribed by State Tax Commission, *describing the nature of the property upon which such exemption is claimed* and setting out in detail any uses and income from such property derived from such rentals, leases or other uses of such property not solely for the appropriate object of such society or organization. The assessor in arriving at the valuation of any property of such society or organization shall take into consideration any uses of the property *not for the appropriate objects of the organization* and shall assess in the same manner as other property, all or any portion of the property involved which is leased, let or rented and is used regularly for commercial purposes for a profit to any party or individual. In *any case where a portion of the property is used regularly for commercial purposes no exemption shall be allowed upon property* so used and the exemption granted shall be in the proportion of the value of the property used solely for the appropriate objects of the organization, to the entire value of the property. No exemption shall be granted upon any property upon or in which persistent violations of the laws of the state of Iowa are permitted. Every claimant of an exemption shall, under oath, declare that no such violations will be knowingly permitted or have been permitted on or after January 1 of the year for which a tax exemption is requested. Claims for such exemption shall be verified under oath by the president or other responsible heads of the organization." (emphasis supplied)

Section 427.1(25) provides:

"427.1(25) Delayed claims. In any case where no such claim for exemption has been made to the assessor prior to the time his books are completed, such claims may be filed with the local board of review or with the county auditor not later than July 1 of the year for which such

exemption from taxation is claimed, and a proper assessment shall be made either by the board of review or by the county auditor, if said property is all or in part subject to taxation."

Application for exemption shall be filed with the assessor not later than February 1 of the year for which such exemption is requested. In the event no such claim for exemption has been made to the assessor prior to the time his books are completed, then said application must be made to the local board of review or the county auditor not later than July 1 of the year for which such exemption from taxation is claimed. This is in accord with 1940 *O.A.G.* 604 which dealt with property acquired after July 1 and is distinguishable from the case of *Iowa Wesleyan College vs. Knight,* 207 Iowa 1240, where subsections 427.1(24) and 427.1(25) had not been enacted.

As set out in subsection 9 and subsection 24, the property cannot be leased or otherwise used with a view to pecuniary profit. Thus the test for the exemption is the use made of the property by the institutions within its provisions. *Lutheran Mutual Aid Society vs. Murphy,* 223 Iowa 1151, 274, N.W. 907. This use can be shown in the statements submitted to the assessor as set out in subsection 24. The burden is strictly upon the taxpayer, in that tax exemption statutes are strictly construed and those claiming exemptions must show themselves entitled thereto. *Theta Xi Building Association of Iowa City vs. Board of Review of Iowa City,* 217 Iowa 1181, 251 N.W. 76.

The final determination rests within the discretion of the assessor, the local board of review or the auditor, depending upon the time application for the exemption is made.

21.28

TAXATION: Real estate contract—§445.29 as amended, Ch. 306, §2, Acts 58th G.A. The delinquent personal taxes of the vendor under an executory contract for the sale of real estate cannot become a lien against the real estate because the vendor is not the owner thereof, but only the owner of personalty in the form of his security interest.

June 28, 1962

Mr. Clare H. Williamson
Adair County Attorney
Post Office Box 25
Greenfield, Iowa

Dear Mr. Williamson:

This will acknowledge your letter of April 3, 1962, wherein you make the following inquiry:

"On February 13, 1959, 'A' entered into a written land contract of sale with 'B'. The contract was placed of record at said time and the same provided for a down payment and the balance of the purchase price in monthly installments. The abstract was continued at the time and good merchantable title was in 'A'. The contract provided that 'B' pay the taxes on the property commencing with the taxes for 1959 payable in 1960. 'A' had no delinquent personal property tax at the time and paid his taxes for 1959 payable in 1960 in full. 'B' made the payments of the monthly installments as provided for in said contract and has paid down to the last monthly installment of $40.00 due under the contract. 'A' has since become insolvent and has no assets at this time and has failed to pay personal property tax for 1960 payable in 1961 and the same is now due in the sum of $566.78 plus interest and penalties.

"Are said personal taxes of 'A' a lien upon said real estate so that they must be paid before 'B' may receive a good title from 'A'?"

Section 445.29 as amended by Ch. 306, §2, Acts 58th G.A. provides as follows:

"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 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." (Emphasis ours)

That section imposes the lien of personal taxes upon "all real estate *owned* by such person" (emphasis ours). Your inquiry, then, becomes a question of who owns this real estate subject to a valid contract between a vendor and a purchaser.

In *Cumming vs. First National Bank,* 199 Iowa 667, 202 N.W. 556, the Court considered a quiet title action between a plaintiff-purchaser and the defendant-assignee of his vendor under a real estate contract such as the one you describe in your inquiry. In that case the Court held:

". . . On this date, the agreement was not a mere option, but constituted a valid contract, and subject to specific performance. Here a landowner enters into a contract of sale, whereby the purchaser agrees to buy and the owner agrees to sell. The vendor retains the legal title until the purchase money is paid. No other condition is attached. Under such circumstances, the ownership of the real estate, as such, passes to the purchaser; and from that time forth the vendor holds legal title as security for his debt, and as trustee for the purchaser. *In Re Estate of Miller,* 142 Iowa 563. This is the recognized rule in Iowa. The title in equity passed to the vendee. It is not dependent upon a conveyance nor upon the payment of the purchase money; nor is possession or delivery of possession a necessary incident. *O'Brien v. Paulsen,* 192 Iowa 1351 . . .".

It appears, then, that ownership under such a contract passes to the purchaser, and only his personal taxes could become a lien on this property. To this effect see 1938 *O.A.G.* 595 wherein a similar state of facts is presented with the exception that inquiry was made as to the imposition of the lien for personal property taxes due from the vendee. In that opinion we said: ". . . It is apparent that upon the execution of the contract of purchase the vendor ceases to be the owner of the property and the vendee becomes the owner of said property in contemplation of law and within the meaning of Section 7203, supra." (§7203 is now §445.29)

Since ownership of the real estate under such a contract determines whether

it is subject to the lien of personal property taxes against the vendor, we are of the opinion that it is not so subject.

However, under the doctrine of equitable conversion, that real estate has become personal property to the vendor who is delinquent in the case you present, and as such, is subject to the lien of personal taxes "upon all the taxable personal property and rights to property belonging to the taxpayer" as set forth in §445.29. In the case of *In Re Estate of Baker,* 247 Iowa 1380, 78 N.W. 2d 863, the Court states:

> "(5) V. It is the holding of text authorities and our cases an executory contract for the sale of land works a conversion. The vendee is, in the contemplation of equity, actually seized of the estate. 19 Am. Jur., Equitable Conversion, section 11, page 11. We so held in Inghram v. Chandler, 179 Iowa 304, 306, 308, 161 N.W. 434, 435, L.R.A. 1917D 713: 'The doctrine of equitable conversion is altogether a doctrine of equity, and depends wholly upon the rules of equity. Its real purpose is to give effect to the manifest intent of a testator or vendor, and to treat that as done which by will the testator has directed to be done, or that which, by previous contract with another, both have mutually bound themselves to do. * * * Taking the typical case of equitable conversion by contract, as above stated, we are fully committed to the doctrine that such a contract works an equitable conversion; that, in case of the death of the vendor, his interest in the contract would pass as personalty; that, in case of the death of the vendee, his interest would pass as realty; that a judgment against the vendee would become a lien upon the property as real estate; that a judgment against the vendor would not become a lien upon the property as real estate. See In re Estate of Miller, 142 Iowa 563 (119 N.W. 977), and authorities therein cited. We have held also that such a contract becomes a credit in the hands of the vendor and is subject to taxation as such.' See also Holzhauser v. Iowa State Tax Comm., 245 Iowa 525, 530, 62 N.W. 2d 229."

Therefore, it is our opinion that the delinquent personal taxes of the vendor under an executory contract for the sale of real estate cannot become a lien against the real estate because the vendor is not the owner thereof, but only the owner of personalty in the form of his security interest. This contract does give the vendor a credit, however, which is subject to the lien of personal taxes.

21.29

TAXATION: Reduction of assessments—Reduction of the taxable value of assessable property as an inducement for industrial development cannot legally be made by assessors or other agencies.

May 17, 1961

Mr. G. W. Templeton
Hancock County Attorney
Garner, Iowa

Dear Mr. Templeton:

This is to acknowledge receipt of your letter of May 10, 1961, in which you state:

> "An oil station property in the town of Britt, Iowa, which is no longer used for that purpose, was acquired by the Britt Tech Corporation. This corporation was formed by persons interested in the industrial development and growth of the town of Britt. The corporation has leased this property to a concern from an adjacent county at a rental figure less

than its reasonable value for the purpose of encouraging the concern to locate in the town of Britt.

"The Hancock County Board of Review has been requested to lower the assessed value of this property below the average of similar properties as an inducement for industrial development. It is my opinion and also that of the Assessor, that any reduction on a property of this kind must be based on the requirements set forth in Section 21 and Section 37 of Chapter 291 of the Acts of the 58th General Assembly. The Board has been advised that such concessions on taxable valuation have been made by Assessors and Boards of Review in other counties.

"Will you please give us your opinion as to whether such an adjustment to encourage industrial development can be legally made.

"We will appreciate it if you can give this your early attention inasmuch as the Board of Review would like to determine this matter prior to May 31, 1961, which is the close of their working period as provided by Section 33 of the Act referred to."

Absent statutory authority in the assessors or other agencies to reduce the taxable value in assessable property as an inducement for industrial development, I am of the opinion that no such reduction can be made. I find no such statutory authorization, and therefore I am of the opinion that reduction of the above character cannot legally be made.

21.30

TAXATION: Refund—§422.45, 1958 Code. A contract between a contractor and the State of Iowa, which provides that the contractor shall pay all taxes imposed on such contract and agrees to reimburse him for such amounts, is an obligation in excess of the authority of the Executive Council or the Tax Commission. Subsection 6 of §422.45 provides the method by which a refund of such taxes may be secured.

February 22, 1961

W. Grant Cunningham, Secretary
Executive Council of Iowa
Statehouse
LOCAL

Dear Mr. Cunningham:

Reference is herein made to the claim of Brown Bros., Inc. for reimbursement to it of the sum of $1572.75 sales and use tax paid in connection with its performance of the outdoor lighting contract covering state buildings and grounds, based upon the following provisions of its contract:

"The Contractor shall pay all taxes imposed on such contracts in full accordance with the present state and federal laws. However, such taxes shall not be included as part of the bid price as the Bidder will be reimbursed additionally by the State for such taxes as are levied by any taxing body. The amount of tax will be added to the bid price after the contract has been awarded and the amount of tax has been definitely determined."

