SCHOOLS: State aids -- Federal agency school districts are not entitled to state aids for Indian pupils residing on the reservation, by virtue of the provisions of Chapter 110, Acts of the 25th G. A. (Rehmann to Wright, St. Supt., 12/24/59)

#60-1-1

December 24, 1959

Mr. J. C. Wright, Superintendent
Department of Public Instruction
L O C A L

Attn: Paul F. Johnston

Dear Sir:

This will acknowledge receipt of your letter of November 4, in which you state:

> "We have had inquiries over the past two or three years from representatives of the Bureau of Indian Affairs and their Agent at Tama concerning the status of Indian lands and Indian pupils, and their attendance in school and their eligibility therefor for state aids -- namely, General Aid, Supplemental Aid, Transportation Aid and Special Education Aid for these districts. The land is in three school districts. The Federal Government operates a school for the elementary children and the high school pupils go primarily to Tama and a few to Toledo.
>
> "We do allow the Lunch Program at Tama to count the pupils fed for reimbursement from the Federal Funds that we disburse for that purpose, and provide commodities for the elementary school operated on the so-called reservation. To date we have not accepted any request for General Aid or Supplemental Aid from the districts having Indian land with pupils residing thereon.
> . . . .
>
> "Our specific question is this -- are the school districts that contain Indian lands and have resident Indian pupils residing

60-1-1

thereon entitled to make application for state funds such as General Aid, Supplemental Aid, Transportation Aid and other miscellaneous state aids? We would appreciate your consideration on this question."

In reply thereto, we advise as follows:

Chapter 110, Acts of the 26th G. A., provides:

"Section 1. That, except as hereinafter provided, exclusive jurisdiction of the Sac and Fox Indians residing in Iowa and retaining the tribal relation, and of all other Indians dwelling with them, and of all lands now or hereafter owned by or held in trust for them as a tribe, be and the same is hereby tendered to the United States, and that, as soon as the United States shall accept and assume such jurisdiction, all such jurisdiction on the part of the state of Iowa shall cease.

"Sec. 2. Consent is hereby given to the United States to purchase any land in Tama county to be used for and in connection with any school or schools to be established and managed by federal authority for the education of said Indians.

"Sec. 3. Nothing contained in this act shall be so construed as to prevent on any of the lands referred to in this act the service of any judicial process issued by or returnable to any court of this state or judge thereof, or to prevent such courts from exercising jurisdiction of crimes against the laws of Iowa committed thereon either by said Indians or others, or of such crimes committed by said Indians in any part of this state, or to prevent the establishment and maintenance of highways and the exercise of the right of eminent domain under the laws of this state over lands now or hereafter owned by or held in trust for said Indians, or to prevent the taxation of said lands for state, county,

bridge, county road, and district road purposes, and such other purposes as the general assembly may from time to time by special statute provide.

"Sec. 4. This act being of immediate importance shall take effect from and after its publication in the Iowa State Register and the Des Moines Leader, newspapers printed and published in Des Moines, Iowa."

After a search of the Acts from the 26th General Assembly to date, there appear to be no amendments to Chapter 110, Acts of the 26th G. A. The law as enacted in 1896 is still in full force and effect. Complete jurisdiction of Indian affairs relating to school problems was given the Federal Government.

By virtue of Chapter 110, Acts of the 26th G. A., school districts are precluded from levying a tax upon the property tendered to the United States. The legislature granted to the United States the right to establish and manage the education of Indians to the complete exclusion of the State.

The board of directors of the school district which includes lands belonging to the Indian reservation has no jurisdiction over the students who reside thereon. By the same token the board of directors of the school district which includes lands belonging to the Indian reservation have no responsibility to see that the children are properly educated.

By legislative mandate, only school districts organized under the laws of Iowa are entitled to state aids. There is no expressed authority for any other agency to receive state aids as provided in the statutes. Thus the school districts are not entitled to state aids for the Indian children over which the school board has no jurisdiction. In like manner, the Federal agency is not entitled to state aids because there are no expressed provisions in the statute making said agency eligible for said aids.

Thus the answer to the question propounded by your letter is in the negative.

Very truly yours,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:bl
cc: Joe Davis

ELECTIONS: Nomination papers - filing date -

The dates for filing nomination papers for state office prior to the primary election of 1960, are the following: The first date for filing is March 14, 1960 and the final date for filing is April 2, 19

(Strauss to Synhorst, Secy. of St., 12/29/59)

#60-1-2

December 29, 1959

Hon. Melvin D. Synhorst

Secretary of State

B U I L D I N G

Dear Sir:

This will acknowledge receipt of yours of even date in which you submitted the following:

> "We have received several inquiries as to the first and final dates for filing nomination papers prior to the June 6, 1960 primary election.
>
> "A formal opinion is respectfully requested from your office setting forth this information."

In reply thereto, in accordance with the provisions of Section 43.11(2), Code 1958, which provides the following:

> "43.11 Filing of nomination papers. Nomination papers in behalf of a candidate shall be filed:
> 1. * * *
> 2. For United States senator, for an elective state office, for representative in congress, and for member of the general assembly, in the office of the secretary of state not more than eighty-five days nor less than sixty-five days prior to the day fixed for holding said primary election.
> 3. * * * "

I advise that the first day for filing nomination papers for state office prior to the primary election of June 6, 1960, is March 14, 1960, and the final date for filing such nomination papers is April 2, 1960.

Yours very truly,

OS:mmh4

First Assistant Attorney General
OSCAR STRAUSS

60-1-2

SCHOOLS: Elections -- two directors elected under section 275.25 will serve a term from July 1 until the next regular school election in September. (Rehmann to Anderson, Howard Co. Atty.; 12/29/59) #60-1-3

December 29, 1959

Mr. C. J. Anderson
Howard County Attorney
Cresco, Iowa

Dear Mr. Anderson:

This is to acknowledge receipt of your letter of December 14, in which you state:

> "A question has arisen in this County concerning the length of the term of office of directors elected to a newly formed community school district. Five directors were elected -- one at large and four from director districts, but with everyone in the entire community school district being eligible to vote for all of the directors.
>
> "Section 275.25 of the Code of Iowa, 1958, provides:
>
> > '. . . At such election, two directors shall be elected to serve until the next regular election, two until the second, and one until the third regular election thereafter, except in districts which include all or part of a city of fifteen thousand or more population, three directors shall be elected to serve until the third regular election thereafter, all of whom to serve until such time as their successors are elected and qualified. . . .'

60-1-3

"Section 277.25 of the Code of Iowa, 1958 provides:

'At the first election in newly organized districts the directors shall be elected as follows: . . . 2. In districts having five directors, two shall be elected to one year, two for two years, and one for three years . . .'

"A special election was held on the 8th of December for the election of directors for the newly formed district. Regular school elections, under change made by the last Legislature, are now to be held in September of each year instead of March. The newly formed district becomes effective as a de jures corporation on July 1st, 1960.

"The question then: Do the terms of the directors under the provisions of Section 275.25, expire as follows: 2 directors in September, 1960; 2 directors in September, 1961; and 1 director in September, 1962? Or do the directors hold their terms of office as is set forth in Section 277.25? If the terms of the first 2 directors terminate as of September, 1960, then a situation arises where they will have served officially only from approximately July 1960 to the election in September of 1960, the September 1960 election being the first regular election."

In reply thereto, we advise as follows:

Section 275.25, Code 1958, the pertinent part of which was set out in your letter, is the controlling section when schools are organized under Chapter 275, Code 1958.

The general provisions of Section 277.25, Code 1958, in essence control the organization of school districts, such as election of new board for independent district, Section 274.33, Code 1950, repealed by 55th G. A., Chapter 117, Section 36; election of directors of new school corporations, Section 274.18, Code 1950, repealed by 55th G. A., Chapter 117, section 36; election of officers in new township

districts, section 274.12, Code 1958; first election of united rural independent districts, section 274.36, Code 1958; and election of new boards in a divided school township, section 274.35, Code 1958. It appears from your letter that the new school district was organized under Chapter 275 and not under any of the above-enumerated sections.

Section 275.25, Code 1958, is clear and unambiguous. The fact that the legislature changed the dates of the regular school elections from March to September has no bearing upon the length of time some directors of the newly-elected board may serve.

Therefore the latter observation in your letter is correct. Two directors of the newly-elected school board will serve from July 1 until the next regular election in September, that being the first regular school election -- Acts of the 58th G. A., chapter 186.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:bl
cc: Paul Johnston
Joe Davis

COURTS: Judges retirement plans --

A district court judge who holds membership in the Judicial Retirement System holds the same subject to the right of the Legislature to amend the act, and amendment reducing the retirement age from 67 to 65 is not retroactive so as to enable him to receive his annuity upon attaining the age of 65.

(Strauss to Sarsfield, St. Comp., 12/30/59)

#60-1-4

December 30, 1959

Mr. Glenn D. Sarsfield

State Comptroller

B U I L D I N G

Dear Mr. Sarsfield:

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

> "Chapter 356, Section 5, Acts of the 58th General Assembly, reads as follows:
>
> > 'Sec. 5. Section six hundred five A point six (605A.6), Code, 1958 is hereby repealed and the following adopted in lieu thereof:
> >
> > "Any person who shall have become separated from service as a judge of any of the courts included in this chapter and who has had an aggregate of at least six years of service as a judge of one or more of such courts and shall have attained the age of sixty-five years or who has had twenty-five (25) years of consecutive service as a judge of one or more of said courts, and who shall have otherwise qualified as provided in this chapter, shall be entitled to an annuity as hereinafter provided."'
>
> "At the present time, we have at least one District Court Judge who has retired, and has met all of the qualifications for his annuity, with two exceptions; at the date of retirement he was not sixty-seven as was then required by statute, and has not yet paid for his prior service. At the present time he is past sixty-five, and still not sixty-seven.
>
> "I request an opinion as to the following:
>
> 1. Had this retired judge paid for his prior service prior to July 4, 1959, would he then have been entitled to receive his

60-1-4

annuity under the Judicial Retirement System from July 4, 1959, or at the time of attaining the age of sixty-five years, whichever is first?

2. In the event that your answer to question No. 1 is in the affirmative, may he now make payment for his prior service and draw his annuity in accordance with question No. 1, or is his annuity to be effective the date of payment for his prior service?"

In reply thereto, I would advise as follows:

1. On the authority of the case of Talbott v. Independent School District of Des Moines, et al., 230 Iowa 949, the retired judge referred to by you has no vested right in the Judicial Retirement System, but held the same subject to the amending power of the Legislature. In the cited case it is said: (pp 966, 967, 970, 971, 972)

> "It is our judgment that under sound principles of law, and under the particular facts of this case, that notwithstanding the appellee was eligible for retirement prior to the resolution of the defending board, on April 16, 1935, raising the retirement age to 65 years, her pension rights were not absolutely vested, but were subject to the amending resolution. She was not then 65 years old. On March 6, 1936, the Board reduced the retirement age to 60 years, and she reached that age on May 29, 1936." * * *

> "The courts of Pennsylvania, California and Georgia, which are the strongest supporters of the appellee's contention, recognize that actuarial or administrative changes if reasonable and necessary to strengthen the financial soundness and security of such retirement systems are matters within the legislative control and discretion, and afford no legal basis for complaint upon the part of the beneficiaries. In the McGovern case, supra (316 Pa., on pages 174, 175), 174A., commencing on page 407, the Pennsylvania court, after referring to the claim that retiring employees were to contribute to a fund, the insolvency of which would increase and would ultimately consume these contributions, said:

'It is no doubt true that if the retirement funds are insolvent or will become insolvent because of actuarial unsoundness, or if the contributions by the employees, or the results expected, are prejudiced by retirement payments, and the employees' property will or may be consumed, so that there will be no funds with which to make retirement payments, a very serious question arises; to answer it the controlling principles should be clearly set forth.

'The charge of insolvency, when dependent on actuarial matters, presents a factual situation which may be controlled by the Legislature. * * *

'But underlying all retirement systems of the class we are now discussing is the legislative object, as well as that of the member employee, that a substantial reserve be built up so that the actuarial soundness of the plan cannot be questioned. This factor is an important one in the relation between state, city, and county, as employer, and the employee member, with respect to retirement pay. If a direct attack on it, such as has been made in the present case, is justified, or a weakness in it manifested through actual trial is found to exist, the remedy or relief rests clearly within the relation between employer and employee contemplated by the legislative system for retirement pay. The Legislature may from time to time, within the confines of that established relation, alter, change, amend, and render intact the actuarial soundness of the system so as to strengthen its fibers in any way it sees fit. Changes in details, such as length of service required, contributions needed, and age requirements, to keep the fund on sound actuarial practices, are essential. Flexibility in component parts is a paramount necessity to guard against changed conditions and to permit keeping abreast with actuarial science.'

"The California courts have, in a number of cases, lowered or raised the allowances after retirement to meet changing conditions. In Casserly v. City of Oakland, supra, 6 Cal. 2d 64, 56 P. 2d 237, the allowance to a pensioner was lowered when the salaries of those of the same rank in active service were lowered because of economic emergency. In Hollis v. Jones, 187 Ga.14, 19, 199 S.E. 203, 205, the widow's award had been reduced from $99 to $40 a month by amendment to the law, brought about by actuarial weakness. She sued for the deficit. In denying her claim, the court said:

'* * * she is entitled to only such sum as might be lawfully paid to her under the act of 1925. The

> trustees were required to administer only such funds as came into their hands under this statute, and will not be compelled by the writ of mandamus to perform the impossible.'"

The Acts of the 58th General Assembly, being Chapter 356 thereof, reduced the retirement age from sixty-seven to sixty-five in the following terms:

> "Sec. 5. Section six hundred five A point six (605A.6), Code 1958, is hereby repealed and the following adopted in lieu thereof: 'Any person who shall have become separated from service as a judge of any of the courts included in this chapter and who has had an aggregate of at least six years of service as a judge of one or more of such courts and shall have attained the age of sixty-five years or who has had twenty-five (25) years of consecutive service as a judge of one or more of said courts, and who shall have otherwise qualified as provided in this chapter, shall be entitled to an annuity as hereinafter provided.'"

According to the case of Schwarzkopf v. State House Commission, et al., 9 Atl. Rep. 2d 103, such laws are not retroactive. There, on page 105, it is said:

> "In the Alden case the court said: 'Laws, generally, are enacted for the regulation of future affairs and conduct, and to establish the basis on which rights may thereafter under them be rested, and are not usually designed to alter or affect the quality or legal relations of past acts and concluded transactions, much less to disturb rights which have arisen under laws running concurrently with their birth. Hence, we do not look for or expect in any enactment that it shall be operative as of time prior to its own existence; and before we are permitted to ascribe to it such purpose, there must be found in the law such clear and indubitable expression of the legislative design as precludes any other reasonable interpretation of the words used. The rule in the courts is, that retroactive effect will not be given to a statute when the words in it can be construed as designed to make it prospective only.' And in the Williamson case, quoting from United States v. Heth, 3 Cranch 399-413, 2 L.Ed. 479, the court said: 'The general rule is, that all statutes shall have a prospective effect only. "Words in a statute," says Justice Paterson, "ought not to have a retrospective operation, unless they are so clear, strong and imperative

> that no other meaning can be annexed to them, or unless the intention of the legislature cannot otherwise be satisfied. This rule ought especially to be adhered to when such a construction will alter the pre-existing situation of the parties or will affect their antecedent rights, services or remuneration, which is so obviously improper that nothing ought to uphold and vindicate the interpretation but the unequivocal and inflexible import of the terms, and the manifest intention of the legislature. " " "

3. Therefore, by reason of the foregoing, the answer to your question No. 1 is in the negative. Answer to your question No. 2 is not required, in view of the conclusion reached in answer to your question No. 1.

Very truly yours,

OSCAR STRAUSS

First Assistant Attorney General

OS:nmh4

TAXATION: Tax sales--Special Assessment. Where county sells real property at tax sale, it is required to sell for all delinquent taxes including special assessments. Where the county purchases property at tax sale pursuant to section 446.19, Code (1958), it is authorized to bid only the amount of the general taxes, interest, penalties and costs. (Gill to McDonald, Cherokee Co Atty, 1/5/60)

60-1-5

January 5, 1960

James L. McDonald
Attorney at Law
McDonald Building
Cherokee, Iowa

Dear Mr. McDonald:

This will acknowledge your letter of December 22, 1959, addressed to Mr. Norman A. Erbe, in which you request the opinion of this department on the following question:

> "On behalf of the Cherokee County Board of Supervisors, I respectfully request your interpretation of Sections 391.64 and 446.7 of the 1958 Code of the State of Iowa in the light of the following facts:
>
> "1. Property 'X' is sold at tax sale according to Section 446.7. At the time of the sale there is a lien for street improvements against the properties resulting from a municipal special assessment. Is the County Treasurer required to sell for the general taxes delinquent or must he also include the delinquent special assessment? If he is authorized to sell for the general taxes, does the special assessment remain a lien in the hands of the purchaser at the tax sale?
>
> "2. Same situation as above with the exception that the County purchases the real estate pursuant to the provisions of Section 446.19. Has the County any authority to pay the special assessment in addition to the general taxes, interest, penalties and costs as provided in this section?
>
> "Must the purchaser at a tax sale, the County included, pay off the special assessment or is the municipality adequately protected by its right to redeem?"

60-1-5

In reply to your first inquiry, it becomes necessary to examine Section 446.7, Code of Iowa (1958), which is set out as follows:

> "446.7 Annual tax sale. Annually, on the first Monday in December, the treasurer shall offer at this office at public sale all lands, town lots, or other real property on which taxes of any description for the preceding year or years are delinquent, which sale shall be made for the total amount of taxes, interest, and costs due and unpaid thereon, including all prior suspended taxes, provided, however, that no property, against which the county holds a tax sale certificate, shall be offered or sold. No interest or penalty on suspended taxes shall be included in the sale price, except that six percent interest per annum from the date of suspension shall be included as to taxes suspended under the provisions of section 427.8."
> (Emphasis added)

Your attention is directed to an Attorney General's opinion found in 1932 A.G.O. 267, which construes Section 446.7, supra, as follows:

> "Under section 7244, Code of 1931, (presently 446.7) it is made the mandatory duty of the treasurer to annually on the first Monday in December hold a tax sale of all lands, town lots, or other real property on which taxes of any description for the preceding year or years are delinquent, and to sell the same for the total amount of the taxes, interest, and costs due and unpaid thereon.
>
> "Under this section the treasurer must, therefore, sell the property at public sale for all of the taxes due and unpaid. This would apply not only to the general taxes but to special assessment installments which were due and unpaid and delinquent. There is no authority for the treasurer selling the property for just the amount of the general taxes, interest, and costs. He must sell it for not only the general taxes but for all special assessment installments which are due, unpaid, and delinquent, together with interest and costs."

It is believed that the above quoted passage answers the first half of question one. Insofar as the last half of the question is concerned, it is seen that the county treasurer, proceeding pursuant to section 446.7, supra, is required to sell for all taxes on the property including special assessments. It should be noted that the sale is to be only for delinquent taxes. Thus, installments for special assessments not due at the time of the sale are not to be included in the sale. Further, the purchaser

at the tax sale upon receiving the deed from the county treasurer, takes the property free from the lien of the special assessment, since the rights of the holder of the special assessment certificates which were a lien on the property prior to the sale, were cut off, see 1932 A.G.O. 267, page 268.

With reference to your second question, it is again necessary to examine the relevant statute. Section 446.19, Code (1958), provides as follows:

> "446.19 County as purchaser. When property is offered at a tax sale under the provisions of section 446.18, and no bid is received, or if the bid received is less than the total amount of the delinquent general taxes, interest, penalties and costs, the county in which said real estate is located, through its board of supervisors, shall bid for the said real estate a sum equal to the total amount of all delinquent general taxes, interest, penalties and costs charged against said real estate. No money shall be paid by the county or other tax-levying and tax-certifying body for said purchase, but each of the tax-levying and tax-certifying bodies having any interest in said general taxes for which said real estate is sold shall be charged with the full amount of all the said delinquent general taxes due said levying and tax-certifying bodies, as its just share of the purchase price."

It is noted that the statute permits the county through its board of supervisors to bid only the total amount of delinquent general taxes, interest, penalties and costs and makes no provision as to special assessments. This conclusion finds support in Fleck v. Duro, 227 Iowa 356, 288 N. W. 426, in which the Court said, "The county only bid the amount of the general taxes, interest, penalty and costs. This was in strict compliance with section 7255-B1 (446.19, Code (1958))", and finds further support in 1936 A.G.O. 260, in which we stated:

> " * * * If he (county treasurer) then entered on the records of the sale, a bid by the county on each piece of property, the full amount of all taxes and special assessment, he did not enter the authorized bid and he should correct his records. As to all items which sold not only for general taxes but for special assessments, and for which there were no other bidders, the records should be corrected to show the sale to the county for the amount of the general taxes, which was the actual bidding made by the supervisors. * * *."

Thus, it is evident that the county is not authorized to purchase property pursuant to section 446.19, supra, for any amount in excess of the general taxes, interest, penalties and costs.

In response to the last paragraph of your letter in which you request our opinion as to whether the county, purchasing under Section 446.19, supra, is required to pay off the special assessment, our opinion is that the county is not so required since the municipality may redeem from the tax sale by paying the holder of the certificate of sale or the county auditor the amount which he (or the county) would be entitled to receive in case of redemption, see 1930 A.G.O. 280.

Very truly yours,

Gary S. Gill
Special Assistant Attorney General

GSG/WWR/bjf

CONSERVATION: Hunting and fishing grounds --
~~STATE CONSERVATION COMMISSION~~

1. Commission is authorized and empowered to acquire by lease or agreement lands or waters and rights of ways, thereto, and maintain the same for public hunting and fishing grounds.

2. Commission may expend moneys in the fish and game protection fund to carry out the above purposes.

January 11, 1960
(Gritton to Powers, St. Conv. Comm., 1/11/60)
#60-1-6

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

Attention: Mr. K. M. Madden

Dear Sir:

Your recent memo is as follows:

"Pursuant to our phone discussion and Mr. Stoker's visit in your office, we are requesting an opinion on the legality of the following:

1. Public access leases for fishing or hunting on private lands or waters.

2. The legality of spending small sums of Fish and Game Funds on private lands covered by lease or agreement for lakes, streams, habitat improvement, and access to such fishing or hunting areas.

Your advice regarding the above minimum 10 year lease or recorded agreements will be appreciated."

Section 107.24, Code of 1958 in pertinent part is as follows:

"107.24. Specific powers. The commission is hereby authorized and enpowered to:

1. Expend any and all moneys accruing to the fish and game protection fund from any and all sources in carrying out the purposes of this chapter; any act, or acts, not consistent with this provision are hereby repealed so far as they may apply to the fish and game protection fund.

2. Acquire by purchase, condemnation, lease, agreement, gift and devise lands or waters suitable for the purposes hereinafter enumerated, and rights of way thereto, and to maintain the same for the following purposes, to wit:

a. Public hunting, fishing, and trapping grounds and waters to provide areas in which any person may hunt, fish, or trap in accordance with the provisions of the law and the regulations of the commission;

b. Fish hatcheries, fish nurseries, game farms and fish, game, fur-bearing animal and protected bird refuges."

"107.17. Funds. The financial resources of said commission shall consist of three funds:
1. A state fish and game protection fund.
* * *
The state fish and game protection fund, except as otherwise provided, shall consist of all moneys accruing from license fees and all other sources of revenue arising under the division of fish and game."

You are, therefore, advised that the Commission pursuant to 107.24 (2a) is authorized and empowered (1) to acquire by lease or agreement lands or waters and rights of ways, thereto, and (2) to maintain the same for public hunting and fishing grounds.

You are further advised that pursuant to 107.24 (1), Code of 1958, the Commission may expend moneys in the fish and game protection fund to carry out the above purposes.

Yours truly,

JAMES H. GRITTON
Assistant Attorney General

JHG:amm

STATE CONSERVATION COMMISSION

1. Commission is authorized and empowered to acquire by lease or agreement lands or waters and rights of ways, thereto, and maintain the same for public hunting and fishing grounds.

2. Commission may expend moneys in the fish and game protection fund to carry out the above purposes.

January 11, 1960

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State Conservation Commission
East Seventh and Court
L O C A L

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1. Expend any and all moneys accruing to the fish and game protection fund from any and all sources in carrying out the purposes of this chapter; any act, or acts, not consistent with this provision are hereby repealed so far as they may apply to the fish and game protection fund.

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a. Public hunting, fishing, and trapping grounds and waters to provide areas in which any person may hunt, fish, or trap in accordance with the provisions of the law and the regulations of the commission;

b. Fish hatcheries, fish nurseries, game farms and fish, game, fur-bearing animal and protected bird refuges."

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1. A state fish and game protection fund.
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You are further advised that pursuant to 107.24 (1), Code of 1958, the Commission may expend moneys in the fish and game protection fund to carry out the above purposes.

Yours truly,

JAMES H. GRITTON
Assistant Attorney General

JHG:amm

CITIES AND TOWNS:

~~Cities and Town:~~ Eminent Domain - City or Town can not condemn State property, if to do so would material impair the previous use by the State of the property without a statute clearly conferring such authority. (Gritton to Smith, O'Brien Co. Atty., 1/12/60) #60-1-7

January 12, 1960

R. T. Smith
County Attorney
O'Brien County
Primghar, Iowa

Dear Mr. Smith:

Your letter of October 26, 1959 is as follows:

> "The Town of Paullina, Iowa is desirous of acquiring and establishing an air strip; they have been unable to secure approval by the proper authorities of their proposed strip because of the direction in which it was proposed to run. They have since come to the conclusion that if they could acquire a different strip of land, part of it being now Mill Creek State Park, the strip would be approved for the receipt by the Town of public funds.
>
> The question which the Town has asked me to ascertain from you is as follows:
>
> Does the Town of Paullina, Iowa have any rights of condemnation against the State of Iowa so far as a State Park is concerned? The land would be condemned for use as a public air strip to be owned and operated by the municipality."

Section 330.5, Code of 1958, is as follows:

> "330.5 Acquisition. Any such city or town is hereby authorized and empowered to acquire by purchase, gift, condemnation, lease or otherwise, either within or without its corporate limits, and either within or without the territorial limits of this state, real estate and personal property for airport purposes; and in like manner to acquire or cause to be moved, removed, abated, eliminated, mitigated, or altered any structure or object protruding above the surface of the ground, or any use of land obstructing the airspace necessary for the safe and efficient flight of aircraft in landing or taking off at any airport, or otherwise constituting a hazard to such landing or taking off."

In the case of Town of Alvord v Great Northern Railway Co.,179 Iowa 465, 161 N.W. 467 the town attempted to condemn property held by the Railway Company and used as part of its depot facilities. The Court pointed out that the property had been previously condemned or appropriated for public purpose.

60-1-7

The Court said in part:

> "'The converse of this proposition necessarily is true, and the authorities quite generally declare that, where land has once been appropriated for public purposes in the exercise of eminent domain, it cannot be again condemned to the public use by city or town for street or other purposes inconsistent therewith, without statutory authority for so doing.
>
> * * * Without the limitation suggested, the most absurd results could follow. The second might take from the first, others take from the latter, and the first turn about and retake, and thus the process go on ad infinitum.
>
> * * * It is said in Elliott on Roads and Streets (2d Ed.) Sec. 219:
>
> The right of eminent domain is a dominant legislative power only called into exercise by the enactment of a valid statute, and when a party asserts a right to seize land previously appropriated to a public use, he must sustain his claim by producing a statute clearly conferring the asserted authority. It will not be presumed, in the absence of such a statute, that the legislature intended to again seize property which had been once appropriated. * * * The general rule is that if the two uses are not inconsistent, and both may stand together without material impairment of the first authority for the second use may be implied from a general grant; but if they cannot co-exist without material impairment of the first, authority to take for the second cannot be implied from a mere general grant of authority to condemn.'"

This case was cited with approval in the case of Connolly v Des Moines & Central Iowa Railway Company 246 Iowa 874 68 N.W. 2d. G 2 0.

It seems to be apparent that the two uses cited in your letter are inconsistent and also that Sec. 303.5, Code of 1958 is a mere general grant of authority to condemn.

The answer to your question is, therefore, in the negative.

Yours truly,

JAMES H. GRITTON
Assistant Attorney General

JHG:amm

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

January 13, 1960

Honorable Melvin D. Synhorst

Secretary of State

L O C A L

Attention: Mr. Berry O. Burt
Director, Corporation Section.

Dear Sir:

This will acknowledge receipt of yours with accompanying letter to you of Betty, Neuman, Heninger, Van Der Kamp and McMahon.

The accompanying letter referred to is this:

"In Re: Incorporation of firm to engage in the practice of architecture

"This letter is being written following our conference on June 3, 1959 in which we requested that the Secretary of State issue a certificate of incorporation to an Iowa corporation which will engage in the practice of architecture in the state of Iowa.

"You will recall that on presentation of the request, as made in behalf of our client, that you declined to approve the incorporation of a business formed for such purpose because under the terms and provisions of Chapter 118 of the Iowa Code only an individual may engage in the practice of architecture.

"The question is therefore as to whether under the terms and provisions of Section 118.6, a certificate under the title 'architect' may be issued to a corporation.

60-1-8

"However, since Section 118.6 does refer to a corporation, a secondary question is presented as to who are 'members' of a corporation within the meaning of Section 118.6 who must have a certificate of registration.

"Under the terms of the proposed Articles of Incorporation, persons other than licensed architects may hold stock in the corporation but only registered architects who are officers of the corporation would be authorized to sign plans and specifications as registered architects in behalf of the corporation.

"It is requested that you reconsider your decision and request a ruling as to whether the Articles of Incorporation for the purpose of engaging in the practice of architecture are acceptable to the state of Iowa.

"In this connection, your attention is called to the fact that at present foreign corporations incorporated in other states are presently engaged in the practice of architecture in the state of Iowa and are using the name 'architects'. It, therefore, becomes a matter of public interest to have this question immediately determined."

I advise as follows:

The duty of the Secretary of State in the situation described is provided by Section 53, subsection 1, Chapter 321, Acts of the 58th General Assembly, as follows:

"SEC. 53. Procedure for filing and recording of documents. If in this Act, it is required that any document be:

1. Filed in the office of the secretary of state, the secretary of state, when he finds that such document conforms to law and when all fees and taxes due him have been paid as in this Act prescribed, shall endorse on such document, the word 'Filed', and the month, day and year of the filing thereof and file the same in his office;"

And insofar as corporations organized under Chapter 491, Code 1958, the duty of the secretary of state with respect to Articles, is prescribed by section 491.6 providing as follows:

491.6 Filing or refusal to file. When articles of incorporation are presented to the secretary of state for the purpose of being filed, if he is satisfied that they are in proper form to meet the requirements of law, that their object is a lawful one and not against public policy, that their plan for

> doing business, if any be provided for, is honest and lawful, he shall file them; but if he is of the opinion that they are not in proper form to meet the requirements of the law, or that their plan for doing business is dishonest or unlawful, he shall refuse to file them."

Therefore if the practice of architecture by a corporation is authorized and legal, then your power and duty is to approve the articles, if otherwise within the terms of the applicable statutes. Address to that problem discloses that Chapter 118, Code 1958, provides:

1. That the use of the title "Architect", or the use of any word or any letters or figures indicating or intending to imply that the person using the same is an architect, without compliance with the provisions of Chapter 118, or the making of any willfully false oath or affirmation is required by Chapter 118, shall be deemed a misdemeanor, punishable with a fine of not more than two hundred dollars, or imprisonment for not more than one year, or both.

2. That an examination to qualify for a certificate of registration as an architect is a prerequisite to such practice, and by the terms of the statute such examination is available only to natural persons.

Section 118.8, Code 1958, provides, so far as applicable, the following:

> "118.8 Examination. Any citizen of the United States, or any person who has declared his intention of becoming such citizen, being at least twenty-one years of age and of good moral character, may apply for a certificate of registration or for such examination as shall be requisite for such certification under this chapter; but before receiving such certificate, this applicant shall submit satisfactory evidence of having completed the course in a high school or the equivalent thereto, and of having subsequently thereto completed such courses in mathematics, history and languages as may be prescribed by the board.

> "Upon complying with the above requirements, the applicant shall satisfactorily pass an examination in such technical and professional subjects as shall be prescribed by the board. In lieu of examination, the board may accept satisfactory evidence of the applicant's knowledge of architectural practice and of any one of the qualifications set forth under subsections 1, 2, and 3 of this section."

Other provisions of the chapter plainly evidence the intention to limit the availability of a license to practice architecture to natural persons.

In like situations case authorities have confirmed such intention. In Binford v Boyd, (1918) 178 Cal 458, 174 P 56, quoting from annotations appearing in 56 A.L.R. 2d at page 727, the following:

> "The terms of the act show clearly that it was directed only to individuals as distinguished fromcorporations. It requires an examination of the person who applies for license, and its language shows that a license can be given only to human beings and not to artificial creations such as corporations. As a corporation could not obtain a license to engage in the profession of architecture, and as it must act wholly by human agency, it could engage in that art or business only by employing individuals who would carry on that business as its officers, agents, or employees. The act is effective upon corporations only to this extent that, if it undertakes to do business of that character, either the persons whom it engages therein must be certificated architects under this statute, or, when contracting for plans and specifications for the erection of buildings for other persons, such persons must be informed that the plans and specifications will be prepared by someone who is not a certificated architect."

And in the same annotation, on page 729, referring to a Georgia statute it is stated:

> "A Georgia statute (Code Ann Supp 84-302, Ga L 1952 pp 457-461) providing that no person shall practice architecture in the state or use the title 'architect' or 'registered architect' or any words or other device indicating or intending to imply that he or she is an architect without having qualified as required in another part of the act was construed in Folsom v Summer, Locatell & Co. (1954) 90 Ga App 696, 83 SE2d 855, as not prohibiting the use of the word 'architect' by a corporation, the court stating

> that while the word 'person' may include a corporation, the word as used in this instance was modified by the pronouns 'he' and 'she', thus compelling the construction that the word 'person,' as used in this context, meant natural rather than artificial persons, and hence there was no prohibition in the law against the plaintiff's using the title 'architects and engineers' in its contracts. Recovery of fees for work in connection with the construction of a tourist court or motel for defendant was therefore allowed."

Now it is true that an inference may be drawn from the provisions of Section 118.6, providing as follows:

> "118.6 Certificate. Any person wishing to practice architecture in the state of Iowa under the title 'Architect' shall secure from the board a certificate under the title 'Architect' as provided by this chapter. Each member of a firm or corporation practicing architecture must have a certificate of registration under the provisions of this chapter. Any properly qualified person, who shall have been exclusively engaged in the practice of architecture in the state at the time this chapter takes effect, may, within ninety days after the approval of this chapter, apply for and will be granted a certificate of registration without examination, by payment to the board of the fee for certificate of registration as prescribed in section 118.11."

that a corporation may acquire such license but, other than the foregoing cited section, there is lacking in such chapter any provision that would enable a corporation to acquire a license to practice architecture. In the practice of other professions, such lack is supplied insofar as engineering by corporations is concerned, by this provision. Section 114.26, Code 1958, provides:

> "Corporations engaged in designing and building works for public or private interests not their own shall be deemed to practice professional engineering within the meaning of this chapter. With respect to such corporations all principal designing or constructing engineers shall hold certificates of registration hereunder. This chapter shall not apply to corporations engaged solely in building said work."

Provision for the acquiring and holding of real estate broker or salesman license by a corporation is made by Section 117.2, Code 1958, providing as follows:

> "117.2 Individual licenses necessary. No copartnership, association, or corporation shall be granted a license, unless every member or officer of such copartnership, association, or corporation, who actively participates in the brokerage business of such copartnership, association, or corporation, shall hold a license as a real estate broker, and unless every employee who acts as a salesman for such copartnership, association, or corporation shall hold a license as a real estate salesman."

It might well be said that if the inference to be drawn from Section 118.6 heretofore exhibited, would conclude the eligibility of corporations to registration, then according to Section 118.8, any such corporation would be required to have been in existence twenty-one years.

Incidental to the provisions here under examination, it is to be observed that power to organize a corporation for the transaction of any lawful business (see Section 491.1, Code 1958) does not include the practice of a profession. See 13 Am Jur. §30, Title: CORPORATIONS. Engineering is deemed a profession. Devorine v Castelbert Jewelry Corporation 185 Atl 562, 566, 170 Md 661; and State v Cohn, 165 So. 449, 450, 184 La 53. Landscape architecture is deemed the practice of a profession within a statute, exempting income from professional services. Geiffert v Mealey, 59 N.E.2d 414, 293 N.Y. 583.

And the Court, in the case of Cummings v. Penn. Fire Ins. Co., 153 Iowa 579, page 587, had this to say as to what constitutes a profession:

> "Formerly theology, law and medicine were specifically known as the professions; but, as the applications of science and learning are extended to other departments of affairs, other votations also receive the name. The word implies professed attainments in special knowledge, as distinguished from mere skill; a practical dealing with affairs, as distinguished

from mere study or investigation; and an application of such knowledge to uses for others as a vocation, as distinguished from its pursuit for one's own purposes.

It is apparent from these definitions that, to constitute a profession, something more than a mere employment or vocation is essential; the employment or vocation must be such as exacts the use or application of special learning or attainments of some kind, and this seems to be the conclusion of the courts. Thus a chemist is a person belonging to a recognized profession. United State v. Laws, 163 U.S. 258, (16 Sup. Ct. 998, 41 L. Ed. 151). So is a consulting engineer. Ericsson v. Brown, 38 Barb. (N.Y.) 390. See Commissioner v. Reynolds, 7 Watts & S. (Pa.) 329. A building contractor is not. In re Whetmore, 29 Fed. Cas. 921. Nor is a milliner a "professional artist" within the act of Congress prohibiting the immigration of aliens under contract to perform labor. United States v. Thompson, (C.C.) 41 Fed. 28. One who operates a real estate agency is not engaged in a professional employment. Pennock v. Fuller, 41 Mich. 153, (2 N.W. 176, 32 Am. Rep. 148), where the court said: 'Professional employment can only relate to some of those occupations universally classed as professions, the general duties and character of which courts must be expected to understand judicially. Real estate agencies are no more professions than any other business agencies. A commission merchant, or an agent for the sale of any particular kind of personal property, acts in an analogous capacity. Any one can assume and lay down such business at pleasure, and any one can conduct it in his own way, on such terms and conditions as he sees fit to adopt. There is nothing in our laws which would enable any court to draw a line between such business agencies. They are not classed as professions by popular usage or by law.'"

In view of the foregoing, I am of the opinion that Articles of Incorporation authorizing the engagement of the corporation in the practice of architecture without a certificate of registration therefor, do not conform to law.