1. I find no statutory authority in the Executive Council to refund or reimburse a contractor for the amount of any taxes paid by such contractor in the performance of a contract with the State of Iowa to furnish and construct buildings or other improvements.

2. I find no statutory authority exempting contractors contracting with the State of Iowa from the payment of any sales or use tax in the performance of a contract with the State of Iowa.

3. I find no statutory authority in the Tax Commission to make such refund to a contractor in the performance of a contract with the State of Iowa.

4. The provision for the aforesaid may result that the contractor whose bid may be the lowest without the incorporation therein of the taxes may not be the lowest bidder if he incorporates such amount of taxes in his bid. In other words, all the contractors will not be bidding upon the same basis.

5. Subsection 6 of §422.45, Code 1958, provides a method by which a tax-certifying or tax-levying body of a governmental unit may secure a refund of any sales or use tax paid to any contractor in the fulfillment of any written contract with the State of Iowa or any of its subdivisions, and imposes a duty upon the contractor to state, under oath, the amount of the sales or goods, etc., used in the performance of any contract and upon which the taxes have been paid; to file forms with the governmental unit which has made the contract, and further provides that upon application to the State Tax Commission for any refund, the governmental unit making the contract may make claim to the State Tax Commission and refund to it the amount of the sales and use taxes paid by the foregoing contractor.

21.31

TAXATION: Refund of taxes—§§441.38, 441.47, 445.60, 1962 Code. Excessive valuation and collection of moneys and credits taxes cannot be corrected through refund provisions of §445.60. Failure to seek relief as provided by §§441.38 and 441.47 amounts to a waiver.

September 4, 1962

Mr. Don C. Salisbury
Jasper County Attorney
Newton, Iowa

Dear Mr. Salisbury:

Reference is herein made to yours of the 18th ult. in which you submitted the following:

> "We have the situtation wherein monies and credits taxes have been erroneously assessed and collected for the current and prior years in that the amount of assessment and collection was larger than it should have been.
>
> "Can and should Jasper County, Iowa reimburse these taxpayers for the excess amount of said taxes assessed and collected as to said excess for:
>
> 1. the current year, and;
>
> 2. prior years."

The refund of these taxes can be secured only by and through §445.60, Code of 1962. That section permits a tax refund when the taxes have been "erroneously or illegally exacted or paid." However, it has been the holding of the Iowa Supreme Court on a number of occasions that excessive valuation is not a tax erroneously or illegally exacted or paid. Thus, a refund based upon an over-assessment would be denied under the above statutory provision.

The case of *Cedar Rapids Hotel Co. v. Stirm,* 222 Iowa 206, 217, 268 N.W. 562, 567 (1936), stated:

"This court has repeatedly held that the tax based on an excessive valuation is not 'erroneously or illegally exacted or paid' where the taxpayer has failed to make use of the administrative body in having the correction made at the proper time. His failure to take advantage of the means provided by the statute for correcting an erroneous assessment of this character amounts to a waiver."

Home Owners L. Corp. v. Polk County, 231 Iowa 661, 667 (1942), states the rule as follows:

"In addition to those citations there are numerous other Iowa cases which hold that an excessive assessment valuation of property is not of such a nature that it can be held that the payment of taxes on these claimed excessive valuations is erroneous or illegal."

The taxpayer's remedy for over-assessment is provided by §441.47, Code of 1962, which permits an aggrieved taxpayer to file a protest with the board of review if such protest is filed on or after May 1, to and including May 20, of the year of the assessment. Also, Code §441.38 permits an appeal to the district court if the board of review does not grant the taxpayer relief. A taxpayer's failure to take advantage of the means provided by the statute for the correcting of an erroneous assessment shall amount to a waiver and no refund can then be made.

In view of the foregoing, refund of taxes for both the current year and prior years is unauthorized.

21.32

TAXATION: Tax Commission—§§421.10, 421.17, 1958 Code. §§33, 45, 46, 47, 49, 52, 70, Ch. 291, 58th G.A. Broad powers conferred on Tax Commission sitting as State Board of Review permitted it to make an order in 1961 directing local taxing district to adjust property valuations of property to be assessed. Failure of Commission to act administratively within times set out in statutes does not involve penalty provisions, as time limitations are directory only and are set out as guides to administration.

November 9, 1961

Mr. D. E. Skiver
Osceola County Attorney
Sibley, Iowa

Dear Mr. Skiver:

This will acknowledge receipt of your letter of October 23, 1961, wherein you have attached and made a part of said letter, marked Exhibit "A" a tentative notice sent by the Tax Commission to the county auditor of Osceola County and wherein you set out the following facts and questions for an Attorney General's opinion.

"Under date of October 19, 1961, the Osceola County Auditor, William Frick, was served with a Tentative Notice issued by the State Tax Commission advising him that a tentative order had been entered by them adjusting the Real and Personal Property Valuations in Osceola County, a copy of which Notice is hereto attached, marked Exhibit 'A' and by this reference made a part hereof.

"Section 49 of Chapter 291 of the Laws of the Fifty-Eighth General Assembly provides as follows:

'The Commission *shall* keep a record of its proceedings and finish its review and adjustment on or before the third Monday of August.'

"Section 52 of the same Chapter provides as follows:

'If any assessor or member of any board of review shall knowingly fail or neglect to make or require the assessment of property for taxation to be of and for its taxable value as provided by law or to perform any of the duties required of him by law, at the time and in the manner specified, he shall forfeit and pay the sum of five hundred ($500) dollars to be recovered in an action in the district court in the name of the county or in the name of the city as the case may be, and for its use, and the action against the assessor shall be against him and his bondsmen.'

"It would appear that the State Tax Commission, sitting as the State Board of Review, is now more than two months late in making their review. It further appears that Osceola County will be subjected to excessive cost and much additional office labor in the assessor's and auditor's offices, if the State Tax Commission is allowed to proceed with the proposed adjustment at this time.

"Your opinion on the following points is hereby requested:

"1. Is the State Tax Commission, sitting as the State Board of Review, barred from making adjustment at this time because of the failure to act within the statutory period?

"2. In the event they are not barred, can Osceola County maintain an action against each of the State Tax Commission members to recover the sum of Five Hundred Dollars ($500) from each of them?"

Sections 49 and 52, to which you refer in your letter are taken from a recent enactment of the 58th G.A., Chapter 291, which act repeals Chapters 405A, 441 and 442, Code of Iowa (1958). The subject matter of the above chapters was by and large incorporated in this new Chapter 441 which is now entitled "Assessment and Valuation of Property" and consists of 72 sections. Also important in this discussion is the chapter on the powers and duties of the Tax Commission which is Chapter 421, Code of Iowa (1958), as amended by Chapter 225, §1 of the 59th G.A. Sections 421.10, "Office Quorum Sessions" and 421.17, "Power and Duties", are as follows:

"421.10 Office—quorum—sessions. Said commission shall have its office at the seat of government of this state. A majority of said commission shall constitute a quorum for the transaction of business. The commission shall be deemed to be in continuous session and open for the transaction of business every day except Sundays and legal holidays, and the session of said commission shall stand and be deemed to be adjourned from day to day without formal entry thereof on it record."

"421.17 Power and duties. In addition to the duties transferred to the state tax commission, said commission shall have and assume the following powers and duties:

"1. To have and exercise general supervision over the administration of the assessment and tax laws of the state, over boards of supervisors and all other officers or boards of assessment and levy in the performance of their official duties, in all matters relating to assessments and taxation, to the end that all assessments of property and taxes levied thereon be made relatively just and uniform in substantial compliance with the law.

"2. * * *.

"The state tax commission shall determine the degree of uniformity

of valuation as between the various taxing districts of the state and shall have the authority to employ competent personnel for the purpose of performing this duty.

"* * *.

"10. To require any board of review at any time after its adjournment to reconvene and to make such orders as the state tax commission shall determine are just and necessary; to direct and order any county board of equalization to raise or lower the valuation of the property, real or personal, in any township, town, city or taxing district, to order and direct any county board of equalization to raise or lower the valuation of any class or classes of property in any township, town, city or taxing district, and generally to make any order or direction to any county board of equalization as to the valuation of any property, or any class of property, in any township, town, city, county, or taxing district, which in the judgment of the commission may seem just and necessary, to the end that all property shall be valued and assessed in the manner and according to the real intent of the law.

"* * *.

"The state tax commission shall have the power to order made effective reassessments or revaluations in any taxing district as to taxes levied during the current year for collection the following year, and it may in any year order uniform increases or decreases in valuation of all property or upon any class of property within any taxing district, such orders to be effective as to taxes levied during the current year for collection during the following year."

Within Chapter 291, Acts 58th G.A., certain sections are particularly involved without question. These sections are:

"Sec. 33. Sessions of board of review. (Formerly 405.15) The board of review shall be in session from May 1 to May 31, both inclusive, each year and shall hold as many meetings as are necessary to discharge its duties. On June 1 said board shall return all books, records and papers to the assessor except undisposed of protests and records pertaining thereto. If it has not completed its work prior to June 1, the state tax commission may authorize the board of review to continue in session for such period as is necessary to complete its work, but in no event shall the state tax commission approve a continuance extending beyond August 1. On June 1 or on the final day of any extended session authorized by the state tax commission as herein provided the board of review shall be adjourned until May 1 of the following year. It shall adopt its own rules of procedure, elect its own chairman from its membership, and keep minutes of its meetings. The assessor shall be clerk of said board. It may be reconvened by the state tax commission. All undisposed protests in its hands on August 1 shall be automatically overruled and returned to the assessor together with its other records."

"Sec. 45. Abstract to state tax commission. (as amended by Chapter 237, 59th G.A., formerly Section 442.14) The county assessor of each county and each city assessor shall, on or before the first Monday in July make out and transmit to the state tax commission an abstract of the real and personal property in his county or city as the case may be, and file a copy thereof with the county auditor in which he shall set forth:

"1. The number of acres of land and the aggregate taxable values of the same, exclusive of town lots, returned by the assessors, as corrected by the board of review.

"2. The aggregate taxable values of real estate in each township, city,

and town in the county, returned as corrected by the board of review.

"3. The aggregate taxable values of personal property.

"4. An abstract as to the number and value of all animals as the same are returned by the assessor, showing the aggregate taxable values and number of each kind or class and such other facts as may be required by the state tax commission.

"In any case where a board of review continues in session beyond June 1, in any year, under provisions of section thirty-three (33) of chapter two hundred ninety-one (291), Acts of the Fifty-eighth General Assembly, the abstract of the real and personal property shall be made out and transmitted to the state tax commission within thirty (30) days after the date of final adjournment by said board. Approved May 6, 1961."

"Sec. 46. State board of review. (Formerly 442.15) The state tax commission shall constitute the state board of review, and shall meet at the seat of government on the second Monday of July in each year."

"Sec. 47. Adjusted valuations. (Formerly 442.16) The state board of review shall adjust the valuation of property in the several counties adding to or deducting from the valuation of each kind or class of property such percentage in each case as will bring the same to its taxable value as fixed in this chapter and chapters four hundred twenty-seven (427) to four hundred forty-three (443) of the Code inclusive. It shall also adjust the valuations as between each kind or class of property in any city assessed by a city assessor and each kind or class of property in the same county assessed by the county assessor."

"Sec. 49. Adjustment by county auditor. (Formerly 442.18) The Commission shall keep a record of its proceedings and finish its review and adjustment on or before the third Monday of August. The county auditor shall thereupon add to or deduct from the valuation of each kind or class of property in his county the required percentage, rejecting all fractions of fifty (50) cents or less in the result, and counting all over fifty (50) cents as one (1) dollar."

"Sec. 52. Failure to perform duty. (Formerly 441.27 and 405.29) If any assessor or member of any board of review shall knowingly fail or neglect to make or require the assessment of property for taxation to be of and for its taxable value as provided by law or to perform any of the duties required of him by law, at the time and in the manner specified, he shall forfeit and pay the sum of five hundred (500) dollars to be recovered in an action in the district court in the name of the county or in the name of the city as the case may be, and for its use, and the action against the assessor shall be against him and his bondsmen."

"Sec. 70. If any of the provisions of this Act shall be in conflict with any of the laws of this state, then the provisions of this Act shall prevail."

Pursuant to administrative procedures directed by Chapter 291, Acts 58th G.A., abstracts of assessment reports were received from the various counties by the State Tax Commission sitting as a review board, in varying periods of time ranging from June 8 to September 21. Inasmuch as all of these abstracts of assessment reports must be received before the State Tax Commission, sitting as a board of review, can act on them to revalue and equalize the properties throughout the State, it was incumbent on the various counties to make sure their abstracts were submitted in time for a proper consideration to be taken thereof.

As a matter of fact, there were nine counties which did not submit their

abstracts even prior to the date which is set out in the statute for rendition of the final determination by the Tax Commission and, therefore, the Tax Commission, due to the lack of punctuality of these reports, could not have possibly been finished within the time set out by §49, the same being before the third Monday in August, August 21, 1961. The time provided as a minimum by the Tax Commission for a review and readjustment of property values throughout the State was ten days. Certainly, the process of reviewing abstracts of 99 counties could not be accomplished in less time. It would seem, therefore, that in order to allow the State Board of Review to complete its work by the time set out by statute, August 21, 1961, the abstracts of the various counties should have been in to the Board at least by the 11th of August, 1961. In point of fact, 19 counties failed to get their abstracts to the Tax Commission within 10 days prior to August 21, one of these being Osceola County. This abstract was received August 16, five days before the deadline. Inasmuch as a great amount of effort goes into compiling these abstracts, as people on the county level are aware, it seems apparent that the State Board of Review has acted with all possible haste and diligence and has, up to this time, exercised its proper duties within a reasonable time. These facts have been set out to acquaint interested parties with the problems of the administration of such a task as adjusting and equalizing property values throughout the State, clearly one of the duties of the State Tax Commission under the provisions of §421.17(10), Code of Iowa, 1958.

Based on decisions of the Iowa Supreme Court, it has been a long established rule in the State of Iowa that statutes prescribing the manner and the time of the discharge of duties by public officials are directory and want of compliance therewith does not render official acts void. This has been especially true in this State when the Court has been concerned with matters which have arisen under various taxing statutes. Two of the early Iowa cases to propound this rule are *Hill vs. Wolfe* (1870), 28 Iowa 577 and *Shaw vs. Orr* (1870), 30 Iowa 355. In the latter case, the Court says at page 359:

> "It is claimed that, under the statute above referred to, defendant has no authority to act after the first Monday in May; that if the taxes were not at that day collected, the law required the tax list to be returned, and that the defendant could not, thereafter, discharge the duty of collector. In our opinion the language of the law is directory as to the discharge of duty by the collector, and does not limit his power and authority to be exercised within the time named. It is a familiar rule of law that statutes prescribing the manner and time of the discharge of duties by public officers are directory, and want of compliance therewith does not render official acts void."

This rule was affirmed in two recent cases, *Younker Brothers vs. Zirbel,* 234 Iowa 269, 12 N. W. 2d 291, and *Rich Manufacturing Company vs. Petty,* 241 Iowa 840, 42 N. W. 2d 80. The *Zirbel* case, while not construing the same section of the Iowa Code, construed similar language in other sections of the Iowa Code which presently make up the language found in the time limitations now found in Chapter 291, Acts 58th G.A., §§1 through 72. Here, the Court was faced with the proposition that the acts of the board of review for the City of Des Moines which were taken after the time limit set out in the statute for such actions were of no effect in that the property owners were prevented from having notice as provided by statute. At page 273, the court said:

> "It may be noted, and it is significant, that in the provisions specifying the various times or periods at or in which the duties of the board are to be performed, *there are no commands that they shall not be performed at any other times.* Section 16 provides that the board shall be in session in the discharge of its duties during the month of May. *But the chapter 202 nowhere prohibits the performance of these duties at any other reasonable time not prejudicial to the rights of an owner or taxpayer.* Any

action of the board in performing such a duty is nowhere in the statute declared to be void and of no effect. One of the duties within the power of the board is to equalize assessments by raising or lowering individual assessments of real property. Section 22 does not expressly state when the power shall be exercised, but neither does it, or any other section, by expression or implication, rigidly limit the exercise of the power to the month of May. *The provisions of the statute are directions only, and are not prohibitory mandates to the board or inflexible limitations upon the exercise of its powers or the performance of its duties.* The provisions of section 16 and 21 are directory and not mandatory. This court has uniformly so held, in like or similar situations, whenever the issue has been presented to it. Able presentations of the reasons supporting such decisions are stated in . . ." (cases cited) (underlining ours).

And at page 275:

"The language of chapter 202 of the Forty-ninth General Assembly should be construed as have been other similar taxation statutes. The times and periods noted in section 16 and 21 are general guides to the taxing officials to effect an expeditious transaction of their duties, so far as possible. *Time is not of the essence of the provisions in such strict sense that a failure to perform any duty at the times or within the periods stated shall render performance within a reasonable time thereafter of no force and effect when it does not prejudice the complaining owner or taxpayer.* This court has repeatedly so held, even though the failure to perform within the times fixed by the statute has been because of oversight or negligence upon the part of the officials. No such fault on the part of the taxing officers is shown in this case."

It should be noted in the above cited case that the statutory sections referred to therein which are to be found in Chapter 202, Acts 49th G.A., §§16, 21, 23 and 24, while dealing only with a local board of review, contain similar time limitations now found in Chapter 291, Acts 58th G.A., §§46, 47 and 49, which outlines the time limitations for the State Tax Commission acting as a State board of review. It is clearly evident that the court would construe the time limits that pertain to the State Board of Review in a similar manner as it has construed the time limits which are required for a local board of review so as to find them to be merely directory and not mandatory. With this result, the actions of the State Board of Review would be valid and of full force and effect just as though they had taken place within the time limit set out in the statute.

It must also be noted that even though Chapter 291, Acts 58th G.A. purports to put a time limit on the actions of the Board while sitting as a State board of review, §421.10, *supra,* clearly states that the Commission shall be open for transaction of business every day except Sunday and legal holidays and that the session of said Commission shall stand and be deemed to be adjourned without formal entry thereof on its record.

Since we have concluded that the time limitations are merely directory and that the Tax Commission is deemed to be in continuous session for the transaction of business, we see no conflict between §421.10 and §§46, 47 and 49 of Chapter 291, 58th G.A., so, therefore, the provisions of §70, Chapter 291, 58th G.A., are not pertinent.

To add to the difficulties of the Tax Commission, under §33, a local board of review may extend its session beyond June 1st up to August 1st. Any business transacted during this time would be allowed by this section and upon the closing of its records, the local board of review would thereafter have 30 days from the time of this closing to submit its record to the State Board of Review. See §45, 58th G.A., as amended by Chapter 237, 59th G.A., which states:

> "* * * In any case where a board of review continues in session beyond June 1, * * * the abstract of real and personal property shall be made out and transmitted to the state tax commission with thirty (30) days after the date of final adjournment by said board."

Therefore, assuming that a local board of review did not adjourn until August 1, thirty days thereafter would make it August 30. The submission at this time of its abstract to the State Board of Review would thus place it beyond the time when the State Board of Review is supposed to render its final order pertaining to such abstracts, which time is August 21.

It is, therefore, seen that an inconsistency exists in the statutes recently enacted and any construction placed on the language pertaining to time and manner in which the Tax Commission would act would have to be construed with the practicalities in mind. When we look to the dates when the abstracts in our case were received and then note the dates when the Tax Commission began reviewing said abstracts, we can only conclude that even though said Commission acted after the time limitations set out in the beforementioned statutes, it did act within a reasonable time. Therefore, we must answer your first question in the negative by stating that the State Board of Review is not barred from making adjustments at the time it did, although there was an apparent failure to act within the statutory period.

In reference to question two, we must reply in the negative. It is our opinion that no action may be maintained against the State Tax Commission or each member thereof under the penal provisions of §52, Chapter 291, 58th G.A. A careful reading of said §52 will disclose that said penalty is directed against a board of review only as it shall knowingly fail or neglect to make or require the assessment of property for taxation. It is obvious from the notice forwarded to the county assessor of Osceola County marked Exhibit "A" by the Tax Commission that said Exhibit "A" is merely a tentative notice by the Commission, acting as a board of review under Chapter 291, that it is *not* assessing property, but is merely adjusting the value of real property within Osceola County.

It is also to be noted that said §52 further attempts to penalize a member of the Board of Review should he knowingly fail or neglect to perform any of the duties required of him by law at the time and manner specified. Since the answer to your first question was that there was no failure by the Commission to perform its duties or to act within the time required by law or within a reasonable time thereafter, there has been no violation of the penal provisions of §52 by the State Tax Commission while sitting as a State board of review. It is further to be kept in mind that while so sitting, the Tax Commission is not *assessing* real property within the State, but is merely acting under its general powers and duties found in §421 and is sitting as a board of equalization.