Very truly yours,

OSCAR STRAUSS

First Assistant Attorney General

WE:mmh

HEALTH: Mental health centers -- Payment for psychiatric examination and treatment given by a licensed physician using the facilities of a community mental health center not having a licensed physician on its administrative staff may be a proper expenditure under Code section 230.24
(Ltr to Ford, Des Moines Co. Atty.; 1/14/60)
#60-1-9

January 14, 1960

Mr. T. K. Ford
Des Moines County Attorney
220 Tama Building
Burlington, Iowa

Dear Mr. Ford:

Receipt is acknowledged of your letter of January 11 as follows:

> "We have a duly constituted Mental Health Center in Burlington, Des Moines County, Iowa.
>
> "During prior years, there has been a duly qualified psychiatrist on the staff of this Mental Health Center. During 1959, the psychiatrist resigned and is not presently connected with the staff of the Mental Health Center. The Board of the Health Center is making agressive efforts to secure either a full time psychiatrist or a part time psychiatrist contributing full time psychiatric supervision. The County Board of Supervisors is authorized under Section 230.24 of the 1958 Code of Iowa to expend from the county mentally ill fund toward the support of a community health center which as facilities for psychiatric examination and treatment.
>
> "The Des Moines County Mental Health Center has as an Executive Director, a man with his Masters Degree in psychiatric social work. He is not a psychiatrist within our definition of that word nor has he taken or passed the appropriate state examination to practice psychiatry.

60-1-9

"Our question is whether the Board of Supervisors of Des Moines County can expend funds under the provisions of the above cited code section during the interim period and until there is a psychiatrist attached to the staff of the Mental Health Center.

"Unfortunately, we are not able to find any authority in this state which would assist us in answering this question.

"Would you also affirm or disaffirm our conclusion that the only persons qualified to give psychiatric examination and treatment within the meaning of Section 230.24 are duly licensed psychiatrists?

"Your usual prompt consideration and cooperation is appreciated."

Examination of our statutes reveals that psychiatrists as such are not licensed by the state of Iowa. The various professions affecting the public health for which state license is required are enumerated in the code title on public health commencing with Chapter 147 of the 1958 Code.

Psychiatry is a branch of the practice of medicine. Webster defines psychiatry as, "The medical specialty dealing with mental disorders, especially with psychoses but also with neuroses".

It therefore appears that psychiatric examination, being a branch of the practice of medicine, can only be conducted by or under the immediate supervision of a licensed physician.

However, it must be noted that the payment authorized in Code section 230.24 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.

Therefore, in answer to your question, I would affirm your conclusion that psychiatric examination end treatment is the practice of medicine and can only be given by or under the supervision of a duly licensed physician, but would point out that use of the facilities of a community mental health center by an outside physician under section 230.24 is not ruled out by the absence of a licensed practitioner from the administrative staff of such center.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl
cc: Dr. Zimmerer

CITIES AND TOWNS: Transfers -- Public square transfers for public school purposes under Section 409.46 is a rededication of public lands and no consideration is necessary. (Reluman to Morrow, Allamakee Co. Atty., 1/12/60)

#60-1-10

January 22, 1960

Mr. Lynn W. Morrow
Allamakee County Attorney
Waukon, Iowa

Dear Mr. Morrow:

This is to acknowledge receipt of your letter of January 21 in which you state:

> "I request an opinion in regard to the interpretation of the word 'transfer' as used in Section 409.46 of the 1958 Code of Iowa as Amended.
>
> "Does the word 'transfer' in the above section contemplate a transfer without consideration and if permissible to provide for consideration must that consideration be stated in the question voted on or may it be agreed upon later by the City Council?"

In reply thereto we advise as follows:

Section 409.46, Code 1958 provides:

> "The people of any town located wholly within an independent community school district, wherein is situated a public square or plat of ground deeded or dedicated to the town or public, may transfer or rededicate to said school district such square or plat for the purposes of a public school or, to be used for the erection thereon of a public schoolhouse, or for playgrounds in connection with such schoolhouse."

The statute is clear and unabmiguous upon its face that the transfer contemplated in the above mentioned section does not contemplate a transfer for consideration but a

60-1-10

rededication from one public use to another public use. This is further substantiated by Section 409.47 which prescribes the precise manner in which the transfer or rededication is to be made.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:kvr

HIGHWAYS: Institutional Roads --

The appropriation made by Chapter 6, Acts of the 58th G.A., is not available to the Board of Regents for capital improvement by way of paving certain institutional roads. Such improvement may be effectuated under the provisions of Chapter 207, Acts of the 58th G. A. (Strauss to Gernetzsky, Bd. of Regents, 1/22/60)

#60-1-11

January 22, 1960

STATE BOARD OF REGENTS

State Office Building

L O C A L

Attention: Carl Gernetzky,
Chairman Finance Committee

Dear Sir:

This will acknowledge receipt of yours of the 14th ult. in which you submitted the following:

> "Chapter 6 of the Laws of the 58th General Assembly provides for a capital appropriation to the State Board of Regents. Included in this appropriation law are a number of items. Items numbered 117 through 120 provide an appropriation of $88,000.00 for the resurfacing of 13th Street in Ames, and State Avenue in Ames.
>
> "Chapter 207 in the laws of the 58th General Assembly entitled, 'Park and Institutional Roads', provides that the Iowa State Highway Commission 'construct, reconstruct, improve and maintain state institutional roads and state park roads as defined in Section 306.2'
>
> "The State Board of Regents is anxious to make plans with the Iowa State Highway Commission for a spring letting to do the resurfacing on 13th Street and State Avenue. With these two laws in the book, we want to be absolutely sure that the $88,000.00 appropriated for this work is available for use.
>
> "We would appreciate it a great deal if you would give us an opinion as to whether or not the $88,000.00 is available to be spent as provided for in Chapter 6 of the Laws of the 58th General Assembly."

In reply thereto, I advise as follows:

In addition to the stated facts, it appears that the roads proposed to be improved are institutional roads as defined

60-1-11

by Section 306.2, Code 1958. The statutes to which reference is made, so far as applicable, are these:

Chapter 6, Laws of the 58th G. A.:

"Section 1. There is hereby appropriated from the general fund of the state of Iowa to the state board of regents for capital improvements, repairs, replacements, alterations, equipment and institutional roads the sum of sixteen million, two hundred forty-two thousand, three hundred thirty dollars ($16,242,330.00), the same being allotted to the various institutions and the central office under the state board of regents in the following amounts:

STATE UNIVERSITY OF IOWA $6,190,900.00

* * * *

CENTRAL OFFICE 88,000.00

1. Institutional roads
Resurface 13th Street, Ames $44,000.00
Resurface State Avenue, Ames $44,000.00"

Chapter 207, Laws of the 58th G.A.:

"Section 1. Section three hundred seven point five (307.5), Code 1958, is hereby amended by adding thereto the following subsection:

'Construct, reconstruct, improve and maintain state institutional roads and state park roads as defined in section three hundred six point two (306.2) of the Code, and bridges on such roads, upon the request of the state board or commission which has jurisdiction over such roads. This shall be done in such manner as may be agreed upon by the highway commission and the state board or commission which has jurisdiction. The highway commission may contract with any county or municipality for the construction, reconstruction, improvement or maintenance of such roads and bridges. Any state park road which is an extension of either a primary or secondary highway which both enters and exits from a state park at separate points shall be constructed, reconstructed, improved and maintained as provided in section three hundred six point three (306.3) of the Code.'

"Sec. 2. Section three hundred thirteen point four (313.4), Code 1958, is hereby amended by adding thereto the following:

'Such fund is also appropriated and shall be used for the construction, reconstruction, improvement and maintenance of state institutional roads and state park roads and bridges on such roads as provided in section one (1) of this Act and for the road improvement payments required in section four (4) of this Act.'

"Sec. 3. Chapter three hundred eight (308), Code 1958, is hereby repealed.

"Sec. 4. When a city, town or county shall drain, oil, pave, or hardsurface a road which extends through or abuts upon lands owned by the state or constructs a bridge on any such road, the state, through the highway commission, shall pay such portion of the cost of making said improvements through or along such lands as would be legally assessable against said lands were said lands privately owned. The amount shall be determined by the highway commission and the city, town, or county concerned."

From the foregoing it clearly appears that it is an appropriation for a specific purpose without substantive authority to perform the obligation. On the other hand, Chapter 207, Acts of the 58th G.A., is a general and comprehensive statute including the substantive authority required to effectuate the appropriations made in Chapter 6. Under this the applicable law to this situation is set forth in Crawford v Iowa State Highway Commission, 247 Iowa 736, as follows: (p 740)

(5) A general analysis of this legislative situation appears in 82 C.J.S., Statutes, section 369: 'For purposes of interpretation, legislative enactments have long been classed as either general or special, and given different effect on other enactments dependent as they are found to fall into one class or the other. Where there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but, to the extent of any necessary repugnancy between them, the special statute, or the one dealing with the common subject matter in a minute way, will prevail over the general statute, according to the authorities on the question, unless it appears that the legislature intended to make the general act controlling; and this is true a fortiori when the special act is later in point of time, although the rule is applicable without regard to the respective dates of passage.'

The subject is also analyzed in 50 Am. Jur., Statutes, section 367, as follows: 'It is an old and familiar principle, closely related to the rule that where an act contains special provisions they must be read as exceptions

> to a general provision in a separate earlier or subsequent act, that where there is in the same statute a specific provision, and also a general one which in its most comprehensive sense would include matters embraced in the former, the particular provision must control, and the general provision must be taken to affect only such cases within its general language as are not within the provisions of the particular provision. Additional words of qualification needed to harmonize a general and a prior special provision in the same statute should be added to the general provision, rather than to the special one. Under these rules, where there is, in the same statute, a general prohibition of a thing and a special permissive recognition of the existence of the same thing under regulation, the particular specified intent on the part of the legislature overrules the general intent incompatible with the specific one. ' "

I am therefore of the opinion that the $88,000.00 appropriated is not available to be spent as provided for in Chapter 6, Acts of the 58th General Assembly. On the other hand, such contemplated improvement may be effectuated under the provisions of Chapter 207, Acts of the 58th General Assembly.

Yours very truly,

OSCAR STRAUSS

First Assistant Attorney General

OS:mmh4

AGRICULTURE: Domestic Animal Fund -- Time for filing.

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

January 25, 1960

Mr. H. K. Roggensack

Clayton County Attorney

Elkader, Iowa

Dear Roggie:

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

> "Will you please give me a ruling on the following set of facts. We have several other comparable cases, but one set of facts will do for all of our cases.
>
> "A farmer has a domestic animal killed by dogs on December 2, 1959. He files his claim on December 12th, 1959. Is he within the 10 days as prescribed in Section 352.1 of the Code?"

In reply thereto I would advise that under the provisions of Section 352.1, Code 1958, providing as follows:

> "352.1 Claims. Any person damaged by the killing or injury of any domestic animal or fowl by wolves, or by dogs not owned by said person, may, within ten days from the time he or his agent has knowledge of such killing or injury, file with the county auditor of the county in which such killing or injury occurred a claim for such damage."

and assuming that the claimant had knowledge of such killing on December 2, 1959, in my opinion his claim filed December 12, 1959, would be within the ten days therein prescribed for filing.

Time is reckoned under the provisions of Section 4.1(23), Code

1958, as amended by Chapter 64, paragraph 1, Acts of the 58th General Assembly, and as so amended now provides the following:

> "23. Computing time. In computing time, the first day shall be excluded and the last included, unless the last falls on Sunday, in which case the time prescribed shall be extended so as to include the whole of the following Monday, 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."

The foregoing statute in the same terms prior to the amendment of the 58th General Assembly was interpreted in the case of Happle v. Monson, 235 Iowa 650, 17 N.W. 2d 391. There the ten-year period of limitation was claimed to be June 22, 1932, and that therefore that was the last day of the ten-year period. This claim was denied by the Supreme Court in the following language:

> "We think the decision here must rest upon a construction of our own statutes, section 63, subsections 11 and 23, Code, 1939. Said subsection 11 defined the word 'month' as a 'calendar month' and the word 'year' and the abbreviation 'A.D.' as equivalent to 'year of our Lord.' Appellants argue that the expression 'year of our Lord' means a year beginning January 1st and ending the succeeding December 31st, citing 62 C.J. 965, section 11. By analogy they then argue that the first day of a given period must be counted and the corresponding later day excluded.

"But we are not dealing here with a statute that involves a definition of the term 'year A.D.' We are confronted with a questionpf how to compute a given period of time---ten years. Subsection 23 of Code section 63, supra, gives us the formula for this purpose:

"' Computing time. In computing time, the first day shall be excluded and the last included, unless the last falls on Sunday, in which case the time prescribed shall be extended so as to include the whole of the following Monday.'

"We can conceive of no reason why this last-quoted statute should not be applied in computing time under the statute of limitations. We have used its formula in computing the statutory year of redemption from execution sale of real estate: Teucher & English v. Hiatt, 23 Iowa 527, 92 Am. Dec. 440; in computing the time for taking appeal: Parkhill v. Town of Brighton, 61 Iowa 103, 15 N.W. 853, and Ritchey v. Fisher, 85 Iowa 560, 52 N.W. 505; and in computing the allowed time for filing bill of exceptions: Sheldon Bk. v. Royce, 84 Iowa 288, 50 N.W. 986. In Service System v. Johns, 206 Iowa 1164, 1168, 221 N.W. 777, we applied the rule without express reference to the statute, in holding that a motion to set aside default was filed in time. For other cases in which the rule has been followed, with or without express reference to the statute, see McLeland v. Marshall County, 199 Iowa 1232, 201 N.W. 401, 203 N.W. 1; Wilson v. Knight, 3 (G. Greene) Iowa 126; Des Moines Union Ry. Co. v. District Court, 170 Iowa 568, 153 N.W. 217; Bonney v. Cocke, 61 Iowa 303, 16 N.W. 139."

Applying the rule of the foregoing case to the situation recited, results in the second day of December being excluded, and therefore filing on the twelfth day of December would bring the claimant within the statutory ten days for filing his claim.

Very truly yours,

OSCAR STRAUSS

First Assistant Attorney General

OS:mmh4

INSURANCE: Loan Insurance --

Savings and Loan Supervisor is authorized to approve private corporations, under the provisions of Chapter 338, Acts of the 58th General Assembly, engaged in the underwriting of loan insurance. (Strauss to Akers, St. Aud., 1/25/60)

#60-1-13

January 25, 1960

Hon. Chet B. Akers
Auditor of State
B U I L D I N G

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

Dear Sir:

This will acknowledge receipt of yours of the 14th inst. in which you submitted the following:

> "This department has been asked to approve insurance underwritten by the Mortgage Guaranty Insurance Corporation, a corporation organized under the provisions of the laws of the State of Wisconsin, on first mortgage amortized real estate loans originated by State savings and loan associations. This corporation has complied with the laws of the State of Iowa and is authorized to transact the business of 'Credit Insurance' in the State of Iowa by the State Insurance Department. As defined by the Insurance Department, 'Credit Insurance' is coverage which includes what is commonly known as Mortgage Guaranty Insurance.
>
> "We believe that by this compliance and such authorization the Mortgage Guaranty Insurance Corporation of Milwaukee, Wisconsin, has properly qualified to underwrite first mortgage real estate loans as provided for in Section 21.1, of Chapter 338, Acts of the 58th General Assembly and with some restrictions under the provisions of Section 21.3.
>
> "Before granting the requested approval, however, we will appreciate consideration by your office as to the legality of the qualifications we cited in relation to the powers granted State savings and loan associations to make such insured or guaranteed loans."

In reply thereto, I advise as follows:

From the foregoing fact situation and the following

provisions contained in Section 21.1 of Chapter 338, Acts of the 58th General Assembly:

> "Sec. 21. Loan requirements.
> 1. Loan plans. Real estate loans may be made as authorized by this chapter, or upon any other loan plan approved by the supervisor. * * * Any loans insured by the federal housing administration or which are guaranteed by the servicemen's readjustment Act of 1944, as amended, or which are guaranteed or insured, in whole or in part, by any other duly constituted federal instrumentality or private corporation approved by the federal home loan bank or the supervisor which qualify for such insurance or guarantee, may be made regardless of the requirements for other loans otherwise contained in this section."

I am of the opinion that you as supervisor, would be within your authority to grant approval to private corporations engaged in the underwriting of loan insurance when qualified by compliance with the foregoing exhibited statute, and within the factual situation set forth in your letter.

Very truly yours,

OSCAR STRAUSS

First Assistant Attorney General

OS:mmh4

STATE OFFICERS AND DEPARTMENTS: Uniform Allowances - P. S. D.

The Commissioner of Public Safety has neither duty nor authority to provide uniforms for the Fire Marshal's office and the Radio Communications Division of the Public Safety Department, nor is he authorized to provide a clothing allowance for members of the Bureau of Criminal Investigation. (Stratton to Exec. Coun. 1/26/60)

60-1-14

January 26, 1960

EXECUTIVE COUNCIL OF IOWA

B u i l d i n g

Attention: W. Grant Cunningham, Secretary

Dear Sir:

This will acknowledge receipt of yours of the 19th ult. in which you submitted the following:

> "Mr. D. M. Statton, Commissioner of Public Safety, appeared before the Executive Council on this date, asking permission to provide uniforms for the State Fire Marshal and Deputies, also for the Director and personnel of the Radio Communications Division.
>
> "At the same time he requested approval to give the members of the Bureau of Criminal Investigation a clothing allowance.
>
> "Would you kindly give us formal answers to the following questions:
>
> (1) Is it an obligation on the part of the Commissioner of Public Safety to provide uniforms for the Fire Marshal's Office and the Radio Communications Division.
>
> (2) Is It an obligation or is it permissible for the Commissioner of Public Safety or the Executive Council to provide a clothing allowance for the Bureau of Criminal Investigation.
>
> If the answer to question #2 is in the affirmative, would this be considered additional compensation to the members of the Bureau."

In reply thereto I advise as follows:

(1) Insofar as your question #1 is concerned, there appears to be no express authority or duty vested in the

Commissioner of Public Safety to provide uniforms for the State Fire Marshal's office and the Radio Communications Division. Implied power does not exist in view of the fact that so far as the Public Safety Department and its members are concerned, the only duty to provide uniforms is disclosed by Section 80.18, Code 1958, which provides as follows:

> "80.18 Expenses and supplies. It shall be the duty of the commissioner of public safety to provide for the members of the department when on duty, suitable uniforms, subsistence, arms, equipment, quarters, and other necessary supplies, and also the expense and means of travel and boarding the members of the department, according to rules and regulations made by the commissioner, as may be provided by appropriation."

and which imposes such duty upon the Commissioner.. Such members of the department as disclosed by Chapter 80 are the members of the Highway Patrol.

Under the well-established principle of law, to wit: expressio unius est exclusio alterius, the mention of one thing implies the exclusion of another. Thus, having made it the duty of the Commissioner to supply the Highway Patrol with uniforms, the duty to make such provision for others of the department is excluded. (See Opinion of the Attorney General, Report for 1938, page 558. See also authorities cited under Section 4.1(14), Code 1958, in Vol. 3, ICA, page 181.) Sec. 80.17(4)

(2) Insofar as authority or permission is vested in the Commissioner of Public Safety to provide the members of the Bureau of Criminal Investigation with a clothing allowance, I would

advise that there is neither express nor implied authority in the Commissioner of Public Safety or in the Executive Council to provide such allowance. See Section 120 of the 1954 Internal Revenue Code set out in the enclosed copy of the September 18, 1958 opinion of this department issued to the Hon. Howard C. Reppert, Jr., State Representative, regarding the subsistence allowance of the federal government for police officers of any state, territory, etc., which required express statutory authority of Congress to effectuate.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh4
Enc: 1

SCHOOLS: Reorganization -- Without specific statutory authority to the contrary, the board of directors of a new community school district which comes into existence July 1 cannot consider a merger petition as provided under Chapter 192, Acts of the 58th General Assembly. (Rehmann to McGee, 1/26/60)

60-1-15

January 26, 1960

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

Dear Mr. McGee:

This is to acknowledge receipt of your letter of January 14 in which you asked the following question:

> "We have a newly formed community school district and a board of directors subsequently elected for said district. Does this board of directors have authority to act before the next July 1st on a merger petition, proceeding under Chapter 192 of the 58th General Assembly?"

In reply thereto, I advise as follows:

Section 275.24, Code 1958, provides:

> "Effective date of change. When any school district is enlarged, reorganized, or changes its boundary by the method hereinabove provided, the effective date of such change shall be July 1 following the election of the new board."

Chapter 191, Section 1, Acts of the 58th General Assembly, provides as follows:

> "The new board shall organize within fifteen (15) days following their election upon call of the county superintendent. The new board of directors

60-1-15

> shall have complete control of the employment of all personnel for the newly formed community school district for the ensuing school year. Following the organization of the new board they shall have authority to establish policy, organize curriculum, enter into contracts and complete such other planning and take such action as is essential for the efficient management of the newly formed community school district."

Under the provisions of Section 275.24, Code 1958, it is obvious that a reorganization of a school district does not become complete until July 1 following the election of the new board. As indicated in your letter, the directors have been elected; however, the district will legally come into existence on July 1 of this year.

As noted from Chapter 191, Section 1, Acts of the 58th General Assembly, the new board can organize prior to the time the newly formed community school district comes into existence, for the purpose of carrying out the provisions as stated therein. The provisions do not include the consideration of a merger petition under Chapter 192, Acts of the 58th General Assembly.

Enclosed please find a letter opinion under the date of July 31, 1958, Abels to Van Ginkel, Assistant Cass County Attorney, which sets out the basic principle behind mergers. Though the factual situations are entirely different, the basic principle is that there cannot be an effective attachment of any territory to any school district which may come into existence at a future time.

Therefore, without specific statutory authority to the contrary, the board of directors of the new community school district which comes into existence July 1 cannot consider a merger petition as provided under Chapter 192, Acts of the 58th General Assembly.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:kvr
Encl.: #58-7-7
cc: Joe Davis, Paul Johnston

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

60-1-16

January 27, 1960

Hon. Chet B. Akers
Auditor of State
B U I L D I N G

Attention: Mr. C. W. Ward, Supervisor:

Dear Sir:

This will acknowledge receipt of yours of the 14th inst. in which you submit the following:

> "I would like an opinion on the following question. A Municipal Corporation in Iowa with a population of 3,915 (1950 Census), has established at separate elections the following boards or trustees: (1) Electric Light Trustees, (2) Water Trustees, and (3) Gas Trustees.
>
> "The Mayor of this Municipal Corporation would like to eliminate the three trusteeships, and operate the functions of said trustees by council. How may this legally be done?
>
> "The council at present is operating under a Mayor-Council form of government."

In reply thereto I would advise that lacking statutory authorization, elimination of the trusteeships operating the foregoing utilities, is unauthorized. Isbell v. Board of Supervisors, 243 Iowa 941, 54 N.W.2d 508. I find no statutory authority for the elimination of any of the foregoing trusteeships. Therefore elimination of these trusteeships cannot be effected.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh4

60-1-16

MOTOR VEHICLES: ~~REGISTRATION~~: Registration -

Where a motor vehicle owned by a non-resident and registered in the state of non-residence and facts are not present to make Sec. 321.55, Code 1958, applicable, may be operated or permitted to be operated in this state without registering the said vehicle in this state ~~providing~~ provided the said vehicle is duly registered in the state of non-residence and otherwise complies with the provisions of Sec. 321.53, Code 1958, as amended.

(Peach to Stoebe, Humboldt Co. Atty., 1/27/60) # 60-2-2

January 27, 1960

Mr. Harlyn A. Stoebe
Humboldt County Attorney
429 Sumner Avenue
Humboldt, Iowa

Dear Sir:

Reference is made to your request for an opinion on the following matter, to wit:

> "Question has been submitted to the undersigned for construction of 321.55 of the 1958 Code of Iowa regarding registration of a vehicle owned by a non-resident. The facts in the instant case are that the vehicle is owned by a father resident of the State of Wisconsin and registered in Wisconsin being operated in Iowa by the son who is a resident of this state. The son is gainfully employed in Iowa but not in the father's business and so far as is known the father is not employed in Iowa nor does he operate any business within Iowa. The question submitted is under these facts can the son continue to operate the vehicle without registering the same in Iowa?"

In reply thereto:

On the basis of the facts you present, Section 321.55, Code of Iowa 1958, which provides:

> "Every nonresident, in addition to those mentioned in section 321.54, but not including a person commuting from his residence in another state or whose employment is seasonal or temporary, engaged in remunerative employment or carrying on business within this state and owning and operating any motor vehicle, trailer, or semitrailer within this state, shall be required to register each such vehicle and pay the same fees therefor as is required with reference to like vehicles owned by residents of this state."

would not be applicable.

60-2-2

Section 321.53, Code of Iowa 1958, as amended, reads as follows:

> "A nonresident owner, except as provided in sections 321.54 and 321.55, of a private passenger motor vehicle, not operated for hire, may operate or permit the operation of such vehicle within this state without registering such vehicle in, or paying any fees to, this state subject to the condition that such vehicle at all times when operated in this state is duly registered in, and displays upon it a valid registration plate or plates issued for such vehicle in the place of residence of such owner. A nonresident who leases a vehicle from a resident owner shall not be considered a nonresident owner of such vehicle for the purpose of exemption under this section. <u>This section shall be operative to the extent that under the laws of the foreign country, state, territory, or federal district of such nonresident owner's residence like exemptions and privileges are granted to vehicles registered under the laws, and owned by residents, of this state</u>. A truck, truck tractor, trailer or semitrailer owned by a nonresident and operated on Iowa highways must have displayed upon it a valid registration plate or plates and a valid registration certificate, card, or other official evidence of its allowable weight in the state, district or county in which it is registered." (Emphasis added).

and on the basis of this statute and Section 341.40, Wisconsin Statutes, 1957, which reads as follows:

> "(1) Except as to foreign-owned vehicles required by s. 341.07 to be registered in this state, any vehicle having a gross weight of 8,000 pounds or less which is registered in another jurisdiction is exempt from the laws of this state providing for the registration of such vehicles if:
>
> (a) The vehicle carries a registration plate indicating the registration in such other jurisdiction; and
>
> (b) The vehicle is owned by a nonresident; and

(c) The jurisdiction in which the vehicle is registered allows such vehicles when registered in Wisconsin to be operated tax free upon its highways under conditions substantially as favorable to residents of Wisconsin as to its own residents.

(2) If the owner of any such vehicle moves to Wisconsin or if the vehicle is purchased by a Wisconsin resident, the vehicle immediately becomes subject to the laws of this state providing for the registration of vehicles."

your question on the facts presented herein, is answered in the affirmative.

Very truly yours,

CARL H. PESCH
Assistant Attorney General

CHP:jml

COURTS: Police Judge -- His jurisdiction in criminal matters is county-wide. (Abels to Schrader, Jones Co Atty., 1/28/60)
#60-2-3

January 28, 1960

Mr. Rex Schrader
Jones County Attorney
Monticello, Iowa

Dear Mr. Schrader:

Receipt is acknowledged of your letter of November 28 as follows:

> "I have received a request from Ralph P. Crim, Justice of Peace, Monticello, Iowa, which request is hereby attached.
>
> "Monticello is a town of less than 15,000. A police court has been established by ordinance and a police judge was appointed by the council.
>
> "Section 367.1 of the Iowa Code specifies that a police court shall have the jurisdiction of a justice of peace court and a Mayor's court.
>
> "I believe the question is as to whether a police court, in Monticello has jurisdiction of a criminal case in violation of state law when said violation occurred outside the corporate limits of Monticello, Iowa.
>
> "I have a letter of October 13, 1959, from Mr. Leonard C. Abels, Assistant Attorney General, in which he stated that a police court has in all criminal actions, the jurisdiction of a justice of peace court. However, this particular justice of peace wishes clarification as to the extent of that jurisdiction."

The request enclosed with your letter is as follows:

> "I hereby request of you an opinion of the Attorney General of Iowa with reference to the jurisdiction of a Police Judge in the state of Iowa.

60-2-3

"Does a Police Judge have any jurisdiction outside the City limits or corporation limits of the city from which he has been appointed to be judge?"

In answer thereto:

(1) By statute (section 367.1, Code 1958) the police judge has, in all criminal actions, the jurisdiction of a justice of the peace.

(2) By statute (section 601.1) the jurisdiction of the justice of the peace is county-wide.

Q. E. D.: The jurisdiction of the police judge in criminal matters is county-wide.

Similarly by statute (section 367.1, Code 1958) the police judge has, in all criminal actions, the jurisdiction of a mayor's court.

The mayor's court has, by statute (section 367.5), "In criminal matters the jurisdiction of a justice of the peace, coextensive with the county".

Thus, again, substituting "equals for equals" the police judge has, "in criminal matters, the jurisdiction of a justice of the peace, coextensive with the county.

But, it is noted, the last sentence of section 367.1 which authorizes police courts to be established by ordinance was added by amendment after the enactment of the first part of the section. The question may then arise, "How can a city council confer jurisdiction by ordinance extending outside its own jurisdiction?" The answer is that the jurisdiction is not conferred by the council but is conferred by the statute. The fact that the last sentence of the statute came in by amendment does not present the jurisdiction expressly set forth in the original and unrepealed portion of the statute from prescribing jurisdiction of the additional police courts authorized by the amendment. The reason for this is the rule that amendments to an act are to be construed as though part of the original act . Authority for this proposition is furnished by the very recent case of State ex rel Board of Pharmacy Examiners v. McEwen, 96 N.W. 2d 189, citing State ex rel Griffith v. Anderson, 117 Kans. 540, Wright v. Cunningham, 115 Tenn. 445, State v. Buttignoni, 118 Wash. 110, Owen v. Off, 218 P. 2d 563, Village of Washington Heights v. Moffatt, 57 111, App. 269. Also see Dingman v. City, 90 N.W. 2d 742; City of Nevada v. Slemmons, 244 Iowa 1068, 58 N.W. 2d 693; In re Guardianship of Wiley, 239 Iowa 1255, 34 N.W. 2d 593; Spencer Publishing Co. v. Spencer, 92 N.W. 2d 633; Board v. Blakesley, 240 Iowa 910, 36 N.W. 2d 751; Sinclair Refining Co. v. Burch, 235 Iowa 594, 16 N.W. 2d 359.

Yours very truly,

LEONARD C. ABELS
Assistant Attorney General

LCA:kvr

TAXATION: PROPERTY TAX EXEMPTION--Flowers being grown in a greenhouse are exempt under the provisions of Section 427.1(13) of the Code of Iowa (1958). (Ltr. to Branstad, Winnebago Co. Atty., 1/28/60)
#60-2-4

January 28, 1960

Mr. Nels W. Branstad
Winnebago County Attorney
Forest City Bank & Trust Building
Forest City, Iowa

Dear Mr. Branstad:

This will acknowledge receipt of your letter dated January 26, 1960, wherein the following problem was submitted:

> "I have a problem relative to taxation which has come up recently. In years past our County Assessor assessed the refrigerator equipment and other general equipment, ribbons, vases, flower pots, etc. in the Green House but did not assess the growing flowers since they were considered a growing crop.
>
> "Last year a new County Assessor took office in Winnebago County and he levied an assessment on the inventory of growing flowers in the Green House. My question is simply this:
>
> "Should growing flowers in the Green House be assessed for taxation purposes or should they be considered a growing crop?"

In determination of the aforesaid problem, Section 427.1(13) of the Code of Iowa (1958) must be considered:

> "427.1 Exemptions. The following classes of property shall not be taxed:
>
> "* * *.
>
> "13. Agricultural produce. Growing agricultural and horticultural crops and products, except commercial orchards and

60-2-4

> vineyards, and all horticultural and agricultural produce harvested by or for the person assessed within one year previous to the listing, all wool shorn from his sheep within such time, all poultry, ten stands of bees, honey and beeswax produced during that time and remaining in the possession of the producer, all swine and sheep under nine months of age, and all other livestock and fur-bearing animals under one year of age."

The writer is aware of the usual statement which is taxation is the rule, exemption the exception, and that tax exemption statutes must be strictly construed and if there is any doubt upon question it must be resolved against exemption. Cornell College vs. Board of Review of Tama County, 1957, 248 Iowa 388, 81 N.W.2d 25. But that does not mean the clear, plain, unambiguous language of the statute can be made to say what it unquestionably does not say.

In Webster's New International Dictionary, Second Edition, the word "horticulture" is defined as follows:

> "The cultivation of a garden or orchard; the science of growing fruits, vegetables, and flowers or ornamental plants. Horticulture is one of the main divisions of agriculture."

In view of the above definition, there seems little room for doubt that flowers raised in a greenhouse are a horticultural crop. Therefore, in response to your question, flowers being grown in a greenhouse are exempt under the provisions of Section 427.1(13) of the Code of Iowa (1958).

Very truly yours,

Gary S. Gill
Special Assistant Attorney General

GSG:fs

COURTS: Costs.

~~COURT COSTS.~~ The costs incurred in a preliminary hearing occuring in a justice of the peace court are properly chargeable as part of the district court costs against a defendant in a criminal case. (Neely to Burdette, Decatur Co Atty.; 1/29/60) #60-2-5

January 29, 1960

Mr. Robert W. Burdette
Decatur County Attorney
Leon, Iowa

Dear Mr. Burdette:

This is to acknowledge receipt of your recent letter in which you present the following questions:

> "1. In a case that is beyond the jurisdiction of a Justice Court, but is handled on the basis of a Preliminary Information and then transcripted into District Court, are the costs incurred in the Justice Court properly chargeable as part of the costs in the District Court case?
>
> "2. Would the laboratory fee charged for a blood test in an OMVI case be properly charged as a part of the court costs in a criminal case?"

In reply to your first question we must first consider section 625.1, 1958 Code of Iowa, which provides that costs shall be recovered against the losing party. Section 625.14, 1958 Code of Iowa provides that it shall be the duty of the clerk to tax in favor of the party recovering costs the allowance of his witness fees, the fees of officers and other expenses.

Section 606.15, 1958 Code of Iowa, provides that the clerk shall collect certain fees and in subparagraph 27 it provides:

> "In criminal cases the same fees for same services as in suits between private parties. When judgment is rendered against the defendant, the fees shall be collected from such defendant."

As for the taxation of costs to a defendant in criminal case, the Iowa Supreme Court said in the case of Schuyler v. ~~Clinton County~~, 118 Iowa 569, on page 572:

60-2-5

> " * * That the amount of costs, as entered by the clerk in the judgment docket in his office, were actually incurred and made on the trial of said cause, is not questioned. 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. Section 3853 provides that costs shall be recovered by the successful against the losing party; and by section 3862 it is made the duty of the clerk to tax in favor of the party recovering costs the allowance of his witness fees, the fees of officers, etc. These provisions of the statute are mandatory in character. No refusal to act in accordance therewith is allowable, and there can be no departure from the course plainly marked out by the statute. In a criminal case, there being but the simple issue of guilt or innocence on the part of the defendant, there is no authority even for an apportionment of the costs as between the state and the defendant. State v. Belle, 92 Iowa 258."

Again in the case of State v. Belle, 92 Iowa 258, the Court said on page 260:

> "II. In Albertson v. Kriechbaum, supra, it is said: 'It has been the uniform practice of the courts of this state, in criminal cases, on the conviction of the defendant, to tax the costs of the prosecution to him; and the power to do this is not questioned.' We know of no exceptions to this rule either in the statute or practice of this state."

Thus it is quite clear that a defendant, against whom judgment has been rendered, is liable for the costs in a criminal proceeding.

It could hardly be said that a defendant would not be liable for costs incurred in a justice of the peace court. The only question that arises is at what point should the costs be taxed to the defendant.

Section 761, 25, 1958 Code of Iowa provides that upon preliminary examination, when a defendant is bound over, the record of the proceedings shall be transmitted to the district court. The Iowa Supreme Court in the case of State v. Japone, 202 Iowa 450, said on page 462:

> "Appellants move to strike from appellee's amendment to abstract that part setting out

> the justice's transcript and the preliminary informations, on the ground that they were not proved at the trial, and that they are not in evidence, and have nothing to do with the appeal. They are a part of the record. Section 13551, Code 1924. The motion is overruled. * * "

It would appear that the preliminary hearing constitutes a part of the record in the district court, therefore the costs accrued in the preliminary hearing would properly be taxed to the defendant, when a judgment is rendered against him in the district court.

In connection with this point it is to be noted that the established administrative procedure is to send the transcript of the costs to the Clerk of the district court. As to fees to which the Justice of the Peace would be entitled see Opinions of the Attorney General, 1940, p. 550.

It is therefore the opinion of this writer that costs incurred in a preliminary examination incurred in a Justice of the Peace court are properly chargeable as part of the costs in the District Court case.

In reply to your second question, it is the established practice, in most counties to charge the cost of a blood test as part of the court costs in a criminal case.

Very truly yours,

MARION R. NEELY
Assistant Attorney General

MRN:kvr

INSTITUTIONS: Legal Settlement -
~~LEGAL SETTLEMENT:~~ Under section 230.1 a married woman whose husband has changed his legal settlement during her confinement, retains the settlement existing at the time of her admission thereto, when she is discharged as "not cured".
(Neely to Parsons, Bd of Control, 2/1/60)
60-2-6

February 1, 1960

Mrs. Eva Parsons
Legal Affairs Officer
Board of Control of State Institutions
L O C A L

Dear Mrs. Parsons:

This is to acknowledge receipt of your letter of January 6, 1960 in which you presented the problem as to what is the legal settlement of a married woman, discharged from a mental health institute, as "not cured," when her husband's settlement has been changed during her confinement. Your specific question is:

> "Does the wife acquire the legal settlement established by her husband, or does she retain the settlement existing at the time she was admitted to the institution."

We must first consider section 230.1, 1958 Code of Iowa which provides in pertinent part:

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

The Supreme Court has held that the legal settlement of an insane wife committed to the insane hospital from the proper county remains unchanged by any act on the husband's part. Scott County v. Townsley, 174 Iowa 192, State Ex.Rel. Gibson v. Story County 207 Iowa 1117, Polk Co. v. Clarke Co., 171 Iowa 556.

Much in point is the rationale of the Iowa Supreme court in the case of Polk Co. v. Clarke Co., cited supra, wherein the court said:

> "Ordinarily the extension of poor relief is not made at the cost of disrupting the family thus aided. On the other hand, care of the insane by the state or county authorities by restraint in institutions provided for that purpose necessitates

60-2-6

> such disruption. The insane wife, while in name still a member of the husband's family, is no longer a member of his dependent family. She is the ward of the state. The husband has no control over her and is powerless to direct the manner or place of her restraint. She has neither intelligent volition nor liberty of action. She cannot follow the husband to his new place of residence. The duty which would rest upon her as a sane wife not under restraint, restraint, to go where he goes and abide where he abides,--the duty which lies at the foundation of the rule making his settlement her settlement, --is wholly lacking; and in the absence of an express statutory provision that the settlement of a wife duly found insane in the proper county and thereafter restrained in the hospitals or asylums provided for that purpose shall follow the settlement of the husband as he may wander from county to county, we do not feel authorized to affirm such a rule or to establish such a precedent. * * *"

An opinion by the Attorney General in 1945 held that, a person, having legal settlement in one county and being discharged as " not cured" from an institution, keeps legal settlement in the first county unless he is declared sane and has intention to establish a new legal settlement.

(See page 121, Opinions of the Attorney General, 1946).

This opinion further held that while an inmate is on parole, the presumption of insanity remains. This of course, is a rebuttable presumption.

This holding was reiterated again in a letter opinion cited as 1958 Opinions of the Attorney General, Sec. 15.18. (Faulkner to Parsons, 5/6/58).

The reason for this holding was best expressed in the case of Polk Co. v. Clarke, Co., cited supra, wherein the court said on page 563 of the Iowa Report:

> "It is proper to note in conclusion that the adoption of the theory urged by counsel for plaintiff would be so prolific of hardship and injustice to counties to which the worse than widowed husband in such case might wander that the court

> would unhesitatingly reject it unless it be found justified by some clear expression of legislative authority. The county to which the husband goes would be practically helpless to protect itself against liability. It cannot be presumed to inquire into or know the family history of every person proposing to make a home within its borders, and if, as in the case at bar, such bills may accumulate for more than twenty-six years without notice, express or implied, and then the collection thereof be enforced, it might well become a source of embarrassment to many counties. Indeed, if argumentum ad hominem is a proper consideration in disposing of a question of law, Polk county, having within its jurisdiction the state's largest city, to which much of the human wreck and driftwood of the state at large naturally centers, might easily find a favorable decision of this controversy furnishing a precedent upon the question of the legal settlement of insane wives and family dependents, of which it would gladly be relieved in the future."

With due regard for the above cited authorities, it is the opinion of this writer that a wife retains the legal settlement existing at the time of her admission to the mental health institute.

Very truly yours,

MARION R. NEELY
Assistant Attorney General

MRN:kvr

COUNTIES: Redistricting -- 1. Under Code sections 331.8 and 331.11, county supervisors have discretionary power. 2. A motion with yeas and nays entered of record is equivalent to a resolution. 3. That a candidate has already filed nomination papers does not deprive a board of supervisors from power to redistrict under sections 331.8 and 331.11. The candidate whose residence is now outside the district may seek the nomination and may also again become qualified to hold the office, if elected, by moving his residence into the district as now constituted. February 2, 1960

(Opels to Forsyth, Emmet Co. Atty.; 1/20/60)

60-2-7

Mr. Gordon J. Forsyth
Emmet County Attorney
Estherville, Iowa

Dear Mr. Forsyth:

Receipt is acknowledged of your letter of January 7 as follows:

> "At its regular meeting in January, 1960, the Emmet County Board of Supervisors by formal motion and majority vote re-districted Emmet County, Iowa allegedly under the provisions of Section 331.8 of the 1958 Code of Iowa. The action taken amounted to an exchange of two townships within Emmet County between two members of the existing Board of Supervisors for representation purposes.
>
> "The supervisor districts existing prior to the above described action of the Emmet County Board of Supervisors came into being through action of the Emmet County Board of Supervisors on January 3, 1952 following an affirmative vote of the electorate in the November election of 1950 upon the question of increasing the membership of the Board of Supervisors from three to five. I inclose certified copies of the pertinent resolutions and motions of the Emmet County Board of Supervisors for your information.
>
> "The action of the Emmet County Board of Supervisors on January 4, 1960 referred to above was also taken after nomination papers

60-2-7

were filed by a candidate for membership on the Emmet County Board of Supervisors who resides in one of the two affected townships. The recent action of the Emmet County Board of Supervisors in re-districting the county would apparently destroy the validity of the nomination papers filed by the said candidate inasmuch as it would alter the district which the candidate would represent, if elected.

"At the request of the Emmet County Board of Supervisors I therefore request an opinion from your office on the following questions:

"1. Does the action of the Emmet County Board of Supervisors on January 4, 1960 referred to above, taken without petition, constitute sufficient compliance with Chapter 331 of the 1958 Code of Iowa to effect the immediate re-districting of Emmet County, Iowa in view of the manner in which the prior districts in the county were established?

"2. Is the said action of the Emmet County Board of Supervisors on January 4, 1960 legally effective in view of the fact that such re-districting effects the candidacy of an individual who had filed nomination papers prior to said action to represent a portion of the area affected by the said action of the Emmet County Board of Supervisors?

"3. Under the above facts are the nomination papers filed by the candidate referred to above null and void, in view of the fact that the nomination papers are based upon a supervisor district no longer in existence following the action of January 4, 1960 of the Emmet County Board of Supervisors?

"There is at this time no litigation pending relative to the above questions. The opinion requested is, however, deemed of importance to this office and the Emmet County Board of Supervisors and I would therefore appreciate your prompt attention to this matter."

1. In answer to your first question, redistricting is authorized in section 331.11, Code 1958, which provides as follows:

> "331.11. Redistricting -- term of office. Any county may be redistricted, as provided by sections 331.8 to 331.10, inclusive, once in every two years, and not oftener, and nothing herein contained shall be so construed as to have the effect of lengthening or diminishing the term of office of any member of such board."

Section 331.8, to which section 331.11 refers, provides as follows:

> "331.8. Supervisor districts. The board of supervisors may, or shall, when petitioned by ten percent of the number of qualified electors having voted in the last previous general election for governor, at its regular meeting in January in any even-numbered year, divide its county by townships into a number of supervisor districts corresponding to the number of supervisors in such county; or, at such regular meeting, it may abolish such supervisor districts, and provide for electing supervisors for the county at large, except that when districted following petition the districts cannot be abolished except by petition of one-tenth of the qualified electors of the said county and submission of the question to the qualified electors of the county at the next general election."

It is to be noted that section 331.8 employs the word "may" which imports discretion -- Wolf v. Lutheran Life Ins. Co., 236 Iowa 377, 18 N.W. 2d 804; State v. Machovec, 236 Iowa 377, 17 N.W. 2d 843. Also see the answer to question number one on page three of the enclosed opinion dated December 26, 1951, hereby adopted and by this reference made a part hereof. (Strauss to Nolting, Allamakee County Attorney)

Your first question further inquires whether the method employed by the Board of Supervisors was sufficient. It is noted that the original districting done on January 13, 1952, was accomplished by resolution whereas the redistricting on January 4, 1960 was done by motion with ayes and nays entered

of record in the minutes. There is authority in some states for the proposition that legal relationships established by ceremony of a certain degree of dignity can only be altered by proceedings of equal dignity or, restated in terms of the instant problem, a situation created by resolution cannot be altered by a mere motion. See, for example, DeLeuw, Cather & Co. v. City of Joliet, 64 N.E. 2d 779, 783; 327 Ill. App. 453.

There seems, however, to be a split of authority among the various jurisdictions of the United States, with Iowa taking the opposite view. In Wood v. Loveless, 244 Iowa 919, 58 N.W. 2d 368, 374, it was held a city council which performed by ordinance an act which should have been done by resolution effectively complied with the law. This case could be distinguished on the basis that an ordinance is of higher procedural dignity than a resolution, as could the holding of the Supreme Court of Iowa in Sawyer v. Lorenzen & Weise, 127 N.W. 1091, 149 Iowa 47. However, more directly in point is Mills v. City of Denison, 237 Iowa 1335, 1340; 25 N.W. 2d 323, in which the Court said:

> "Appellant argues condemnation by a city must be ordered by ordinance or resolution of the council and that the motion adopted May 7, 1945, was not a resolution. It is true it was not a formal written resolution. But the record book shows the adoption of the motion, above paraphrased, by a majority of the whole number of the council by call of yeas and nays, which were recorded. The motion was in legal effect a resolution." (Emphasis supplied)

This holding of the Iowa Court to the effect that a motion adopted by a vote of yeas and nays entered of record is the equivalent of a resolution is supported by Sylvestre v. St. Landry School Board, 113 So. 818, 164 La. 204 and City of Spokane v. Ridpath, 132 P. 638, 74 Wash. 4.

It thus appears the action taken by the Emmet County Supervisors on January 4, 1960 was sufficient compliance with the statute.

2. In general, where, by change of boundary, the residence of a public officer is placed outside the district or subdivision he formerly served, a vacancy occurs in the office -- section 69.2(3), Code 1958. For the purposes of Chapter 331, special exception to this rule is made in

section 331.10 with respect to supervisors already elected and serving. No special exception, however, appears with respect to candidates. Since, but for the saving clause in section 331.10, the term of office of a supervisor already serving would be vacated by removal of his residence from a district through boundary change under section 69.2(3), it follows that a candidacy, with respect to which no special exceptions were made could not result in the election of an officer eligible to take office where the candidate was not a resident of the district.

Therefore, in answer to your second question, the fact that nomination papers of a candidate were already on file does not appear to affect the legality of the redistricting done by the supervisors.

3. Since the papers filed seem to have complied in every way with the statutes as of the time of filing, it would appear, under the enclosed opinion dated April 28, 1958 (Strauss to Darrington) that the person who has already filed his papers may be a candidate for the nomination even though his eligibility to ultimately hold the office be in doubt by virtue of his present residence status. He could become qualified by moving into the district as it is now constituted.

Therefore, in answer to your question, the papers heretofore filed are not null and void, it appearing that District Number 2 remains in existence but with altered boundaries.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl
Encl Letter Opinion dated 12-26-51,
Strauss to Nolting
Letter Opinion #58-4-12,
Strauss to Darrington
cc: Ralph Rouse
Elmer Iverson

TAXATION: Monies and Credits: The following items are not deductible as debts under section 429.4, Code (1958), from moneys and credits required to be listed by decedent's estate: (a) Federal estate tax, (b) Iowa inheritance tax, (c) Attorney fees for representing executor of estate, (d) Executor's fee, (e) Court costs for the estate, (f) Federal income tax payable on decedent's final return, and (g) Iowa income tax payable on decedent's final return.
(Gill to Salisbury, Jasper Co. Atty., 2/2/60)

February 2, 1960 60-2-8

Don C. Salisbury
Jasper County Attorney
Newton, Iowa

Dear Mr. Salisbury:

This will acknowledge receipt of your letter dated January 20, 1960, in which you request the opinion of this department as to whether the following items may be deducted as "debts" within the meaning of section 429.4, Code of Iowa (1958), from the moneys and credits required to be listed on January 1, 1960, by an estate of a decedent dying in 1959.

"(a) Federal estate tax
(b) Iowa inheritance tax
(c) Attorney fees to be paid the attorney representing the Executor in the estate
(d) Executor's fee
(e) Court costs for the estate
(f) Federal income tax payable on the decedent's return for 1959
(g) Iowa income tax payable on the decedent's return for 1959"

The Iowa Supreme Court in Bailies vs. City of Des Moines, 127 Iowa 124, has held that the term "debt" does not, either in its ordinary or technical sense, include taxes since in a legal sense, a debt is founded upon contract relations, either expressed or implied, whereas, a tax is a charge imposed by the legislature for the purpose of revenue. In the Bailies case, the taxes sought to be offset against the moneys and credits for the real estate taxes; however, it is believed that the definition excluding

taxes as a debt may be applied to taxes imposed by other tax levying bodies.

An opinion found in the 1948 Attorney General Opinions at page 171 concludes that federal income taxes due and unpaid on January 1, are not a debt within section 429.4, Code (1958). Another opinion found in 1946 A. G. O. 25, concerning federal estate tax is to the same effect. The reasoning adopted in the Bailies case, and the opinions above cited apply equally well to Iowa income and inheritance tax.

With regard to the remaining items listed in your letter, i. e., attorneys fees, executors fees, and court costs, you are advised that in In Re Estate of Evans, 246 Iowa 893, the Iowa Supreme Court in determining whether these items were "debts" within the terms of the inheritance tax statutes, decided tha t they constituted costs of administration, and not debts. It is believed that the Court would reach the same result were it to construe the word "debts" as used in section 429.4, Code (1958).

Very truly yours,

Gary S. Gill
Special Assistant Attorney General

GSG/WWR/bjf

~~PUBLIC~~ HEALTH:-- Board of Cosmetology under present statute cannot require a surety bond as a prerequisite to establishing a school of cosmetology nor can the board limit the ~~member~~ number of such schools.

Cosmetology

(Brainard & Zimmerer, Comm'r Pub. Health, 2/3/60)

60-2-10

February 3, 1960

Dr. Edmund G. Zimmerer, M.D. M.P.H.
Commissioner of Public Health
L O C A L

Attn: Mrs. West

Dear Dr. Zimmerer:

Reference is made to your recent favor reading as follows:

> "The Board of Cosmetology Examiners desire me to request an opinion on the following:
>
> "1. May the Board of Cosmetology Examiners require a surety bond of $15,000.00 as a prerequisite to the establishing of a school of cosmetology?
>
> "2. Has the Board of Cosmetology Examiners the right to limit at its discretion the number of schools of cosmetology?"

In answer thereto we beg to advise:

A study of Chapter 157 reveals no provision that would authorize the board to require by rule or regulation a surety bond as a prerequisite to establish a school of cosmetology.

Section 157.6 provides: "The state department of health shall prescribe such sanitary rules for shops and schools as it may deem necessary, with particular reference to the conditions under which the practice of cosmetology shall be carried on and the precautions necessary to be employed to prevent the creating and spreading of infectious and contagious diseases. * * *"

In the case of Gilchrist v. Bierring, 234 Iowa 899, the court construed this delegated power and we quote some of the language of the court:

60-2-10

> At page 905: "As shown by our review of the statutes, that is the only express delegation of power to make rules relating to such schools."
>
> At page 907: "Items -- relate to sanitary requirements. Sec. 2585.15 (Now Sec. 157.6) expressly delegates to the department authority to prescribe rules and regulations in regard thereto. * * * Such delegation of power implies authority to make reasonable rules and regulations relating to the course of study to be pursued in an approved school and the method of teaching it."

We note the following rule of construction; that, when the statute makes specific enumeration of the conditions governing a subject matter, the courts may not impose additional conditions. (See Carter v. City of Council Bluffs, 180 Iowa 227, 163 N.W. 195).

It is our considered opinion that we cannot read into this statute a requirement for a surety bond and therefore the answer to your first question is in the negative.

Your second question has been answered in the negative by a previous opinion from Mr. Abels under date of November 1, 1957, a copy of which is attached hereto for your information.

Sincerely yours,

FRANK D. BIANCO
Assistant Attorney General

FDB:kvr
Encl.

COUNTIES: Soldiers Relief --

Soldiers' Relief provided by Chapter 250, Code 1958, available to minor children not over 18 years of age means minors attaining that age on their anniversary date. A minor of 18 years and 1 day is not entitled to relief. (Bonus Board) 2/5/60

February 3, 1960 #60-2-11

World War I Bonus Board
East 12th and Court
L O C A L

Attention: Mr. Frost Patterson

Dear Frost:

I am returning your letter of February 2, 1960, from D. D. Lovejoy, Executive Secretary, Bremer County Soldiers Relief Commission, in which letter he asked whether or not an age of eighteen in the soldiers relief statute means age at the eighteenth birthday, or during the year.

With reference thereto I quote to you from the case of Knott v. Rawlings, 96 N.W. 2d 900, the following:

> "(2) A child is one year old on the first anniversary of his birth and is sixteen years old on the sixteenth anniversary. Before the sixteenth anniversary he is under the age of sixteen years and after that anniversary he is over the age of sixteen. Sixteen years is an exact and definite period of time. It does not mean or include sixteen years and six months. We should be realistic and not read something into the statute which is not there and which clearly was not intended to be there. This is a criminal statute and cannot be added to by strained construction."

Accordingly a minor is eighteen years of age on the day he reaches that age. After that day he is over eighteen years of age.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh3

BANKS & BANKING: Savings and loan joint accounts.

A legal joint account with right of survivorship is not a pay-on-death account within the terms of Chapter 338, Section 11, subsection 8, Acts of the 58th General Assembly.

(Strauss to Akers, St. Aud., 1/3/60)

60-2-12

February 3, 1960

Hon. Chet B. Akers

Auditor of State

B U I L D I N G

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

Dear Mr. Carson:

This will acknowledge receipt of yours of the 28th ult. in which you submit the following:

> "We hand you herewith a copy of a letter received from Mr. E. S. Tesdell, Jr., Council for the Des Moines Savings and Loan Association, Des Moines, Iowa.
>
> "In compliance therewith we are requesting an official interpretation of Section 11.8 Chapter 338, Laws of the 58th General Assembly, in its application to a bona fide joint tenancy account with right of suvivorship and as tenants in common.
>
> "This Department does not believe that the statutes establish a conclusive presumption that a valid joint tenancy account can be created with pay-on-death provisions. A valid joint tenancy account is severed upon the death of any one of its owners, the proceeds of the account becoming the property of the survivor or survivors and thus could not become the property of a person or persons designated under the provisions of Section 11.8."

The letter to you from Tesdell & Miller, accompanying your letter, is this:

> "In re: Pay-on-Death accounts.
>
> "I would appreciate a ruling from the Attorney General regarding an interpretation of the law regarding Section 11 (8), Chapter 338, Page 439, of the laws of the

60-2-12

58th General Assembly, pertaining to "pay-on-death" accounts.

"My question specifically is whether or not two or more individuals can hold a pay-on-death account as joint tenants with rights of survivorship with the provision of pay-on-death to named beneficiaries after the death of the last surviving joint tenant.

"The section clearly allows more than one person to hold a pay-on-death account but does not specifically provide that such holding, prior to the expiration of the pay-on-death feature, can be a joint tenancy with survivorship.

"Would you be kind enough to give an opinion or request an opinion of the Attorney General in this matter."

In reply thereto I would advise as follows:

The answer to the specific question propounded by the Tesdell & Miller letter, to wit:

"My question specifically is whether or not two of more individuals can hold a pay-on-death account as joint tenants with rights of survivorship with the provision of pay-on-death to named beneficiaries after the death of the last surviving joint tenant."

is in the negative. The reason for this is found in the statute referred to as being Chapter 338, Section 11, subsection 8, Laws of the 58th General Assembly, which provides as follows:

"8. Pay on death accounts. Any association and any federal savings and loan association may issue share accounts in the name of one or more persons with the provision that upon the death of the owner or owners thereof the proceeds thereof shall be the property of the person or persons designated by the owner or owners and shown by the record of such association, but such proceeds shall be subject to the debts of the decedent and the payment of Iowa inheritance tax, if any, provided, however, that six months after the date of the death of the owner the receipt or acquittance of the person so designated shall be a valid and sufficient release and discharge of such association for the delivery of such share account or the payment so made."

The foregoing statute contains two provisions that are inconsistent with the existence of a joint tenancy with the right of survivorship. The first inconsistency is that it makes the joint property subject to the debts of the decedent owner, and second, it makes provision for the property to descend upon a person or persons designated by the owner or owners of the property.

In confirmation of this conclusion, the case of Wood, Admr. v. Logue, 167 Iowa 436, 441, states:

> "Sarah Logue was the first of the tenants to die, and if the terms of the deed by which she acquired right in the property are valid, as we are disposed to hold, the brother and sister surviving may assert their title to the property as against her creditors. The survivors do not acquire title through the deceased, but by virtue of the deed. Before her death there was an equality and unity of right and title in the three tenants. Her death extinguished her right of survivorship, but left the unity of right and title unchanged in the other two tenants, and when one of them shall die, all rights of survivorship provided for by the deed having become effective and having accomplished the intent of their creation, the joint tenancy will cease to exist, and the last survivor will be the sole and unqualified owner. As we have already suggested, neither of the successive survivors takes or receives anything from or through the deceased tenant for the title is derived directly from the grantor through the deed which created the tenancy."

And the case of In re Estate of Miller, 248 Iowa 19, 79 N.W. 2d 315, states:

> "(5,6) III. Of course, language creating a joint tenancy in a written instrument gives the grantees, or payees, the rights of joint tenants. The most important and well established of these is the right of the survivor to take the whole property. Since the right of joint tenancy in personal property as well as in real estate is recognized in Iowa (see In re Estate of Winkler, 232 Iowa 930, 933, 5 N.W.2d 153, 155), it follows that language which is sufficient to effectuate

a joint tenancy in a deed will be equally so in personalty, such as stock certificates, bank accounts, or the debentures involved in the case at bar. In Hruby v. Wayman, 230 Iowa 653, 656, 298 N.W. 639, 640, we said: 'The word "Survivor" or "Survivorship" has no equivocal meaning * * *.' Proper words creating a joint tenancy, such as we have held the language of the debentures to do, are always held to make a joint estate, with the whole interest going to the survivor upon the death of the other joint tenant, or joint tenants. See Switzer v. Pratt, 237 Iowa 788, 796, 23 N.W.2d 837, 842, in which the survivor was held to be the sole owner of the property involved and able to make a good title by conveyance by herself alone."

Very truly yours,

OSCAR STRAUSS

First Assistant Attorney General

OS:mmh4

SOIL CONSERVATION: Soil conservation -
Legal sponsors for federal aid - County drainage districts, ci
and towns may qualify as legal sponsor under Public Law 566 wit
the purview of the chapters applicable, Iowa Code 1958.
County Conservation boards have no power to qualify as legal spons
under Public Law 566, as per chapter 111A, Iowa Code 1958.
(Maggart to Greiner, 2/3/60) 60-2-13

February the Third
1960

Mr. William H. Greiner, Secretary
State Soil Conservation Committee
Building

Dear Mr. Greiner:

Reference is made to your letter of July 16, 1958, that sets out as follows:

"We have had a previous opinion that soil conservation districts and county boards of supervisors may sign these applications as legal sponsors since they have power to construct, operate and maintain works of improvement. Recently we have had other agencies sign as official sponsors. These agencies include county drainage districts and cities and towns.

We are wondering if these groups can sign these applications as legal sponsors. There is another group that also might be able to sign as a legal sponsor, and this is the county conservation boards being established in many counties throughout the state."

In reply thereto:

A. County Drainage Districts

1. 16 USCA 1002 defines "local organization" "...Any state, political subdivision thereof, soil or water conservation district, flood prevention or control district, or combination thereof, or any other agency having authority under state law to carry out, maintain and operate works of improvement."

2. 16 USCA 1002 defines "works of improvement" "Any undertaking for:
   (1) Flood prevention (including structural and land treatment measures) or
   (2) Agricultural phases of the conservation, development, utilization and disposal of water (including measures for irrigation and drainage).

60-2-13

3. Section 455.1, Code 1958 provides as follows:

> "The board of supervisors of any county shall have jurisdiction, power, and authority * * * to establish a drainage district * * * and to locate and establish levees, and cause to be constructed as hereinafter provided any levee, ditch, drain, or watercourse, or settling basins in connection therewith, or to straighten, widen, deepen or change any natural watercourse * * *.

4. Section 455.2, Code 1958 provides:

> "The drainage of surface waters from agricultural lands or the protection of such lands from overflow shall be presumed * * *."

5. Section 467B.1 provides:

> "Whenever any county, * * * or other agency shall engage or participate in any project for flood * * * control, flood prevention * * * in cooperation with the federal government, * * * 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. * * *."

6. Section 467B.2 provides:

> "Any county may, in accordance with the provision of this chapter, accept federal funds for aid in any project for flood * * * control, flood prevention, and may cooperate with the federal government."

7. Section 462.7, Code 1958, provides:

> "Trustees shall have control, supervision and management of the district * * * and shall be clothed with all of the powers conferred on the board or boards of supervisors for the control, management and supervision of drainage * * * districts."

The question of whether a county drainage district can act as a legal sponsor on an application for benefits conferred under Public Law 566 is twofold.

First: If the county drainage district is under the control and supervision of the board of supervisors, then the county board of supervisors in their capacity as supervisors of the county can be legal sponsors. (Letter opinion Forrest to Greiner July 15, 1958) The supervisors may be legal sponsors while acting in the capacity of managers of the county drainage district provided that such application is made for the purpose of flood prevention. Statutes establishing drainage districts and the powers to be exercised by the county board of supervisors thereunder is limited to those expressly provided for by statute. However, additional implied powers necessary to carry out those expressed is within the scope of the board. (Mitchell County vs Oden, 219 Iowa 793, 259 N. W. 774).

A drainage district has no authority to request aid under Public Law 566 for soil conservation purposes because soil conservation is not within the primary purpose for which a drainage district is established. However, a drainage district can request aid for any undertaking for flood prevention because it is one of the presumptions for the purpose of establishing drainage districts (See Section 455.2, Code 1958) The statutes concerning drainage districts should be liberally construed. (Thorson vs. Board of Supervisors, _____, Iowa, _____, 90 N. W. 2d 730) Therefore, in view of the provisions in 467B.1, drainage districts which are managed or controlled by the supervisors, can be legal sponsors within the meaning of Public Law 566.

Secondly: When the drainage district is managed by duly elected trustees, may the trustees sign applications as legal sponsors within the purview of Public Law 566?

Section 462.1, Iowa Code 1958, provides that trustees are authorized to manage drainage districts "...in which the original construction has been completed and paid for by bond issue or otherwise..."

Section 462.27, Iowa Code 1958, supra, clothes the trustees with all the powers of the board of supervisors. However, this provision must be construed within the provisions of section 455.135, Iowa Code 1958. This section sets out the duties of the board of supervisors or trustees in keeping a district in repair once it has been established.

Therefore, section 455.135, Iowa Code 1958, limits the powers conferred upon the trustees under section 462.27, Iowa Code 1958. (Smith vs Monona-Harrison Drainage District, 178 Iowa 823, 160 N. W. 229)

16 USCA 1002, supra, defines a local organization as any State ...water conservation district, flood prevention or control district...or any other agency having authority under State law to carry out, maintain and operate works of improvement.

Section 462.27, Iowa Code 1958, supra, expressly states the duties and powers of the trustees limited by section 455.135, Iowa Code 1958, thereby conferring "local agency" authority as per section 467 B.1 Iowa Code 1958.

Therefore, as the drainage district, managed by the trustees, is a local agency, it thereby is within the provisions of 16 USCA 1002. However, section 467B.1, Iowa Code 1958, supra, limits the authority of a drainage district when managed by trustees; as the section states:

> "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..." (Emphasis supplied)

The result is that the trustees may sign as a legal sponsor, but the signing must be approved by the board of supervisors.

B. Cities and Towns

1. Section 368.47, Iowa Code 1958 provides:

> "Whenever the government of the United States, acting through its proper agencies or instrumentalities, will undertake, in whole or in part, the original construction or planning of improvements within or adjacent to the corporate boundaries of any municipal corporation or the repair or alteration of existing improvements within or adjacent to the corporate boundaries of any municipal corporation and which improvements will benefit said municipal corporation, or which could be constructed, repaired, or altered by said municipal corporation, when authorized by a majority vote of the electors thereof at a general, regular or special election called for that purpose as provided in section 368.48 acting through its dock board in the case of improvements referred to in chapter 384 or acting through its council in the case of all other improvements, shall have the power to enter into and to perform such agreements with the United States as may be necessary to meet federal requirements, including the giving of indemnifying agreements to the United States holding and saving the United States free from damages due to the construction and subsequent maintenance of the improvements, including the granting of easements or other interests in real estate, and including the taking over, repair and maintenance of the improvements. Any agreement or agreements with the United States contemplated herein may be entered into by the municipal corporation as herein provided in advance of the adoption of a

final plan for such improvements, such agreement to be effective if the plan of improvement is finally adopted.

2. Section 395.1, Iowa Code 1958 provides:

"Cities and towns are hereby empowered to establish a flood control system for the protection or reclamation of property situated within the limits of such cities or towns, from floods or highwaters and to protect property in such cities from the effects of flood water, whenever the establishments of such a flood control system shall, in the judgment of the city council, or other governing body, of such city, be conducive to public convenience and welfare, and such cities and towns may in accordance with the provisions of this chapter, deepen, widen, straighten, alter, change, divert, or otherwise improve watercourses within or without their limits, by constructing levees, embankments, structures, impounding reservoirs, or conduits and improve, widen and establish streets, alleys and boulevards across and adjacent to the abandoned or new channel or conduit and provide for the payment of the cost, and maintenance of such flood control activities under the terms of this chapter.

The establishment, construction and operation of a flood control system as authorized by this section is declared to be a local improvement, conferring special benefits upon property affected thereby."

3. Section 395.26, Iowa Code 1958 provides:

"Cities and towns may in accordance with the provisions of this chapter accept federal aid in the doing of the acts provided in section 395.1, and may assume such portion of the cost thereof not discharged by such federal aid. They shall have power of condemnation as provided in section 395.2."

It should be noted that section 368.47 gives authority for cities and towns to enter into agreements with the Federal government on works of improvement. (Emphasis ours) However, when the work of improvement falls within the purview of chapter 395 i. e. a flood control system, the same shall govern cities and towns.

Therefore, cities and town may be legal sponsors under Public Law 566 as governed by section 368.47 or chapter 395, Iowa Code 1958, whichever is applicable.

C. County Conservation Boards

1. Section 111A.1 provides:

> "The purposes of this chapter are to create a county conservation board and to authorize counties to acquire, develop, maintain and make available to the inhabitants of the county, public parks, preserves, parkways, playgrounds, recreational centers, county forests, wildlife and other conservation areas, and to promote and preserve the health and general welfare of the people, to encourage the orderly development and conservation of natural resources, and to cultivate good citizenship by providing adequate programs of public recreation."

2. Section 111A.7 provides:

> "Any county conservation board may co-operate with the federal government or the state government or any department or agency thereof to carry out the purposes and provisions of this chapter..."

The county conservation board has the power to construct, operate, and maintain works of improvement. (Section 111A.4) However, the purpose for which they were organized as defined in Section 111A.1 is clearly stated and does not include either flood prevention or agricultural phases of conservation. While it is true that Section 111A.7 gives the county conservation board the power to co-operate with the Federal government it does not

specifically give them the right to enter into agreement and accept Federal funds, except as an aid to and in co-operation with the government in carrying out the purpose, as defined in Section 111A.1, Code 1958, for which the county conservation board was established. Therefore, county conservation boards cannot be legal sponsors under Public Law 566 because flood prevention and soil conservation are not the primary purposes for which county conservation boards are established.

Very truly yours,

JAMES R. MAGGERT
ASSISTANT ATTORNEY GENERAL

JRM/1

PUBLIC HEALTH: -- Barber shop licenses. Under the provisions of §158.11 it was the intent of the legislature to require a single barber shop license for each establishment or place of business, irrespective of the number of separately licensed barbers conducting their own barbering business in the same establishment. (Branco to Zimmerer, Comr Pub. Health, 2/4/60)

February 4, 1960 60-2-14

Dr. Edmund G. Zimmerer, M.D., M.P.H.
Commissioner
Department of Health
L O C A L

Attn: Clyde L. Kenyon, Director
Barber Division

Dear Dr. Zimmerer:

I have your recent favor in which you state:

"We respectfully request an opinion as to the legality of a holder of a barber shop license leasing the chairs to licensed barbers to be operated by such licensed barber as his own individual business. Thereby, each lessee becomes, in fact, an independent operator. As such is he considered either manager or proprietor of a barber shop and required to have a barber shop license? Would it be said that he is operating a barber shop within a barber shop? If the answer is yes, could two or more barber shop licenses be issued in the same shop at the same address?

"On the other hand, is it your opinion that Section 158.11, Code of Iowa, simply means that a barber shop license is required for the practicing of barbering in a specific room at a specific location regardless of the lessor, lessee or employer, employee relations of the licensed barbers practicing therein?"

and in reply thereto we beg to advise as follows:

Section 158.11, Code of Iowa, relating to barber shops reads as follows:

"1. For the purpose of this chapter, a barber shop shall mean an establishment or place of business where one or more persons engage in the practice of barbering as defined in section 158.1.

60-2-14

"2. A barber school or college shall mean an establishment operated by any person, or partnership for the teaching of barbering as defined in section 158.2.

"No person or partnership shall maintain or operate a barber school or a barber shop until he or they shall have obtained a license for that purpose from the state department of health, Each such license shall expire at the same time and shall be renewed in the same manner as an individual barber license. Any such license may be suspended, revoked, or renewal thereof denied by the board of barber examiners for violation of any provision of statute or rule of the department of health pertaining to the operation of barber shops or barber schools, after finding following due notice and hearing before the board of barber examiners.

"Every application for a license to maintain or operate a barber shop or a barber school shall be made on a form furnished by the state department of health and shall contain such information relative to ownership, management, location, sanitation, and other data concerning said business as may be required by the department.

"The state department of health shall collect, in addition to the annual individual license fee required by section 147.80, an inspection fee of ten dollars for every barber shop or barber school hereafter opened and every barber shop or barber school changing ownership before it may open for business or before the new owner assumes the control and management of the barber shop on the same site as an existing shop and under the same owner ship shall not for the purpose of this section be considered as a new shop."

It is noted that subparagraph 1 of the above quoted statute defines what constitutes a barber shop.

Sec. 4.1 (Rules of Construction) states that -- "Words and phrases shall be construed according to the context and the approved usage of the language; * * *"

According to the facts stated and the form of lease submitted with your request, the holder of the barber shop license is the owner of the fee or the entire leasehold interest in the location or place of business for which the shop license was issued.

There are no technical words or phrases such as may have acquired a peculiar or appropriate meaning in law, as would take the definition of a barber shop as delineated in Sec. 158.11(1) out of the rule of construction above quoted.

The legislature is its own lexicographer in defining terms as applied to any given statute.

The statute reads "a barber shop" in the singular form -- "shall mean an establishment or place of business where one or more persons engage in the practice of barbering as defined in section 158.1."

Thus it is evident that one or several properly licensed barbers can carry on their barbering business in the same establishment or place of business without each such barber securing a separate barber shop license.

Therefore, based on the facts presented, it is our opinion that it was the intent of the legislature to require a single barber shop license for each establishment or place of business, irrespective of the number of separately licensed barbers conducting their own barbering business in the same establishment.

Yours truly,

FRANK D. BIANCO
Assistant Attorney General

FDB:kvr

INSTITUTIONS: Under Chapter 161, Acts of the 58th G.A., a transferee from the Eldora Training School is not entitled to court appointed counsel, therefore a claim filed for compensation for attorney's fees will be disallowed.
(Neely to Callenius, Bd of Control 2/4/60)
60-2-15

February 4, 1960

Mr. George W. Callenius, Chairman
Board of Control of State Institutions
L O C A L

Dear Mr. Callenius:

This is in reply to your recent letter in which you refer to a transfer of an inmate at the Boy's Training School, Eldora Iowa, to the Men's Reformatory, Anamosa, Iowa.

Your specific question is:

"Under the provisions of Chapter 161, Acts of the 58th General Assembly, is it necessary that a defense attorney be appointed, and, if so, from what funds should he be paid?"

We must first consider Chapter 161, Acts of the 58th General Assembly which provides:

"Section 1. Chapter two hundred eighteen (218) Code 1958, is hereby amended by adding thereto the following section:
'The board of Control or the director of corrective institutions may order the transfer of inmates of the training school for boys to the men's reformatory for custodial care whenever it is determined that such action will be conducive to the welfare of the other inmates of the school. Such transfer shall be effected by application in writing to the district court, or any judge thereof, of the county in which the said training school is situated. Upon the granting of the order of transfer, the transfer shall take place. The county attorney of the said county shall appear in support of such application. The cost of the transfer shall be paid from the funds of the training school for boys.'"

60-2-15

An examination of this enactment indicates quite clearly that the legislature has given the board of control power to effectuate a transfer to the men's reformatory, when it will be conducive to the welfare of other inmates. The legislature has established the procedure to be followed and has specifically designated the county attorney as being the one responsible for presenting the application to the court, but, no mention is made as to the transferees right to counsel. The primary question, therefore, is whether the transferree is entitled to counsel as a matter of right.

Article I, §10 of the Constitution of the State of Iowa provides that an accused person shall have the right of counsel in all criminal prosecutions. The legislature then enacted section 775.4 which provides the manner by which counsel shall be appointed in a criminal proceeding.

It is quite clear from an examination of the pertinent sections of the Code that the legislature intended only to provide an attorney in criminal proceedings when an individual's liberty was involved. There is no such right involved in the instant case. The young man has been committed to a state institution. Because the Training School was unable to cope with his activities, he is being transferred to Anamosa, another State Institution.

There was no right existing at Common Law that an individual be represented by counsel. The legislature has provided only that an individual be represented in a criminal proceeding. The court is not endowed with special powers to appoint counsel except when an individual is charged with a criminal offense.

Therefore, it is the opinion of this writer that the transferee was not entitled to counsel.

The criminal proceedings have already been held and committment was made to an institution under the supervision of the Board of Control. This is an interdepartmental transfer. The Board of Control applied to have the young man transferred to another State Institution under its control, because they felt that the transfer would be in the best interests of the other inmates at the Eldora Boy's Training School.

Yours very truly,

MARION R. NEELY
Assistant Attorney General

MRN:kvr'

Drainage Districts- An owner of platted lots which, in the aggregate, total 3 acres is not a bona fide owner of agricultural land so as to qualify as a trustee under the provisions of Section 462.7 of the 1958 Code. (Lyman to Erhardt, Wapello Co. Atty., 2/8/60)
60-2-16

February 8, 1960

Mr. Samuel O. Erhardt
Wapello County Attorney
Ottumwa, Iowa

Dear Mr. Erhardt:

Your letter of January 27, 1960, has been referred to me by the Attorney General Norman Erbe. In your letter you request an opinion on the following question to-wit:

> "Is a person owning land in a drainage district having title to several lots which, in the aggregate, contain one or several acres of land and does or can use this land for agricultural purposes qualify for a trustee of the said drainage district?"

Section 462.7 of 1958 Code states:

> "Each trustee shall be a citizen of the United States, not less than 21 years of age, a resident of the county and a bona fide owner of agricultural land in the election district for which he is elected."

The Supreme Court in State vs. Patterson, 1955, 246 Iowa 1129, 70 N.W. 2d 838 at page 841 of the Northwestern Report defined the term "bona fide" to mean:

> "In good faith - honesty as distinguished from bad faith; without fraud or unfair dealing"

The Legislature for certain purposes has defined the term "agricultural lands". In Section 426.2, 1958 Code, agricultural lands are defined as follows:

> "All tracts of land of ten acres or more and not laid off into lots of less than ten acres or divided by streets and alleys into parcels of less than ten acres lying within any school corporation in this state and in good faith used for agricultural or horticultural purposes." (Emphasis supplied)

60-2-16

Section 404.15 of the 1958 Code defines agricultural lands as that land "which is in good faith occupied and used for horticultural purposes." The Supreme Court in State vs. Patterson, supra, in commenting on a predecessor of Section 404.15 at page 841 of the Northwestern Report states:

> "We have held that there must be more than mere actual occupancy and use for such a purpose, or else there would have been no occasion for the use of the term 'in good faith' and that the intent of the owner in acquiring the land is of controlling importance." (Emphasis supplied)

It is our opinion that a trustee to qualify under the provisions of Section 462.7 of the Code must own land in the election district which land is in good faith being used for agricultural purposes or which land was purchased with the intent on the part of the owner to use it for agricultural purposes. Land that has been platted and sub-divided with the intent to sell off lots for residential, commercial or industrial purposes could not be considered as agricultural land even though its present temporary use is agricultural or even though the land is adaptable to agricultural purposes.

It is our opinion that the owner of the three-acre tract described in your question would not qualify as a trustee since he would not be a bona fide owner of agricultural land in the election district for which he is elected.