Since receiving your request for an opinion the State Tax Commission has held a number of hearings to date and has many more on its schedule during the month of November. There have been requests from approximately forty-three taxing districts, which have received tentative notices, to be heard on the revaluation question. As a result of these hearings to date, the Tax Commission has become aware that the mechanics of readjusting values across the board would necessitate, in many instances, great additional expenses to the various cities and counties affected thereby, which expense, in the eyes of the State Tax Commission, would greatly jeopardize the public interest. The Commission, therefore, has requested our opinion as to whether or not a final order directed to the local authorities to readjust property values based on their review of the abstracts in 1961, could be made in the current year to be effective the following year or on January 1, 1962. In addition to the formal request by the Tax Commission, numerous other officials have posed related questions. Since this problem is related to the question raised by you, we are taking the liberty of incorporating it into this opinion.

Section 421.17(10), when considered in light of the case law above, shows that the Commission has the authority to order local taxing boards to adjust property valuations. Coupling this with its other powers and duties set out in §421.17(1) wherein it is to exercise general supervision over boards of supervisors, all other boards of assessment and levy in the performance of their duties, and other powers as stated in §421.17(10), subsection 1, e.g., to require any board of review *at any time* (underlining ours) to reconvene and raise property valuations, we are of the opinion that the Commission may make an order directing local taxing districts to adjust property valuations which adjustments will be operative on property assessed in 1962.

21.33

Agricultural land tax credit—§426.3, 1958 Code. Property owner may not choose between homestead tax credit and agricultural land tax credit, and qualification for homestead tax credit precludes his entitlement to benefits under the agricultural land tax credit law. Administration of the agricultural land tax credit law lies with the county auditor as supervised by the State Comptroller. (Murray to Burdette, Decatur Co. Atty., 2/26/62) #62-2-6

21.34

Agricultural land within city—§428.16, 1958 Code. Agricultural land within the limits of a city not laid off in parcels of ten acres or less is not exempt from city or town taxes. Stock of merchandise held for resale on such premises is taxable under the provisions of §428.16. (Strauss to Branco, Ida Co. Atty., 2/26/62) #62-2-4

21.35

Allocation of road use tax fund—Ch's. 53, 168, 59th G.A., §§312.1, 312.2, 1958 Code. Allocation of the road use tax fund to the primary road fund, secondary road fund and farm to market road fund is to be credited to the regular primary road fund on the calendar basis beginning January 1, 1962, the allotments to be made annually in one sum. These funds are designated both as credits and allotments and are not contingent upon the allotment of the sum of $2,500,000.00, or an amount equal to one-ninth of the federal allotment. The meaning of allotment in the foregoing chapter is determined by the federal statute, which authorizes the allotment. (Strauss to Selden, Compt., 4/6/62) #62-4-2

21.36

Capital gain—§422.8(1), 1958 Code. Capital gain realized from sale of farm land in Minnesota is subject to Iowa income tax. (Murray to O'Connor, Tax. Comm., 8/8/61) #61-8-11

21.37

Charitable institutions—§427.1(11), 1958 Code. 1. A civil township is merely a legal subdivision of the county for governmental purposes. 2. §427.1(11) applies not only to farm land but also to city property. 3. Charitable institution must pay taxes on all its property over and above its exemption of 320 acres in a single civil township, whether leased for pecuniary profit or not. (Strauss to Hougen, St. Rep., 3/31/61) #61-3-20

21.38

County board of review, reassessment—§442.2, 1958 Code. In view of provisions of §442.2, and consideration thereof by 1938 *O.A.G.* 730 and opinion

of May 7, 1958, in any year after assessment has been made, the board of review may, without complaint of an individual taxpayer, reassess or revalue the real estate in a taxing district if its finds there has been a change in value of all the property within the taxing district. (Strauss to Hoover, Clay Co. Atty., 10/4/61) #61-10-7

21.39

County soil conservation district, tax status of property—§§422.45, 427.1, 1958 Code. (1) Real estate owned by district is tax exempt; (2) District is entitled to a sales tax refund on materials used in construction of a building by and for the use of the district. (Murray to Milani, Appanoose Co. Atty., 9/15/61) #61-9-7

21.40

Exemption as fraternal benefit corporation—§427.1(9), 1962 Code. Where the BPOE, a fraternal benefit society, is the lessee of property owned by Elks Building Corporation and pays rent to such corporation for its use, the Building Corporation is not entitled to exemption as a fraternal benefit corporation. (Strauss to Boeye, Montgomery Co. Atty., 5/31/62) #62-5-11

21.41

Homestead credit, surviving spouse, divided ownership—§§425.11, 561.11, 561.12, 636.5, 636.6, 1958 Code. (1) One electing to take dower interest in wife's estate is not "occupying as a surviving spouse", within §425.11, 1958 Code, as amended. (2) One sharing interest in homestead property with stepchildren shares an interest with persons related to him by blood, marriage or adoption, as those terms are used in §425.11, Code 1958, as amended. (Murray to McDonald, Dallas Co. Atty., 8/15/61) #61-8-22

21.42

Homestead tax credit—§425.11, 1958 Code. Where divorced 'W', a record owner, retains occupancy of property, she is the one entitled to the homestead tax credit. (Murray to Schroeder, Jackson Co. Atty., 7/6/61) #61-7-3

21.43

Income tax—§422.7, 1958 Code. Salary paid by Iowa school district to exchange teacher from Germany under U.S. Information and Exchange Program not subject to Iowa income tax. Said salary, however, is subject to withholding under Iowa Public Employees Retirement System. (Gill to Harris, Greene Co. Atty., 1/17/61) #61-1-9

21.44

Liens—§428.4, 1958 Code. A building erected on land owned by one other than the builder under a three-year lease is assessed as personal property to the builder and is subject to a lien for taxes thereon which can be enforced by sale of the building. (Murray to McDonald, Cherokee Co. Atty., 8/16/61) #61-8-25

21.45

Military service exemption—§427.3(4), 1958 Code. One serving in the Coast Artillery in the Philippine Islands during the Nicaraguan Campaign is not eligible for the military service exemption. (Adams to Erhardt, Wapello Co. Atty., 1/17/61) #61-1-10

21.46

Military tax exemption—§427.6, 1958 Code. The effective date for filing military tax exemption is July 1, 1962. (Murray to O'Connor, St. Tax Comm., 7/13/61) #61-7-9

21.47

Moneys and credits—§428.4, 1958 Code. Recipient for life of principal and interest payments of a real estate contract is owner of the contract for moneys and credits tax purposes. (Adams to Newell, Louisa Co. Atty., 1/13/61) #61-1-6

21.48

Moneys and credits—§429.4, 1958 Code. In a land contract, where $5,000.00 is paid in October of 1959, $5,000.00 in March of 1960, and $5,000.00 in March of 1961, with interest payable on the last $5,000.00 only, the $5,000.00 paid in March of 1960 is exempt by virtue of §429.4. (Gill to Struck, Grundy County Attorney, 2/3/61) #61-2-1

21.49

Moneys and credits—§§429.4, 429.5, 429.6, 1958 Code. A valid debt owed to the Commodity Credit Loan Corporation evidenced by a chattel mortgage and note is a deductible debt for purposes of moneys and credits tax. (Gill to Cady, Franklin Co. Atty., 3/21/61) #61-3-15

21.50

Moneys and credits—§429.4, 1958 Code. Land contract may be an interest-bearing credit, even though the compensation for money used is not called "interest". Noninterest-bearing exemption is subject to fact determination by the assessor. (Murray to Goreham, Poweshiek Co. Atty., 4/15/62) #62-4-4

21.51

Moneys and credits exemption—§§427.1(20), 428.20, 429.2, 1958 Code. A foreign corporation engaged in printing and publishing newspapers is a manufacturer within the provisions of §427.1(20). Where such corporation obtains 74% of its total operating income from sources within Iowa and has four of its six operating plants within the State of Iowa, its "principal factories" are in Iowa. (Murray to Leir, Scott Co. Atty., 4/26/61) #61-4-23

21.52

Moneys and credits—§429.2, 1958 Code. Moneys and Credits in the hands of an executor and belonging to nonresident legatees are subject to the moneys and credits tax. (Murray to Frye, Floyd Co. Atty., 7/13/61) #61-7-13

21.53

Moneys and credits—§429.1, 429.2, 1958 Code. Nonresident decedent's interest in Iowa land contract is not subject to moneys and credits tax in ancillary administration where it has not been shown that a situs for the intangible was established in Iowa. (Murray to Matthews, Louisa Co. Atty., 8/15/61) #61-8-23

21.54

Moneys and credits deduction—§§441.19, 441.33, 441.37, 445.60, 1958 Code. Where taxpayer fails to claim deduction at time of assessment or to protest assessment by May 20, he loses the deduction and no refund can be made. (Murray to Maddocks, Wright Co. Atty., 11/13/61) #61-11-15

21.55

Penalty and interest—§§445.36, 445, 37, 1958 Code. The taxpayer is permitted ninety days from the date of certification of the tax list to the county treasurer before he becomes subject to penalty and interest. (Murray to Ford, Des Moines Co. Atty., 3/26/62) #62-3-6

21.56

Personal property assessment, Laundromat units—§441.21, 1958 Code. Assessor required to assess units at actual value, and to use a method of valuation to reach this result which is, in his judgment, appropriate to the situation. Appeals to board of review and district court are available for correction of incorrect assessments. (Murray to Lucken, St. Sen., 8/15/61) #61-8-24

21.57

Personal property tax, trailers and wagon box trailers—§§321.1(9)(10), 321.122, 321.123, 321.130, 1958 Code; Ch's. 108 and 176, 59th G.A. Trailers and wagon box trailers are subject to personal property tax even though required to be registered under Chapter 321, 1958 Code. (Murray to Morrison, Washington Co. Atty., 5/4/62) #62-5-3

21.58

Property exemption—§427.1(9), 1958 Code. Church-owned farm, from which soil bank payments are received, is not exempt from property tax. (Adams to Martin, Keokuk Co. Atty., 1/17/61) #61-1-11

21.59

Property tax—§427.4, 1958 Code. Qualification of a widow for military service tax exemption. (Murray to Shill, Asst. Webster Co. Atty., 8/8/61) #61-8-10