Very truly yours,

C. J. Lyman
Special Assistant Attorney General
for Iowa State Highway Commission

JLM:lle

AERONAUTICS: Delinquent-registration refund -- Claim should be submitted to the legislative claims committee by the person claiming the refund; Code section 328.24 being nearly identical with Code section 321.126(1). (Applies to Licensing Section, 2/8/60) 60-2-17

February 8, 1960

Iowa Aeronautics Commission
State House
L O C A L

Attn: L. W. Wolverton, Air Enf. Officer

Gentlemen:

Receipt is acknowledged of your letter of January 26 as follows:

> "Question has arisen with this office in which an opinion is needed for disposition. The problem is one concerning an aircraft which was registered delinquently in the fiscal period subsequent to the one in which it was first due for registration and for which a refund is sought, due to out-of-state selling, or dismantling, in accordance with Section 328.24; and for which application for refund is made at, or within, ten days following the date of actual delinquent registration.
>
> "Can a refund be granted against this late registration from another fiscal period (registered during the current fiscal period) when the aircraft was sold out of state or dismantled prior to the time of registration, during either the past or current fiscal periods?"

Section 328.24, to which you refer, has its counterpart of long standing in subsection 1, section 321.126 of the motor vehicle law. We are advised the standing procedure under the same set of facts where refund of automobile

60-2-17

registration is sought is submission of the claim to the legislative claims committee. In view of the similarity of wording of the two statutes, it appears the same procedure should be followed under Code section 328.24.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl

MOTOR VEHICLES: School buses—Discharging of pupils.
Section 321.372, Code of Iowa, 1958 relating to discharging of pupils from school buses applies to school districts of cities and towns. (Preakti Statton, Safety Comm., 2/9/60)

60-2-18

February 9, 1960

Mr. D. M. Statton
Commissioner
Department of Public Safety
L O C A L

Dear Sir:

Reference is made to your request for an opinion on the following matter, to wit:

> "The Department of Public Safety has been requested to interpret Section 321.372, Code of Iowa, 1958.
>
> "With reference to this and other applicable statutes, your opinion is respectfully requested as to whether the provisions of Section 321.372 shall apply in 'school districts' of cities and towns."

In reply thereto:

Section 321.372, Code of Iowa, 1958 reads as follows:

> "1. The driver of any school bus used to transport children to and from a public school shall, when stopping to receive or discharge pupils, turn on the flashing stop warning signals lights at a distance of not less than three hundred feet, nor more than five hundred feet from the point where said pupils are to be received or discharged from the bus. At the point of receiving or discharging pupils the driver of the bus shall bring bus to a stop and extend the stoparm. After receiving or discharging pupils, the bus driver shall turn off the flashing stop warning lights, retract the stop-arm and then proceed on the route. No school bus shall stop to load or unload pupils unless there is at least three hundred feet of clear vision in each direction.

Ca - 2 - 18

"2. All pupils shall be received and discharged from the right front entrance of every school bus and if said pupils must cross the highway, they shall be required to pass in front of the bus, look in both directions, and proceed to cross the highway only on signal from the bus driver.

"3. The driver of any vehicle when meeting a school bus on which the stop warning signal lights are flashing shall reduce the speed of said vehicle to not more than twenty miles per hour, and shall bring said vehicle to a complete stop when school bus stops and stop signal arm is extended and said vehicle shall remain stopped until stop arm is retracted after which driver may proceed with due caution.

"The driver of any vehicle overtaking a school bus shall not pass a school bus when flashing stop warning signal lights are flashing and shall bring said vehicle to a complete stop not closer than fifteen feet of the school bus when it is stopped and stoparm is extended, and shall remain stopped until the stoparm is retracted and school bus resumes motion, or until signalled by the driver to proceed.

"This section shall not apply to 'business' and 'residence' districts but shall apply in suburban districts of cities and towns."

Section 321.1, Sub-paragraph 57 and 321.1, Sub-paragraph 58 contain definitions of "business district" and "residence district" as follows:

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

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

In addition "school district" is also defined in Section 321.1 in Sub-paragraph 59 thereof which reads as follows:

> "59. 'School district' means the territory contiguous to and including a highway for a distance of two hundred feet in either direction from a schoolhouse in a city or town."

As you will note from reading Section 321.372 set out above, this section does not apply to business and residence districts. Turning now to the definition of residence district set out above, you will notice that a school district is excepted from that definition and, therefore, the provisions of Section 321.372, Code of Iowa, 1958 applies to school districts, as defined in Section 321.1 (59), Code of Iowa, 1958, of cities and towns.

Very truly yours,

CARL H. PESCH
Assistant Attorney General

CHP:jml

TAXATION:
~~TAXES~~ -- Motor vehicle Fuel - aviation gas refunds - information confidential -- Under the provisions of Sec. 324.62 Code of Iowa, 1958, the Aeronautics Commission is not authorized to receive information relative to claims for refunds made by users of aviation gasoline.
(Bennett Abrahamson, St Treas, 2/11/60)
#60-2-20

February 11, 1960

Hon. M. L. Abrahamson
Treasurer
L O C A L

Attention: C. E. Borg, Superintendent
Gas Tax Refund Division

Dear Sir:

We have your letter of recent date in which you state:

> "The last legislature passed into law that the revenue collected by the Motor Vehicle Fuel Tax Department shall be refunded to the Aeronatuics Commission with the provision that deductions be made of the claims paid as Motor Fuel Tax Refund on aviation fuel.
>
> "Will you kindly give us your opinion of the following question:
>
> "'Can we provide the Aeronautics Commission any information which they would desire relative to claims and invoices, and warrants issued to refund claimants without violating Chapter 324, Section 62 of the Iowa Motor Vehicle Fuel Tax Law, headed Information Confidential?'"

In reply thereto we would advise you as follows:

The pertinent sections of the statute with which your question is concerned reads as follows:

> §324.62 "Information confidential. All information obtained by the treasurer or his representatives, agents or employees from the examining of reports or records required to be filed or kept under the provisions of this

> chapter shall be treated as confidential and shall not be divulged except to a member or members of the general assembly or any duly appointed committee or either or both houses thereof or to a representative of the state having some responsibility in connection with the collection of the taxes imposed or in proceedings brought under the provisions of this chapter; provided, however, that the treasurer shall make available for public information on or before the last day of the month following the month in which the tax is required to be paid the names of the distributors and as to each of them the total gallons received in the state and separately, the received gallons (1) exported or sold for export, (2) sold tax-free in the state to entities that are exempt from the tax, and (3) sold tax-free in the state to entities required to report and account for the tax thereon. The treasurer shall also make available to the public information with respect to special fuel dealers and users and as to each of them the gallonage used and taxes paid. The treasurer, upon request of officials entrusted with enforcement of the motor vehicle fuel tax laws of the federal government or any other state, may forward to such officials any pertinent information which he may have relative to motor fuel and special fuel provided the officials of the other state furnish to the treasurer like information.
>
> "Any person violating the provisions of this section, and disclosing the contents of any records or reports required to be kept or made under the provisions of this chapter, except as hereinabove provided, shall upon conviction be fined not less than one hundred dollars nor more than one thousand dollars or be confined in the county jail not less than thirty days nor more than six months." (Emphasis Ours)

As will be noted said statute requires that "all information obtained by the treasurer or his representatives, agents or employees * * * shall be treated as confidential and shall not be divulged except * * *" and thereafter specifically enumerates those persons entitled to receive the information and type of information that may be made public.

We fail to find any provision in the law, Chapter 328, Code of Iowa, 1958 (Aeronautics Commission) and particularly Sec. 328.12

(Powers and Duties) such as would qualify the commission as a --"representative of the state having some responsibility in connection with the collection of taxes imposed or in proceedings brought under the provisions of this chapter;".

By amendment to Chapter 324, the 58th General Assembly (chapter 247, H.F. 244) permitted the said commission to receive any unclaimed refunds of taxes on aviation gasoline sold, said funds to be credited to the "state aviation fund". We do not think this provision would constitute the Aeronautics Commission a tax collecting body, and permit them to come within the exceptions enumerated in Sec. 324.62.

Therefore, under the familiar rule of construction that inclusion by specific mention excludes what is not mentioned, it is our opinion that under the provisions of Sec. 324.62 the Aeronautics Commission is not permitted nor authorized to receive the information described in your letter.

Very truly yours,

FRANK D. BIANCO
Assistant Attorney General

FDB:kvr

SCHOOLS: Reorganization -- Attorney fees are not part of expenses in Section 275.26, Code 1958.
(Rehmann to Scholz, Mahaska Co. Atty., 2/15/60)
#60-2-21

February 15, 1960

Mr. Charles H. Scholz
Mahaska County Attorney
Lacey Block Building
115 North Market Street
Oskaloosa, Iowa

Dear Sir:

This is to acknowledge your letter of January 25 in which you state the following:

> "Recently a proposition for the organization of the Oskaloosa Community School District was defeated at an election held under the provisions of Chapter 275 of the Code. In connection with those proceedings an attorney who was not directly employed by any of the school districts involved or by the Mahaska County Board of Education, but who was employed by a so-called 'steering committee' formed for the purpose of promoting the proposed organization, the members of which committee were all residents of the several school districts involved in the proposition, rendered extensive professional services in the preparation and circulation of the petitions, conducting the various proceedings before the Board, preparation of the Board's decisions on objections thereto and preparation of the notice of election.
>
> "I request your opinion as to whether the attorney fees of the attorney referred to are included in the expenses referred to in Section 275.26, particularly in view of the fact that the first sentence of that statute refers to 'expenses incurred by the Superintendent and Board of Education in connection with the proceedings'. Inasmuch as

60-2-21

the County Board of Education is meeting during the first week of February and desires at that time to make the apportionment of expenses in connection with the defeated proceedings, I will appreciate receiving your opinion by February 1st, 1960 if it is at all possible for you to render it by that time."

In reply thereto, we advise as follows:

The county attorney, upon request, should render the necessary legal advice to the county superintendent of schools and the county board of education. There is no express statutory authority for the employment of other counsel by the county board of education. The only statutory authority for the employment of counsel is found in Section 279.35, Code 1958, but such authority is limited to the school corporation.

The expenses which must be borne by the respective school districts must be found expressly in Chapter 275, Code 1958. Such expenses include the preparation of notices, publication of notices, preparation of decisions, minutes of the meeting, etc. The items referred to are primarily clerical in nature and Section 275.26, Code 1958 places the burden of such expenses upon the affected school districts and not upon the county superintendent or the county board of education.

If the county superintendent or the county board of education has not in fact directly incurred some of the afore-mentioned expenses, then the expense of the preparation of some of the necessary papers cannot be indirectly imposed upon the school districts. It appears from your letter that the "steering committee" retained the counsel for the direct benefit of the said committee and as an incident thereto indirectly helped the county board of education.

Therefore, in answer to your question, attorney fees are not to be included in the expenses referred to in Section 275.26, Code 1958, because of the lack of express statutory authority in the county superintendent or the county board of education to retain such counsel.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:bl

ELECTIONS 107

Nominating Papers -- Ditto marks are permissable and legal for fixing the date upon which signature was written. Each individual nomination paper must be notarized separately. Figures are permissable in writing out the date.
(Strauss to Smith, St Rep. 2/16/60) #60-2-22

February 16, 1960

Hon. Marvin W. Smith
State Representative
Paullina, Iowa

My dear Mr. Smith:

This will acknowledge receipt of yours of the 5th inst. in which you submit the following:

> "I would like to ask a question on legality in regard to nomination papers if I may. Some of my own papers came back with ditto marks in the date column. I turned to the code to see what it said about dating the signature and noted that the date is required to be written out by signor. Is that correct? Also noted the code said that where there are more than one sheet they should be clipped together and treated as one nomination paper. Does that mean that there is only one notarization necessary for the office regardless of the number of sheets if one person has the acquaintance to so witness? Third, and this is getting to be a lengthy question, when in the court house, Corrine Gillispie wrote out the month i.e. Febr. 2, 1960 and commented in so doing that this was proper rather than 2-2-60. I took that she meant it was better form. At least I hope it does not invalidate or I have not done you much good."

In reply thereto, I advise you as follows:

1. Ditto marks are permissable and legal insofar as fixing the date upon which the signature was written. See

60-2-22

Opinions of the Attorney General in the report of 1910 at page 255.

2. Each nomination paper for a particular candidate for specific office is required to be notarized. While these may be treated as one nomination paper, each separate sheet constituting the nomination paper should bear a notary certification. See Section 43.17, Code of 1958.

3. As between writing out the month and the day of the month and designating them by figures instead of names, illegality is not present. In describing such month and day, either by name or by number, no question of legality arises.

Yours very truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:kvr

ELECTIONS: Voting machines -- Under Code section 52.2, a 3 to 2 vote is not sufficient to meet the requirements of a "two-thirds vote" for the purpose of authorizing purchase of voting machines. (Ltr to Bruner, Carroll Co. Atty., 2/16/60)

60-2-23

February 16, 1960

Mr. Robert S. Bruner
Carroll County Attorney
118½ West Fifth
Carroll, Iowa

Dear Mr. Bruner:

Receipt is acknowledged of your letter of February 10 as follows:

> "Section 52.2 of the 1958 Code of Iowa provides that the Board of Supervisors 'may, by a 2/3 vote, authorize, purchase, and order the use of voting machines in any one or more voting precincts within said county * * *'.
>
> "The Board of Supervisors of Carroll County is composed of five members. At one of its meetings last fall, the Board decided to purchase voting machines by a vote of 4 to 1. This vote was simply on the question of whether or not the voting machines should be purchased for Carroll County.
>
> "After that meeting, the Board investigated two different makes of voting machines and, at a later meeting, voted to purchase one of the makes on contract. The vote on this was 3 to 2.
>
> "The question now arises whether the purchase of and contract for the voting machines by the recorded vote of three to two is valid in the light of the provisions of Section 52.2 which require a '2/3 vote'.
>
> "The opinion of your office will be greatly appreciated."

60-2-23

The full text of Code section 52.2 reads as follows:

> "Purchase. The board of supervisors of any county, or the council of any incorporated city or town in the state may, by a two-thirds 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."

From the express language of the statute, it appears the requirement of a two-thirds vote applies to the purchase itself and not merely to the general question of whether or not to purchase. Converting the actual vote and required vote to the least common denominator, a 3 to 2 vote is a nine-fifteenths vote, whereas the required two-thirds vote is equal to ten-fifteenths. Since nine-fifteenths is less than ten-fifteenths, the vote was not sufficient to authorize the purchase.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl

WELFARE: Settlement - County Relief -- Under Code section 252.16, one who receives relief before residing in a county one year does not acquire settlement but retains his old settlement for so long as he continues to receive relief. The county of residence may recover from the county of settlement the amount of relief furnished.
(Opinion to Cady, Franklin Co. Atty., 2/17/60)

February 17, 1960 #60-2-24

Mr. G. A. Cady
Franklin County Attorney
Hampton, Iowa

Dear Mr. Cady:

Receipt is acknowledged of your letter of February 11 as follows:

> "I am requesting an opinion from your office concerning the following factual situation:
>
> "A family lives in Franklin County and has been served with a notice to depart under the former statute, Section 252.16. The family will have lived in Franklin County continuously for one year July 4, 1960, since the change in the statute went into effect July 4, 1959. However, the family is now requesting general assistance, and a request has been made by Franklin County to the county where the family has legal settlement for poor relief. The county that is legally responsible hesitates in giving the relief if it is going to interfere with the settlement in Franklin County. The question is: Would the county authorizing the relief be financially responsible after July 4, 1960, and if so, for how long?
>
> "An additional question is: If the answer to the above question is in the affirmative, can a county that is financially responsible refuse to pay claims for a family living in another county?"

60-2-24

According to an opinion dated June 5, 1959 (STAFF to Johnson, Poweshiek Co. Atty.), legal settlement under the facts you describe cannot be acquired in Franklin County prior to July 4, 1960. A copy of the aforesaid opinion is attached hereto.

You inquire whether present payment of general relief to the family in question now residing in Franklin County would prevent that family from acquiring legal settlement in Franklin County on July 4, 1960. The answer to this question is directly furnished by subsection 3 of Code section 252.16, which was not amended. It provides in pertinent part:

> ". . . any person who is being supported by public funds shall not acquire a settlement in said county unless such person before . . . being supported thereby has a settlement in said county."

In the case of Audubon County v. Vogessor, 228 Iowa 281, 291 N. W. 135, the Supreme Court of Iowa held that where poor persons were transported from Cass County to Audubon County and were receiving relief from Cass County before the move and received relief from Audubon County after the move, they acquired no legal settlement in Audubon County. To like effect see 1934 Report of the Attorney General, page 631; 1936 Report of the Attorney General, page 347; and 1942 Report of the Attorney General, page 37.

In the 1942 opinion, supra, a similar question was considered, the question being:

> "Now suppose x comes from another Iowa county which we will call 'A County' -- and 'A County' refuses to pay for x's support. Washington County instead of taking it to court and deciding where the settlement is, merely goes ahead and furnishes relief to x for a year . . . Does x acquire legal settlement in Washington County where Washington County could have had the matter decided in court but did not?"

And the answer given (based upon the quoted statute) was:

> "It is our opinion that refusal of another county to accept responsibility for the relief client upon notice is immaterial and that if Washington County in the instant case furnishes

relief to the client at any period during the year, he cannot obtain legal settlement in Washington County."

In answer to the part of your first question as to how long the county of original settlement would remain responsible for the relief of one prevented from obtaining settlement in another county by reason of his support from public funds, I quote section 252.17 which provides:

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

Your additional question is answered by sections 252.22 and 252.24 as amended. Section 252.22 as amended provides the mechanics whereby Franklin County may obtain reimbursement from the county of settlement for relief furnished as follows:

"Contest between counties. When relief is granted to a poor person having a settlement in another county, the auditor shall at once by mail notify the auditor of the county of his settlement of such fact, and, within fifteen days after receipt of such notice, such auditor shall inform the auditor of the county granting relief if the claim of settlement is disputed. If it is not, the poor person, at the request of the auditor or board of supervisors of the county of his settlement, may be maintained where he then is at the expense of such county, and without affecting his legal settlement.

"All laws relating to the support of the poor as provided by this chapter shall be applicable to care, treatment, and hospitalization provided by county public hospitals."

Section 252.24 as amended provides for the liability of the county of settlement:

"County of settlement liable. The county where the settlement is shall be liable to the county rendering relief for all reasonable

charges and expenses incurred in the relief and care of a poor person.

"When relief as herein provided is furnished by any governmental agency of the county, township or city, such relief shall be deemed to have been furnished by the county in which such agency is located and the agency furnishing such relief shall certify the correctness of the costs of such relief to the board of supervisors of said county and said county shall collect from the county of such person's settlement. The amounts herein collected by said county shall be paid to the agency furnishing such relief. This statute as herein amended shall apply to services and supplies furnished as provided in section 139.30."

In summary, under the facts stated in your letter, relief furnished by Franklin County to the relief client who has not yet acquired settlement in Franklin County will prevent such relief client from acquiring legal settlement in Franklin County under the terms of Code section 252.16(3) as amended. For so long as such person continues to be supported by public funds his settlement in the county from which he came will continue as provided in Code section 252.17. The liability of the county of settlement to Franklin County for relief furnished is fixed by Code section 252.24 as amended and the mechanics for notifying the county of settlement by Code section 252.22 as amended. If settlement is disputed, the dispute may be resolved as provided in Code section 252.23 as amended.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl
Encl STAFF to Johnson,
Powoshiek Co. Atty.,
6-5-59

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

February 16, 1960

#60-2-25

Honorable Samuel E. Robinson
State Representative
703 North 2d Street
Guthrie Center, Iowa

Dear Mr. Robinson:

Receipt is acknowledged of your letter of February 6 as follows:

> "Guthrie County owns and operates a County Hospital. A number of citizens of Guthrie County would like for the county to construct and operate a County Nursing Home. Can this be done under our present laws?
>
> "Assuming your answer is no to the preceding question, then I would like to know, -
>
> "(1) Could the County lease some of the unused hospital land to a private institution for a term of 99 years for the construction of a privately owned nursing home?
>
> "(2) If the above answer is yes, then would it be legal for the hospital trustees to make a lease with the privately owned nursing home to furnish laundry facilities and or kitchen facilities or to let the privately owned nursing home use its laundry and or other kitchen facilities?"

Reference to files of the office indicates the general question concerning county ownership of nursing homes was considered in opinions dated August 19, 1958 (Strauss to Morrison, Wash. Co. Atty., #58-8-6) and July 10, 1959 (Peterson to O'Malley, St. Sen., #59-7-12). Copies of both

60-2-25

opinions are enclosed herewith and by reference made part hereof.

In answer to your further questions, I would refer you to Code section 347.13(12), which empowers the county hospital trustees to:

> "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."

Thus, whether or not the lease to which your first numbered question refers may be made depends upon the will of the voters voting upon such proposition at a regular or special election.

Since the quoted statute refers only to the lease of "sites and buildings" and not to the lease of kitchen or laundry facilities located within such buildings, I am of the opinion the lease to which your second numbered question refers would not be authorized.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl
Encl #58-8-6
#59-7-12

~~SOCIAL~~ WELFARE: LEGAL SETTLEMENT ~~PARENTS OF BLIND PERSONS~~.
Parents of an adult recipient of blind assistance do not come within the application of the provisions of Section 252.16, subsection 8, Code of Iowa, 1958.
(Peterson to Forsyth, Emmett Co. Atty., 2/19/60)

February 19, 1960. #60-2-26

Mr. Gordon J. Forsyth
County Attorney
Emmet County
Estherville, Iowa

Dear Mr. Forsyth:

This is to acknowledge receipt of your recent request for an opinion, which states as follows:

"A question has arisen in the department of public welfare of Emmet County, Iowa, conserning a family who has made application for relief. The facts are as follows:

"This family consists of a father and mother, and an adult son who is presently receiving aid to the blind assistance. The family moved to Emmet County from Warren County approximately fifteen years ago and at that time a non-resident notice was served upon the family and upon Warren County. The notice was accepted by Warren County and Warren County has previously authorized relief for the mother and father. It would appear under the present settlement law that this family will gain residence in Emmet County one year after the recent amendment to Section 252.16 of the 1958 Code of Iowa. It is the contention of Warren County that the father and mother of the recipient of blind assistance also gain residence in Emmet County, Iowa under the provisions of Section 252.16 -8-.

"We therefore request an opinion from your office as to whether the father and mother of a recipient of assistance to the blind also gain residence within six months under the provisions of Section 252.16 subsection 8 of the 1958 Code of Iowa."

Section 252.16, Subsection 8, Code of Iowa, 1958 states as follows:

60-2-26

"8. The provisions of subsections 1, 2 and 3 of this section shall not apply to any blind person who is receiving assistance under the laws of this state. Any such person who has resided in any one county of this state for a period of six months shall have acquired legal settlement for support as provided in this chapter."

It is our opinion that this statute is clear and unambiguous and should not be interpreted to include persons not designated therein. In the absence of other intervening factors, the father and the mother of the adult son receiving blind assistance will gain legal settlement in Emmet County on July 4, 1960.

Yours very truly,

Carl E. Peterson
Special Assistant Attorney General

CEP/sp

SCHOOLS: Mileage -- teachers come within section 79.9, Code 1958. (Ltr. to Jack R. Gray, Calhoun Co. Atty., 2/23/60.

60-2-27

February 23, 1960

Mr. Jack R. Gray
Calhoun County Attorney
Rockwell City, Iowa

Dear Mr. Gray:

This is to acknowledge receipt of your letter of February 18 in which you state:

> "This is to advise you that the superintendent of the Cedar Valley Community School District desires to have an opinion concerning whether or not the school board is limited in paying teachers for travel expenses at the rate of 7¢ a mile.
>
> "It appears that the teachers feel that they should have more than 7¢ a mile for mileage when done in the course of their employment and the superintendent on behalf of the school board desires to know whether 7¢ a mile is a limitation that could be allowed or whether there is any limitation at all."

Your attention is invited to Section 79.9, Code 1958, which provides:

> "Charge for use of automobile. When a public officer or employee, other than a state officer or employee, is entitled to be paid for expenses in performing a public duty, no charge shall be made, allowed, or paid for the use of an automobile in excess of seven cents per mile of actual and necessary travel except as otherwise provided."

60-2-27

The intent of the above-mentioned section is to pay mileage to public officers or employees who are not paid out of monies appropriated by the General Assembly. Opinion of the Attorney General, 1940, page 373.

Therefore, the answer to your question is that teachers cannot be reimbursed for travel expenses above the rate of 7¢ a mile.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:bl

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

February 26, 1960

Honorable Eugene Halling

R.F.D., Orient

Iowa

My dear Gene:

I have yours of the 20th inst. in which you stated to me the following:

> "I am having many voters in my county asking about the procedure that would be followed to call a Constitutional Convention, if and when the people voted for such in the coming November Election.
>
> "Is the holding of a Constitutional Convention any assurance that re-apportionment of the legislature will be made by said Convention?
>
> "What other changes in the Constitution could be made by the Convention?"

In reference to the foregoing, I would advise you that two opinions have been issued by the Attorney General covering a number of potential problems inherent in the voting and holding of a constitutional convention. These opinions were issued respectively on July 9 and September 14, copies of which I enclose. These opinions, I think, contain consideration of the questions that you submit. You will understand that precedents in Iowa directed to these problems are lacking. However, most of the problems involved have had consideration and adjudication by the courts of other states

60-2-28

and these precedents may be of sufficient authority for following by our courts when, as, and if these matters are submitted. However, in these discussions it should be remembered that if the electorate votes affirmatively for a constitutional convention, there is no assurance that the legislature will provide for such convention. This was the situation in 1920 when the electorate so voted, but the legislature failed to act in accordance with the mandate of the electorate.

In connection with this letter, and supplementing the two opinions previously issued, additional authority is found in the 1959 Supplement to Volume 11, American Jurisprudence, at page 103, where with respect to the powers of the constitutional convention, in addition to what is set forth in the opinions enclosed, is stated the following:

> "In the absence of express constitutional provisions specifying the powers of a constitutional convention, the question whether a state legislature has the power to limit the powers of a state constitutional convention is not susceptible of an unconditional answer, since it depends upon a number of factors. One of these factors is whether or not the existing constitution expressly authorizes the legislature to enact a law calling a constitutional convention.
>
> "Another, and it is believed the most important, factor is whether the law which purports to limit the powers of a constitutional convention called thereby has or has not been approved directly by the people at an election held thereunder, or at least indirectly by being enacted before the people voted for the calling of, or elected delegates to, the constitutional convention. In a number of cases the power of the legislature to limit the powers of a state constitutional convention have been sustained. Thus, the courts seem to agree that the powers of a constitutional convention may be effectively limited by the terms of a statute calling the convention into existence which has been approved by the people at an election held for that purpose. In some cases the power of the

legislature to limit the powers of a constitutional convention has been sustained in a situation in which the act containing such limitations was passed after the people had voted for the calling of a constitutional convention, but before they had elected the delegates thereto. In a number of other cases the power of the legislature to limit the powers of the constitutional convention have been denied."

Support for the foregoing principle appears to be found in the following authorities:

158 ALR 514, 515, 518, 519, 521, 522, 523.

Staples v. Gilmer, 183 Va. 613, 33 SE2d 49, 158 ALR 495

Wells v. Bain, 75 Pa. 39, 15 Am Rep 563

Dissenting opinion in:
Miller v. Johnson, 92 Ky. 589, 18 SW 522, 15 ALR 524

Goodrich v. Moore, 2 Minn 61. Gil. 49. 72 Am Dec 784

Hoping this will be of assistance to you, I am,

Sincerely yours,

OSCAR STRAUSS

First Assistant Attorney General

OS:mmh4

Enc: 2 opinions

TAXATION: Moneys and Credits, Deductions.--Pledge to municipal hospital is not deductible from moneys and credits. Iowa corporation, whose capital stock is subject to assessment and who makes return to assessor under which stock is assessed, is not allowed $5,000.00 deduction provided for in section 429.4, 1958 Code of Iowa, ~~(1958)~~. (Gillette to Nelson, Story Co. Atty., 2/18/60)

60-3-1

February 18, 1960

Donald L. Nelson
Story County Attorney
Nevada, Iowa

Dear Mr. Nelson:

This will acknowledge your letter of January 27, 1960, in which you request the opinion of this department on the following questions.

> "(1) Many people in the City of Ames, and surrounding territory, have made pledges to the Mary Greeley Memorial Hospital, a municipal hospital. Some such pledges are of sizable amounts, and are to be paid over a period of years according to the pledge agreement.
>
> Question: Are the unpaid amounts of these pledges deductible as an indebtedness against monies and credits of these individuals?
>
> "(2) Is a small loan company entitled to the $5,000.00 exemption from monies and credits under Section 429.4?"

In answer to your first question, your attention is directed to Section 429.8 (2), Code (1958), which disallows as a deduction from the moneys and credits required to be listed "any unpaid subscription to any institution, society, corporation or company". It is believed that this provision does not permit the deduction of the pledges described in your first question.

In response to your second question, we refer you to a prior opinion issued by this office, found in the 1950 Report of the Attorney General, at page 126,

60-3-1

where we held that corporations are entitled to the same deduction as individuals, unless it is an Iowa corporation, the capital stock of which is subject to assessment to the corporation and makes a special return to the assessor under which its capital stock is assessed. Thus, if the small loan company referred to in your letter is a corporation within the limits above described, it would not be entitled to the $5,000.00 deduction provided by Section 429.4, Code of Iowa (1958). Where, however, the loan company is not incorporated or is a corporation which does not come within the terms hereinbefore set out, the $5,000.00 deduction should be allowed.

Very truly yours,

Gary S. Gill
Special Assistant Attorney General

GSG/WWR/bjf

MOTOR VEHICLES: Penal provisions -- A violation of Section 321.319, Code 1958, constitutes a misdemeanor, punishable upon conviction as provided in Section 321.482, Code 1958.

(Read to Mr. Templeton, Hancock Co. Atty., 2/24/60)

60-3-2

February 22, 1960

Mr. G. W. Templeton
Hancock County Attorney
Garner, Iowa

Dear Sir:

Reference is made to your letter reading as follows:

"Will you please give me your opinion as to whether or not a violation of Section 321.319 (intersection right-of-way) when construed with Section 321.482 (punishment provision) constitutes a criminal offense.

"I am aware that in State vs Holling, 78 NW 2nd at page 26, the Court in commenting on the case of State vs Brighi (7 NW 2nd at page 9) makes the following statement: 'Were the Brighi case before us at this time with the statute there involved, as it now is, Section 321.319 of the 1954 Code of Iowa, connected as it is with Section 321.482 of that Code, we would hold it valid and that it does state a criminal offense—'.

"The Court, in commenting on the Brighi case, states that it was decided upon the enactment there involved solely as Chapter 175 of the 49th G. A. and not as a section of the Iowa code in connection with Section 321.482 of the Code of 1946 and of all subsequent codes. I might add that Chapter 175 of the 49th G. A. contains exactly the same wording as present Section 321.319.

"Reading of the Brighi case indicates that the point made by the Attorney General was that a violation of Chapter 175 of the Acts of the 49th G. A. and because of the provisions of Section 5036.01 of the Code of 1939 (present Section 321.482) constituted a criminal offense.

"The Court decided in the Brighi case that no criminal offense was created. It would appear that the statement of the Court in the Holling case, set forth above, mis-states the issues and the circumstances under which the Brighi case was decided.

60-3-2

"I would appreciate an official opinion as to the attitude of your office in response to the question asked at the beginning of this letter."

In reply thereto:

Section 321.319, Code of Iowa, 1958, reads as follows:

"Where two vehicles are approaching on any public street or highway so that their paths will intersect and there is danger of collision, the vehicle approaching the other from the right shall have the right of way."

and, Section 321.482, Code of Iowa, 1958, reads as follows:

"It is a misdemeanor for any person to do any act forbidden or to fail to perform any act required by any of the provisions of this chapter unless any such violation is by this chapter or other law of this state declared to be a felony. Chapter 232 shall have no application in the prosecution of offenses committed in violation of this chapter 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."

In State v. Holling, at page 26 of 78 N. W. 2d, the Iowa Supreme Court stated:

"Defendant in the trial court relied on our ruling in State v. Prighi, 232 Iowa 1087, 7 N. W. 2d 9, while the State contended that section 321.288, when interpreted with section 321.482, Iowa Code of 1954, I. C. A., is a criminal statute. The Court said: 'Whether or not the language of 321.288, I. C. A., is sufficiently definite and precise is, in the opinion of this Court, very questionable. This Court is of the opinion that there is definitely a wide and unresolved area in between the Iowa Supreme Court's rulings in State v. Prighi and State v. Paul

(242 Iowa 853, 48 N. W. 2d 309).' We think there is, but as stated in the opinion in State v. Coppes, supra, it is solely because the Brighi case discussed and passed upon the enactment there involved solely as Ch. 175 of the 49th G. A. and not as a section of the Iowa Code in connection with section 321.482 of the Code of 1946 and of all subsequent Codes. The Brighi case is not decisive of the instant case. Were the Brighi case before us at this time with the statute there involved, as it now is, section 321.319 of the 1954 Code of Iowa, I. C. A., connected as it is with Section 321.482 of that Code, we would hold it valid and that it does state a criminal offense, particularly under the precedent of State v. Paul, 242 Iowa 853, 48 N. W. 2d 309."

Therefore on the basis of Holling and State v. Paul, 242 Iowa 853, 48 N. W. 2d 309, and the statutes as they now exist and appear, a violation of Section 321.319, Code of Iowa, 1958, would constitute a misdemeanor punishable upon conviction as provided in Section 321.482, Code of Iowa, 1958.

Very truly yours,

CARL H. PESCH
Assistant Attorney General

CHP:jml

MOTOR VEHICLES: Brake requirements - Section 321.430 (4), 1958 Code of Iowa, ~~1958~~, requires service brakes upon all wheels; therefore, service brakes are required on wheels on an extra axle, commonly referred to as a "cheater".

(Cothern & Cothern, Clarke Co. Atty., Osceola)

60-3-3

February 22, 1960

Mr. James H. Cothern
Clarke County Attorney
Osceola, Iowa

Dear Sir:

Receipt is hereby acknowledged of your letter under date of February 17, 1960, reading as follows:

> "Upon the request of the Highway Patrol officials of my County, I am writing you to obtain an opinion from your office as to brake requirements on certain motor vehicles.
>
> "The specific question is in regard to certain straight trucks that have an extra axle, which is colloquially known in the trade as 'cheaters'. This extra axle with wheels is suspended from springs, and located toward the rear of the truck. The wheels do not contact the highway when the truck is empty. However, when the truck is carrying a load, the wheels from this extra axle do come in contact with the highway and do carry a share of the weight-load of the truck.
>
> "Under Sec. 321.430 of the 1958 Code of Iowa, it states:
>
> > "'4. Except as otherwise provided in this chapter, every new motor vehicle, trailer, or semi-trailer hereafter sold in this State and operated upon the highways shall be equipped with service brakes upon all wheels of every such vehicle with the following exceptions: (following are exceptions, none of which apply to this question).'
>
> "My specific question, then, is: Must there be service brakes upon the wheels of an extra axle of a straight truck, the extra axle being located toward the rear of the truck, and the said axle being suspended on springs so that it comes in contact with the highway and carries a share of the load only when the truck is loaded? I will appreciate your opinion on this question."

60-3-3

In reply thereto:

Section 321.430, Code of Iowa, 1958, the pertinent part thereof which reads as follows:

> "4. Except as otherwise provided in this chapter, every new motor vehicle, trailer, or semitrailer hereafter sold in this state and operated upon the highways shall be equipped with service brakes upon all wheels of every such vehicle with the following exceptions:
>
> "a. Any motorcycle.
>
> "b. Any trailer or semitrailer of less than three thousand pounds gross weight need not be equipped with brakes.
>
> "c. Trucks and truck tractors having three or more axles need not have brakes on the front wheels, except that such vehicles equipped with two or more front axles shall be equipped with brakes on at least one of such axles; provided that the service brakes of such vehicle comply with the performance requirements of section 321.431.
>
> "d. Only such brakes on the vehicle or vehicles being towed in a driveaway-towaway operation need be operative as may be necessary to insure compliance by the combination of vehicles with the performance requirements of section 321.431. The term 'driveaway-towaway' operation as used in this subsection means any operation in which any motor vehicle or motor vehicles, new or used, constitute the commodity being transported, when one set or more of wheels of any such motor vehicle or motor vehicles are on the roadway during the course of transportation, whether or not any such motor vehicle furnishes the motive power."

The statute above, is clear and unambiguous, therefore, requiring no construction.

The facts you present do not fall within any of the four exceptions set out above nor does a review of chapter 321, Code of Iowa, 1958, disclose any further exception other than those set out above. Your question is, therefore, answered in the affirmative, <u>on the facts presented herein</u>.

Very truly yours,

CARL H. PESCH
Assistant Attorney General

CHP:jml

HIGHWAYS:
Bridges and Culverts:- The responsibility for the construction and maintenance of culverts over three feet in diameter and of bridges, in cities controlling their own bridge levies, is in the city and not in the county; provided, however, counties may at their option participate in the construction and maintenance of bridges in cities of a population of 8000 or less. (Legislative to Milani, Appanoose Co. Atty., 2/24/60) 1960 Op. Att'y Gen. 3-4

Ames, Iowa
February 24, 1960

Mr. James G. Milani
County Attorney
107½ West Van Buren St.
Centerville, Iowa

Dear Mr. Milani:

Your letter addressed to Norman Erbe, Attorney General, has been referred to me. In your letter you ask our opinion on the following question to-wit:

> "Within the corporate limits of a city of approximately 8,000 population, is the city or county responsible for the construction and maintenance of culverts over three feet in diameter as well as all bridges?"

You also state in your letter that the city referred to in the question is Centerville, Iowa, and that it does control its own bridge levies.

Section 309.3 of the 1958 Code states:

> "The secondary bridge system of a county shall embrace all bridges and culverts on all public highways within the county except on primary roads and on highways within cities which control their own bridge levies..." (Emphasis Supplied)

Since the city of Centerville controls its own bridge levies, the bridges and culverts on highways other than primary highways within the corporate limits of Centerville are excluded from the secondary bridge system of Appanoose County, and it is not the responsibility of the county to construct and maintain bridges and culverts on highways within the corporate limits of Centerville.

Your attention is called to bridges and culverts on secondary roads which roads are located along the corporate limits of cities which control their own bridge funds and which are partly within

60-3-4

and partly without such corporate limits. Section 309.73 of the 1958 Code provides that the cost for the construction of such bridges and culverts shall be shared equally between the city and the county.

Section 309.9(3) relating to the use of the secondary road fund provides that at the option of the Board of Supervisors, the County can pay for all or part of the cost of construction and maintenance of bridges in cities having a population of 8,000 or less. If Centerville's population is 8,000 or less, then the county may at its option, participate in the payment of all or part of the cost of the construction and maintenance of bridges within the corporate limits of Centerville. The participation by the county in the construction and maintenance of bridges within the corporate limits of Centerville is discretionary with the county and is not mandatory. There is no authority in Section 309.9(3) authorizing a county to construct and maintain culverts in a city having a population of 8,000 or less.

Section 381.1 of the 1958 Code delegates to cities the care, supervision and control of all public bridges and culverts within their corporate limits, and Section 381.1 further delegates to cities the power within their corporate limits to construct, reconstruct, repair, enlarge and maintain bridges and culverts.

It is our opinion that the responsibility for the construction and maintenance of public bridges and culverts within the corporate limits of Centerville is in the city.

Very truly yours,

/s/ C. J. Dyas

JLM:mj

HIGHWAYS:

Farm-to-Market Roads: -- The duty and responsibility for the repair and maintenance of a farm-to-market road located on the corporate line of a town, which road was materially damaged by reason of the town's action, is in the county and not in the city; and the maintenance on such a road cannot be abandoned by the county unless the road is removed from the farm-to-market system by appropriate action.

(Lyman to Hoyman, Warren Co. Atty., 2/24/60)

#60-3-5

Ames, Iowa
February 24, 1960

Mr. James R. Hoyman
Warren County Attorney
Indianola, Iowa

Dear Mr. Hoyman:

Your letter of December 28, 1959 addressed to Attorney General, Norman A. Erbe, has been referred to me. In your letter you request an opinion on the following questions to-wit:

> Is it the duty of the Warren County Board of Supervisors to repair a farm to market road located on the corporate line of a town, which road was materially damaged by reason of the town's excavating and placing a sewer in the middle of the said road, or is the duty of the town to repair the said road?
>
> Can the Warren County Board of Supervisors abandon the said farm to market road for maintenance purposes until the same is placed back in a condition such as prior to the damage done by reason of the excavation?

In accordance with the authority vested in them by Section 306.2(4) of the 1958 Code, the Warren County Board of Supervisors have jurisdiction and control over the farm to market road system in Warren County. Section 314.6 of the 1958 Code, provides that any public highway located along the corporate limits of a city or town, which highway is an extension of a farm to market road, may be included in the farm to market road system. Since the road way described in your questions has been included in the farm to market system, it is our opinion that it is the duty and responsibility of Warren County acting through its Board of Supervisors to repair said roadway even though it was damaged by reason of the town's action. We do not in this opinion pass on the question of whether or not Warren County can recover the cost of repairing said roadway from the town.

60-3-5

Mr. James H. Heyman
Warren County Attorney
Indianola, Iowa

Section 310.29 of the 1958 Code states in part:

> "Any farm to market road constructed under the provisions of this Chapter shall be maintained by the county in a manner satisfactory to the Federal authorities and to the State Highway Commission." (Emphasis supplied)

It is our opinion that Warren County through its Board of Supervisors has the duty and responsibility to maintain the above referred to farm to market road, and that it cannot abandon the maintenance of this road unless said road is by appropriate action taken out of the farm to market road system.

Very truly yours,

/s/ C. J. Fitzgerald

JLM:mj

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

February 26, 1960

The Hon. X. T. Prentis
State Senator
Mt. Ayr, Iowa

Dear Senator:

This is in answer to your question whether the opinion of this office dated May 22, 1956 applies to feed grinders mounted on trucks where the bin and tank are designed and manufactured as an integral or component part of the grinder.

In that opinion, a copy of which is attached hereto, is quoted section 321.118, Code of Iowa, which provides as follows:

> "Every motor vehicle, trailer, and semi-trailer when driven or moved upon a highway shall be subject to the registration provisions of this chapter except:
> 1. Any such vehicle driven or moved upon a highway in conformance with the provisions of this chapter relating to manufacturers, transporters, dealers, or nonresidents as contemplated by sections 321.53 and 321.56, or under a temporary registration permit issued by the department as hereinafter authorized.
> 2. Any such vehicle which is driven or moved upon a highway only for the purpose of crossing such highway from one property to another.
> 3. Any implement of husbandry.
> 4. Any special mobile equipment as herein defined.
> 5. Any vehicle which is used exclusively for interplant purposes, in the operation of an industrial or manufacturing plant, consisting of a single unit comprising a group of buildings separated by streets, alleys, or railroad tracks, and which vehicle is used solely to transport materials from one part of the plant to another

60-3-6

or from an adjacent railroad track to the plant and in so doing incidentally using said streets or alleys for not more than one thousand feet.

6. Any vehicle which is propelled by electric power obtained from overhead trolley wires, but not operated upon rails."

As is pointed out in the aforesaid opinion, where the bin or tank are used for the purpose of transporting merchandise for sale the truck is used for general hauling in addition to serving as a mount for a portable grinder. The question in that opinion involved mounting a tank or bin of sufficient size to permit the sale of feed from the bin or molasses from the tank as end-products with an occasional bit of mixing in the portable mill engaged in for the purpose of claiming the benefit of section 321.118. This does not appear to be the case with respect to the equipment described by you, where the bin and tank are actually designed to be exclusively used in connection with the grinder or mill in the mixing or processing of feed.

As is pointed out in the 1956 opinion, the test is whether the vehicle to be registered is to be used for the transportation of the "factory" or the transportation of merchandise or materials. Certainly the fact that the crank case on the power unit used to drive the mill or grinder contains oil or the fuel tank gas does not convert the truck into a fuel transport, yet, were either the crankcase or fuel tank to be made so disproportionately large as to be capable of transporting oil or fuel for sale as such, with only occasional use in connection with powering the grinder, the intent of section 321.118 would be violated.

In an opinion dated November 22, 1957, subsequent to issuance of the 1956 opinion, also attached hereto, it is recognized that the mixing apparatus can be an integral part of the portable "factory" and that the process of grinding and blending in additives is a part of "manufacture".

In an opinion dated September 5, 1957, also subsequent to the first above-quoted opinion, it was said that a truck upon which was mounted both a portable mill and a mixer came within the meaning of Code section 321.118.

You are, therefore, advised that the net effect of Code section 321.118 as construed in the three enclosed opinions is to encompass all trucks upon which are mounted equipment used for grinding and mixing and capable of description by the term "portable mill".

Whether or not this includes bins and tanks depends upon the intended purpose of the bins and tanks. If their physical dimensions and use are such that they are a necessary part of the milling or manufacturing process, then their presence would not take the truck out of section 321.118. On the other hand, if they are present for the purpose of carrying an additional line of saleable merchandise, the truck would be subject to the higher registration fee.

In other words, the idea we are trying to convey, to use an extreme example, is that mounting a small grinder or mill on a tank truck would not alter its nature as a tank truck or bring it within the provisions of section 321.118 but that presence of a small tank of molasses or bin of additives on a mobile mill, would no more alter its nature nor take it out of section 321.118 than would the oil in its crank-case or fuel in its gasoline tank make it a tanker.

Thus, the ultimate test as to whether or not a given vehicle comes under section 321.118, is one of actual intent as determined from the objectively manifested facts in each case.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:kvr
Encl. 3 opinions

COUNTIES: AUDITOR - -

Mrs. Nichols

Auditors have authority to seal applications for, and affidavits of, absentee or disabled voters, and all affidavits of individual candidates appearing IN his office;

At NO time can the County auditor use the Auditor's seal outside the office, and as County Auditor he cannot take acknowledgments.

(Opinion to McDonald, Dallas Co. Atty., 2/29/60)

#60-3-7

February 29, 1960

Mr. John C. McDonald

Dallas County Attorney

Dallas Center, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 25th inst. in which you submitted the following:

> "My County Auditor has presented me with copies of two letters, one dated March 23, 1956 from Oscar Strauss and the other dated April 6, 1956 from Ed S. McMillin, Wapello County Auditor. I am enclosing copies of each of the letters since each letter reflects a different view. I would like to re-submit the questions discussed as follows:
>
> "Does the County Auditor have authority to take acknowledgements on the following instruments to-wit:
>
> "1. Applications for absentee or disabled voters.
>
> "2. The affidavit of the absentee or disabled voters.
>
> "3. The affidavit of the individual candidates filed under Section 43.18.
>
> "4. The acknowledgements on the back of candidates nomination papers.
>
> "Would you please direct to me a letter as to the validity of such acknowledgements by a County Auditor."

In reply thereto I will answer your questions as follows:

60-3-7

1. Applications for absentee or disabled voters.

Applications for absentee ballots received in the Auditor's Office by an individual in the Auditor's Office may be sealed by the County Auditor if said person appears in the office.

2. The affidavit of the absentee or disabled voters.

At no time can a County Auditor use the Auditor's seal outside the office. It is permissible to seal absentee ballots and applications voted in the Auditor's Office.

3. The affidavit of the individual candidates filed under Section 43.18.

All affidavits of individual candidates can be sealed by the County Auditor if said individual appears in the Auditor's Office.

4. The acknowledgements on the back of candidates nomination papers.

It is not permissible for a County Auditor as a County Auditor to take acknowledgements.

Yours very truly,

OSCAR STRAUSS

First Assistant Attorney General

OS:mmh7

COUNTIES: Recorder - Re: Instruments

Chapter 225, Acts of the 58th ~~General Assembly~~ requires all instruments filed for recordation ~~with the Recorder~~ to have typed or legibly-printed the names of all signers thereon; ~~Held that~~ such Act does not include copies of Articles of Incorporation certified to the Recorder by the Secretary of State, ~~nor the~~ signatures to Affidavit of Publication of Notice of Incorporation.

(Attorney to Synhorst, Secy of State, 3/4/60) #60-3-8

March 3, 1960

Honorable Melvin D. Synhorst
Secretary of State
B U I L D I N G

Attention: Berry O. Burt, Director, Corporation Section

Dear Mr. Burt:

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

> "We call your attention to House File No. 19 of the Acts of the 58th General Assembly which amends Section 335.2 of the 1958 Iowa Code.
>
> "Under this Section as amended County Recorders are refusing to accept for recording Articles of Incorporation and Amendments certified as true copies under the seal of the Secretary of State unless all names in the certified copies and the Secretary of State's signature are typed under the signatures as executed. Also, under the Corporation law, requirements are made that notices be published in the local newspapers in the county wherein the corporation does business and the publisher then furnishes an affidavit of publication to the County Recorder. The County Recorders are refusing to accept these affidavits unless the publisher prints his name under his signature.
>
> "We respectfully request an opinion from your office interpreting the stand we shall take in these matters."

In reply thereto I would advise as follows:

The statute to which you refer is Chapter 255, Laws of the 58th General Assembly, and so far as pertinent thereto, provides the following:

60-3-8

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

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

It will be noted that the provision therein is against all instruments. Such term, in its generic form as used in this statute, has been defined in a number of cases appearing in Words and Phrases, Volume 21, Title: Instruments, among which are the following definitions:

"The term 'instrument,' in its broad sense, includes formal or legal documents in writing, including contracts, deeds, wills, bonds, leases, mortgages, etc. In the law of evidence it has a still wider meaning, and includes not merely documents, but witnesses and things, animate and inanimate, which may be presented for inspection. Cardenas v. Miller, 39 P. 783, 784, 108 Cal. 250, 49 Am. St. Rep. 84."

"The word 'instrument,' as used in Civ. Code Cal. § 1217, providing that an unrecorded instrument is valid as between the parties thereto and those who have notice thereof, indicates some written paper or instrument signed and delivered by one person to another transferring the title or creating a lien on property or giving a right to a debt or duty." In re McIntosh, 150 F.546,548, 80 C.C.A. 250, quoting and adopting definition in Hoag v. Howard, 55 Cal. 564, 565.

"The word 'instrument,' in a legal sense, is defined to be a writing as the means of giving formal expression to some act; a writing expressive of some act, contract, process, or proceeding, as a deed, contract, writ, etc. Webst. Int. Dict. 'A writing given as the means of creating, securing, modifying, or terminating a right, or affording evidence; as a writing containing the terms

> of contract, a deed of conveyance, a grant, a patent, an indenture, etc.' Cent. Dict. 'A formal legal writing, e. g., a record, charter, deed, or written instrument.' Rap. & L. Law Dict. 'Anything reduced to writing; a written instrument, or instrument of writing; more particularly, a document of formal or solemn character.' And. Law Dict. 'The term "instrument," in the broadest sense, comprises formal or legal documents in writing, including contracts, deeds, wills, bonds, leases, mortgages, etc.' 16 Am. & Eng. Enc. Law (2d Ed.) p. 824. Abbott in his Law Dictionary defines the term 'instrument' as something reduced to writing as a means of evidence. The word 'instrument' is frequently employed in the registry laws, and usually refers to some written document that is entitled to be recorded in a public record. State v. Phillips, 62 N.E. 12, 14, 157 Ind. 481."

While the word in its generic sense has not been defined by our own Supreme Court, the Court in the case of Waters v. Pearson, 163 Iowa 391, 405, did have occasion to say:

> "...'The person to whom a tender is made must, at the time, make any objection which he may have to the money, instrument or property tendered, or he will be deemed to have waived it.'
>
> "We do not think that an abstract of title should be construed as an 'instrument' within the meaning of this statute. To say that a nonprofessional man should be required to make specific objections instanter to an abstract of title upon presentation would be so manifestly unreasonable that such a construction ought not to be put upon the statute, unless clearly required by its express terms. We see no such requirement here. This statute has a clear and manifest field of application where it operates reasonably and naturally. For instance, if a party proposes to object to an offer of a check or draft in lieu of money, it devolves upon him to say so when the offer is made. We hold, therefore, that the mere failure of the plaintiff to point out the defects in the tendered abstract on the night of March 1st was not of itself a waiver."

In this state of the law, I answer your questions as follows:

1. Insofar as Articles of Incorporation and Amendments certified as true copies by the Secretary of State are concerned, I am of the opinion that they are not embraced within the prohibition of the foregoing statute because (assuming they be instruments, which is not determined), they are copies of instruments and not original documents. The statute makes no provision against the recording of copies of instruments as being within the prohibition of this statute.

2. The affidavit of publication of a notice of incorporation, likewise in my view, is not within the prohibition of the statute as tested by the definitions of 'instrument' as hereinbefore set forth.

Very truly yours,

OSCAR STRAUSS

First Assistant Attorney General

OS:mmh4

COUNTIES: Fire districts -- Ch. 357A differs from Code sections 359.42, 368.11 and 368.12.

March 3, 1960

Mr. Richard F. Nazette
Linn County Attorney
Cedar Rapids, Iowa

Attention: Keith E. Stapleton

Dear Mr. Nazette:

Receipt is acknowledged of your letter of March 1 as follows:

"Your opinion is requested on the following question:

"Are trustees of a benefited fire district empowered, under Chapter 357A, 1958 Code of Iowa, to enter into a contract with a town council to furnish fire protection service within said town located within the fire district?

"This question has arisen in Linn County in connection with a proposal for such a contract between a town of less than 1000 population and a benefited fire district. The terms of the contract, such as duration, compensation, etc., are not yet settled, the thought being that such terms would be settled by negotiation. The fire equipment and apparatus is wholly owned by the fire district, manned by voluntary firemen, and possibly would be housed in the town.

"Your early reply shall be appreciated."

The powers of the trustees of a benefited fire district are specified in section 357A.11, Code 1958, as follows:

"Powers of trustees. The trustees may purchase, own, rent or maintain fire apparatus or equipment and provide housing for same and furnish services in

60-3-9

> 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."

Since benefited fire districts are "creatures of statute", they are necessarily subject to the rule frequently announced by the Supreme Court that, "creatures of statute have only those powers conferred by statute or reasonably and necessarily implied as incident to exercise of an expressly conferred power".

I must therefore regretfully advise you that Chapter 357A does not appear to confer the power concerning which you inquire. Certainly, in view of the beneficial and humanitarian nature of the type of agreement, it would appear the lack of authorization must have arisen from legislative oversight. It seems that Chapter 357A was originally designed for the express purpose of providing fire protection for rural areas and that authority to enter into such agreements was not included only because its need was not foreseen. Needless to say, I would be more than pleased to assist you or the legislators from your county in the drafting of bills for legislation designed to remedy the deficiency.

An item of recent history that may have some parallel significance is that, prior to the convening of the 58th General Assembly, an opinion was issued pointing out the fact that Chapter 357A contains no authorization for the inclusion of cities and towns in benefited fire districts. Although no general amendment authorizing such inclusion was enacted by the 58th General Assembly, one legalizing act was passed (Ch. 390, 58th G. A.) legalizing a benefited fire district which included the town.

This reference should not be considered as recommending a "contract now, legalizing act later" procedure, but I point it out only as an actual illustration of how one fire district dealt with a somewhat similar problem.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl

SCHOOLS: Schoolhouse sites -- Re-dedication of public lands under section 409.46 can only be accomplished if the land in question was platted for public use or deeded to the city at the time the plat was filed. (Release to Waukon, Allamakee Co. Atty., 3/4/60) 60-3-10

March 4, 1960

Mr. Lynn W. Morrow
Allamakee County Attorney
Waukon, Iowa

Dear Mr. Morrow:

This is to acknowledge receipt of your letter of February 10 in which you made the following inquiry:

> "Section 386.39 of the Iowa Code grants to City Councils the power to dispose of land in such manner and upon such terms as they see fit. Section 409.46 and 47 sets out a procedure for the transfer and rededication of a city park for school house purposes?
>
> "Facts: A town in Iowa is contemplating the transfer or sale of a public park to the School for the purpose of building a school thereon. The Town got the property by a straight warranty deed containing no restrictions or reversion provisions and nothing in the deed provided that this land was for the use of the town as a park.
>
> "Question: Has the Town Council authority to sell this park to the school under the provisions of Section 386.39 upon such terms as it sees fit or must the procedure set out in 409.46 and 47 be followed to the exclusion of 386.39?"

In reply thereto, we advise as follows:

In order to understand sections 409.46 and 409.47, Code 1958, it is necessary to have a brief knowledge as to

60-3-10

their historical development. Prior to the enactment of these two sections in 1886, when lands were platted, acknowledged and recorded, such plat vested in the public whatever interest the proprietor or grantor had at the time of platting, and it was held in trust for the public for the purpose for which it was dedicated. Ransom v. Boal, 29 Iowa 68. In the absence of specific legislative authority, public lands cannot be diverted to another public use, and this is true whether public ownership arose from purchase, platting, condemnation or grant. Carson v. State, 240 Iowa 1178, 38 N.W. 2d 168.

If a town receives land by virtue of a plat or a warranty deed in execution of what is platted by the proprietor of that plat, then section 409.46 becomes applicable when the rededication of such land for public purposes is to be used for a school site or school yard. In other words, the dedication has to be made at the outset of the plat and not at some subsequent date when the city might acquire title to property within the plat.

Therefore, in answer to your question, unless the property in question was platted as public lands or deeded to the city at the time the plat was filed, sections 409.46 or 409.47 would not apply. Thus, if sections 409.46 or 409.47 are not applicable to your given set of facts, then the only procedure is for the council to sell this park to the school under the provisions of section 386.39, Code 1958.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:bl
cc: Joe Davis
Paul Johnston

~~SOCIAL~~ WELFARE: LEGAL SETTLEMENT: COUNTY RELIEF. - ~~The~~ payment of relief does not create a permanent disability to acquiring legal settlement in a new county. Settlement may be acquired in the new county by continuously residing in such county for one year without receiving relief. (Petersen to Smith, Bd. of Soc. Welfare, 3/9/60) March 9, 1960. 60-3-11

Mrs. Irene M. Smith, Chairman,
State Board of Social Welfare,
State Office Building
Des Moines, Iowa

Dear Mrs. Smith:

Reference is made to your letter of March 7, 1960, which states:

> "On February 17, 1960, an informal opinion was issued from the office of the Attorney General to Mr. G. A. Cady, County Attorney, Hampton, Iowa, interpreting Section 252.16, Subsection 3, relating to legal settlement.
>
> "There has been some confusion as to the proper interpretation of this opinion and I would appreciate it if a further opinion would be rendered to clarify the following question:
>
> "If a family has not lived in a new county for the prerequisite year to gain legal settlement in that county, does the payment of relief prevent them from acquiring settlement in that county for all time, or is it only a legal disability toward obtaining legal settlement in that county while they are receiving such relief?"

Legal settlement in this state is acquired in accordance with the provisions of Section 252.16, Code of Iowa, 1958, as amended by Chapter 181 of the Acts of the 58th General Assembly. The general effect of the changes made by the 58th General Assembly on legal settlement is interpreted in a formal opinion from this office dated June 5, 1959.

Your request has reference to subparagraph 3 of Section 252.16 which provides in pertinent part:

60-3-11

> "Any such person *** who is being supported by public funds shall not acquire a settlement in said county unless such person before *** being supported thereby, has a settlement in said county."

The question arises specifically from the conclusions contained in an informal opinion directed to Mr. G. A. Cady, Franklin County Attorney, on February 17, 1960. In that opinion, it is stated:

> "Relief furnished by Franklin County to the relief client who has not yet acquired settlement in Franklin County will prevent such relief client from acquiring legal settlement in Franklin County ***"

and a subsequent statement:

> "For so long as such person continues to be supported by public funds, his settlement in the county from which he came will be continued ***"

Section 252.16, subparagraph 2, as amended by the 58th General Assembly, states:

> "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."

Section 252.16, subparagraphs 2 and 3, have been analyzed and reconciled several times in former opinions from this office and by the Supreme Court of Iowa. The Attorney General's opinion dated February 18, 1957 contains a summary of the expressions on this subject by stating:

> "The dictates of the legislature were specific and clear. Legal settlement cannot be obtained, even though no notice to depart has been served, when one continues to receive county poor support during the two year period of residence which by statutes, is a prerequisite to acquiring a new legal settlement. See Audubon County v. Vogessor, 1940, 228 Iowa 281; 1942 Report of Attorney General, page 37; 1938 Report of Attorney General, page

869, at notes 10 & 11, pp. 877-879; also see 1954 Report of Attorney General, 178."

The decision reached by the 1957 opinion is conclusive on this subject and is only changed by the recent amendment of the 58th General Assembly to modify the residence requirement of one year rather than two years in the county to gain legal settlement.

Thus, the payment of relief is regarded as a legal disability to acquiring settlement in the new county under the provisions of subsection 2 of this section. During the period such person is receiving relief, he cannot acquire a new settlement under that section. However, when such person who has received relief in the new county, resides in the new county for one year without receiving further relief, he will acquire legal settlement in that new county.

Respectfully submitted,

Carl E. Peterson
Special Assistant Attorney General

CEP/sp

State officials' duties re: Board of Regents.
Notes or bonds issued by a public body may not be sold for less than par, under Section 75.5, Code 1958. (Advised to Gernetzky, St. Bd. of Regents, 3/9/60) #60-3-12

March 9, 1960

STATE BOARD OF REGENTS
State Office Building
L O C A L

Attention: Carl F. Gernetzky, Chairman Finance Committee

Dear Carl:

Reference is herein made to the offer made to the State Board of Regents to buy certain Iowa State Teachers College Dormitory Serial Revenue Notes proposed to be issued by the Board of Regents, at a sum of $969.00 for a $1000.00 note.

Answering your question as to whether the Board of Regents would have authority to issue these notes at a price less than par, I would advise as follows:

Section 75.5, Code 1958, provides the following:

> "§75.5 Selling price. No public bond shall be sold for less than par, plus accrued interest."

In view of authorities hereinafter cited, I am of the opinion that the foregoing statute has equal applicability to indebtedness incurred either by issuance of bonds or notes.

Section 502.3(1), Code 1958, defines "security" as follows:

> "§502.3 Definitions. When used in this chapter the following terms shall, unless the text otherwise indicates, have the following respective meanings:
> 1. 'Security' shall include any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest in an oil, gas, or mining lease, collateral

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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.
*** "

In the Opinion of this department appearing in the Report of the Attorney General for 1934, page 257, addressing itself to a proposed issue of county judgment bonds, and to this question, it was said:

Section 1175 of the Code provides as follows:
"Selling price. No public bond shall be sold for less than par plus accrued interest."

Section 1176 provides:
"Commission and expense. No commission shall be paid, directly or indirectly, in connection with the sale of a public bond. No expense shall be contracted or paid in connection with such sale other than the expenses incurred in advertising such bonds for sale."

Section 1177 provides:
"Penalty. Any public officer who fails to perform any duty required by this chapter or who does any act prohibited by this chapter, shall be guilty of a misdemeanor."

"It is clear from the above sections that the board has no right or authority to sell the bonds for less than par plus accrued interest. It would not seem so important that the board should determine the source of the money to be paid for the bonds so long as the bonds sell at par plus accrued interest.

"It is not clear from the letter what connection the Board of Supervisors has with the Charity Fund. There is nothing to indicate that it is a county fund over which the board has any control, and I assume the board has nothing to do with this fund except as it has been placed at the disposal of the board by the Charity Fund Committee. The board may be assured its members will not be held personally liable for their action if they comply with the above statutes."

In the Iowa Supreme Court case of Weiss v. Woodbine, 229 Iowa 978, addressing itself to the same question arising

out of the issuance of revenue bonds, it is stated:

> "(2) Code section 6134.05 provides:
>
> 'Sale of bonds--interest. Such revenue bonds shall not be sold for less than par, plus accrued interest,' etc.
>
> "Code section 1175 reads:
> 'Selling price. No public bond shall be sold for less than par, plus accrued interest.'
>
> "With regard to the above statutes requiring that bonds be not sold for less than par, the trial court in its decision concluded that section 6134.02 permitting delivery of bonds in payment of the contract is probably limited by the requirement that the bonds be not sold for less than par. Assuming, as we are inclined to believe, that the town was required to deliver the revenue bonds to the contractor at not less than par, appellants have failed to show that the town is to deliver, or the contractor accept, the bonds in question at less than par."

While the foregoing does not exhaust the legal literature upon the subject, upon the basis of the foregoing, I am of the opinion that the issuance of these notes for less than par would present a borderline question as to the validity of such notes and a declaratory judgment adjudicating the question would be in order.

Very truly yours,

OSCAR STRAUSS

First Assistant Attorney General

OS:mmh4

TOWNSHIPS: Benefited fire districts -- Under Code section 357A.2, any number of adjoining townships may be formed into a fire district. (Abels to Morrow, Allamakee Co. Atty. 3-14-60) 60-3-13

March 14, 1960

Mr. Lynn W. Morrow
Allamakee County Attorney
Waukon, Iowa

Dear Mr. Morrow:

Pursuant to your letter of March 9, I am pleased to enclose thermofax copies of "Abels on Fire Districts". Until I saw the list in your request, I hadn't realized I'd written so many letters on the subject.

With respect to your specific question, it appears the only limiting factor contained in section 357A.2 as to number of townships that may be included in a benefited fire district is in the word "adjoining". Section 357A.2 provides:

> "Extent of district. The benefited fire district may include all or portions of one township and any adjoining townships or portions thereof."

Thus, in planning a fire district, it appears the procedure is to select a central township and add all or parts of any or all "adjoining" townships. If the statute had employed the word "contiguous", it would be necessary for any additional townships to have a common boundary line. Since it uses the word "adjoining", it seems to be enough if they corner at a single point. There is even case authority indicating there need be no point of actual contact where the word "adjoining" is used, but that the word also would include "near". See 2 Words & Phrases 585.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl
Encl: #57-7-26, #57-7-34, #57-8-12, #57-9-23, #58-5-16, #58-5-20, #59-7-29, #59-12-3

60-3-13

ELECTION TERMS OF SUPERVISORS --

P.

1. Chapter 252, Acts of the 58th General Assembly, is an implied repeal of Section 39.19(2), Code 1958, and therefore, on a board of supervisors consisting of five members, each township is entitled to one member to be elected at large.

2. Nomination papers of a candidate for primary nomination should designate the term of office which he is seeking to fill.

3. Candidates in each category in the primary receiving the highest number of votes for the office of supervisor, and not less than 35% of the vote for which nominations are respectively sought, are deemed nominated.

4. In the general election, where there are two or more candidates for election to the board of supervisors having the same townsnip residence, the candidate receiving the highest number of votes will be declared elected.

5. If a vacancy results from a failure to elect a member of the board of supervisors, such vacancy is filled pursuant to the provisions of Section 69.8(5), Code 1958. (Hultman, Black Hawk Co. Atty., 3/14/60) #60-3.14

"The last paragraph of Section 331.7 indicates that:

> 'The length of term for which any person is a candidate and the time when the term begins shall be indicated on the ballot'.

"As you can readily understand, the auditor must certify to the printer in the near future what is to be printed on the ballots for the June primary and what is to appear in the notices, etc. concerning the election. In digesting the above sections, it is evident that there must be an indication by the candidate as to which term he is seeking, i.e., two, three or four year term; that the term must be indicated upon the ballot and not more than one person nominated for the office from any one township. However, Section 39.19(2) indicates:

> 'In counties having five or seven supervisors two members may be residents of a township which embraces a city of thirty-five thousand population.'

"As you can readily see, it is possible that the candidates for each term of office getting the highest number of votes could conceivably be from the same township in the primary. Which are the party nominees to go on the ballot for the November general election? The situation is even more complex when you consider the nominees from both parties. In other words, we could have a number of legally nominated candidates in the primary who would be in fact eliminated by the questionable township residence requirement before the votes are even cast in the November election.

"It has been suggested that one solution to the problem would be for the Board of Supervisors to set up five supervisor districts under section 331.8 of the 1958 Code and only one candidate nominated from each district. I informed the present board prior to and again at 'its regular meeting in January' that action of this kind would have to be taken at that time. The question has now arisen as to whether or not 'its regular meeting in January' is a continuous meeting which is only recessed each Monday and is still in session.

"As you can readily appreciate, there are many procedural problems concerning both the primary and general election of supervisors created by the passage of Chapter 352 of the Acts of the 58th General Assembly and the passage of the issue of reducing the board to five members by the electorate here in Black Hawk County. Needless to say, it is imperative that the proper election procedure be set out prior to the first step in the election procedure in fairness to all candidates and political parties and to insure a valid election to the general public.

"I will be in Des Moines on Monday, March 7th, and would like to converse with you further concerning this problem in the afternoon. As you can appreciate the time factor of filing, I would appreciate a final opinion concerning this matter as soon as it is reasonably possible."

And receipt is acknowledged of your supplemental letter dated March 8, 1960, in which you submitted the following:

"As per our discussion yesterday, I submit the following additional questions concerning the procedure of electing the Board of Supervisors in Black Hawk County this year:

"Question No. 1: May the present Board of Supervisors district themselves under Sedtion 331.8 of the 1958 Code of Iowa in lieu of Section 331.7 as amended by the 58th General Assembly?

"Question No. 2: In the event candidates filing for a term of 2 years, 3 years, and 4 years are all from the same township residence, do the 2 candidates receiving the highest number of votes for the 2-year terms, the 2 for 2 3-year terms and the 1 for the 3-year term constitute the party nominees for the general election?

"Question No. 3: In the event 2 or more candidates in the general election have the same township residence and are seeking the same term or different term is the candidate with the largest vote the only one elected?

"Question No. 4: In the event there should be a vacancy as a result of the election procedures, in accordance with Section 69.2 of the 1958 Code of Iowa, are said vacancies to be filled in accordance with Section 69.8 (5) of the 1958 Code of Iowa?

"I kindly request that the aforementioned questions be added to my previous correspondence and a written opinion given to me concerning these additional questions in addition to those originally submitted."

#1. In reply thereto I advise you as follows:

Insofar as a conflict exists between Chapter 252, Acts of the 58th General Assembly quoted by you, and the provisions of Section 39.19(2), (evidenced by the fact that Black Hawk County, having a city of 35,000, and a board consisting

of five members, under the provisions of Section 39.19, Code 1958, may have two members on the board residents of the same township, while a county having a population of 80,000 or more, which Black Hawk County has -- see Federal Census of 1950, and the case of Harp v. Abrahamson, 248 Iowa 222 -- is limited to one supervisor for each township, according to Chapter 252, Acts of the 58th General Assembly.) I am of the opinion that this conflict amounts to an implied repeal of Section 39.19(2) by the subsequent enactment of Chapter 252, Acts of the 58th General Assembly. This has both textbook and case support.

In SUTHERLAND STATUTORY CONSTRUCTION, 3rd Edition, Volume 1, page 447, after reciting an arbitrary distinction established by the Court between amendments and repeal, it is stated:

> "This arbitrary distinction has been followed by the courts, and they have developed separate rules of construction for each. However, they have recognized that frequently an act purporting to be an amendment has the same qualitative effect as a repeal -- the abrogation of an existing statutory provision -- and have therefore applied the term 'implied repeal' and the rules of construction applicable to repeals to such amendments. The courts also have recognized that acts which the legislature has treated as original frequently have the same effect in substance as amendments and repeals and that an independent act in effect adds a provision to a prior act pertaining to the same subject matter or in effect adds a provision to a prior act and abrogates a part of it by being in conflict with it, and have therefore applied the term 'implied amendment' to the first two of these results and the term 'implied repeal' to the last.
>
> "The term implied amendment has been used chiefly by courts in determining whether the constitutional requirement as to the form of an amendatory act has been violated, whereas the term implied repeal has been used to justify the application to the act of the rules of construction developed for express repeals. Where an independent act

> in effect adds a provision to a prior act and at the same time repeals a part thereof by being in conflict with it, the terms 'implied amendment' and 'implied repeal' are both used to describe the situation, the former in determining whether the constitutional limitation on the form of amendments has been violated, the latter in construing the act."

And addressing itself to the same proposition, Sutherland, on pages 388 and 389, states:

> "The constitutional limitation that no act shall be amended by mere reference to its title does not apply to 'implied repeals' or 'repeals by implication.' Repeal by implication occurs when an act not purporting to repeal any prior act is wholly or partially inconsistent with a prior statute or covers the subject of a prior act or section and is a substitute act. On the basis that the latest declaration of the legislature prevails, the inconsistent provisions of the prior statute, or the whole prior statute if the later act is intended as a substitute, are treated as repealed. Where the existence of a prior act is only partially terminated by the inconsistency of provisions in a later act, the repealed provisions of the prior statute are necessarily replaced by the inconsistent provisions of the new act, thus in substance altering or amending the prior act. Repeal by implication when only a part of the prior statute is repealed is identical with amendment by implication."

And on page 458 the author states:

> "However, a former act may be just as effectively repealed by implication as by express designation."[3]

Quoting from the case of People v. Lowell, 250 Mich. 349, 230 N.W. 202 (1930), he states: (Footnote 3)

> "The operation of a repealing act is not dependent upon whether the repeal is express or implied, for, when a repeal is finally determined, inquiry into how it arose is unimportant."

And so far as case authorities are concerned, the case of New York, N.H. & H. R. Co. v. Bridgeport Traction Co., 65 Conn. 410, 32 Atl. 953, 955, 29 L.R.A. 367, 371 (1895)

states the following:

> "The main contention of the plaintiff is that the Public Act of June 14, which took effect July 30, repealed or modified those parts of the special grants made on June 28 (when the private acts took effect under the provisions of the general statutes), under which the defendant claims an absolute right to construct the crossing in question.
>
> "The doctrine that a later statute repeals by implication all provisions of former ones which are inconsistent with it rests on the ground that the last expression of the legislative will ought to control. It assumes that there have been successive and different expressions of such will in relation to the same subject; and the latest of these governs, precisely as the last word of a master governs his servants, however much it may vary from his previous directions. Such is presumed to be his intention; and the intent of a statute is determined by the same rule and the same reason."

And while it has not been so pointedly stated, it is hornbook law in Iowa that where two statutes are in irreconcilable conflict, the last one enacted will be construed as repealing the prior one. (Iowa Digest, Vol. 17, p. 380)

IOWA 1857. Casey v. Harned, 5 Iowa 1, 5 Clarke 1.
IOWA 1859. Edgar v. Greer, 8 Iowa 394, 8 Clarke 394, 74 Am. Dec. 316.
IOWA 1872. McKinney v. Wood, 35 Iowa 167.
IOWA 1925. Owens v. Smith, 204 N.W. 439, 200 Iowa 261.
IOWA 1933. Waugh v. Shirer, 249 N.W. 246, 216 Iowa 468.

The fact that Section 3.1, Code 1958:

> "3.1 Form of bills. Bills designed to amend, revise, codify, or repeal a law:
> "1. Shall refer to the numbers of the sections or chapters of the code to be amended or repealed, but it shall not be necessary to refer to such sections or chapters in the title.
> "2. Shall refer to the number of the general assembly and of the sections and chapters of the acts thereof to be amended in case the bill relates to a section or sections of an act not appearing in the code.
> "3. All references to statutes shall be expressed in words, followed by the numerals in parentheses, and if omitted the reporter of the supreme court in preparing acts for publication in the session laws shall supply the same.

"4. The title to a bill shall contain a brief statement of the purpose of the bill, however all detail matters properly connected with the subject so expressed may be omitted from the title."

has not been complied with is no bar to the application of this principle. It was so held in the case of Waugh v. Shirer, 216 Iowa 468, 472, 249 N.W. 246, in which it was stated:

"(3) II. It is further argued by the appellant, however, that section 4753-a11 was not repealed because the Legislature did not conform to the requirements made in section 47 of the 1931 Code. This last-named section provides:

'Bills designed to amend, revise, codify, or repeal a law: 1. Shall refer to the number of the section or sections of the code to be amended. 2. Shall refer to the number of the chapter or chapters and title of the code to be amended. 3. Shall refer to the number of the general assembly and of the sections and chapters of the acts thereof to be amended in case the bill relates to a section or sections of an act not appearing in the code. 4. All references shall be expressed in words, followed by the numerals in parentheses, and if omitted the reporter of the supreme court in preparing acts for publication in the session laws shall supply the same.'

"There is no claim by the appellees that the Legislature, in adopting section 1171-d4, complied with section 47 when repealing section 4753-a11. The question here raised by the appellant, nevertheless, has been disposed of by this court in previous cases. In Solberg v. Davenport, 211 Iowa 612, we said on page 624, 232 N.W. 477, 483:

'With the latter proposition (the one now raised by the appellant in the case at bar) we cannot agree. The general rule is too well settled to need citation of authority that each Legislature is an independent body entitled to exercise all legislative power under the limitation of the Constitution of this state and the United States, and no Legislature can pass a law which would be binding on subsequent Legislatures. We think this rule applies to the situation before us (the one before us in the case at bar). In other words, section 47 of the Code 1927 was utterly disregarded by the Legislature; yet it cannot be held invalid because thereof. Authorities on this proposition are not numerous, but those we have been able to find announce this doctrine.'

> "So far, then, as section 47 of the Code is concerned, section 1171-d4 thereof, by implication, repealed section 4753-a11 under consideration."

The rule was likewise announced in the case of Barber v. Housing Authority of City of Rome, 5 S.E.2d 425, 427, in the following language:

> "(3,4) (b) The amendatory act of 1939 is attacked on the further ground that it violates art. 3, sec. 7, par. 17, of the constitution (Code, § 2-1817), precluding the amendment or repeal of any law or Code section 'by mere reference to its title, or to the number of the section of the Code,' and requiring a distinct description of the law to be amended or repealed and the alteration to be made. It has been held that this provision is 'confined to repeals and amendments expressly made,' and does not apply to changes made by 'implication' (Nolan v. Central Georgia Power Co., 134 Ga. 201 (3), 67 S.E. 656; Swift v. Van Dyke, 98 Ga. 725-727, 26 S.E. 59; Durham v. State, 166 Ga. 561, 144 S.E. 109), and that 'an act which does not purport to amend or repeal any particular law or statute is not within (its) prohibition.' "

#2. Insofar as the declaration of the term of office for which a person is a candidate, in view of the provision of Section 331.7, Code 1958:

> "The length of term for which any person is a candidate and the time when the term begins shall be indicated on the ballot."

and the following provision of Section 39.18, Code 1958:

> "It shall be specified on the ballot when each shall begin his term of office."