21.60

Property tax assessment of trust property for real estate tax—§427.1(9), 1958 Code. Charitable trusts qualify for tax exemption in hands of trustee. Sec. 427.1(9), Code 1958. (Murray to Schrader, Jones Co. Atty., 8/10/61) #61-8-13

21.61

Real, personal, moneys and credits, and business corporation taxes—§§427.1(8)(10)(11), 422.34(2), 1958 Code. Where public library is sole beneficiary of a trust, all property of the trust, and all income of the trust are exempt from taxation. (Gill to Erhardt, Wapello Co. Atty., 3/31/61) #61-3-24

21.62

Taxability of stock—§427.1(20), 1958 Code. Administrative procedures require submission of question of taxability of a list of stocks to the assessor initially, as he is advised by the Property Tax Department of the State Tax Commission, with any grant or denial of an exemption then subject to review by board of review or appeal to district court. (Murray to McDonald, Dallas Co. Atty., 9/18/61) #61-9-13

21.63

Tax sale—§§446.32, 565.3, 1958 Code. Where property is sold at tax sale, subsequent execution of quit claim deed by owner to State operates to vest title in State of Iowa; State of Iowa as owner would remain on auditor's plat book until tax deed is issued, and holder of tax sale certificates on said property may pay taxes levied subsequent to the tax sale. (Murray to Goodenberger, Madison Co. Atty., 1/15/62) #62-1-4

21.64

Tax sales delinquent special assessments—§§391.64, 391.65, 391.66, 446.19, 1958 Code. Sales of property for delinquent special assessment taxes are handled by county treasurer and private buyers, and certifying body for the tax may bid but county not required to bid. (Gill to Bedell, Dickinson County Attorney, 2/21/61) #61-2-13

21.65

Transfer tax— On the authority of the Internal Revenue Ruling #45-349 appearing in the Internal Revenue Cumulative Bulletins, Rulings 1957—Nos. 1-616, and Prentice-Hall on Federal Taxes, permanent volume, paragraph 190,053, entitled Stock Transfers, the State is immune from federal transfer tax on the sale of certain securities, but the nonexempt party to the transaction is liable to the tax. (§4384, Int. Rev. Code). (Strauss to Abrahamson, St. Treas., 3/30/61) #61-3-17

CHAPTER 22

TOWNSHIPS

STAFF OPINIONS

LETTER OPINIONS

22.1

TOWNSHIPS: Cemeteries—§§359.30, 359.33, 1958 Code. A township having both township-owned cemeteries and nonowned cemeteries may levy a tax sufficient for the maintenance of township-owned cemeteries but is limited to a tax levy of one-fourth mill for the maintenance of nonowned cemeteries, and it is the duty of the township trustees to prevent over-spending of the one-fourth mill for maintenance of nonowned cemeteries.

April 21, 1961

Mr. Richard G. Davidson
Page County Attorney
Clarinda, Iowa

Dear Mr. Davidson:

This is in response to your letter of April 4, 1961, in which you request an opinion of this office on the following questions:

"In the event the Township has both Township-owned and non-owned public cemeteries, is the cemetery tax levy in the Township then limited to 1/4 mill?

"If there are both Township-owned public cemeteries and non-owned public cemeteries, and the Township also contains an individually-owned small private cemetery, is the total cemetery levy limited to 1/4 mill?

"In the event the Township can levy the amount necessary for Township owned cemeteries, and an additional 1/4 mill for non-owned cemeteries, who has the responsibility of determining whether the amount spent on non-owned cemeteries might exceed the amount received from the legal 1/4 mill levy?"

As you are aware, the statutory provisions governing cemetery tax levies for maintenance purposes are §§359.30 and 359.33, Iowa Code, 1958. Section 359.30, relating to township-owned cemeteries, provides:

"*Cemetery and park tax.* They shall, at the regular meeting in April, levy a tax sufficient to pay for any lands so condemned or purchased, or for the necessary improvement and maintenance of cemeteries thus established, and for the necessary improvement and the maintenance of public parks acquired by gift, devise, or bequest under section 359.29, or for the maintenance and improvement of cemeteries so established in adjoining townships, in case they deem such action advisable."

Section 359.33, relating to nonowned cemeteries, provides:

"*Tax for nonowned cemetery.* They may levy a tax not to exceed one-fourth mill to improve and maintain any cemetery not owned by the township, provided the same is devoted to general public use."

There is quite clearly established a one-fourth mill limitation for the maintenance of nonowned cemeteries, while the levy for maintenance of township-owned cemeteries is limited only to a "tax sufficient to pay for ... maintenance ...". The one-fourth mill limitation on maintenance is not to be read into the section on township-owned cemeteries merely because a township might have both classes of cemeteries. 1940 *O.A.G.* 503.

Your second question appears to be a restatement of the first question and is disposed of by the first answer, with the caveat, however, that an "individually-owned small private cemetery" is not entitled to any maintenance assistance unless it is "devoted to general public use." §359.33, *supra.* A cemetery devoted to general public use is one where "public burials must be permitted ... irrespective of any religious or fraternal affiliations or other distinctions." 1930 *O.A.G.* 76. Your description of the above cemetery would seem to preclude it from this classification.

The levying body, the township trustees, is charged with the responsibility of determining that the one-fourth mill tax levy for the maintenance of nonowned cemeteries is not over-spent. The township clerk is given custody of all township funds but is authorized only to "... receive, collect and disburse, under the order of the township trustees ...". §359.21, 1962 Code.

22.2

TOWNSHIPS: Cemetery association, withdrawal from—§358B.16, 1962 Code. There is no statutory authority for the withdrawal of a township from a cemetery association established under §359.36.

December 6, 1962

Mr. J. T. Snyder
Buena Vista County Attorney
Storm Lake, Iowa

Dear Mr. Snyder:

This is to acknowledge receipt of your letter of November 8, 1962, in which you submitted the following:

"A question has arisen in this County in reference to the method of withdrawal of a party to a cemetery association established under Section 359.36 of the 1958 Code of Iowa.

"Under the authority of the above referenced Section of the Iowa Code, the Townships of Hayes, Providence and Washington in Buena Vista County, Iowa, and the City of Storm Lake, by resolutions adopted on October 15, 1957 and March 3, 1958, established a joint board for the future management and control of two former private cemetery associations, receiving conveyances therefrom.

"At this time, one of the townships which originally joined in the establishment of the joint cemetery board is considering a withdrawal from the board.

"The question presented is whether the Trustees of the Township concerned now have the power to withdraw from the joint cemetery board, or whether a majority vote of the joint cemetery board itself is necessary for the reorganization of the existing joint board?

"Section 359.35 of the 1962 Code of Iowa states that when a cemetery has been utilized for more than 25 years and has been maintained by Township funds, that the Township Trustees shall continue to improve and maintain the cemetery. However, Sections 359.36 and 359.37 do not provide for the reorganization or disestablishment of an existing joint board, and Section 359.36 would appear to vest this power in the joint board in view of the following language: 'in such case the two official bodies shall constitute a joint cemetery board and shall have equal voting power.'

"I'm enclosing copies of the joint resolutions dated October 15, 1957 and March 3, 1958 for your use."

There being no provision in the statutes here under consideration authorizing withdrawal from the cemetery association of a township, I quote to you the following from an opinion of this Department appearing at 1954 *O.A.G.* 49, as applicable and controlling to the situation described by you:

" 'It is a general rule that the courts may not by construction insert words or phrases in a statute, or supply a casus omissus by giving force and effect to the language of the statute when applied to a subject about which nothing whatever is said, and which, to all appearances, was not in the minds of the Legislature at the time of the enactment of the law however just and desirable it may be to supply the omitted provision. Under such circumstances, new provisions or ideas may not be interpolated in a statute, or ingrafted thereon. In this respect, it has been declared that it is not the office of the court to insert in a statute that which has been omitted, and that what the legislature omits the courts cannot supply.'

"Cited in support of the foregoing rule, among other numerous cases, are the following: Sysink vs. Jasper County, 229 Iowa 1240, 296 N. W. 376; State vs. Claiborne, 185 Iowa 170, 170 N. W. 417, 3 A.L.R. 392.

"The foregoing rule was applied by our Supreme Court in the case of Isbell vs. Board of Supervisors, 54 N. W. 2d 508, where the town of Correctionville had, by vote of the electorate, become part of the county library system. The claim was made that having thereafter established a town library, such fact constituted a withdrawal of the town of Correctionville from the county library system. To that claim the Supreme Court stated:

" 'When this county library was established Correctionville had no free public library—it was established later. It is not questioned that Correctionville was included within the county library district at the outset. Nothing has happened that constitutes a withdrawal of the town from that district unless the establishment of the town library has that effect. We find no statute which so provides. If formation of a town library is to constitute a withdrawal of the town from an existing county library district the legislature must so provide. Until it does there is no basis for such holding. Plaintiff's remedy at this point rests with the legislature, not the courts. See Kistner vs. Board, 225 Iowa 404, 414, 280 N. W. 587; In re Estate of Hagan, 232 Iowa 525, 529, 5 N. W. 2d 856, 859; 50 Am. Jur., Statutes, section 234; 59 C.J., Statutes, Section 576.' "

I would observe to you that subsequent to the *Isbell* case referred to above, the legislature enacted §358B.16, Code of 1962, authorizing withdrawal in that situation.

22.3

TOWNSHIPS: Fire districts—§357A.11, 1958 Code. The powers of trustees

in a benefited fire district do not include authority to purchase and maintain an ambulance.

April 26, 1961

Honorable Lawrence D. Carstensen
State Representative, Clinton County
House of Representatives
LOCAL

Dear Mr. Carstensen:

Reference is herein made to yours of April 21, 1961, accompanied by a letter of Simon W. Rasche, Jr., Clinton County Attorney, in which he requested through you an Attorney General's opinion on the following proposition:

"Can a Fire District consisting of 3 townships buy and maintain an ambulance out of the funds allotted to them by taxation.

"If so, what should be the type of liability insurance incident to this ownership."

In my opinion, no authority to purchase and maintain an ambulance lies in the fire district. The powers of the trustees are set forth in §357A.11, Code 1958, as follows:

"357A.11 *Powers of trustees.* The trustees may purchase, own, rent or maintain fire apparatus or equipment and provide housing for same and furnish services in the extinguishing of fires in said benefited fire district. The trustees shall have the power after approval given by section 357A.9 to levy an annual tax not to exceed one and one-half mills outlined in section 357A.9 for the purpose of exercising the powers granted in this section. This levy shall be optional with the trustees. The trustees may purchase material and employ labor to properly maintain and operate the benefited fire district. The trustees shall be allowed necessary expenses in the discharge of the duties, but shall not receive any salary."