I refer to the following controlling opinion appearing in the Report of the Attorney General for 1932, at page 201, as follows:

> "ELECTIONS -- NOMINATION PAPERS: Where nomination papers did not state term, new papers should be secured.
>
> "April 6, 1932. County Attorney, Clarinda, Iowa: This will acknowledge receipt of your request of March 22nd, which is as follows:

'I would like to have an opinion from your office on the following question and set of facts: A candidate has made his announcement in the papers of the county that he is a candidate for the office of county supervisor and has designated the term for which he is a candidate, namely the term commencing January 1, 1933. His political cards also designate the term. His nomination papers, which are signed and ready to file, state that he is a candidate for the office of County Supervisor but do not state the term.

'The question arises, should he secure new nomination papers, stating that he is a candidate for the office of County Supervisor, term commencing January 1, 1933, and have these papers signed by the required percentage of voters, or will it be permissible to add, "Term commencing January 1, 1933" to each of his nominating petitions which are already signed and ready to file?'

"In reply we would say that under the present statutes the candidate of whom you speak may not add to his nomination papers, and he should, therefore, secure new nomination papers designating the particular office and term for which he desires to become a candidate."

This opinion, now of long standing, unchanged and unchallenged, is still the view of the department and is now confirmed.

#3. In answer to Question No. 1, set forth in your supplemental letter, I repeat the language of Chapter 252, Acts of the 58th General Assembly, as follows:

"AN ACT relating to the election of members of the board of supervisors in certain counties, after reduction of membership of the board, and to amend chapter three hundred thirty-one (331), Code 1958.

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

"Section 1. Section three hundred thirty-one point seven (331.7), Code 1958, is hereby amended by inserting in line six (6) after the period the following:

'In counties of over eighty thousand (80,000) population where such proposition reduces the board to five (5) members, there shall be elected at large the number of members required by such proposition provided, however, that not more than one (1) supervisor shall be a resident of any one (1) township of such county.'

and by it exhibit the mandatory language of the Act, to wit:

> "In counties of over eighty thousand (80,000) population where such proposition reduces the board to five (5) members, there shall be elected at large," etc.

Therefore, in compliance with the foregoing mandate, in counties having a board consisting of five members, the foregoing act restricts the power of the board in redistricting to members at large and not by districts, at the same time limiting each township to one member on the board.

#4. In answer to Question No. 2 contained in your supplemental letter, I would advise that the candidates in the primary receiving the highest number of votes cast for that office, and not less than 35% of the vote in each category, to wit: a term of two years, or a term of three years, or a term of four years, all from the same township, shall be deemed to have been nominated.

Addressing itself to the provision of Section 39.19, Code 1958, that no person shall be elected a member of the board of supervisors who is a resident of the same township of any of the members holding over, it was stated in the opinion of this department issued April 28, 1958, to the Honorable W. E. Darrington, State Representative, as follows:

> "This appears to be the only statute respecting the eligibility of a person desiring to be a candidate for elective office. The statement therein made by the candidate is that he is 'eligible to the office for which I am a candidate'. The eligibility consists of his being of constitutional age, that is, 21 years of age, and a resident of the state six months and the county ten days. The fact that Green may not be elected and may not qualify for the office by reason of the prohibition contained in Section 39.19 heretofore quoted deals with the eligibility of the person to be

elected to the Board of Supervisors. Section 43.18 deals with the eligibility to be a candidate for the office. These statutes deal with different situations, one with the primary and one with the election. The same situation appeared in the case of Stafford v. State Election Board, 203 Okla. R. 132, 218 P. 2d 617, where it was said:

> 'We are not dealing here with the eligibility of petitioner to hold the office if elected thereto. We agree with the contention of petitioner that the provision of the Constitution that members of the House of Representatives must be at least 21 years of age at the time of their election and not the primary election.
>
> 'The Constitution does not prescribe the qualifications of a candidate in a primary election. Therefore, it was within the province and right of the Legislature to declare upon what terms and subject to what conditions the right to become a candidate before a primary election shall be conferred. The Legislature has exercised that right and petitioner is bound thereby.'

"In view of the foregoing I am of the opinion that Green may become a candidate for the Board of Supervisors for the term beginning January 2, 1959, and that the County Auditor has the duty of placing his name upon the ballot as a candidate for the office."

#5. In answer to Question No. 3 in your supplemental letter, it is my opinion that in the case of two, or more than two, candidates in the general election having the same township residence and being candidates for the same term or different terms, the candidate receiving the highest number of votes cast will be declared elected. It may be said of this conclusion what was said in the case of Arp v. Lage, 236 Iowa 775, 777, with reference to the result of an election for membership in the board of supervisors where the election itself presents a situation where a candidate takes a chance of election or defeat. It was there said:

"In other words, a person elected supervisor must be able to show that he is not a resident of the same township as a holdover, or if he is, that he is also a resident of the same township as the one he succeeds, or, in townships with a city of thirty-five thousand, he must show that his election will not result in three members from such township. Because Arp was a resident of the same township as a holdover, and his election will result in three members from the township having the city of thirty-five thousand, his election falls within the prohibition and is invalid.

"We recognize that this construction makes the validity of an election in certain instances depend upon the outcome of the election of other candidates for other supervisor offices. But this arises by reason of the difference in the exceptions. The first is a personal exception, which applies to any candidate who is a resident of the same township as the member he seeks to succeed. The second is not a personal exception. It is based upon a situation. Of course, this situation might vary, depending upon the election or defeat of other candidates. This is the chance one takes who, as one of the prohibited class, seeks office in reliance upon this exception. As a resident of Davenport, Arp knew that there was one board member from that city and one candidate (Lage) from Davenport who was not in the prohibited class. He should have known that he would be in the prohibited class unless he would be able to show that his election would not result in three members from Davenport township. He cannot now argue that Lage's election is the one that makes three from Davenport for Lage did not rely on this exception. Lage relied on the first exception where residence in the same township as a holdover is immaterial so long as the candidate is a resident of the same township as the one he tries to succeed. It is Arp's election that makes three from Davenport. He relied solely on the second exception. Since his election results in three from Davenport it is invalid and the trial court was right in so holding. The decree of the trial court is affirmed. -- Affirmed.

#6. In answer to Question No. 4 propounded in your supplemental letter, I would advise it is my opinion that if a vacancy, as a result of a failure to elect a member or members to the board of supervisors in the 1960 election should occur, said vacancy would be filled in adcordance with the provisions of Section 69.8(5), Code 1958, which provides as follows:

"69.8 Vacancies -- how filled. Vacancies shall be filled by the officer or board named, and in the manner, and under the conditions, following:

1. * * *
2. * * *
3. * * *
4. * * *
5. Board of supervisors. In the membership of the board of supervisors, by the clerk of the district court, auditor, and recorder.
6. * * *
7. * * *"

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh4

SCHOOLS: Reorganization -- Distribution of assets should be considered as a whole as of the date the distribution is to be made. (Rehmann to Dunn, Hardin Co. Atty., 3/15/60) #60-3-15

March 15, 1960

Mr. William N. Dunn
Hardin County Attorney
Eldora, Iowa

Dear Mr. Dunn:

This is to acknowledge receipt of your letter of February 18 in which you state:

> "A school house was constructed by an independent school district in 1920. In 1946 this district became a part of a consolidated school district and operated as such until 1958. In that year as a result of two school reorganizations involving school district A and school district B the consolidated district was reduced to eight and one half sections of land, these reorganizations having become effective on July 1, 1959. The school house was located in a part of the district which was included in school district A. On October 1, 1959, five and one half sections of the remaining eight and one half sections became a part of school district B and the remaining three sections were assigned to a third district by the County Board of Education.
>
> "There is no controversy as to the distribution of the school furnishings and similar assets but school district A refuses to pay school district B any part of the value of the school building.
>
> "I would appreciate your opinion as to whether or not the value of the school building should be divided between school district B and school district A."

60-3-15

In reply thereto, we advise as follows:

In July of 1959, when the reorganization became complete, there should have been present at the reorganization meeting the boards of directors of A school district and R school district and the board of directors of the remaining consolidated district.

The distribution of the assets should have been made accordingly, as considering the old consolidated district as a whole, and the distribution of assets and liabilities should have been divided among the three districts by the representative boards of directors. In the consideration of assets and liabilities of the district to be reduced, it is considered on all the property within the district and not upon separate portions which are included in other school districts. Peterson v. Swan, 231 Iowa 745, 2 N.W. 2d 70. In considering assets, your attention is directed to District Twp. of Williams v. District Twp. of Jackson, 36 Iowa 216, and District Twp v. Wiggins, 110 Iowa 702, it was held that school houses used for school purposes are to be considered in the division of assets, but that the division need not result in partition of the real estate.

It was recognized that where a school must be maintained in the portion of the original district remaining after the boundary change, it is logical that the existing school facilities be used therefor. Where there are not sufficient assets to make up the proportionate value of the school plant, a cash levy may be made under section 275.31, Code 1958, in order to equalize distribution.

Your attention is directed to Opinions of the Attorney General 1956, page 54, where it is held, in essence, there is no express limitation upon the amount to be levied under section 275.31 so long as the amount levied is equitable.

Therefore, in answer to your question, it would appear that there should be some equitable division of the value of the school building between school district R and school district A.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:bl

INSURANCE: Vending machines -- Machines dispensing policies providing indemnity for loss of life, limbs or sight, where the policies are countersigned before insertion in the machine and are delivered in blank to the purchaser, are in violation of Code section 515.52. (Ltr. to Timmons, Ins. Comm., 3/18/60) March 18, 1960 #60-3.16

Honorable William E. Timmons, Commissioner
Insurance Department of Iowa
State Office Building

Dear Mr. Timmons:

Receipt is acknowledged of your letter as follows:

"Recently several insurance carriers have submitted to our office for approval, policy forms which insure against expense incurred as a result of accidents which occur while traveling. These policies also provide for a schedule of doller benefits to be paid in the event of specific losses, such as loss of life, limbs or sight.

"It is the intention of the companies submitting these forms to sell these policies through vending machines, placed in locations attracting large numbers of vacationers and traveling men.

"One of the machines dispenses a policy, folded and in an envelope, and the purchaser merely tears off a portion of the policy, fills in his name, address, effective date and beneficiary and deposits the tear sheet in a slot in the machine.

"This type of machine is not designed so as to be able to validate each policy individually as it is purchased, and requires that the policies be countersigned in blank before they are inserted in envelopes and placed in the machine.

"Our question specifically is whether or not the vending of this type policy as outlined above is in

60-3-16

conflict with Section 515.52, of the Code of Iowa, as it relates to the countersigning of certain types of insurance policies in blank."

Section 515.52 provides:

"Issuance by licensed agents. No insurance company shall write, issue, or place, or cause to be written, issued, or placed any policy or contract of insurance or indorsement thereto, covering risks on any property, insurable business activity, or interest, located within, or transacted within this state, including any contract of indemnity or surety-ship, except through or by a duly licensed agent of such company, residing within this state, who shall before delivery, countersign said policy or contract of insurance or indorsement thereto. No such resident agent shall countersign such policies, contracts of insurance or indorsements in blank."

The policy in question provides a schedule of indemnity for loss of life or limb. Section 515.52 is made expressly applicable to "any contract of indemnity". The section is, therefore, expressly applicable to the policy in question as reference to the exemptions enumerated in section 515.58 fails to disclose any exemption for this type of policy.

Section 515.52 prohibits agents from countersigning policies in blank. However, in the transaction you describe, the machine delivers a policy, already countersigned, to the policyholder who then fills in his name, address, effective date and beneficiary. In other words, the policy is counter-signed in blank.

It is therefore my opinion that the specific type of vending machine operation described in your letter is in violation of the statute. No opinion is herein expressed with respect to other types of vending machines designed so as to validate each policy individually at the time it is purchased.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl

AERONAUTICS: Registration of leased aircraft -- Since, under Code section 328.25, registration fees take the place of tax, the word "owner" in Code section 328.20 takes the definition employed in Code section 428.9 for purposes of personal property tax.

March 21, 1960

Iowa Aeronautics Commission
6001 Fleur Drive
Des Moines, Iowa

Attention: L. W. Wolverton

Gentlemen:

Recently you requested an opinion on the following: An Iowa corporation leases aircraft from a California rental company and bases the aircraft in Iowa. Are the aircraft subject to Iowa registration?

In answer thereto, section 328.20, Code of Iowa, provides as follows:

> "Registration of aircraft. Every civil aircraft owned either wholly or in part by persons residing in this state, unless specifically excepted under the provisions of this chapter, shall be registered annually with the commission, by the owner thereof."

The real question is, therefore, whether the Iowa corporation, in the circumstances described, is an "owner" within the meaning of the quoted statute. In this connection, it is pertinent that section 328.25 provides:

> "Fees in lieu of taxes. The registration fees imposed by this chapter upon aircraft shall be in lieu of all taxes, general or local, except state sales or use tax, to which aircraft might otherwise be subject."

Thus, the registration fee imposed by sections 328.20 and 328.21 is more than a mere fee; it is a tax.

60-3-17

For this reason, it becomes further pertinent to consider who the "owner" would be for purposes of general taxation of personal property. This is entirely reasonable and proper as the registration fee, which takes the place of personal property tax, logically should extend to all items of personal property (aircraft) which would be subject to personal property tax but for the exemption in section 328.25. For purposes of general taxation, "owner" is defined in section 428.9, Code 1958, as follows:

> "'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."

Since the corporation in question would appear to be included within the phrase "all persons other than warehousemen", it follows the property would be subject to taxation but for the provision in section 328.25, supra, that registration fees shall be in lieu of the tax.

Having concluded that the registration fee extends to all aircraft that would otherwise be subject to tax, it follows that the aircraft in question are subject to Iowa registration. It should be noted, however, that under section 328.23, the amount of any registration fee, tax, or license paid to another state shall be deducted from the Iowa registration fee.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl

TAXATION: Real Property - Remission of Taxes - The County Board of Supervisors has no authority to remit the taxes on buildings, permanently affixed to land which have been destroyed by fire. (Gill to Lindeen, Beaulieu & Co. attys.) 3/21/60) #60-3-18

March 21, 1960

James W. Hudson
Pocahontas County Attorney
Pocahontas, Iowa

Dear Mr. Hudson:

This will acknowledge your letter of February 4, 1960, in which you request the opinion of this department regarding the propriety of the board of supervisors to remit the 1959 real property taxes on a building destroyed by fire in January, 1959, where such loss was recovered by insurance. The actual value of the building as disclosed by assessor's records was $10,221.00, the assessed value $6,133.00, and the insurance recovery $9,500.00.

As stated in your letter the relevant statute is Section 445.62, Code of Iowa (1958), which is set out for your convenience.

> "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."

This problem has been considered previously in an informal opinion of April 3, 1958, directed to Mr. T. C. Strack, Grundy County Attorney, and written

60-3-18

by Oscar Strauss, First Assistant Attorney General. That opinion held in essence that a building attached to real property has no separate taxable value, and the assessment of real property includes any buildings situated thereon. It provided further that Section 445.62, supra, applies only to property of the same character as the items of property specifically mentioned therein, such as buildings, crops and stock. Since buildings permanently attached to real property are not separately assessed and taxed as personal property and taxes on the buildings as such being non-existent, remission of such taxes cannot be affected by virtue of Section 445.62, supra.

However, the taxpayer may apply to the Board of Review, pursuant to Section 35 of Chapter 291, Acts of the 58th G. A., to have the valuation of his property reduced where there has been a change in value.

We conclude, then, that the Board of Supervisors has no authority to remit the 1959 real property taxes on the destroyed buildings; but that the taxpayer's recourse would be with the Board of Review to obtain a decrease in valuation.

Very truly yours,

Gary S. Gill
Special Assistant Attorney General

GSG/WWR/bjf

ELECTIONS: COMPATIBILITY OF OFFICE. — Thos. Kirkland

A public officer or employee may be a candidate for public office and precinct committeeman at the same primary election, and the name of such candidate for such offices may appear upon the same primary ballot.

(Mervin J. Flander, Bremer Co. Atty., 3/22/60)

#60-3-19

March 22, 1960

Mr. Mervin J. Flander
Bremer County Attorney
Waverly, Iowa

My dear Sir:

Pursuant to telephone conversation and confirmation thereof, I would advise that I am of the opinion that a public officer or employee may be a candidate for public office and precinct committeeman at the same primary election, and the name of such candidate for such offices may appear upon the same primary ballot.

Yours very truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh4

60-3-19

OFFICERS & DEPARTMENTS:

STATE ~~EMPLOYEES:~~ Vacations--Head of department, commission or agency of State of Iowa may allow employee vacation prior to anniversary date, provided employee has completed one full year of employment. (Hill to O'Connor, State Tax Comm., 3/24/60) #60-3-20

March 24, 1960

John J. O'Connor
Chairman
State Tax Commission
Local

Dear Mr. O'Connor:

This will acknowledge your letter of March 2, 1960, in which you request the opinion of this department relative to the following problem:

> "X, an employee of the State Tax Commission, commenced employment with the State in July of 1958. X plans to become married in May of this year and for this reason requests that he be allowed his vacation during May, rather than wait until July (his anniversary date).
>
> "Is this department authorized, under the laws of the State, to grant X's request or must X wait until after his anniversary date to be entitled to his two weeks vacation."

The answer to this question will be found by reference to Section 79.1 as amended by Chapter 100 of the 58th G. A., which provides in pertinent part as follows:

> "79.1 Salaries--payment--vacations--sick leave--injuries in line of duty. * * * All employees of the state including highway maintenance employees of the state highway commission are granted one week's vacation after one year's employment and two weeks' vacation per year after the second and through the tenth year of employment, and three weeks' vacation per year after the tenth and all subsequent years of employment, with pay. Said vacations after the first complete year of employment shall be granted, regardless of anniversary date, at the discretion and convenience of the head of the department, agency or commission. * * *."

60-3-20

The last sentence of the statute above set out was added to the law by the 58th General Assembly and clearly establishes authority in the commission or head of department to allow an employee who has completed one year's employment his vacation prior to the occurrence of his anniversary date.

Thus, in answer to your specific question, the commission or head of the department, in its discretion, may allow X his vacation prior to his anniversary date.

Very truly yours,

Gary S. Gill
Special Assistant Attorney General

GSG/WWR/bjf

ELECTIONS: RESIDENCY REQUIREMENTS --

1. To be entitled to vote or hold office, residence in the state for six months, in the county for sixty days, is required.
2. Such residency requirements must have been met at the time the affidavit of candidacy is filed. (Strauss to Schroeder, Jackson Co. Atty., 3/28/60) #60-3-21

March 28, 1960

Mr. Asher E. Schroeder
Jackson County Attorney
Maquoketa, Iowa

Dear Mr. Schroeder:

This will acknowledge receipt of yours of the 25th inst. in which you submitted the following:

"I wish to submit for your answer the following problem that has been raised in this County, in connection with the eligibility of a person to run for County office.

"Nomination papers are now being circulated in this County for a prospective candidate for County office on the June Primary ballot. This individual is currently living in Dubuque County, Iowa, but is planning to move into Jackson County, on or about April 1, 1960. He formerly lived in this County for a period of some five years, before moving away approximately nine months ago.

"The question I wish to submit for answer, is in regard to the residency requirements, if any, that must be fulfilled before a person may become a candidate for County office in this State. I am aware of the affidavit to be signed and filed by a candidate. (Section 43.18, 1958 Code)

"If residence requirements are necessary, what are those requirements? Further does a candidate have to possess these requirements, if needed, as of the 12th of April, the last day for filing, or as of the primary election date of June 6th, or at the time of the General Election in November, or is he only required to be a qualified as of the time he takes office?"

1. The residence requirements for persons seeking county offices are those provided in the Constitution, Article II, Section 1, which requires residence in the state for six months, and in the county sixty days before being entitled to vote and hold office.

60-3-21

2. Insofar as to when possession of these requirements is necessary, I would advise that according to an opinion of this department issued March 22, 1956 to Melvin D. Synhorst, copy of which is enclosed, such requirements must be met at the time the affidavit of candidacy is filed.

Very truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh4
Enc: 1

COUNTING RECORDED INSTRUMENTS -- Borcherding, Franklin Co. ASC Office, 2/28/60) # 60-3-22

The provision of Section 335.2, Code 1958, that all instruments filed with the recorder shall have typed or legibly printed the names of all signers thereon, is restricted to instruments filed for recordation.

March 28, 1960

FRANKLIN COUNTY ASC OFFICE
Hampton
Iowa

Attention: Darrel A. Borcherding

Dear Sir:

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

"Subject: The Filing or Recording of Commodity Chattel Mortgages.

"We understand that a new law on the filing and/or recording of chattels was passed by the last legislature, effective July 1, 1959. Under this law the names of the signers on an instrument are to be typed.

"Enclosed is a sample of a Commodity Chattel Mortgage used in connection with the USDA Price Support Programs.

"Will you let us know if the names are supposed to be typed above or below the signature. This instrument is filed -- not recorded. We are of the opinion that the typed name above or below the signature is not required for this type of instrument.

"We will appreciate your answer to this question."

The statute to which you have reference is Section 1 of Chapter 255, Acts of the 58th General Assembly, which provides as follows:

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

'All instruments filed for recordation with the recorder shall have typed or legibly printed the names of all signers thereon, excluding those of the acknowledging officers and witnesses, beneath the original signatures; provided, however, that in the event that such instrument does not contain such typed or printed names, the recorder shall accept such instrument for recordation if accompanied by an affidavit, for record with the instrument, correctly spelling in legible print or type the

60-3-22

signatures appearing on said instrument. This requirement shall not apply to military discharges or military instruments, nor to wills or court records, or to any other instrument dated prior to the effective date of this Act. Failure to print or type signatures as herein designated shall not invalidate the instrument.'

Note that the requirements set forth therein for the typing or legible printing of the names of the signers to instruments is restricted to instruments filed for recordation. Mortgages of personal property, conditional bills of sale, or other instruments where the vendor or mortgagor retains actual possession of the property lien may be either recorded or filed. Section 556.5, Code 1958, provides therefor in the following terms:

"556.5 Filing equivalent of recording. Upon receipt of any such instrument or a true copy thereof affecting the title to personal property, the recorder shall indorse thereon the time of receiving it, and shall file the same in his office for the inspection of all persons, and such filing shall have the same force and effect as if recorded at length."

This statutory distinction of providing notice shows an intent of the legislature not to include the matter of filing such instrument within the terms of Chapter 255, Acts of the 58th General Assembly.

Very truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh4

HIGHWAYS:

Secondary Roads: -
~~Cities and Towns:~~

There is no authority for a county and a town to enter into an agreement, whereby both the county improvement of a secondary road extension and the town improvement in conjunction therewith can be consolidated and let as one contract, with the county having supervision over the construction; and where the county agrees to pay the initial cost of the entire project, subject to reimbursement by the town. (Lyman to Salisbury, Jasper Co. Atty.) 3/28/60) #60-3-28

Mr. Don C. Salisbury
Jasper County Attorney
Newton, Iowa

March 28, 1960

Dear Mr. Salisbury:

In your letter of February 4, 1960 you asked for an opinion on the following questions to-wit:

> Is there any authority for an agreement between the Iowa State Highway Commission and the town of Kellogg or between Jasper County and the town of Kellogg for a joint improvement on the farm-to-market road extension in the town of Kellogg where it is contemplated that the town will be assessing their part of the cost against the abutting property owners?
>
> If part of the town's cost were to be paid from funds on hand and part to be assessed against abutting property owners could there be an agreement for the joint improvement which simply embraced that part of the cost that the town was to pay from funds on hand?

Farm-to-market roads are a part of the secondary road system and the jurisdiction and control over the secondary road system is vested in the respective county board of supervisors. The jurisdiction and control over the primary roads of the state is vested in the Iowa State Highway Commission, see 306.2(4) and 306.3 of the 1958 Code of Iowa. The road that is the subject of your questions is in the secondary road system and there is no authority for an agreement between the Iowa State Highway Commission and the town of Kellogg for its improvement.

Under the provisions of 314.5 of the 1958 Code of Iowa, the board of supervisors of Jasper county are authorized subject to the approval of the council to construct, reconstruct, improve, repair and maintain any road or street which is an extension of a secondary road within the town of Kellogg. The road mentioned in your questions is in this category.

60-3-28

Mr. Don C. Salisbury

In addition to giving its approval in accordance with 314.5, the town can also agree with the board of supervisors to make improvements in conjunction with the secondary road improvement. However, there is no authority for the county board of supervisors and the town council to enter into an agreement whereby both the county improvement and the town improvement could be consolidated and let as one contract with the county having supervision over the construction and where the county agrees to pay the initial cost of the entire project and then later be reimbursed by the town for the town's portion. The fact that the city has a portion of the funds collected and available for its part does not alter the situation. Sections 313.22, 313.23 and 391A37 apply only to improvements of primary road extensions within a city or town.

/s/ C. J. Lyman

JLM:mj

COUNTIES: COMPENSATION OF FIRST DEPUTY SHERIFF

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

March 28, 1960

Hon. Chet B. Akers
Auditor of State
B U I L D I N G

Attention: Earl C. Holloway, Supervisor of County Audits

Dear Sir:

This will acknowledge receipt of yours of the 18th inst. in which you submitted the following:

"We are asking that you kindly give us an opinion on the following matter:

'Item #2 COMPENSATION OF FIRST DEPUTY SHERIFF

During the examination of Washington County for the year 1959 the following items relating to the sheriff's office were noted:

1. The First Deputy Sheriff a salary of 85% of the salary of his principal plus 85% of $600.00 value of housing facilities furnished for use of the sheriff. The above salary was set by the Board of Supervisors as shown on "Supervisor's Minute Book N, page 539" dated February 3, 1959.

2. The First Deputy Sheriff resided in the housing quarters provided for the sheriff, provided food and cared for the prisoners confined in the jail and also submitted claims and received warrants monthly for the amounts permitted by the 1958 Code of Iowa as compensation to the sheriff for care and feeding of prisoners. The above mentioned claims approved by the Board of Supervisors of Washington County, Iowa.

The Code of Iowa showing the fees the sheriff is entitled to receive in Section 337.11 sub-section 11 reads: "for boarding a prisoner, a compensation of fifty cents for each meal, and not to exceed three meals in twenty four consecutive hours, and fifteen cents for each night's lodging." Subsection 12 of 337.11 states: "for waiting on and

60-3-24

washing for prisoners, the sum of five cents per prisoner per day."

"Section 337.14 of the Iowa Code, relating to the sheriff, is as follows: 'The amounts allowed by law for mileage and for actual, necessary expenses paid by him, and board, washing, and care of prisoners, may be retained by him in addition to his salary.'

"Due to the absence of any mention of the Deputy Sheriff in the Code Sections cited above a question arises as to the legality of the First Deputy Sheriff receiving the use of the residence provided for the sheriff and compensation allowed for the care of prisoners, in addition to the salary set by the Board of Supervisors as mentioned in 1. above.

"Can the additional compensation received by the First Deputy Sheriff, who is a full time county employee be termed compensation in excess of statutory salary as provided by the 1958 Code of Iowa and as set by the Board of Supervisors?

"The question stated on page five has been discussed with the Board of Supervisors and County Attorney of Washington County, Iowa and County Attorney's Opinion furnished to the Board of Supervisors of Washington County, Iowa, in accordance with Section 336.2 Paragraph 7 of the 1958 Code of Iowa, filed in the office of the County Auditor of Washington County, Iowa, on February 20, 1960, is as follows:

"February 19, 1960

"Board of Supervisors
Washington County

"Gentlemen:

"Pursuant to your request I have examined the law in re payments to the Deputy Sheriff and find the following to be the facts:

"1. The furnishing of a house, or cash in lieu thereof to the sheriff is a part of his salary, and included in the total upon which the percentage to the deputy is computed.

"It therefore follows that the deputy is entitled to his per cent of house allowance whether a house is furnished to the sheriff or not.

"2. Who, or by what arrangements, the Sheriff employs, hires, or otherwise directed to look after the jail and

see to the care of the prisoners from time to time incarcerated therein, has no effect whatsoever on the method of computing the percentage for pay purposes of the deputy.

"3. The deputy, when acting pursuant to the direction of the sheriff, is entitled to file claim and receive compensation as provided by statute for the care and feeding of prisoners at and in the jail.

"I believe the above answers the questions raised.

Very truly yours,

Gifford Morrison, County Attorney

GM/rmt:HW

"May we please have an early opinion on the foregoing."

In reply thereto I would advise as follows:

1. The answers contained in No. 1 and No. 2 of the County Attorney's opinion are confirmed.

2. I disagree with the County Attorney's opinion set forth in No. 3, where he states the following:

"3. The deputy, when acting pursuant to the direction of the Sheriff, is entitled to file claim and receive compensation as provided by statute for the care and feeding of prisoners at and in the jail."

My disagreement arises from the fact that the salary of the deputy sheriff is fixed by statute and there is no statutory authorization for compensation to be paid to him other than in accordance with the statutory direction. Therefore any claim of the deputy for compensation for the services described is unauthorized.

Very truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh4

STATE OFFICERS & EMPLOYEES; TRANSPORTATION EXPENSE - 1

State funds are not available for the payment of insurance upon household goods of a State Highway Commission employee, said expense not being an actual transportation expense within the terms of Chapter 206, Acts of the 58th General Assembly. (Strauss to Sarsfield, St. Comp., 3/28/60) #60-3-25

March 28, 1960

Hon. Glenn D. Sarsfield
State Comptroller
B U I L D I N G

Dear Mr. Sarsfield:

This will acknowledge receipt of yours of the 29th ult. in which you submitted the following:

"Chapter 206, Acts of the 58th General Assembly, reads as follows:

'SECTION 1. Section three hundred seven point five (307.5), Code 1958, is hereby amended by inserting the following after the period (.) in line seven (7) of subsection three (3): "When in the interest of the state, the commission may allow not to exceed forty-five (45) days subsistence expense for continuous stay in one (1) location while on duty away from established headquarters and/or place of domicile; allow seven (7) cents a mile for moving an employee and his family from place of present domicile to new domicile, and actual transportation expense for moving not to exceed seven thousand (7,000) pounds of household goods. Such household goods shall not include pets or animals."

'Sec. 2. Section three hundred seven point five (307.5), Code 1958, is hereby further amended by adding the following as a new subsection: "The commission shall adopt such rules and regulations in accordance with the provisions of chapter seventeen A (17A), Code 1958, as it may deem necessary to transact its business and for the administration and exercise of its powers and duties."

"We are also attaching a copy of a letter dated February 23, 1960, from the Auditor of the Highway Commission which gives a rather detailed explanation of a claim that has been submitted for payment for insurance on a Highway Commission employee's household goods.

60-3-25

"I respectfully request an opinion as to whether or not insurance on household goods of Highway Commission employees may be paid from state funds pursuant to the authority vested in Chapter 206, Acts of the 58th General Assembly."

In reply thereto I would advise you as follows:

In my opinion, the payment for any insurance placed upon household goods of a Highway Commission employee is not an actual transportation expense within the terms of the foregoing statute, and therefore state funds are not available for the payment thereof.

Very truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh4

CITIES AND TOWNS: FLOOD CONTROL — Mr. Erhardt

1. Under the provisions of Chapter 395, Code 1958, a city engaged in flood control work and river improvement which is to cross a railroad right of way, by proper notice in writing, may require said railroad company to construct or pay for a bridge. The obligation of the railroad company exists with or without the obligation to pay its share of the special assessment.
2. If each segment, section, or district of the whole flood control program is a separate improvement district, the cost thereof is restricted to said segment, section, or district, and can be paid by special assessment.

March 29, 1960

(Strauss to Erhardt, Wapello Co. Atty., 3/29/60) #60-3-26

Mr. Samuel O. Erhardt

Wapello County Attorney

Courthouse

Ottumwa, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 19th ult. in which you submitted the following:

> "I would like an opinion from your office on the following questions concerning the flood control work on the Des Moines River in the City of Ottumwa, Iowa:
>
> "The City of Ottumwa, Iowa, has done extensive flood control work on the Des Moines River in the City of Ottumwa, Iowa. This has been done by straightening the river and by the construction of levies and other protective work. Three separate contracts have been let and the costs of construction have been paid for by the issuance of General Obligation Bonds and no part of the costs have been assessed against any property specifically benefited.
>
> "One additional segment of the flood control work is yet to be constructed. This requires the widening of the river at a point where the improvement will cross the right-of-way of a railroad company.
>
> "Sections 395.15, 395.16, and 395.17 of the Code of Iowa, provides a method of requiring the railroad company to build or pay for a bridge when the same is crossed by flood protection work.
>
> "Question 1. Can the City require the railroad company to construct or pay for a bridge when no part of the costs of the river improvement is assessed against the property which is specifically benefited, as provided in Chapter 395 of the Code of Iowa, 1958?

60-3-26

"Question 2. Could the City now follow the procedure as set out in Chapter 395 of the Code of Iowa, 1958, as to the remaining segment of this improvement and assess a part of the cost to specifically benefited property and thereby require the railroad company to construct or pay for a bridge across the same?

"Thank you for your past cooperation and in advance for your future cooperation."

In reply thereto I advise as follows:

1. Sections 395.15, 395.16, and 395.17, Code 1958, referred to by you as pertinent to this situation, provide the following:

"395.15 Notice to railway companies. If the improvement contracted for is to cross the right of way of a railroad or street railway company, the city clerk shall cause to be served upon such company, in the manner for the service of original notices, a notice in writing stating the nature of the improvement, the place where it will cross the right of way of such company, and full requirements for its complete construction across such right of way as shown by the plans, specifications, maps, and plats of the engineer, and directing such company to construct, within a time fixed by the city council, not exceeding six months from the date of the service of the notice, in such manner as not to interfere with the construction of the diverted channel, and in such manner as not to obstruct, impede, or interfere with the free flow of water, the necessary bridge, or bridges, where the diverted channel crosses the right of way."

"395.16 Duty to construct. Upon receiving such notice it shall be the duty of such railroad or street railway company, to provide the necessary temporary structure to carry its tracks during the constructing of the channel, and to construct the necessary permanent bridge, or bridges, within the time specified in said notice."

"395.17 Construction by city. If such company shall fail, neglect, or refuse to comply with the notice within the time fixed, the temporary structure may be provided, and the bridge or bridges, may be built, under the supervision of the engineer in charge of the channel improvement, and such railroad or street railway company, shall be liable for the cost of the construction of such structures, in addition to its liability for assessment for special benefits as other property is assessed, and the cost of such structures may be collected by the city from the company in any court having jurisdiction."

I am of the opinion that under the circumstances set forth by you, that is, that no assessment was made against benefited property within the district, the obligation of the railway company to perform the directions of Section 395.16 still remains. The fact that no such assessment has been made does not dilute the obligation of the railway company to construct the structures required by the foregoing Sections 395.15 and 395.16, Code 1958. The fact that no special assessment has been made upon the benefited property has only a bearing upon the liability of the railway company in the event it does not construct the bridges and the city does. In other words, the obligation of the railway company exists with or without the obligation to pay its share of the special assessment.

2. In view of the answer to No. 1, it would seem that answer to No. 2 is unnecessary. However, in any event, if each segment or section is a separate improvement district, then the third segment could impose and pay the costs of the improvement by special assessment. According to Section 395.11, Code 1958, the duty of the council is to assess the land and other property included within the improvement district for the purpose of paying the cost of the improvement, and the special power contained in Section 395.25, Code 1958, to pay the costs of this improvement by the levy of taxes on each improvement district, which could be a segment, section, or district of the whole flood program, is likewise restricted to each improvement district, segment, or section.

Yours truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh4

ELECTIONS: PARTY AFFILIATION - -

Code sections 43.41 and 43.44, each providing a method of changing party affiliation, are both operative and lawful.
(Directed to Pierce, St. Rep., 3-29-60) #60-3-27

March 29, 1960

Hon. Neal Pierce

Russell

Iowa

My dear Neal:

I have yours in which you stated the following:

> "I had one of the judges of the coming election ask me about a person changing his party affiliation. There are 2 places in the code, one is 43.41 and the other is 43.44. Would you say that either way is lawful."

In reply thereto I would advise you that these sections: 43.41 and 43.44 of the 1958 Code are both operative and lawful. Section 43.41 provides a method of changing party affiliation prior to the primary election, while Section 43.44 provides a method of changing party affiliation on primary election day.

Yours very truly,

OSCAR STRAUSS

First Assistant Attorney General

OS:mmh4

60-3-27

CRIMINAL LAW: PAYMENT OF FINE --
In a prosecution under §693.1, where an individual is committed to the penitentiary and a fine imposed, continued incarceration in the penitentiary for non-payment of the fine under §789.17, does not violate any provisions of the Code. (Nady & Bennett, Bd. of Control, 3/30/60) #60-3-28

March 30, 1960

Board of Control
of State Institutions
L o c a l

Attn: John E. Bennett, Warden, Iowa State Penitentiary

Dear Sir:

This is in reply to yours of January 28th, wherein you present the problem of an individual who has been sentenced to the Penitentiary, for a term not to exceed five years, for the crime of Mayhem. The trial court also imposed a fine of $1,000 and ordered that, if the defendant fails to pay, he shall serve, in the State Penitentiary, one day for each $3.33 1/3 of the fine, which remains unpaid.

Your specific question is:

"We do not find any law in the 1958 Code of Iowa that states that a man shall serve time in the Penitentiary for a fine that he is to pay. Would you please send us a ruling on this matter to clarify this for us?"

In answer thereto, I refer you first to section 693.1, 1958 Code of Iowa, which provides in pertinent part:

"If any person, with intent to maim or disfigure, * * * cut, bite, slit, or mutilate the nose or lip; * * * of another person, he shall be imprisoned in the penitentiary not more than five years, and fined not exceeding one thousand * * * dollars."

Section 789.17, Code of Iowa, provides in pertinent part:

"A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine is satisfied, specifying the extent of the imprisonment, which shall not exceed one day for every three and one-third dollars of the fine."

60-3-28

A review of the authorities indicates that as a general rule, the right to impose a fine gives authority to compel payment of the fine by imprisonment. Imprisonment of defendant until the fine is paid is no part of the penalty of the offense, but is merely a means of compelling obedience to the judgment of the court. If he refuses to pay, he is not sentenced to a term in prison; the duration of his imprisonment is in his own control and, by payment of the fine he can at any time secure his release. (See State v. Harbour, 240 Iowa 705, 37 N.W. 2d 290; 36 C.J.S., Fines, §11, p. 788).

In Peeples v. District of Columbia, 75 A. 2d 845, the court said:

> "And where a fine or imprisonment or both may be imposed, and both are imposed, the weight of authority is that in default of payment of fine the defendant may be committed for an additional term after expiration of the term to which sentenced, even though the total of the two terms exceeds the maximum imprisonment provided in the statute."

A review of the pertinent authorities leaves no doubt but that in a prosecution for the crime of Mayhem, the court may impose not only a sentence but a fine and for non payment of that fine, the defendant may be imprisoned until it is paid.

The question then arises as to where the imprisonment should be for non payment of the fine.

In Foertsch v. Jameson; 48 S. D. 328, 204 N.W. 175, the court was faced with a similar problem. The defendant was sentenced to a term of 4 years in the penitentiary and to pay a fine of $1,000 and in default thereof, he should remain imprisoned in the penitentiary for 500 days, one day for each two dollars of the fine. The statute is the same as the Iowa statute. In construing this statute the court said:

> "There is no provision of our code which requires that imprisonment for the non payment of a fine shall be in the county jail. There is no provision of our code which will not permit such further imprisonment in the same institution to which the convict has been committed. * * *
>
> "We are therefore of the opinion that appellant's continued incarceration in the penitentiary does not violate any provisions of statute."

Other authorities also hold that where a statute authorizes imprisonment for non payment of a fine, and the primary punishment

includes a term of imprisonment in a prison, the convict may be required to serve out his fine in the same institution and need not be transferred to a county jail for that purpose. (See 36 C.J.S., Fines, §11, p. 791).

Therefore, it is the opinion of this writer that an individual, convicted and fined under section 693.1, may be required to serve time for non payment of the fine, as provided under section 789.17, in the same place as the incarceration for the primary offense, namely the Iowa State Penitentiary.

Yours very truly,

MARION R. NEELY
Assistant Attorney General

MRN:kvr

STATE OFFICERS & DEPARTMENTS: BOARD OF REGENTS, STATE

The name IOWA STATE TEACHERS COLLEGE, conferred by statute (§268.1, Code 1958), can only be changed:

(a) by the Legislature, or

(b) by the State Board of Regents, IF the Legislature confers upon said Board the power to do so. (Emmet E. Gernetzky, Ch. Bd. of Regents, 2-23-60) #60-3-29

March 31, 1960

STATE BOARD OF REGENTS
State Office Building

L O C A L

Attention: Carl Gernetzky, Chairman Finance Committee

Dear Sir:

This will acknowledge receipt of yours of the 28th inst. in which you asked if it was within the authority of the Board of Regents to authorize a change of the name IOWA STATE TEACHERS COLLEGE, and your desire to know, if it is not within the authority of the Board, how a change of the name may be accomplished.

In reference thereto I would advise you as follows:

Section 268.1, Code 1958, provides the following:

> "268.1 Official designation. The normal school at Cedar Falls, for the special instruction and training of teachers for the common schools, shall be officially designated and known as the 'Iowa State Teachers College'."

The name IOWA STATE TEACHERS COLLEGE thus conferred by the foregoing statute, it is clear that such name could only be changed by a like action, that is, by statute, unless by statute the power is conferred by the Legislature upon the Board of Regents to change such name. Such power does not appear to exist, and of course if desired, it may be accomplished by and through the Legislature.

Yours very truly,

60-3-29

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh4

TAXATION: Exemption -- Capehart Housing Project exempt from taxation under Section 511 of the Housing Act of 1956, thus overruling and withdrawing Attorney General's opinion issued August 19, 1959. (Files to Samore, Woodbury Co. Atty., 3-31-60) 60-3-30

March 31, 1960

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

Dear Mr. Samore:

Pursuant to your request to reconsider the Attorney General's opinion issued August 19, 1959, pertaining to the Capehart Housing Project, this is to inform you of our decision.

This letter is to advise you that we find Section 511 of the Housing Act of 1956 to be controlling in this matter and hereby withdraw the aforementioned opinion.

In conclusion, the Capehart Housing Project is not taxable under the last provision of Section 511 of the foregoing act.

Very truly yours,

Gary S. Gill
Special Assistant Attorney General

GSG:fs

60-3-30

TAXATION: GRAIN TAX: - Handling or handled does not require the unloading of grain at a facility within the State of Iowa, only that it be physically present at such location and received for any purpose whatsoever under Section 428.35, Code of Iowa (1958). (Gill to Samore, Woodbury Co. atty., 1/15/60) #60-4-1

February 15, 1960

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

Dear Mr. Samore:

This will acknowledge receipt of your letter of January 19, 1960, wherein the following problem was submitted:

"An Attorney General's opinion is respectfully requested as to the law on the following situation:

"It is my understanding that the State Tax Commission Form GT-1 "grain tax return" is to be filled out by all grain firms for the purpose of paying an excise tax at the rate of one-fourth mill per bushel on grain handled. In the past years an organization has paid this excise on the total amount of grain handled during each calendar year. In checking the application of this tax, this organization claims to have been in error in the payment of the tax. Reference is made to Page 2, Definition #1, wherein the excise tax applies only on grain unloaded at an elevator, warehouse, mill or processing plant for the purpose of accumulation, storage, or processing. Of the total amount of grain handled by this organization, during a year, not over one-third of this grain is actually unloaded, stored, or processed in their terminal elevator located in Sioux City.

"Therefore, they claim an overpayment due to the fact payment was made not only on grain unloaded and handled through their elevator, but also on grain that was sold or merchandised on track and not processed through the elevator. To clarify their operations, as a handler of grains they have three types of operation:

#1 The merchandising of grain which is bought and sold for unloading and processing through their elevator.

#2 The storing or warehousing of grain unloaded at their elevator for individuals or for the U.S. Government.

60-4-1

#3 The selling of carloads of grain on a commission basis or the merchandising of grain on track.

The grain handled on the track is never unloaded at their elevator. In most cases carloads of grain handled in this manner are diverted off inspection track to destinations beyond Sioux City.

"The organization claims they have made their returns on this basis since sometime in the mid-forties and claims an overpayment and asks for a refund.

"My question is this: Should this company report for handling tax the grain which is shipped into Sioux City and shunted off to an inspection siding, and this company merely takes a sampling for grading purposes, does not unload the grain or in any way physically handle it, but ships it on to some further destination. The grading is for the purpose of determining quality and price, I assume."

Reference must be made to Section 428.35 which imposes the grain tax and to Subsection 1 thereunder which defines certain words therein:

"428.35 Grain handled.

"1. Definitions. 'Person' as used herein means individuals, corporations, firms and associations of whatever form. 'Handling or handled' as used herein means the receiving of grain at or in each elevator, warehouse, mill, processing plant or other facility in this state in which it is received for storage, accumulation, sale, processing or for any purpose whatsoever. * * *.

"2. Tax imposed. An annual excise tax is hereby levied on such handling of grain in the amount hereinafter provided. * * *."

In response to your request, your attention is directed to the phrase in the above-cited section, which is "receiving" as opposed to "unloaded" as the taxpayer, in the situation you outline, seems to think it reads. The tenor of the aforementioned section leads one to the conclusion that if the grain is physically present "at or in" any facility in this state "for any purpose

whatsoever" it is subject to the grain handling tax. On the other hand, if the grain is not received "at or in" a facility, it is not subject to the aforementioned tax.

In conclusion, you are advised that if the grain is not received at the taxpayer's facilities, but only in the railroad yard, the grain handling tax is not applicable.

Very truly yours,

Gary S. Gill,
Special Assistant Attorney General

GSG:fs

SCHOOLS: School sites -- Under section 297.22(3), the $10,000 limitation is upon each school site to be sold. Board of directors has authority to give easement. ~~unless authorized by electors as provided in section 278.1.~~ (Rehmann to Pappas, Cerro Gordo Co. Atty., 3/30/60) #60-4-3

March 30, 1960

Mr. William Pappas
Cerro Gordo County Attorney
Mason City, Iowa

Dear Mr. Pappas:

This letter is pursuant to further inquiry and in response to your letter of March 18, in which you state the following:

> "The Independent School District of Mason City, Iowa, is not situated in either a special charter city or in a city having a population of 50,000 or more. The said School District does, however, maintain a High School in which the average daily attendance is in excess of 500 students. The Board of Directors would like to do the following:
>
> "1. Sell certain land located within the District which is in the unanimous opinion of all the Directors no longer required for school purposes.
>
> "2. Grant an easement to the City of Mason City for sewer purposes over a portion of a school site which is needed for school purposes.
>
> "I request your opinion on whether the Board of Directors of the Independent School District of Mason City has authority under Section 297.22 without a vote of the electorate to sell the land which is no longer needed for school purposes and whether the said Board has the authority to grant an easement across a school site.
>
> "In your opinion, assume that all values involved are substantially less than $10,000 and

60-4-3

that the proposed procedure to follow is that contained in Section 297.3 and 297.4 of the Code of Iowa."

In reply thereto, your attention is directed to section 297.22, which was set out in full in my letter of March 28, 1960.

It is the considered opinion of this office that, based upon the facts, the board of directors of the Independent School District of Mason City has the authority to sell or dispose of, wholly or in part, any school house or school site or other property belonging to the Independent School District of Mason City, provided that the evaluation thereof is not more than $10,000, as provided in section 297.22(3).

If the property lies outside the City of Mason City, then the provisions of sections 297.15 to 297.20 inclusive should be followed with respect to ascertaining the value of the said property. However, if the property is located within the City, the real estate proposed to be sold should be appraised by three disinterested freeholders residing in the school district and appointed by the county superintendent of schools of the county in which said real estate is located.

This is the determining factor whether or not the school board has the authority to sell the property without the approval of the electors of the district in which the property is located. It is the value of each property to be sold (which must be under $10,000) that gives the school board of the Independent School District of Mason City the authority to sell the property in question without the approval of the electors of the district; even though the school board desires to dispose of several sites which, in aggregate, total more than $10,000.

With respect to your observations of sections 297.3 and 297.4, Code 1958, this is to advise that these two sections do not set out any procedure as to the method to be followed in disposing of school houses and school sites. Sections 297.3 and 297.4, Code 1958, are the limitations placed upon certain school corporations as to the amount of land that the school district may acquire for a single site under given circumstances.

With regard to the grant of an easement to the City of Mason City by the board of directors, your attention is

directed to the Sch. Dist. of Ionia v. DeWilde, 243 Iowa 685, 53 N.W. 2d 256, beginning at page 690 of the Iowa Report, where the Supreme Court stated:

> "An easement is an interest in property -- in this case in real estate belonging to the Ionia School District. Being public property it could not be disposed of except in the manner provided by statute. Chapter 278, Code of 1950. Section 278.1, subsection 2, of said chapter provides that the voters at a regular election shall have the power to 'Direct the sale, lease, or other disposition of any schoolhouse or site or other property belonging to the corporation, and the application to be made of the proceeds thereof.' In McLang v. Harper, 236 Iowa 1006, 20 N.W. 2d 454, there was involved the validity of a lease on certain property belonging to the school district. The implication seems to be clear that if the electors make some disposition of school property it is to be paid for -- no gift is contemplated."

Subsequent to the above decision, the legislature did confer upon the school board by virtue of section 297.22, in certain instances, the right to dispose of property, in whole or in part, belonging to the school corporation without the express authority of the electors of the school district. As pointed out in the Ionia case, supra, the school board could not do anything without the express authority by statute or under the direction of the electors in the school district.

If the easement in question is to be less than $10,000 in value, then the school board has the right to dispose of the school property in question by giving an easement thereto, provided it is so done with the proper amount of consideration.

If you have any further questions regarding the matter of which you inquire, please feel free to contact me at any time and I will be more than happy to cooperate with you.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:bl
cc: Joe Davis, Paul Johnston

ITIES AND TOWNS: Civil service --

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

April 4, 1960

Hon. Howard C. Reppert, Jr.
4108 Oak Forest Drive
Des Moines, Iowa

My dear Mr. Reppert:

This will acknowledge receipt of yours of the 21st ult. in which you submitted the following:

> "I respectfully request an opinion from your office at your earliest convenience on the following:
>
> 1. Under the Civil Service Law (Chapter 365) is the Civil Service Commission allowed to have outsiders come in to conduct entrance and/or promotional examinations for the police and fire departments? (Such as the Firemanship Training Staff at Iowa State University).
>
> 2. Is the Civil Service Commission allowed to obtain information and examination material from these outside sources?"

In reply thereto I advise as follows:

The duty of the Commission with respect to the holding and character of examinations for original eligibility for civil service appointments is contained in Section 365.8, Code 1958, which so far as applicable, provides the following:

> "365.8 Original entrance examination -- appointments. The commission shall, during the month of April of each year, and at such other times as shall be found necessary under such rules, including minimum and maximum age limits, as shall be prescribed and published in advance by the commission and posted in the city hall, hold examinations for the purpose of determining the qualifications of applicants for positions under civil service,

60-4-4

> other than promotions, which examinations shall be practical in character and shall relate to such matters as will fairly test the mental and physical ability of the applicant to discharge the duties of the position to which he seeks appointment. Provided, however, that such physical examination of applicants for appointment to the positions of policeman, policewoman, police matron or fireman shall be held under the direction of and as specified by the boards of trustees of the fire or police retirement systems established by section 411.5."

As to the duty of the Commission with respect to the holding and character of the examination for eligibility of applicants for promotion to higher grades under civil service rating, Section 365.9, Code 1958, so far as applicable, provides the following:

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

In the performance of these duties, the Civil Service Commission performs administrative function of discretionary powers. See Fitzgerald v. Conway, 88 New York Supplement, 2d Series, 649, 655, where it is said:

> "The preparation and conduct of civil service examinations are administrative functions vested in the Civil Service Commission. In the exercise of these functions the Commission has broad discretionary powers to determine, among other things, all matters relating to the time and place of the examination; the selection of questions to be used; the manner of conducting the tests; the relative values to be given to different sections of the tests; whether the examination shall be open or promotional, and the preliminary requirements and subjects of the examination."

However, the discretionary power vested in administrative bodies may not be delegated.

10 American Jurisprudence, page 925, under the title CIVIL SERVICE, states the following:

> "§5. -- Delegation of Authority to Boards or Commissions. In exercising its general authority and discretion the legislature has the constitutional right to create a board of civil service commissioners and to delegate to it the power to make rules, not inconsistent with existing laws, to conduct investigations and in the course thereof to compel the attendance of witnesses and the production of evidence, and generally to exercise whatever administrative measures may be necessary to effect the purposes of the civil service acts; and this is not considered as being a delegation of the power to enact laws or of judicial functions, but merely a delegation of administrative powers and duties. Civil service commissioners or other public officers, in the exercise of authority thus conferred, may prepare and promulgate rules for conducting civil service examinations and these rules usually have the force and effect of law. The legislature after providing a complete classification may authorize the civil service commission to classify the officers and provide for exemptions. The power of a civil service commission to promulgate rules is not unlimited, however, for it may be restricted by statute or by constitutional provisions. It is for the courts to determine whether a rule, such as one classifying certain positions as exempt, is a valid exercise of the discretionary power of the commission, and in proper cases the rules of the commission may be set aside by the courts, although as a general rule they will not attempt to revise or control the reasonable discretion of the commissioners. The view has been taken that a civil service commission is not bound to examine a single applicant where it is required by its rules to certify three names of persons qualified by examination, but that whether it shall proceed or shall make a new provision for examination rests in its discretion.
>
> The courts may be called upon to perform such functions of an essentially judicial nature as may supplement and render effectual the administrative powers of the board or commission, as for instance, punishment for contempt."

And in the case of Kinney v. Howard, 133 Iowa 94, 104, with respect to the delegation of discretionary powers, it is stated:

> "But it is said that the board, and the board alone, had authority to contract for the schoolhouse; that it, and it alone, can determine upon the plans and specifications; that it, and no one else, can settle the price to be paid for land upon which the schoolhouse is to be built; and that it alone can locate the site of the schoolhouse, that none of these powers can be delegated, and that at the meeting of February 3, 1906, it attempted to delegate each and all of these powers. These propositions do not go to the validity of the tax, nor do they in any way affect the action of the board in locating the schoolhouse and in determining to build the same. They relate to the details of letting the contract, etc. The plans for the schoolhouse were submitted to the county superintendent and fully approved by him, as provided in section 2779 of the Code, so that the only question here is, may the board delegate to a committee the power to select and procure title to a building spot, to advertise for bids for the erection of a schoolhouse, to act as a building committee, and to see to the erection and completion of the building? While it is a general rule that power conferred upon a public board or body cannot be delegated, yet a public corporation or municipality or instrumentality of government may, like a private corporation or person, do its ministerial work by agents or committees.
>
> Holland v. State, 23 Fla. 123 (1 South. 521);
> Burlington v. Dennison, 42 N.J.Law, 165;
> Damon v. Inhabitants, 2 Pick. (Mass.) 345;
> Gregory v. Bridgeport, 41 Conn. 76 (19 Am. Rep. 458);
> Young v. County, 66 Iowa, 460.
>
> Where the act to be done involves judgment or discretion, it cannot be delegated to an agent or committee.
>
> Mechem on Public Officers, sections 567, 568, and cases cited;
> Abrams v. Ervin, 9 Iowa, 87.
>
> Thus it has been held that the time and manner of constructing sidewalks, and of constructing or repairing a pier, of deciding upon and purchasing a school or market site, of regulating the bridging of public streams, and other like matters, cannot be delegated.
>
> Birdsall v. Clark, 73 N.Y. 73 (29 Am. Rep. 105);
> Thomson v. City, 61 Mo. 282;
> Matthews v. City, 68 Mo. 115 (30 Am. Rep. 776);
> Lord v. Oconto, 47 Wis. 386, (2 N.W. 785);
> Lauenstein v. Fond du Lac, 28 Wis. 336;
> State v. Paterson, 34 N.J. Law, 167;
> Maxwell v. Bay City Co., 41 Mich. 453 (2 N.W. 639).

> The statute made it the duty of the school board to select the site, adopt the plans for the schoolhouse, and award the contract for the building thereof, and these powers it could not delegate. The committee appointed by it had no authority in the premises, and it should have been enjoined from doing these things."

Therefore, by reason of the foregoing, I am of the opinion:

1. That the Civil Service Commission, appointed under Chapter 365, Code 1958, is without power to have outsiders conduct entry or promotional examinations for the Police and Fire Departments. This is the duty of the members of the Civil Service Commission under the foregoing statutes, and may not be delegated to others.

2. In answer to your Question #2, I would advise that no express statutory authority exists in the Commission to obtain information and examination material from outside sources, nor will such authority be implied from the limited authority contained in the quoted statutes. No authority is conferred upon the Commission by the statute to employ others to perform any of its duties, even ministerial, or employ others to aid it in the final performance of its discretionary powers. Even if the Commission be deemed to have power to delegate some of its ministerial functions, I do not regard obtaining information and examination material from outside sources as being a ministerial function. Such function may be authorized by statute and the material collected, adopted, or revised by the Commission, in which event the final discretion will be exercized by the Commission, and in no respect delegated.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS;mnh

CITIES AND TOWNS: Pay increase --

Any time prior to the expiration of their respective terms of office, the compensation of the mayor and councilmen in cities of over 15,000 population, operating under the commission form of government, by ordinance may now be increased under the provisions of Chapter 272, Acts of the 58th G.A., anything in Section 368A.21, Code 1958, or any other statute to the contrary, notwithstanding. (Similar to Akers ltr. dated 4/5/60)

#60-4-5

April 5, 1960

Hon. Chet B. Akers
Auditor of State
B U I L D I N G

Attention: C. W. Ward, Supervisor

Dear Mr. Ward:

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

> "I would like an opinion on the following question, in behalf of one of our examiners who is auditing a city at this time: May a city in Iowa, with a population of 30,613, 1950 Census, operating under the Commission Form of Government, pass an ordinance after January 2, 1960, changing the salary of the Councilmen and Mayor?
>
> "Chapter 272, Acts of the General Assembly, Chapter 363, Section 363B.9 and Chapter 368A, Section 368A.21 are not too clear to me regarding the intent of said sections.
>
> "The former City Council of said City, did not pass an ordinance after the effective date of Chapter 272 of the General Assembly."

In reply thereto, without exhibiting these several sections and chapters of the Code and Session Laws, I advise as follows:

1. It seems to me that Chapter 272, Acts of the 58th General Assembly, authorized the increase of the compensation of the mayor and councilmen in cities of over 15,000, operating under the commission plan of government.

60-4-5

2. That the authority to make such increase provided by this chapter became effective upon the effective date of the chapter.

3. That in providing in Sec. 4 of Chapter 272, Acts of the 58th General Assembly that:

> "the salaries of the mayor and councilmen may be increased in accordance with this Act immediately upon the effective date hereof, anything in section three hundred sixty-eight A point twenty-one (368A.21) of the Code or any other statute to the contrary notwithstanding.",

it barred the applicability of Section 368A.21, Code 1958, which provides as follows:

> "368A.21 Ineligibility - change of compensation. No member of any city or town council shall, during the time for which he has been elected, be appointed to any municipal office which has been created or the emoluments of which have been increased during the term for which he was elected, nor shall the emoluments of any city or town officer be changed during the term for which he has been elected. No person who shall resign or vacate any office shall be eligible to the same during the time for which he was elected, when, during the time, the emoluments of the office have been increased."

4. As a result of the foregoing, any city with a population of over 15,000, operating under the commission form of government could now adopt an ordinance increasing the salary of the mayor and councilmen of such city in accordance with the provisions of Chapter 272, Acts of the 58th General Assembly, and make such increases operative and effective at any time prior to the expiration of the terms of such mayor and councilmen.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh4

Daylight savings time will not supersede standard time for the opening and closing of the polls on primary election day. Code section 43.37; 52 Am. Jur., Par. 7, Title TIME.

April 6, 1960

P.

Mr. Martin D. Leir
Scott County Attorney
Third Floor, Courthouse
Davenport, Iowa

Dear Martin:

This will acknowledge receipt of yours of the 4th inst. in which you submitted the following:

> "I received the following inquiry from our County Auditor:
>
> > 'Will you please advise whether the Primary Election on June 6, 1960 in Scott County is to be conducted by Central Standard Time or Daylight Savings Time?
> >
> > "The Cities of Davenport and Bettendorf have adopted Daylight Savings Time. This, of course, does not affect the Township precincts which will no doubt operate under Central Standard Time.
> >
> > 'In a similar situation in Des Moines County in June, 1954, an opinion was issued by Oscar Strauss, Second Assistant Attorney General, which stated that daylight savings time would not supercede standard time for the opening and closing of the polls. Will you please check into this matter and see if there has been any change in the ruling?'
>
> "I am sure there has been no change in the position of your office since your Opinion of 1954 mentioned above. However, I would appreciate confirmation from you to this effect."

60-4-6

The Opinion to which you refer was issued June 4, 1954, to the Honorable Melvin D. Synhorst, copy of which is hereto attached, and is now confirmed.

Yours truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh4
Enc: 1

WELFARE: Hospital bills -- County supervisors may limit amount of relief to be furnished for hospitalization of the indigent. (Abels to Sacks, Pottawattamie Co. Atty., 4/6/60) #60-4-7

April 6, 1960

Mr. Kenneth Sacks
Pottawattamie County Attorney
Council Bluffs, Iowa

Dear Mr. Sacks:

The answer to your inquiry of March 29 relative to placing a limit on hospital room charges to be paid under Code section 252.28 is directly furnished by the last sentence of Code section 252.31. In view of the oft-asserted rule of the Supreme Court that interpretation lies in the realm of ambiguity and that no room for construction by opinion exists where the wording of the statute is plain and unequivocal on its face, I exhibit Code section 252.31 and invite your attentipn to the underscored portion.

> "252.31 County Expense. All moneys expended as contemplated in sections 252.25 to 252.30, inclusive, shall be paid out of the county treasury, after the proper account rendered thereof shall have been approved by the boards of the respective counties, and in all cases the necessary appropriations therefor shall be made by the respective counties. <u>But the board may limit the amount thus to be furnished</u>." (Emphasis added)

Also, see <u>Hunter v. Jasper County</u>, 40 Iowa 568, 571, wherein the Court referred to the above-emphasized language and said:

> "They may, under section 1363, <u>before relief is furnished</u>, establish a limit on the amount to

60-4-7

be furnished. But, when such a limit has not been established they must allow the reasonable value of the services rendered." (Emphasis added)

Further, see 1948 Opinions of the Attorney General, 261.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl
cc: Polk Co. Atty.,
Attn: Mr. Becker

SCHOOLS: Vacancies -- Vacancy is created when a member of the board moves from one director district to another director district within the same school corporation. (Rehmann to Te Paske, Sioux Co. Atty., 4/6/60) #60-4-8

April 6, 1960

Mr. Henry J. Te Paske
Sioux County Attorney
Orange City, Iowa

Dear Mr. Te Paske:

This is to acknowledge receipt of your letter of March 24, in which you state the following:

> "This letter is to request your opinion as to whether the removal of a director in a community school district organized under Chapter 275 from the director district for which he was elected to another director district within the same school corporation creates a vacancy on the board.
>
> "The term of the director will expire in September, 1960. He has moved out of the town which comprised the director district, into the country, which puts him within the area of another director district, but he remains within the limits of the school corporation. The director has not tendered his resignation, but will, of course, do so, if he is no longer eligible to remain as a member of the board."

In reply thereto, we advise as follows:

What constitutes a vacancy upon a school board is defined in section 277.29, Code 1958, to wit:

> "Vacancies. Failure to elect at the proper election or to appoint within the time

60-4-8

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

Section 275.12(2), in pertinent part, provides:

"2. Such petition shall also state the method of election of the school directors of the proposed district. The method of election of the directors shall be one of the following optional plans: * * *

"b. Division of the entire school district into designated geographical subdistricts, to be known as director districts, * * *

"d. Division of the entire school district into designated geographical subdistricts, to be known as director districts, * * *"

It will be noted by the express wording found in section 275.12 that director districts are in fact subdistricts within a community school district.

Therefore, from the express meaning found in the statute, a person moving from one director district to a another creates a vacancy as a matter of law.

Very truly yours,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:bl

CITIES AND TOWNS: Sinking funds -- Under Code section 453.9: (1) Such portions of revenue from sewer rentals as are set aside to retire existing indebtedness constitute a sinking fund. (2) Money accumulated to retire revenue bonds is a sinking fund. (3) Money allocated for repairs to a light plant is not a sinking fund. (Addressed to Robert R. Rigler, Sen., 4/7/60)

April 7, 1960

#60-4-9

Honorable Robert R. Rigler
Senator, Forty-Fourth District
New Hampton, Iowa

Dear Senator:

Receipt is acknowledged of your letter of April 2 relative to the meaning of the word "sinking fund" as used in Code section 453.9.

Your letter is as follows:

"The New Hampton City Council last week passed a resolution directing the city treasurer to invest in US Treasury 90 day notes the following sums from the following funds:

"Sewer Rental Fund	$35,000
Light Revenue Bond Account	10,000
Machinery Breakdown Fund	9,000

"We have discussed the matter with the city attorney; naturally they don't want to make investments not authorized or permitted by law. We have your opinion of October 20, 1959 addressed to the Superintendent of Banking which is quite clear. However, we are wondering if there is or has been a definition of sinking funds as mentioned in Sec 453.9. Your October 29, 1959 opinion does not go into the provisions of Sec 453.9.

"The sewer rental fund is the statutory sewer rental fund with the statutory limitations on its uses. The revenue of the fund is received from a charge based on water consumption and billed to the sewer user quarterly by the City of New Hampton.

60-4-9

"The machinery breakdown fund is a specific reserve fund of the City light plant. Its sole revenue is from a fixed monthly transfer from the funds of the City light plant. Its purpose is to provide funds for major emergency repairs to the municipal light plant.

"The light revenue bond fund is likewise a specific reserve fund of the light plant. Its sole revenue is from a specific amount set aside monthly from the revenues of the plant for the purpose of paying revenue bond indebtedness and interest at the municipal plant and for the additional purpose of paying off callable bonds on the call date. Payment dates from this fund are April 1st and October 1st.

"The question specifically involved is the authority of the Council to invest these funds in 90 Treasury notes pending their use for the specific purposes for which they are being accumulated. Interpretation of Sec 453.9 would appear to be involved."

Code section 453.9 reads as follows:

"Investment of sinking funds. The governing council or board who by law are authorized to direct the depositing of funds shall be authorized to direct the treasurer to invest any fund not an active fund needed for current use and which is being accumulated as a sinking fund for a definite purpose, the interest of which is used for the same purpose, in the certificates provided by section 454.19, or in United States government bonds, or in local certificates or warrants issued by any municipality or school district within the county, or in municipal bonds which constitute a general liability, and the treasurer when so directed shall so invest such fund."

The phrase "sinking fund" has been judicially defined as one instituted and invested in such manner that its gradual accumulations will enable it to meet and wipe out a debt at maturity. It is the aggregate of sums of money set apart and invested, usually at fixed intervals, for the

extinguishment of the debt of a government or municipal corporation by the accumulation of interest. Brown v. J. P. Morgan & Co., 31 N.Y.S. 2d 323, 329, 177 Misc. 626; Bank v. Grace, 7 N.E. 162, 168, 102 N.Y. 313; Levy v. McClennan, 89 N.E. 569, 196 N.Y. 178; Spitzer v. Franklin Co., 123 S.E. 636, 188 N.C. 30; Clark v. City of Philadelphia, 196 A. 384, 328 Pa. 521; City of Hialeah v. United States, 87 F. 2d 953.

Applying the foregoing definition to the specific items described in your letter, and considering first the sewer rental fund, section 393.7 provides as follows:

> "Rentals supplanting taxes. Said sewer rentals, charges, or rates may supplant or replace in whole or in part millage levy taxes which may have been authorized by resolution of any city or town council to meet interest, and/or principal payments on bonds legally authorized for the financing of such sanitary utilities, and when such sewer rental ordinance has been duly passed and put into effect, such prior ordinances or resolutions providing for millage taxes against real and personal property for such purpose, or the portion thereof thus replaced, may be rescinded, repealed, or rendered inactive."

1. On the basis of section 453.9, supra, and the case definitions hereinabove set forth, it is my opinion that whatever portion of sewer rentals as is necessary to be periodically set aside for the purpose of paying principal and interest on bonded indebtedness may be considered a sinking fund and invested as provided in section 453.9, but that the portion allocated to operation and maintenance may not be considered a sinking fund.

2. The item for retirement of principal and interest on revenue bonds is clearly a sinking fund and may be invested under section 453.9.

3. Since no indebtedness exists to be retired by the accumulation of principal and interest, I regret to advise that the item for machinery breakdown does not appear to meet the test of a sinking fund under the case definitions

hereinabove cited. If the fund were set up to entirely replace the light plant at the end of a certain depreciation schedule, rather than existing as a means of paying for unexpected repairs, it would be a sinking fund in the ordinary commercial usage of the term, but apparently not within the above case definitions. In this state of the law, it appears the machinery breakdown fund does not meet the legal test for a sinking fund for purposes of investment under section 453.9.

I trust the foregoing will prove of assistance to your council and am pleased to be of service.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl

MINORS: Marriage--

Code section 595.8 is a mandatory statute, and may not be waived; if waived, would subject the clerk of the District Court to the penalty of Code section 595.9. (Attorney General to Samore, Woodbury Co. Atty., 4/8/60) #60-4-10

April 8, 1960

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

Dear Sir:

This will acknowledge receipt of yours of the 6th inst. in which you submitted the following:

> "An attorney General's opinion is requested, based on the following facts:
>
> > A female applicant for a marriage license has attained the age of 21 years. The male applicant, and her prospective husband, has not attained the age of 21 years, but has passed the age of 20 years. The prospective wife is pregnant, and both desire marriage to avoid illegitimacy.
> >
> > The mother of the prospective husband, living in the state of Michigan, refuses to grant consent.
> >
> > Under these conditions, may the office of the Clerk of District Court waive the consent provisions under Iowa law where the prospective wife has attained the age of consent and is pregnant, and where the prospective husband is in excess of 20 years and is unable to obtain the consent of his non-resident mother.
>
> "Due to the urgency of this matter, your prompt reply will be greatly appreciated."

In reply thereto, I advise you as follows:

It appears from the foregoing, that one of the parties to the proposed marriage is a minor. Therefore the duty of

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the Clerk of the District Court, as provided in Section 595.8, Code 1958, is as follows:

> "595.8 Consent of parent. If either applicant for a license is a minor, a certificate in writing of the parents or guardian, as the case may be, of consent, as provided in section 595.3, must be filed in the office of the clerk, and be acknowledged by them or proven to be genuine, and a memorandum thereof entered in the license book. The false making of such certificate shall be punishable as forgery."

and for its violation, Section 595.9, Code 1958, provides the following:

> "595.9 Violations. If the clerk issues a license in violation of the provisions of Section 595.8, or if a marriage is solemnized without its being procured, the clerk so issuing the same, and the parties married, and all persons aiding them, are guilty of a misdemeanor."

I am of the opinion that Code section 595.8 is a mandatory statute, and may not be waived, or if waived, would subject the clerk to the penalty of Code section 595.9.

Very truly yours,

OSCAR STRAUSS

First Assistant Attorney General

OS:mmh4

TAXATION: City lots--

Tracts of land of less than ten acres within a city or town are taxable at the city tax rate, and are not entitled to agricultural land credit. (Hammett to Davidson, Page Co. Atty., 4/12/60) 60-4-11

April 12, 1960

Mr. Richard G. Davidson

Page County Attorney

Clarinda, Iowa

Dear Sir:

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

> "It has been requested at this office by the Page County Auditor that an opinion be sought from your office relative to the following questions:
>
> "(1) There are two Irregular Survey lots within the City. This man has the title to 9.07 acres of one lot. From this is deducted 1.17 acres for City Street, leaving 7.90 acres on which he is taxed.
>
> "(2) The other lot, which adjoins the above lot, has a gross acreage of 10.40 acres. From this is deducted 1.11 acres for road ½ within city limits, leaving a net of 9.29 acres on which the owner is taxed.
>
> "Since neither of these lots is ten or more acres (taxable) we have taxed the property at the regular City rate. The owner built a new house on a portion of this property this last year, and rented out the balance of the land to a renter who planted it in corn, so he feels the property should not be taxed at the City tax rate.
>
> "We wish to thank you in advance for your opinion as to this question."

In reply thereto I advise as follows:

The foregoing being privately-owned property within the city is subject to taxation unless relieved therefrom by statutory exemption. Insofar as exemption is concerned, it is to be

60-4-11

observed that city streets and roads are exempt from taxation. (See Code section 427.1) On the other hand, agricultural land within the city aggregating less than ten acres by parcel, is not exempt. (See Code section 426.2)

Applying such rules:

(1) Tract #1 is an area of less than ten acres, with or without the street exemption.

(2) The exemption of streets and roads from taxation reduces the taxable area of Tract #2 to less than ten acres.

(3) Each of the parcels aggregating an area of less than ten acres, the exemption of agricultural land credit may not be applied.

Under the foregoing, both of the tracts remain taxable.

Yours very truly,

OSCAR STRAUSS

First Assistant Attorney General

OS:mmh4

COUNTIES: Recorder-leases --

A lease of real estate creates in the lessee an interest therein. Under the provisions of Code section 558.53, leases or extensions of leases dealing with lots in cities, towns, or villages, the plats whereof are recorded, shall be recorded in separate books. Leases of lands, or of both lands and lots, in such cities as have recorded plats, shall be recorded in one record, but indexed in both land and town lot indexes. (Code section 558.54)

(Mailed to Sturgeon, Iowa ASC Office, 4/14/60)

#60-4-12

April 14, 1960

Leo E. Sturgeon, State Administrative Officer

Iowa ASC State Office

Room 411, Iowa Building

Des Moines 7, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 7th inst. in which you submitted the following:

> "This office has issued instructions to all ASC county offices in the State that all extensions of leases and all new leases for CCC bin sites must be recorded in the real estate records of the county in which the land is located.
>
> "We enclose copy of a letter from the Cherokee County Attorney, James L. McDonald, to the County Recorder stating that the land leases can be recorded in the miscellaneous records.
>
> "As you know we have bin site leases in every county in Iowa which must be recorded, so this is a state-wide problem of serious concern.
>
> "It would be appreciated if your could give us an authoritative answer which can be used on a state-wide basis and followed by all ASC county offices."

In view of the previous opinion rendered by the Cherokee County Attorney in this situation, issued March 10, 1960, the Department adds its view thereof.

60-4-12

I advise the following:

The rule of law in the situation presented is found in 45 American Jurisprudence, page 457, titled "Records and Recording Laws", wherein, in pertinent part, it is stated:

> "§68. Necessity for Recording in Particular Book. While as a matter of convenience separate books are ordinarily kept for recording deeds, mortgages, and other instruments, respectively, it has been quite generally held that in the absence of a statute requiring a particular instrument to be recorded in a specified book, a record of it in any book kept in the recorder's office is sufficient."

One of the supporting cases cited is that of Switzer v. Knapps, 10 Iowa 72, 74 Am. Dec. 375, wherein it is stated:

> "The complainant claims under a quit-claim deed from the same Casteel to Lois Hawley, of July, 1852, and he objects to the above deed from Casteel to Paul Pitts, because it was recorded in the 'book of mortgages,' claiming that therefore it did not operate as notice. He refers to the act of 23d January, 1843 (Acts 1843, p. 542, section 4). There is no evidence showing whether that book was used for recording mortgages only, or whether as claimed by the defendants, it was merely labeled 'mortgages,' and was used to record both absolute deeds and mortgages. The law at that time (in 1848) did not require separate books for these different instruments, and we see no ground upon which we can hold the record insufficient."

In other words, unless the statute imposes a duty upon the recorder to provide separatebooks for specifically-designated instruments, he is within his authority to record such instruments in books in his discretion.

INSOFAR as the recording of a lease or an extension of a lease is concerned, there is no express provision requiring recording in a separate book or a specified book, and therefore

the recording of such instruments is vested in the discretion of the recorder in accordance with the rule stated, unless a lease be regarded as an interest in real estate, in which event separate books are required under the provisions of Sections 558.53 and 558.54, Code 1958, as follows:

> "558.53 Town lot deeds and mortgages. The recorder shall index and record all deeds, mortgages, and other instruments affecting lots in cities, towns, or villages, the plats whereof are recorded, in separate books from those in which other conveyances of real estate are recorded.
>
> "558.54 Deeds covering both lands and lots. Where any instrument contains a description of land or lots in cities, towns, or villages, the plats whereof are recorded, and other land, he shall record such instrument in but one record and charge but one fee, but shall index in both land and town lot indexes."

A lease of real estate in Iowa is an interest in real estate. Such was the holding in the case of Jensen v. Nolte, 233 Iowa, 636, 639, wherein it is said:

> "We think the provisions of chapter 517, when fairly read, make an action for possession of real estate available to a lessee who is entitled to, but not in, possession. Surely such a person has a 'valid and subsisting interest' in the real estate. A lease of real estate is a conveyance by the owner of a portion of the owner's interest therein to the lessee. It creates in the lessee an interest in the real estate. State Savings & Loan Assn. v. Bryant, 159 Or. 160, 81 P. 2d 116;
> Moeller v. Gormley, 44 Wash. 465, 87 P. 507;
> Showalter v. Lowndes, 56 W. Va. 462, 49 S.E. 448, 3 Ann. Cas. 1096;
> Bremner v. Spiegle, 116 Ohio St. 631, 157 N.E. 491.