It would appear from the foregoing that express power is not given, nor is there any basis for implying from the statutes the existence of such power.

22.4

TOWNSHIPS: Taxation—§§359.45, 368.16, 408A.2, 1962 Code. Authority to levy a tax granted by a public vote does not furnish implied authority to incur a debt or issue bonds to pay a debt incurred for the same purpose. Anticipatory bonds may be issued, however, under §359.45. Cities and towns have authority to incur debts by issuing bonds to equip fire department under §§368.16 and 408A.2.

November 2, 1962

Mr. Henry L. Elwood
Howard County Attorney
P. O. Box 377
Cresco, Iowa

Dear Mr. Elwood:

Reference is herein made to yours of recent date in which you submitted the following:

"Sumner Township of Winneshiek County, Iowa, and the Town of

Protivin located in Howard County, Iowa, are planning to enter into an agreement pursuant to Section 359.42 to acquire a fire truck and a building to house the fire truck.

"Both Sumner Township and the Town of Protivin desire to jointly contribute to the purchase of a new fire truck, and for the maintenance of this fire truck, and also for the purchase of a new building and maintenance of the building.

"In 1958 Sumner Township submitted to the voters the question whether or not the Township trustees of Sumner Township should be authorized to levy not to exceed 1½ mills for the purchase of fire fighting equipment. This public measure was adopted by passing more than 60% of the vote. Since 1958 Sumner Township has been making a levy and at the present time they have approximately $3,000.00 in their fire department fund for purchasing a fire truck. The question which now arises is, to-wit: Whether or not Sumner Township may now authorize the issuance of bonds without submitting that question to the voters. Section 359.45 of the Code of Iowa states Townships may anticipate the collection of taxes authorized by Sections 359.43 and 359.44 and for such purposes may issue bonds payable in not more than 10 equal annual installments and at a rate of interest not exceeding 5% per annum and payable at such place and in such sum as the Board of Trustees shall designate by Resolution. Sections 23.12 to 23.16 shall apply to such bonds. The public measure which was submitted to the voters made no mention of Sumner Township creating a debt by issuance of bonds. The public measure which was submitted to the voters is as follows:

" 'Shall the Township Trustees of Sumner Township, Winneshiek County, Iowa, be authorized to levy not to exceed one and one-half mills in any one year on the taxable property in Sumner Township for the purchase, renting and maintaining fire fighting apparatus and/or equipment and the housing of same and the furnishing of service and the extinguishing of fires in said township independently or jointly with an adjoining township or town as provided in Section 359.42 I.C.A.?'

"I would like to call your attention to Section 407.5 which states that no indebtedness shall be incurred unless authorized by an election, and Section 75.1. I am, therefore, inquiring as to whether another election must be held concerning the issuance of bonds or whether it is automatically assumed that the Township has a right to issue bonds since they have the right now to make a levy for maintaining fire fighting equipment.

"Another question arises which I am asking for an official Attorney General's opinion on, and that is as follows, to-wit: The Town of Protivin, pursuant to Section 404.8 is making a levy of 5.5 mills for public safety, and a portion of the tax money collected from this levy is used to maintain the Town of Protivin fire department. The question which now arises in the Town of Protivin is whether the Town of Protivin can issue bonds for paying off an indebtedness for the purchase of fire fighting equipment without submitting this question to the voters of the Town of Protivin. Both Sumner Township and the Town of Protivin assume that they will need $14,000.00 to acquire sufficient fire fighting equipment and to build a building. At the present time Sumner Township has $3,000.00 in their fire fund and the Town of Protivin has also $3,000.00 in their fire fund."

(1) In answer to your question one, I am of the opinion that the express authority to levy a tax, as set out in your letter, furnishes no implied authority to incur a debt for the same purpose or to issue bonds to pay for any such indebtedness. See *Swanson v. City of Ottumwa,* 131 Iowa 540, and *Heins v. Lincoln, et al.,* 102 Iowa 69. However, under the provisions of §359.45,

the township may issue anticipatory bonds for the purpose described, payable out of future collections of taxes authorized under the question submitted, as shown by your letter.

(2) Insofar as your second request is concerned, in view of our limited authority in connection with city matters, it would appear that there is authority in cities and towns to incur indebtedness for equipping a fire department by the issuance of bonds. See §368.16, Code of 1962. An election is required if petitioned for. See 408A.2, 1962 Code of Iowa.

22.5

Fire districts, taxation—§359.43, 1958 Code. The inclusion of part of a township in another fire district does not destroy the township trustees' power to tax over the entire township under §359.43, 1958 Code. This power may be exercised even though fire district trustees may also tax within their statutory authority. (Strauss to Matthews, Louisa Co. Atty., 10/10/61) #61-11-12

22.6

Investment of funds—§453.10, 1958 Code. Township funds arising from authority of an election may be invested in time certificates as authorized by §453.10. (Strauss to Charlton, Delaware Co. Atty., 9/15/61) #61-9-8

22.7

Powers of township trustees—§359.42, 1958 Code. The power of the township trustees does not exceed the authority vested by the electorate, and the township trustees do not have authority to lease a part of the premises erected for housing fire equipment to the United States for use as a post office. (Strauss to Hamilton, Webster Co. Atty., 3/30/62) #62-3-11

22.8

Township public disposal grounds—Ch. 186, 59th G.A. (§332.31, 1962 Code). (1) The county board of supervisors cannot anticipate levy to obligate township for purchase of land for public disposal ground. (2) The one-quarter mill levy provided for in Ch. 186 is not affected by two-mill limitation imposed by Ch. 54 (ordinary county revenue). (3) County equipment cannot be used in the creating and maintenance of public disposal grounds. (4) Townships can enter into contractual agreements with cities and towns for the use of public disposal grounds. (Bump to Perkins, Polk Co. Atty., 8/14/61) #61-8-20

22.9

Withdrawal by individuals from town-township fire district—Ch. 357A, 1958 Code. Individuals belonging to an existing town-township fire district may not withdraw in order to join another district, since such action is not authorized under Ch. 357A. (Strauss to Snyder, Buena Vista Co. Atty., 2/23/62) #62-2-3

CHAPTER 23

WELFARE

STAFF OPINIONS

LETTER OPINIONS

23.1

WELFARE: ADC, reimbursement by counties—§331.21, 1958 Code. It is the mandatory duty of each county to appropriate and pay its proportionate share of ADC assistance upon request for reimbursement by the State Department. Such claims are liquidated claims and do not come within the purview of §331.21.

June 5, 1961

Mr. Richard L. Hasbrouck
Guthrie County Attorney
Guthrie Center, Iowa

Dear Mr. Hasbrouck:

We have your recent favor requesting opinion, which reads as follows:

"Guthrie County would like to request an Attorney General's opinion on the following set of facts:

"A disagreement has arisen between the State Department of Social Welfare and the Guthrie County Board of Supervisors over the billings of the Department of Social Welfare for ADC payments made in Guthrie County. The Guthrie County Board of Supervisors feels that the statement submitted by the State Board of Social Welfare for ADC payments is not only vague and indefinite, but it is an illegal bill because no names or code numbers are shown on the bill in order to enable the Board to pass on the legality of the bill. A total billing is given but out of this total, no individual accounts are shown so that the method of reaching the total can be checked. Under this method of billing, Guthrie County made what the Board of Supervisors considers an illegal payment in that the recipient was not entitled to the aid from Guthrie County; and since no names or identification numbers were shown on the bill, the illegal recipient could not be immediately checked. Iowa Statute 331.21 is a statute to give the Board an opportunity for investigation and for determining whether a claim should be paid or litigated. The Guthrie County Board of Supervisors feels that it is violating the law in paying a bill that is not self-explanatory. I am enclosing to you a copy of one of the bills from the State Board of Social Welfare to Guthrie County.

"1. Does the Guthrie County Board of Supervisors have the authority to request that the names of ADC recipients or at least an identifying number for such recipients be shown on the bill?

"2. Can the Guthrie County Board of Supervisors legally under Iowa Code section 331.21 pay this bill when no code numbers or names of recipients are shown?

"3. In the form in which the same is submitted, is the enclosed bill a legal billing under Iowa Code section 331.21?"

For answer to your questions, we first quote the pertinent sections of the statutes applicable thereto.

"239.10 Records—report of recipients. All applications, investigation reports and case records shall be privileged communications and held confidential, subject to use and inspection only by persons authorized by law in connection with their official duties relating to financial audits and the administration of the provisions of this chapter. * * * "

"239.11 County appropriations. The county board of supervisors in each county in this state shall appropriate annually, and pay in the manner hereinafter specified from the county poor fund, such sum as shall result in the payment by such county of that portion of all assistance and benefits payable with respect to dependent children chargeable to the county under this chapter, which shall equal one-half of all such assistance and benefits chargeable to the county exclusive of such receipts and contributions to such fund other than state or county funds, as may from time to time be legally received from any source and credited to the state department and shall include in the tax levy for such county the sum or sums so appropriated for that purpose. The sums necessary as above provided shall be originally determined upon the basis of an annual budget prepared by the county board and approved by the state department. Should the sum so appropriated, however, be expended or exhausted during the year for which it was appropriated, such additional sum shall be appropriated by the board of supervisors from the county poor fund as shall be sufficient to meet the obligation of the county to pay its share as heretofore provided of all assistance and benefits with respect to dependent children chargeable to the county. The appropriation provided in this section shall not exceed statutory tax limitations now or hereafter provided, except that in counties having a population of sixty thousand, or more, the board of supervisors may levy annually an additional tax not to exceed one-fourth mill to carry out the provisions of this chapter; and in counties having a population of over thirty-five thousand and less than sixty thousand, the board of supervisors may levy annually an additional tax not to exceed one-eighth mill to carry out the provisions of this chapter.

"The share of any county for assistance and benefits payable to dependent Indian children living on an Indian reservation in said county shall be paid by the state, from the fund for aid to dependent children."

"239.12 Fund for aid to dependent children—reimbursement to state. * * * The state department shall report to the county board quarterly the total amount of assistance and benefits paid during the preceding quarter to recipients chargeable to the county. The county board shall promptly report the same to the county board of supervisors which shall then order paid from the county poor fund a sum representing the county's share thereof determined in the manner heretofore provided, which payment shall be credited to the fund for aid to dependent children. * * *"

"239.18 State control exclusive. Questions of policy and control respecting administration of this chapter shall vest and remain in the state agency of the state of Iowa for the purposes of administering all provisions of this chapter. In order to provide a uniform state-wide program for aid to dependent children, the state board shall promulgate such rules and regulations as may be necessary to make the provisions of this chapter uniform in all of the counties of this state."

Under the provisions of §234.9, the Guthrie County board of social welfare is composed of three members, one of whom is also a member of the county

board of supervisors. At the discretion of the board of supervisors, one or more of said members may be chosen from the membership of the board of supervisors.

Pursuant to the provisions of §239.18, the state board has promulgated rules and regulations establishing policy, procedures and standards respecting administration of this law to make the provisions thereof uniform in all of the counties of the state.

Although the law specifies that counties shall be billed quarterly, it has been the long-established procedure and policy of the Department to bill each county monthly for the share owing by each county. The statute, §239.12, says the "state department shall report to the county board quarterly *the total amount of assistance* and benefits paid during the preceding quarter to recipients chargeable to the county." This does not require specific or individual billing as contended for by the board of supervisors.

However, in addition to the total monthly billing submitted by the department, there is submitted to the county board each month a certification roll of assistance granted, which specifically sets out the name of each recipient, the case number, the amount of assistance, and the number of persons in each family receiving assistance. There is also sent out each month a certification roll as to medical payments, showing the name of the beneficiary, the case number and the vendor who received the payment and amount paid. This, we feel, supplies all of the specific data necessary to enable the board to pinpoint payments made to any particular individual recipient each month. These records are available to persons authorized by law in connection with their official duties, and the administration of the provisions of this chapter. §239.10, *supra.* The certification rolls are available to the board of supervisors at any time they desire to examine them.

Therefore it appears, in answer to your first question, that the specific information as to names of recipients and other data is being furnished by the State Board each month at the same time the total billing is submitted, in accordance with the provisions of §239.12 of the Code.

Since questions two and three are interrelated, they will be considered together in view of the fact that it is our opinion that §331.21 is not applicable to the administration of Chapter 239, aid to dependent children.

Section 331.21 reads as follows:

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

This section has reference to *unliquidated* claims against counties.

We therefore have the further question, can the claim of the State Department of Social Welfare for reimbursement under Chapter 239 be considered an unliquidated claim?

You will note that under §239.11 it is provided that each county *shall* annually *appropriate* and *pay* in the manner prescribed such sums as shall result in the payment by such county of the portions chargeable to the county, It further provides the sums necessary as above provided shall be originally determined upon the basis of an annual budget prepared by the county board

and approved by the State Department. The assistance is paid out of these annually-appropriated funds. In this case, the demand by the state for reimbursement is not unliquidated. It is a sum certain paid by the state upon approved cases for assistance certified by the county board. As bearing on this question, see *Farr v. Seaward,* 82 Iowa 221, 224, and *City of Des Moines v. Polk County,* 107 Iowa 525, 531.

Therefore, under the plain provisions of the law, §239.11, it is the mandatory duty of each county to appropriate and pay its proportionate share of ADC assistance rendered upon the demand of the state department for reimbursement, §331.21 of the Code being inapplicable to the administration of Chapter 239, aid to dependent children.

23.2

WELFARE: Application for poor relief after death of alleged poor person— §§252.26, 252.33, 252.37, 1962 Code. An application for relief of poor person under said sections may not be made subsequent to said person's death. Application for relief rejected by overseer of the poor but not considered on appeal by board of supervisors during lifetime of alleged poor person may be considered on appeal by board of supervisors subsequent to death of alleged poor person. Right of county to recover from children of alleged poor person would be governed by same provisions of statute that would apply had relief been actually granted during lifetime of poor person.

December 26, 1962

Mr. Charles H. Barlow
Palo Alto County Attorney
Emmetsburg, Iowa

Dear Mr. Barlow:

This will acknowledge receipt of your recent letter in which you submitted the following facts:

"The holder of a life estate in eighty acres of land in Palo Alto County, Iowa made application by one of her daughters on May 11, 1962, to the Palo Alto County overseer of the poor for poor relief. The remainderman of the eighty acres were children of the life tenant. During the same time, the life tenant was seriously ill and had been confined in the Palo Alto Memorial Hospital at Emmetsburg, Iowa, for several months. Her principal assets were a 1958 automobile and the income from the eighty acres of land, net after taxes, would be a little over $1000.00 a year. Further, she was receiving about $47.00 per month in social security payments.

"At the time of application, the overseer of the poor denied same thinking that a guardian would be appointed to handle funds of the life tenant and to encourage contribution from the children. The life tenant passed away on July 13, 1962, and although one of the children paid the funeral expenses, the hospital, doctors, and nursing bills remained unpaid in the approximate amount of $1400.00.

"Subsequent to date of death, the attorney for one of the children remainderman renewed application on behalf of the life tenant asking that the county pay the medical and nursing bills and seek recovery equally from the children."

You have requested an opinion from this office as to the following questions:

1. Whether an application can be made or renewed after death.

2. Whether or not the overseer of the poor and the board of supervisors would have discretion to refuse relief under the actual situation as above described.

3. If they should grant relief by paying the medical and hospital bills after death, whether or not they could recover from the children of the life tenant.

The pertinent provisions of Chapter 252, Code of Iowa, 1962, appear to be as follows:

"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 the applicant is in such a state of want as requires relief at the 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."

"252.26 Overseer of poor. The board of supervisors in any county in the state may appoint an overseer of the poor for any part, or all of the county, who shall have within said county, or any part thereof, all the powers and duties conferred by this chapter on the township trustees. Said overseer shall receive as compensation an amount to be determined by the county board and may be paid either from the general or poor fund of the county."

"252.37 Appeal to supervisors. If any poor person, on application to the trustees, be refused the required relief, he may apply to the board of supervisors, who, upon examination into the matter, may direct the trustees to afford relief, or it may direct specific relief."

In a case involving interpretation of Chapter 252, the Supreme Court of Iowa held that an application and action thereon was necessary before there could be any liability under Chapter 252 (*Davis v. Davis,* 246 Iowa 266), and in another case the Supreme Court held that an application by the poor person or someone for the poor person to the trustees and action thereon, was a requisite initial step (*Wright County v. Hagan,* 210 Iowa 795). 1932 *O.A.G.* 225 states that in the first instance a poor person must make application to the township trustees. All the language in Chapter 252, Code of Iowa, 1962, in the court's decisions and in the opinions of the Attorney General specifically states that "the poor" or that "a poor person" or that someone acting for the poor or a poor person must file an application for relief. This same language clearly refers to a living poor person as the one who must file an application for relief or as the one for whom someone acting in his behalf must file an application for relief.

Entitlement to poor relief is a statutory right only. There is no right and entitlement unless and until the statutory requirements have been fulfilled. One of the statutory requirements is that an application must be filed by the poor person or someone acting for the poor person. Your submission shows that one of the daughters of the alleged poor person filed an application for relief in behalf of the alleged poor person prior to her death. This application was formally denied by the overseer of the poor prior to the death of the alleged poor person, but there is nothing in your submission to show whether that application was or was not considered by the board of supervisors. However, after the death of the alleged poor person you state that an attorney acting in behalf of one of the children of the alleged poor person has sought to renew the application for relief. If the original application filed during the lifetime of the alleged poor person was considered by the board of supervisors and denied by them during the lifetime of the alleged poor person, then

there is no living poor person who can file a new application or for whom someone else can renew an application for relief. However, if the decision of the overseer of the poor denying the application for relief was not finally considered by the board of supervisors during the lifetime of the alleged poor person, then it would appear that the board of supervisors should have power to consider an appeal brought to their attention after the death of the alleged poor person.

In answer to your question one, the right to file an *application* for relief in behalf of an alleged poor person expires with the death of that person. As to question two, any discretion which the board of supervisors may have is dependent upon whether *they,* in fact, denied the application for relief filed during the lifetime of the alleged poor person. If the board of supervisors during the lifetime of the alleged poor person had not considered on appeal the decision made by the overseer of the poor, then the board of supervisors would have power to consider the "renewed application" as an appeal from the application for relief denied by the overseer of the poor during the lifetime of the alleged poor person. If considered as an appeal, the board of supervisors would have discretion to allow or reject relief on the basis of the application filed during the lifetime of the alleged poor person. Inasmuch as any entitlement to relief must be based on the application filed during the lifetime of the alleged poor person, the question as to whether the county could recover from the children of the alleged poor person must be governed by the same standards that would have been applicable had relief been actually granted during the lifetime of the alleged poor person, so that the answer to your question three is that §252.13 would be applicable in the event that the board of supervisors was to grant relief on appeal from the original application.

23.3

WELFARE: Legal settlement—§252.6, 1958 Code. When a family moves from one county to another and establishes a new settlement, the legal settlement of the child committed to the Glenwood State School remains in the county of commitment.

January 27, 1961

Mr. Lee R. Watts
Adams County Attorney
Corning, Iowa

Dear Mr. Watts:

This will acknowledge receipt of your letter of December 29, in which you state:

"As I understand your opinion of Feb. 17th, 1960 to Mr. Cady you hold that where a family is receiving support from A county and that family moves to M county where it resides a full year and during that year receives support from A county, then that family does not acquire a legal settlement in M county, and A county is still liable for its support even after the expiration of the year. To put it another way, you hold that under the law as amended by Chapter 181 of 58th G.A. which went into effect July 4, 1959, you hold that where a family moves from one county to another, it cannot acquire a legal settlement in the second county so long as it is receiving support from the first county from which it moved. Is this a correct statement of your holding?

"In the problem which we now have, the parents had a legal settlement in Adams County at the time their son was admitted to the Glenwood School as a voluntary patient. The parents were not receiving aid or support from Adams County at that time nor have they ever received

any such support. They moved from Adams County to Mills County and have resided there for more than a year since July 4, 1959. Adams County has continued to pay the support of this child at Glenwood. We would like to know whether or not Mills County is now liable for this support."

Your attention is directed to 1942 *O.A.G.* 181, which holds that a minor child committed to Woodward State School retains legal settlement in the county where committed regardless of the parents' change of settlement. This opinion is applicable to the facts as set out above in view of the case of *Polk County v. Clark County.* 171 Iowa 558, 151 N.W. 489, which holds that legal settlement of an inmate of an institution remains unchanged even though the dominant party, through which the inmate acquired his legal settlement at the outset, has subsequently changed his legal settlement.

Therefore, the opinion under the date of February 17, 1960, Abels to Cady, Franklin County Attorney, is not applicable in determining legal settlement in this instant case. The family moving from one county to another may establish a new legal settlement; however, the county committing the child to the Glenwood State School shall remain liable for the support of the child so committed.

23.4

WELFARE: Legal settlement—§252.16, 1962 Code. Legal settlement cannot be acquired in the county wherein an inmate to an institution is located unless said county was the county of legal settlement prior to the time of commitment as provided under §252.16.

December 18, 1962

Mr. Donald E. Skiver
Osceola County Attorney
Sibley, Iowa

Dear Mr. Skiver:

This is to acknowledge your request for an opinion wherein you state as follows:

"A and B, husband and wife, were residents of X County for many years; in March of 1961, A and B left X County and moved to Y County where they took up residence in the Holland Home for the Aged, (this is a board and room home) operated by a Church Group and considered to be a non-profit organization. In April of 1961, A and B were approved for Old Age Assistance Payments through Y County, where the Holland Home for the Aged is located. In August of 1961, the house owned by A and B in X County was sold and the proceeds applied first to the repayment of all Old Age Assistance granted to them and the balance was paid to the Holland Home for the Aged. In April or May of 1962, B was hospitalized in a hospital located in X County under authorization from the Social Welfare Director of Y County.

"At the time A and B moved to the Holland Home for the Aged, in Y County, they had no intention of returning to X County to live. It was their intention to spend the rest of their lives in the Home in Y County.

"The hospital bill of B has now become a controversy between County X and County Y."

Section 252.16, Code 1962, in pertinent part provides:

"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.

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

In a previous opinion issued by this office under the date of July 25, 1961, to Emery Goodenberger, Madison County Attorney, we held that legal settlement acquired under §252.16 required two elements: (1) residency; (2) for one year. Under subsection 3 you will note there is a condition which precludes a person from acquiring legal settlement even though the first two conditions have been met. This restriction is clear and unambiguous and precludes a person who is an inmate, whether voluntarily or involuntarily, in any institution, whether organized for profit or not, whether charitable or supported by public funds, from acquiring legal settlement in the county wherein the institution is located.

The county of legal settlement would be X County and not the county in which the home for the aged is located.

23.5

WELFARE: Legal settlement, how acquired—§252.16, 1958 Code. Under Ch. 145, §1, Acts 59th G.A., by continuous present good faith residence for one year before or after July 4, 1961, receipt of public funds prior to July 4, 1961 will not prevent acquiring legal settlement prior to July 4, 1962.

July 25, 1961

Mr. Emery L. Goodenberger
County Attorney
Madison County
Winterset, Iowa

Dear Mr. Goodenberger:

Reference is made to your letter of June 27, 1961, wherein you state:

"I would like an opinion concerning legal settlement in view of the amendments to Section 252.16 by the 58th and 59th General Assembly.

Subsections 1,2,3 of Section 252.16 as amended now read as follows:

'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.

'3. Any such person who is an inmate of or is supported by any institution whether organized for pecuniary profit or not or any insti-

tution supported by charitable or public funds in any county in this state shall not acquire settlement in said county unless such person before becoming an inmate thereof or being supported thereby has a settlement in said county.'

"Prior to its amendment by the 59th General Assembly, Subsection 3 above contained the additional provision that a person who is being supported by public funds could not acquire settlement. The amendment in the statute takes effect July 4, 1961.

"My questions are as follows:

"1. Does a person who has resided continuously in Madison County for a period of one year prior to July 4, 1961, and who has not acquired a settlement in Madison County because he was being supported by public funds, immediately acquire legal settlement in Madison County as of July 4, 1961?

"2. Does a person who has resided in Madison County for less than one year acquire legal settlement as soon as he has resided in Madison County continuously for one year from the time that he moved into the county or one year from July 4, 1961?"

The legislature has, in effect, eliminated county control over acquisition of legal settlement. As pointed out in *Emmet County v. Dally,* 216 Iowa 166, 248 N.W. 293 (1933), "People generally have the right to settle where they please * * *. To give any officer or board the power to cause or require anyone to move on by the service of a Notice to Depart is to bestow upon them an arbitrary and serious power and authority." Chapter 181, Acts 58th G.A., approved March 31, 1959, eliminated this element of control. The effect of this Act of the 58th G.A. is discussed at length in a prior Attorney General's opinion under date of June 5, 1959 to Johnson, Poweshiek County Attorney.

Chapter 145, §1, 59th G.A., passed May 3, 1961, repealed from §252.16(3) the provision precluding the acquisition of legal settlement by a person who was receiving public support at any time during one year immediately prior to the acquisition of a legal settlement.

Legal settlement is a status which is strictly statutory and there now remain just two requirements for legal settlement under §252.16: 1. residency. 2. for one year.

When a statute is repealed it is as though it had never existed. *City of Dubuque v. Ill. Cent. R. Co.,* 39 Iowa 56, 96 (1874). This is subject to the qualification that rights acquired under the statute may not be lost by its repeal. §4.1(1), Code of Iowa, 1958; *Gelpcke v. City of Dubuque,* 68 U.S. 175, 1 Wall. 175, 17 L. Ed. 520 (1863).

Does the county have any such rights?

The statute prior to its amendment did not create a *right* in the county, but rather a *power* to deny relief. *Scott County et al. v. Johnson et al.,* 209 Iowa 213, 222 N.W. 378 (1929). The powers of a public corporation are conferred by the legislature, and may be taken away by the same authority. *Id.* Thus, the amendment repeals the previous legal prohibition and the effect of this repeal is as though the prohibition never existed.

Therefore, in the construction and application of Chapter 145, §1, 59th G.A., it is our considered opinion that:

1. In the case of the person who has resided continuously in a county for one year or more and has received public support, such person's one year residency requirement commences upon setting up residency in the county

and *not* from the date of the last payment for public support, thus qualifying him to receive assistance as of July 4, 1961.

2. In the case of a person who has resided in a county for less than one year, such person's one year residency requirement commences when he has set up residency in the county, therefore allowing him to have a legal settlement in the new county before July 4, 1962.

23.6

WELFARE: Settlement, poor support—§252.16(3), 1958 Code. Under the provisions of §252.16(3), one residing in X county for more than a year subsequent to July 4, 1959 cannot acquire legal settlement in said county while receiving support from the county of her original settlement.

April 4, 1961

Honorable A. L. Mensing
State Representative, Cedar County
House of Representatives
LOCAL

Dear Mr. Mensing:

I have your request for an opinion on a question of legal settlement, based upon the following facts, to wit:

"Mrs. X makes her home in Calamus with a couple of bachelor brothers and has lived there for a number of years. A non-resident notice had been served on her in years past by Clinton County and when it became necessary for her to apply for relief, it was up to Cedar County to furnish it, which we have been doing for the last ten or twelve years.

"Since Mrs. X's residence in Clinton County has been more than a year since July, 1959, when the change in the law went into effect, we are of the opinion that she has now acquired poor settlement in Clinton County and therefore referred her to that county for her assistance. Mrs. Witmer, Clinton County Social Welfare Director, called me on the telephone to advise me that since Mr. and Mrs. X are not divorced, even though they have been separated for ten or twelve years, she continues to take his county of poor settlement, which is Cedar County."

The answer to this problem lies in these pertinent parts of the law applicable to the establishment of a legal settlement in this case:

"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.

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

"4. A married woman has the settlement of her husband, if he has

one in this state; if not, or if she lives apart from or is abandoned by him, she may acquire a settlement as if she were unmarried. Any settlement which the wife had at the time of her marriage may at her election be resumed upon the death of her husband, or if she be divorced or abandoned by him, if both settlements were in this state."

Under the facts as stated, Mrs. X has been residing in Clinton County for a period of some ten or twelve years, and more than a year since July 4, 1959. It also appears that a notice to depart has been served on her from time to time by the Clinton County authorities. This in and of itself would not prevent her from establishing a legal settlement in Clinton County. See opinion of the Attorney General dated June 5, 1959, copy of which is attached, wherein it was held:

"(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 1940 *O.A.G.* 316, 605; 1938 *O.A.G.* 869)."

It is further shown by the facts that Mrs. X, though not divorced, has been living apart from her husband, whose residence has been in Cedar County, for some ten or twelve years.

In the statute above quoted, we find this language: "A married woman has the settlement of her husband, if he has one in this state; if not *or if she lives apart from or is abandoned by him, she may acquire a settlement as if she were unmarried.*"

There seems to be no question that she has been living apart from her husband for some considerable period of time. Whether or not she has been abandoned, *quaere*. Under the statute, living apart from the husband gives the spouse the right to acquire a legal settlement as though unmarried. We quote from an attorney general's opinion found in 1940 *O.A.G.* 189, wherein it was held:

"We do not believe that the fact that the wife received partial support from her husband while residing in your county alters the situation. Nothing is said in the statute concerning support during the period required by law for the acquisition of legal settlement. The statute seems very clear that a married woman, if she *lives apart from her husband,* may acquire a settlement as if she were unmarried. In the instant case she has *lived apart* from her husband. This seems to be all that is required in order for a married woman to obtain a legal settlement in the county of her residence.

"We reach the conclusion, therefore, that the married woman referred to has a legal settlement in your county."

See also opinions reported in 1934 *O.A.G.* 712; 1936 *O.A.G.* 384. And it is well established that a married woman who has been abandoned by her husband may acquire a settlement as if she were unmarried. (See *Washington County v. Mahaska County,* 47 Iowa 57, and *Washington County v. Polk County,* 137 Iowa 333.

However, more important, and we think decisive of the problem, is the provision of the statute which states: "* * * any person who is being supported by public funds shall not acquire a settlement in said county unless such person before * * * or being supported thereby has a settlement in said county." Under the facts stated, Cedar County has furnished and is furnishing support to Mrs. X.

Therefore, it is our opinion that Mrs. X, under these facts, has not acquired a settlement in Clinton County. (See opinion of Attorney General dated February 18, 1957, copy attached).

23.7

Assignment of liens—§249.20, 1958 Code. State Board of Social Welfare does not have authority to assign its statutory lien against real estate of an old age assistance recipient. (Rehmann to Putney, Soc. Welfare, 11/9/61) #61-11-9

23.8

Children's private boarding schools—§§234.6, 237.2, 257.9, 1962 Code. State Board of Social Welfare has no authority or responsibility for setting educational standards of children's private boarding schools licensed under the provisions of Ch. 237. (Rehmann to Putney, Soc. Welfare, 6/27/62) #62-6-3

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