Generally an instrument affecting real estate is not required to be recorded in a separate book. Section 558.41, Code 1958, provides the following:

> "558.41 Recording. No instrument affecting real estate is of any validity against subsequent purchasers for a valuable consideration, without notice, unless filed in the office of the recorder of the county in which the same lies, as hereinafter provided."

Therefore it would appear that if the leases here in question and the extensions thereof, deal with lots 'in cities, towns, or villages, the plats whereof are recorded,' they should be recorded in separate books, as provided by Sec. 558.53, Code 1958, and both lands and lots in such cities as have recorded plats (section 558.54, Code 1958) should likewise be recorded.

Yours very truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh4

SCHOOLS: Reorganization -- When a school district is divided by a reorganization into two non-contiguous parts, one part being an area of less than four sections, it must be attached as provided under section 275.1. (Rehmann to Murray, Webster Co. Atty., 4/19/60) #60-4-13

April 19, 1960

Mr. John J. Murray
Webster County Attorney
611 Snell Building
Fort Dodge, Iowa

Dear Mr. Murray:

This will acknowledge receipt of your letter of April 12 as follows:

> "A number of months ago a petition was filed in this office calling for the formation of a new community school district in Webster County and including, as one of the component parts, the entire Harcourt Consolidated School District. Subsequently the procedure as outlined in chapter 275, Code of Iowa, 1958, was followed and the new district was legally formed, but it was somewhat smaller than originally proposed due to the action of the county board of education based upon objections which were filed and considered at the time of the hearing for objections. At the hearing for objections the county board of education eliminated from the proposal two non-contiguous areas of the Harcourt District, one area containing less than four square miles and the other area containing more than four square miles.
>
> "The questions which have arisen and are asked in view of the provisions of chapter 275, Code of Iowa, 1958 and chapter 189, and chapter 190, of the Acts of the Regular Session of the 58th General Assembly, are as follows:

60-4-13

"1. May the two non-contiguous left-over areas of the Harcourt Consolidated School District be considered separate or must they be considered jointly in planning their ultimate disposition? In other words, may the area of less than four sections be attached to another school district even though no disposition is made of the other area of more than four sections or must the area of less than four sections wait to be attached until the area of more than four sections is disposed of through regular reorganization elections?

"2. In view of the fact that the major portion of the Harcourt District will be a part of a new community district as of July 1, 1960, as previously determined, and since an additional new district has been proposed involving the area of more than four sections is it mandatory that all the residents of the old Harcourt Consolidated School District be given the opportunity to vote in the coming election, or will only those living in the affected portions be privileged to vote?

"3. If your answer to number 1, above, is in the affirmative, is it mandatory, or is it permissible, or is it immaterial, whether or not the area of less than four sections is attached to another district by the county board of education prior to, but effective on July 1, 1960?

"4. If the area of more than four sections is legally reorganized with another district prior to but effective on July 1, 1960 and if the area of less than four sections is not disposed of in any way by July 1, 1960 what will be the legal or official school district name of this left-over portion, what board will administer the affairs of this unnamed district, and what alternatives are available to the children of this district for educational opportunities."

In reply thereto, we advise as follows:

It is fundamental that the creation of a community school district is the reorganization of existing districts. When all of a school district is reorganized, the district loses its identity in the formation of the new district.

If all of the school district is not reorganized into the proposed new school district, the remaining portion still exists as a school district. Curlew Consol. Sch. Dist. v. Bd. of Ed., 247 Iowa 112, 73 N. W. 2d 20. By the same token, a school district can be divided by reorganization; however, the remaining portions do not form one school district unless they are contiguous. De Berg v. Bd. of Ed., 248 Iowa 1039, 82 N. W. 2d 710.

The severance of the school district creates two new school districts from the former district. Section 275.1, as amended by Chapter 189, Section 1, Acts of the 58th General Assembly, makes the provision mandatory upon the county board of education to attach any school district which has been reduced to less than four sections to a school district which maintains a twelve-grade system.

Thus, in answer to questions 1, 3 and 4, we advise as follows:

The area which is less than four sections must be attached by the board of education to another school district as provided in section 275.1, as amended. If the area of more than four sections is reorganized into another proposed school district, then nothing remains of Harcourt School District.

In answer to your second question, your attention is directed to my letter of April 8, 1960 in which, based upon the facts, it would appear to this office that the entire district would vote upon the proposition involving the area of "more than four sections", even though a substantial part of the school district is involved in a school district to come into existence on July 1, 1960.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:bl
cc: Paul Johnston
Joe Davis

COMPATIBILITY OF OFFICE: (1) Supervisor and election judge. (2) Supervisor and utilities trustee. (Ahls to Hindt, Lyon Co. Atty., 4/19/60.) 60-4-14

April 19, 1960

Mr. Harvey W. Hindt
Lyon County Attorney
Rock Rapids, Iowa

Dear Mr. Hindt:

Receipt is acknowledged of your letter of April 5 as follows:

> "Recently one of the members of the Lyon County Board of Supervisors resigned. The individual who has been appointed to succeed him is also a member of the local three man utilities commission, a council appointed by the City Council to run the city utilities. This individual also serves on the election board every two years. My question is whether these offices or any of them are incompatible. Your opinion on this matter will be appreciated."

In connection with the election board, I quote Code section 50.24, which provides:

> "Canvass by board of supervisors. At their meeting on the Monday after the general election, at twelve o'clock, noon, the board of supervisors shall open and canvass the returns, and make abstracts, stating, in words written at length, the number of ballots cast in the county for each office, the name of each person voted for, and the number of votes given to each person for each different office."

If, as member of the canvassing board, the individual in question were to canvass returns made by him as a member of an election board, he would be passing on his own work, which would seem to render the respective positions incompatible.

60-4-14

In the case of utilities trustees, the question of compatibility would depend upon whether or not the particular utility or utilities furnished by the board were sold to the county. If so, the offices would appear incompatible.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl

SCHOOLS: Reorganization equalization levy--

In DallasCounty, Iowa, the Lincoln Township School District ceased to be a corporation July 1, 1958, upon the establishment of the Central Dallas Community School District which included a part thereof, and a tax levy on said Lincoln Township School District after said date, to accumulate the sum of $11,000 found owing by said school district to others than the Central Dallas Community School District, would be unauthorized. (Directed to Mr. Donald, Dallas Co. Atty., 4/20/60) #60-4-15

April 20, 1960

Mr. John C. McDonald

Dallas County Attorney

Dallas Center, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 1st inst. in which you submitted the following:

> "The Central Dallas Community School District of Dallas County, Iowa, became effective July 1, 1958.
>
> "At a special meeting held July 18, 1958, the Board of Directors met for the purpose of recommending a division of the assets and liabilities of the Lincoln Township School District. At that time it was determined by resolution that a school tax of $11,000.00 should be assessed against the property of the Lincoln Township District as its boundaries were as of June 30, 1958. (I am enclosing a copy of the Board Proceedings.)
>
> "The Board attorney, Mr. Robert Frederick of Winterset, Iowa, presented this Resolution to the Dallas County Auditor in October of 1958, at which time the Auditor, after conferring with the State Comptroller's Office, advised the school district that the tax could not be levied.
>
> "The Board is very desirous of collecting this money and has requested an Attorney General's Opinion on the legality of this proposed tax levy.
>
> "If I may provide further information in this matter, please advise."

and the subsequently-furnished map of the present Central Dallas Community School District.

60-4-15

I advise as follows:

It would appear from the exhibits furnished, and your letter, that the Central Dallas Community School District, as established, is composed of several previously-individual districts, including a part of the Lincoln Township School District. In the statement of settlement of assets and liabilities, it appears that the Lincoln Township School District was determined to be owing the sum of eleven thousand dollars ($11,000.00) to others than the Central Dallas Community School District. You advise that in that situation the Central Dallas Community School District is proposing, by resolution, to levy a tax against the property of the former Lincoln Township School District to accumulate the sum of eleven thousand dollars ($11,000.00). I am of the opinion that such a levy would be an unauthorized levy. If authorized, it would be made under Section 275.31, Code 1958, which provides:

> "275.31 Taxes to effect equalization. If necessary to equalize such division and distribution, the board or boards may provide for the levy of additional taxes upon the property of any corporation or part of corporation and for the distribution of the same so as to effect such equalization."

The inapplicability of that statute to the situation outlined is shown by the fact that a levy is authorized "upon the property of any corporation or part of corporation". However, the Lincoln Township School District ceased to be a corporation upon the establishment of the Central Dallas Community School District, and a levy upon the property of the Lincoln Township

School District or a part of that district, could not be founded upon the foregoing statute. In short, the Lincoln Township School District did not survive as a corporation when divided by reason of the establishment of the Central Dallas Community School District.

I agree with the findings issued by the State Comptroller's office in this situation.

Yours truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh4

ELECTIONS: Nominating supervisors --
Where five candidates are running on the Republican ticket for supervisor in the first supervisor's district of Tama County, Iowa, the one receiving the highest vote in the primary would be the nominee. Code section 43.53 provides that the choice is not dependent upon the candidate receiving 35% of the vote. (Opinion to Willett, Tama Co. Atty., 4/20/60) #60-4-16

April 20, 1960

Mr. Walter J. Willett

Tama County Attorney

215 West Third Street

Tama, Iowa

My dear Walt:

This will acknowledge receipt of yours of the 19th inst. in which you submitted the following:

> "I would like to have an Attorney General's opinion in regards to what procedure is to be followed in the event that no candidate for supervisor in the first supervisor's district in Tama County, Iowa, receives 35% of the vote.
>
> "Tama County is divided into three supervisor's districts. Each district separately elects their own supervisors. In the first supervisor's district of Tama County, Iowa, there are five candidates running on the Republican ticket in the June primary for supervisor. It appears that none of the five candidates will receive the 35% of the vote necessary to win the candidacy. In this case, what is the procedure?
>
> "It would appear from the Attorney General's ruling that the County Convention representing the three county districts would have no jurisdiction to name a candidate from any area less than a County such as a supervisor's district.
>
> "I would appreciate the answer as soon as possible as we have to have some definite law to follow in selecting the candidate from this first district for

60-4-16

supervisor in case of failure of any candidate to receive 35%. Possibly, you have answered this question before but I have not been able to find the answer."

In reply thereto I would advise that in view of the provisions of Section 43.53, Code 1958, the choice of a candidate in the situation outlined is not dependent upon 35% of the vote. This statute provides as follows:

> "43.53 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."

It would seem clear from the foregoing, that in the first supervisor's district, where there are five candidates running on the Republican ticket, the one receiving the highest vote in the primary would be the nominee.

Very truly yours,

OSCAR STRAUSS

First Assistant Attorney General

OS:mmh4

I 240

SCHOOLS: Reorganization -- There cannot be two concurrent reorganizations, one under sections 275.12 - 23, and the other under Chapter 192, Acts of the 58th G. A.

April 21, 1960

Mr. Ralph L. Neuzil
Johnson County Attorney
603 Iowa State Bank Building
Iowa City, Iowa

Dear Mr. Neuzil:

This will acknowledge receipt of your letter of March 12, in which you ask the following questions:

"1. When a merger of a portion of one rural independent school district with one community school district containing a first class city is effected pursuant to Sections 275.12 - 275.25, inclusive, and the petition for merger provides for the election of school directors at large from the entire district, can paragraph 2 of Sec. 275.25 be interpreted to mean that no director election need be held for the newly formed community school district if the population of the newly formed community school district does not exceed by more than 25% the population of the former Community School District?

"2. If a merger of a portion of rural independent school district with a community school district is effected pursuant to Sections 275.12 - 275.25, inclusive, and prior to July 1, or the effective date of the change, a petition seeking merger under Section 275.40 is presented to the Board of Directors of the said community school district, seeking a merger of an entire non-high school district with adjoining community school

60-4-17

district operating a high school, may the Board of Directors of the community school district take approving action upon such petition, and if such petition were approved and merger voted by the non-high school district, would there then be any restrictions to having the merger involving a portion of a rural independent school district with an adjoining community school district under 275.12 - 275.25, inclusive, to become effective on July 1 concurrently with the merger of the same community school district and an adjoining non-high school district pursuant to Section 275.40 of the Code?"

In reply thereto, we advise as follows:

Section 275.25, Code 1958, in pertinent part, reads as follows:

"Election of directors. * * *

"Provided, however, in cases involving two districts only, where the population of the new district does not exceed the population of the more populous of said districts by more than twenty-five percent, the incumbent board members of said more populous district shall continue to hold office as director of the new district for the remainder of their elective terms. * * *"

The above provision is a limitation upon section 275.25. It limits the provisions of the said section when two events happen, namely:

(1) Only two school districts can be involved in the establishment of the new school district, and

(2) For every twenty-five or less persons in the less populated district, there must be one hundred or more persons in the more populated district.

If the two conditions are present in a reorganization, there is no necessity for electing a new board of directors; for the incumbent board members of the said more populous district continue to hold office in the new district for the remainder of their elective terms.

The question propounded in your letter is one of fact. If the facts fall within the provisions outlined above, no election of directors is necessary under section 275.25, Code 1958.

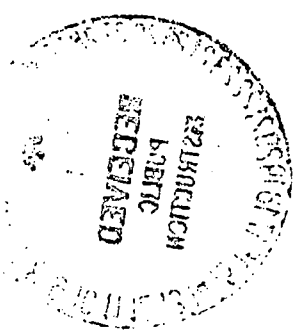
There is no express statutory authority which allows the board of directors of a community school district which is currently involved in a reorganization to bind the new community school district to take effect on July 1 under Chapter 192, Acts of the 58th G. A., to merge with another non-high school district to take effect on the same day. The board of directors of the new district does not have any statutory authority to consider a reorganization prior to July 1. Please refer to the enclosed opinion under the date of January 26, 1960, Rehmann to McGee, Mills County Attorney.

Thus, the answer to your second question is negative.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:bl
Encl Rehmann to McGee,
Mills Co. Atty.,
1-26-60
cc: Paul Johnston
Joe Davis



CONSERVATION COUNTY BOARD ~~BOARD OF SUPERVISORS~~ has no authority to charge County board of Conservation for use of County-owned equipment and operators and any other county-owned material pursuant to section 111 A.7 of Code of Iowa. (Hutton to Cady, Franklin Co. Atty., 4/25/60) 60-4-18

April 25, 1960

G. A. Cady
Franklin Co. Attorney
Hampton, Iowa

Dear Sir:

In your letter of April 8, 1960, you request an opinion on the following question:

> "Is the Board of Supervisors in a position where they can charge the County Conservation Board the reasonable value for the use of the county owned equipment and operators, or must the equipment be furnished free of charge? Is the Board of Supervisors in a position where they must make some charge?"

The last sentence of Section 111 A. 7, Code of Iowa is as follows:

> "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."

In the case of Mullen v. Mullen 246 Iowa 1255, 1264 the Court said:

> "The term 'available' has been defined to mean capable of availing or 'Capable of being used to accomplish a purpose." Woodley Petroleum Co. v. Arkansas Lousiana Pipeline Co., 179 La. 136, 143, 153 So. 539, 542; State v. Hoblitt, 87 Mont. 405, 288 P. 181, 185; Playa De Flor Land & Imp. Co. v. United States, D.C. Canal Zone, 70F Supp. 281; Webster's International Directory (1947). It has also been defined as such as one may avail himself of. Woodley Petroleum Co., supra. The term 'make water available' has been defined in Collins v. Twin Falls North Side Land & Water Co., 28 Idaho 1, 7, 152 P. 200, 202, as being made capable of being used."

60-4-18

The Court has also said in Helgers v. Woodbury County 200 Iowa 1318, that:

> "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 powers so conferred."

I find no expressed authority for the Board of Supervisors to charge the County Conservation Board nor is it necessary to imply such authority to accomplish the purpose of the statute, particularly in view of the fact that the authority to make available is discretionary with the Board of Supervisors.

Yours truly,

James H. Gritton
Assistant Attorney General

TAXATION: Property Tax--Exemption:-- An opinion withdrawing an opinion issued February 12, 1960, relating to the tax exempt statutes of the Mayflower Home. (Gill to Johnson, Poweshiek Co. Atty., 4/26/60) #60-4-19

April 26, 1960

Mr. Vincent E. Johnson
Poweshiek County Attorney
Montezuma, Iowa

Dear Mr. Johnson:

This is to inform you that an opinion issued by this office dated February 12, 1960, is hereby withdrawn. The aforementioned opinion related to the taxability of the Mayflower Home at Grinnell, Iowa. Subsequently, the writer's attention has been directed to certain facts not stated in your request; as well as an opinion by this department found in the 1952 Report of Attorney General at page 18. This opinion found the Friendship Haven Home at Fort Dodge, Iowa, to be exempt from taxation.

Because of the factual similarity, to the Friendship Haven Home, you are advised that the Mayflower Home is exempt in accordance with the aforementioned opinion.

Very truly yours,

Gary S. Gill
Special Assistant Attorney General

GSG:fs

60-4-19

DRAINAGE: Drainage and levee districts distinguished--
A drainage district and a levee district are by statute two different establishments; authorization to purchase drainage district warrants does not include authority to purchase warrants of a levee district. Authorization of a bank to purchase levee district warrants would require legislation. (Issued to Newell, Louisa Co. Atty., 4-27-60) #60-4-20

April 27, 1960

Mr. Russell R. Newell

Louisa County Attorney

Columbus Junction, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 25th inst. In which you submitted the following:

> "I am most anxious to obtain the opinion of your office on the following question:
>
> > Are warrants issued by a levee district, as contemplated by Section 455.212 of the 1958 Code of Iowa, a proper investment for a Savings Bank under Section 526.25 (4) of said Code?
>
> "It appears to me that the term levee district and drainage district, when used in the drainage laws of Iowa, are synonymous, and I doubt very much if it was the intent of the Legislature to allow a bank to purchase the warrants of a drainage district but not allow the purchase of such warrants of a levee district.
>
> "All possible haste in connection with this matter will be appreciated."

In reply thereto I would advise you that according to Chapter 455, a drainage district and a levee district are by statute two different establishments and operate on two different improvements, and it would appear that in authorizing the purchase of drainage district warrants it was excluding the authority to purchase warrants of a levee district. In this

60-4-20

situation, it is my opinion it would require legislation to authorize a bank to purchase levee district warrants.

The following statutory rule found in Pierce v. Bekins Van & Storage Co., 185 Iowa 1346:

> "Inclusion by specific mention excludes what is not mentioned."

is applicable.

Very truly,

OSCAR STRAUSS

First Assistant Attorney General

OS:mmh

TAXATION: Personal Property Tax Lien:- Lien for personal property relates back to the first day of January of the year in which such taxes were assessed. (Lee to Hardin, Marion Co. Atty., 4/29/60) #60-4-21

April 29, 1960

William W. Hardin
Marion County Attorney
114 1/2 S. Second Street
Knoxville, Iowa

Dear Mr. Hardin:

This will acknowledge your letter of March 15, 1960, in which you request the opinion of this department on the following question:

> "What lien does the County have on personal property by reason of unpaid personal property taxes.
>
> "The particular situation involved herein is as follows:
>
> "A tax-payer mortgaged his personal property in 1956 and the mortgage was promptly recorded and the same was sold in January of 1960. At said sale the personal property did not bring a sufficient amount for the payment of the mortgage lien. At the time of the sale the personal property taxes against said property, for 1959 payable in 1960 and for 1960 payable in 1961, had not been paid. Under the provisions of Chapter 445 of the 1958 Code and Chapter 306 of the Acts of the 58th General Assembly, the treasurer took the steps as provided therein and a distress warrant was issued prior to the date of sale. The sale proceeds and the funds are now, by agreement of the parties, held in escrow.
>
> "The particular question is this:
>
> "Is the chattel mortgage holder entitled to all of the proceeds of said sale or is the County entitled to take the taxes as a prior lien against said personal property?"

As stated in your letter, an unofficial opinion dated April 8, 1959, directed to the Cass County Attorney held that, "Where the chattel mortgage was

60-4-21

executed and recorded prior to the time the personal property tax became delinquent, the lien of the mortgage is prior." This opinion is based on an official Attorney General's opinion found in 1956 A.G.O. 106, which holds that the tax lien on personal property created by Section 445.29, Code of Iowa (1958), is not a prior and superior lien, and cites Bibbins vs. Clark, 90 Iowa 230, 57 N.W. 884, as authority for this conclusion.

Thus, the question herein resolves itself as to whether the amendment to Section 445.29 contained in Section 2 of Chapter 306, Acts of the 58th General Assembly, alters the conclusion reached in the opinion of April 8, 1959. The amendment is set out as follows:

> ", 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."

This amendment provides that the lien for personal property taxes shall relate back to January 1, of the year in which the property was assessed. In view of the fact that the mortgage referred to in your question was executed and recorded prior to the time the taxes became a lien on the personal property, i. e., January 1, of 1959 and 1960, the mortgage must be deemed prior, and the proceeds of the foreclosure sale should first be devoted to the satisfaction of the mortgage lien.

Very truly yours,

Gary S. Gill
Special Assistant Attorney General

GSG/WWR/bjf

AGRICULTURE: State Entomologist-- The state entomologist, under chapter 267, Iowa Code 1958, known as the Iowa Crop Pest Act, does not have the authority to promulgate rules and regulations regarding misrepresentation, grade standards, varieties, etc. such as vigor and vitality. (Maggert to Spry, Secy of Agriculture, 4/7/60) #60-5-1

April 7, 1960

Honorable Clyde Spry
Department of Agriculture
State House
Des Moines, Iowa

Dear Mr. Spry:

Your letter of March 2, 1960 is hereby acknowledged in which the following inquiry, regarding rules and regulations under the Iowa Crop Pest Act, was stated:

> "There has been recently renewed discussion on the part of some of the membership of the Iowa Nurserymen's Association concerning the possibility of including in the rules and regulations, issued pursuant to Section 267.5 of the Iowa Crop Pest Act, new sections dealing with trade practices and specifically with grade standards, trueness of varieties, misrepresentation in advertising, etc. The Federal Trade Practice rules for the nursery industry are applicable to nursery stock shipped interstate. The Nursery Industry Trade Practice rules deal specifically with the problems mentioned above and certain Iowa nurserymen feel that state laws should cover similar practices for nursery stock produced and sold in the state.
>
> Since the Iowa Crop Pest Act is based on protection of the state agriculture from introduction into the state of new and seriously injurious insect pests and diseases and spread within the state of such pests, there is some question as to the legality of writing into the rules and regulations, issued pursuant to Section 267.5 of the Iowa Crop Pest Act, regulations that do not deal specifically with pest hasards.
>
> It is requested, therefore, that we obtain a ruling as to the legality of including within the rules and regulations governing the handling of nursery stock regulations that would make it possible for our state inspectors to exert control over such matters as misrepresentation, grade standards, varieties, etc., and such matters as vigor and vitality of nursery stock offered for sale within the state."

In reply thereto, the following is submitted. Senate File 118,

60-5-1

as enacted by the 42nd General Assembly, Chapter 68 of said acts states:

> "An act to prevent the introduction into and dissemination within this State of insect pests and diseases injurious to plants and plant products of this state...." (Emphasis ours)

Section 267.6, Iowa Code 1958, states:

> "The state entomologist shall, from time to time, make rules and regulations for carrying out the provisions and requirements of this chapter, including rules and regulations under which the inspectors and other employees shall:
>
> 1. Inspect places, plants and plant products, and things and substances used or connected therewith,
>
> 2. Investigate, control, eradicate and prevent the dissemination of insect pests and diseases, and
>
> 3. Supervise of cause the treatment, cutting and destruction of plants and plant products infected or infected therewith.

The above section relates to the rules and regulations which may be promulgated by the state entomologist under the Pest Act. No where in the said section is the state entomologist given the authority to make rules and regulations regarding misrepresentation, grade standards, varieties, etc. Furthermore, Chapter 267, Iowa Code 1958, excludes any reference to misrepresentation, grade standards, etc.

In section 267.8, regarding importation of plants and plant products, it is again stated among certain other requirements, that the consignor of shipper have a certificate of inspection regarding the freedom from disease of such plants.

Again, no reference is made by said section relating to misrepresentation, grade standards, varieties, etc.

In order to ascertain whether the state entomologist has the power to promulgate rules and regulations regarding misrepresentation, grade standards, varieties, etc. it is necessary to endeavor to establish if the legislature intended that the state entomologist have such authority.

"In the interpretation of statutory provisions the primary object is to arrive at legislative intent." Selkin v. Northland Ins. Co., 249 Iowa 1046, 90 NW 2d 29.

One of the means to establish legislative intent is to consider the preamble of the act. However, "the recitation by the legislature in the preamble to an act...., although properly to be considered in determining legislative intent....is not controlling." In re Guardianship of Wiley, 239 Iowa 1225. The preamble to Crop Pest Act, supra, shows that the purpose of the act is to prevent the introduction of insect pests and diseases into this state. The preamble is silent as to grade standards, varieties or vigor of plants or plant products.

Another factor to consider is whether the act taken as a whole makes reference to promulgating rules and regulations regarding misrepresentation, grade standards, varieties, etc. No where in chapter 267, Iowa Crop Pest Act, is there any reference to the grading, misrepresentation, etc., of plants or plant products. By a long standing rule of statutory construction found in Pierce v. Bekins Van & Storage Co., 185 Iowa 1346, states: "Inclusion by specific mention excludes what is not mentioned." (Emphasis ours) Consequently, the act specifically mentions a mode to prevent insect pests and diseases, but not to control misrepresentation, grading standards, varieties, etc.

Therefore, by excluding any such reference to the promulgation of rules regarding grading, misrepresentation, varieties, etc. of plants the legislature, coupled with the preamble, has expressed their intent that the act was not enacted for the purpose requested.

It is the opinion of this office, that the state entomologist does not have the authority under chapter 267, Iowa Code 1958, to promulgate rules and regulations regarding misrepresentation, grading standards, varieties, etc. of plants and plant products.

Respectfully submitted,

JAMES R. MACGHEE
ASSISTANT ATTORNEY GENERAL

JRM/ldr

AGRICULTURE: Indemnity;--Brucellosis Area Testing:--- Cattle condemned under brucellosis area testing are eligible for the State's proportionment share of indemnity, as lack of funds is not a basis of eligibility for indemnity by the United States Department of Agriculture. (Maggert to Roggensack, Clayton Co. Atty., 4/26/60) #60-5-2

April 26, 1960

H. K. Roggensack
Clayton County Attorney
Elkader, Iowa

Dear Mr. Roggensack:

Acknowledgment is made to your letter dated February 3, 1960 in which the following was requested:

> "We would like a construction of Section 164.19 of the Code of Iowa and in particular we would like to have the words construed "but in no case shall the department pay indemnity on cattle not eligible to receive a like amount from the U. S. Department of Agriculture".
>
> The question is in regard to the words, not eligible. Does this eligibility mean that the State funds must be matched with Federal Funds in order to qualify or does it mean that the cattle are eligible for indemnity according to the other provisions of the Chapter in the Code.
>
> It would appear that by meeting the requirements of Chapter 164 that cattle are still, never,-the-less, eligible, regardless of whether Federal funds are available or not."

The applicable state statute is section 164.19, Iowa Code 1958, which states:

> "The department shall certify the claim of the owner for each animal slaughtered in accordance with this chapter for not more than one-third of the difference between the appraised value of such animal and the net salvage value thereof, but in no case more than twelve dollars and fifty cents for a grade animal or not more than twenty-five dollars for a registered purebred animal, but in no case shall the department pay indemnity on cattle not eligible to receive a like amount from the United States department of agriculture." (Emphasis ours)

The above section makes reference to eligibility of indemnity by the State Department of Agriculture based on eligibility for indemnity by the United States Department of Agriculture.

60-5-2

Under section 51. (1), Title 9; Federal Regulations, which pertains to definitions, the word "destroyed" is defined as follows:

> Section 51.1 (1); Title 9, CFR
> "Destroyed"; Condemned under state authority and destroyed by slaughter or by death otherwise" (Emphasis ours)
>
> Section 51.2; Title 9; CFR - Payment to owners for cattle destroyed
> "Owners of cattle which are destroyed...may be paid an indemnity by the Department (USDA)...." (Emphasis ours)

It is observed that under Title 9, Section 51.2; CFR, that the United States Department of Agriculture may pay an indemnity on cattle destroyed under state authority. Therefore, eligibility for indemnification by the USDA is determined by the authority of the various states.

Section 51.9, Title 9, CFR states specifically certain instances when indemnity will not be paid by the USDA, thereby stating in effect when cattle are not eligible for indemnity. No where in section 51.9, Title 9, CFR is eligibility denied because of lack of funds by the United States Department of Agriculture.

Therefore, cattle condemned in Iowa under Iowa authority are eligible for indemnity with Iowa funds, unless such cattle are specifically ineligible under section 51.9, Title 9; Code of Federal Regulations or have failed to comply with other procedural matters stated in Title 9; Part 51; Code of Federal Regulations.

Very truly yours,

James R. Maggert
Assistant Attorney General

JRM:kk

TAXATION: Real Property: Exemption: -- Statutes of exemption are strictly construed, and real property in order to be exempt has to qualify under the applicable section. (Kelton to Hoover, Clay Co. Atty., 4/28/60) #60-5-3

April 28, 1960

Mr. Earl E. Hoover
Clay County Attorney
Courthouse
Spencer, Iowa

Dear Mr. Hoover:

This is in response to your letter of January 18, 1960, pertaining to assessment and taxation of real properties devised to the Spencer Municipal Hospital. Your correspondence sets out the following:

> "1. Farm property left under Last Will and Testament 'to the Spencer Municipal Hospital, Spencer, Iowa, to be used to aid in the construction of a surgical ward or wing of said hospital for the use and benefit of said institution.'
>
> "This farm has been operated by the Trustees as a unit.
>
> "2. In a subsequent provision of the same Will, a residence in Spencer, Iowa was given to the Spencer Municipal Hospital, Spencer, Iowa, and the Will contained the following language 'and I suggest and request that said property be used for a nurses home, if needed for that purpose; or if not so used, that said property or the proceeds therefrom be used to aid in the construction of a surgical ward or wing of said hospital for the use and benefit of said institution.'
>
> "This second piece of property was sold by the Hospital Trustees for $20,500.00 and of these proceeds, $10,800.00 was reinvested in a piece of property across the street from the hospital with the intent of this being used for the purpose specified under the Will.
>
> "3. The third question relates to property held under an escrow agreement with a local bank, dated June 21, 1934, signed by the donor to be held by the bank as trustee for the benefit of the City of Spencer, Iowa, a deed naming as grantee the City of Spencer, Iowa, and containing the following language: 'Whereas, under the agreement, the income from said property is to be paid to Maude P. Gage during

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her lifetime, and upon her death, all of said property is to become the absolute property of the City of Spencer, Iowa, for the benefit and maintenance of the Spencer Municipal Hospital as the same may now or hereafter exist.[1]

"All of said property has been retained in its original state."

You have also indicated that the property purchased across the street from the hospital was being rented until the hospital could use it as directed under the Will.

In answer to the first situation proposed in your letter, it is submitted it would be taxable as a result of its present status. Status here meaning the property being retained in its original state, and the hospital not having devoted it to its objects. Thus, an exemption for real property applies to those organizations that qualify under Section 427.1(9), Code of Iowa, 1958, and whose property is "used by" them "solely for their appropriate objects". For your information, Section 427.1(9) reads (the pertinent applicable portion) as follows:

"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 * * *."

The term "used" as contained in the above section does not have reference to a vacant lot or property that is being applied to its prior or normal functions. Intent to devote the property to the objects of the organization is not enough. The property must be appropriated and actively committed to the functions that are the objects of the organization, e.g., hospital wing being erected to further facilitate the care offered by the hospital. Hence, real property tax exemption

applies upon meeting prerequisite qualifications; applicable to certain type organizations. Attorney General's opinion dated April 1, 1955, page 40, Report of Attorney General, 1956, bears out, and expands, this answer.

In answer to investment in property and then rental of it until used for hospital purposes, it is advised it would be taxable. That portion of Section 427.1(9), as indicated above, would appear to apply under this factual circumstance, but the remainder of that exemption would also have bearing under this second inquiry. The rest of Section 427.1(9) states:

> "* * * 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."

Thus, since the exemption is strictly construed, it means that the use of property must be directly, not indirectly, devoted to the objects of the organization. In Nugent v. Dilworth, 95 Iowa 49, the Court stated:

> "* * *. It will be seen, by referring to the section cited, that it would not permit the plaintiff to lease or otherwise use these lots with a view to obtain money for their use, even though the money should be used for the appropriate objects of the church; or, in other words, the church could not use them for pecuniary profit, and apply the profits to its appropriate object, and claim the exemption. The devotion to the objects of the church, within the meaning of the law, is limited, and not general. * * *."

The question of pecuniary profit is a factual consideration for each particular case. The mere claim that the property is not being operated for profit is not sufficient, if, in fact, the property is actually being operated for profit, and the burden is upon the person claiming exemption to produce facts which will entitle such person to tax exemption.

In regard to the third question, it is submitted that this is also taxable for reasons set out in answer to question number one. In addition, this property must be "* * * devoted to public use and not held for pecuniary profit.", (427.1(2)), before this exemption would inure to the municipality. Hence, considering the problem from either the municipal or hospital interests, it is submitted it would be taxable.

The mere fact that the property has been donated to an institution indicated under Section 427.1(9), does not automatically constitute an exemption. If the Spencer Municipal Hospital qualifies under this section, the properties mentioned in your letter still are not exempt for the reasons herein above set out.

Very truly yours,

Donald J. Dalton
Assistant Attorney General

DJD:fs

MOTOR VEHICLES: ~~Section 321.343~~ - Railroad crossing signals--which do not alternately direct traffic to stop and proceed are not traffic-control devices as will excuse motor vehicle drivers required to stop at railroad grade crossings from doing so. (Craig to Johnson, Lee Co. Atty., 5/2/60)

#60-5-4

May 2, 1960

Mr. Robert N. Johnson
Lee County Attorney
516 Seventh Street
Fort Madison, Iowa

Dear Mr. Johnson:

This will acknowledge receipt of your letter of March 8. You state:

> "The Special Agent for the C. B. & Q. Railway in this county has asked me for an opinion relating to the interpretation of Section 321.343 of the Iowa Code and more particularly the following quotation: 'No stop need be made at any such crossing where a police officer or a traffic-control signal directs traffic to proceed.' The question arises with him as to trucks not being required to stop at railroad crossings unless the railroad signal denotes a train approaching. It seems that some truckers contend that such a signal is a 'traffic control signal' and when not flashing red indicates that the traffic is to proceed.
>
> "It is my offhand opinion that the railroad signal is not a 'traffic control signal' so as to excuse the truckers from stopping. I would appreciate very much receiving your opinion on this point."

Section 321.343, 1958 Code of Iowa provides:

> "Certain vehicles must stop. The driver of any motor vehicle carrying passengers for

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hire, or of any school bus carrying any school child, or of any vehicle carrying explosive substances or flammable liquids as a cargo or part of a cargo, before crossing at grade any track or tracks of a railroad, shall stop such vehicle within fifty feet but not less than ten feet from the nearest rail of such railroad and while so stopped shall listen and look in both directions along such track for any approaching train, and for signals indicating the approach of a train, except as hereinafter provided, and shall not proceed until he can do so safely.

"No stop need be made at any such crossing where a police officer or a traffic-control signal directs traffic to proceed.

"This section shall not apply at street railway grade crossings within a business or residence district."

Section 321.1(63), 1958 Code of Iowa, provides:

"63. 'Official traffic control signal' means any device, whether manually, electrically or mechanically operated, by which traffic is alternately directed to stop and to proceed."

Section 321.1(64), 1958 Code of Iowa, provides:

"64. 'Railroad sign' or 'signal' means any sign, signal, or device erected by authority of a public body or official or by a railroad and intended to give notice of the presence of railroad tracks or the approach of a railroad train."

The Iowa Code thus differentiates between traffic-control signals and railroad signals.

A Michigan case, United States Fire Insurance Company v. Grand Trunk West Railroad Company, 344 Mich. 270, 73 N.W. 2d 905, is on point. The Michigan statutes are almost identical to the Iowa statutes.

P. A. 1949, No. 300, § 669, CLS 1954, § 257.669, Stat. Ann. 1952 Rev. § 9.2369, the Michigan statute, provides:

"(a) The driver * * * of any motor vehicle weighing over 10,000 pounds, including the load thereon, before crossing at grade any track or tracks of a railroad, shall stop such vehicle within 50 feet but not less than 10 feet from the nearest rail of such railroad and shall listen and look in both directions along such track for any approaching train, and for signals indicating the approach of a train, except as hereinafter provided, and shall not proceed until he can do so safely . . .

"(b) No stop need be made at any such crossing where a police officer or a traffic-control signal directs traffic to proceed."

P. A. 1949, No. 300, § 72, CLS 1954, § 257.72, Stat. Ann. 1952 Rev. § 9.1872, provides:

"'Traffic control signal' means any device whether manually, electrically or mechanically operated, by which traffic is alternately directed to stop and to proceed."

In United States Fire Insurance Company v. Grand Trunk Western Railroad Company, supra, the Court stated, at page 907 of 73 N.W. 2d:

"The traffic control signal near track 1 did not alternately direct traffic to stop and proceed and, therefore, did not meet the statutory requirements of a traffic signal which would excuse plaintiff Fee from bringing his vehicle to a stop before crossing track 1."

Upon the basis of the above authority, it is my opinion that a railroad signal which does not alternately direct traffic to stop and proceed does not meet the requirement of a traffic-control signal, as stated in section 321.343, 1958 Code of Iowa, so as to excuse the driver of a motor vehicle from stopping at railroad grade crossings, as required by section 321.343.

Very truly yours,

FRANK CRAIG
Assistant Attorney General

FC:bl

ELECTIONS: Withdrawal from candidacy -- Jr. Rep.

There is no provision in the law for the withdrawal of a candidate's name from the ballot, after his nomination papers and affidavit have been filed. (Strauss to Hoth, St. Rep., 5/2/60.)

#60-5-5

May 2, 1960

Honorable Elmer A. Hoth

State Representative
Allamakee County

Postville, Iowa

My dear Mr. Hoth:

This will acknowledge receipt of yours of the 29th ult. in which you advise that you are a Republican candidate for the Senate from Allamakee and Fayette County, and that your nomination papers and affidavit have been duly filed with the Secretary of State. You desire to know now, as long as your papers are filed and in order, is there any way you can withdraw and not have your name appear on the primary election ballot.

In reply thereto I advise you that I enclose herewith an Opinion of the Attorney General appearing in the Attorney General's Report for 1934, at page 534, holding that in the circumstances recited above, the withdrawal of your nomination papers is unauthorized. See also Opinion of Attorney General appearing in the Report for 1946, at page 153, herewith enclosed.

Yours truly,

OSCAR STRAUSS

First Assistant Attorney General

OS:nmy4

Enc: 2

60-5-5

~~BOARD OF CONTROL, acquisition of real estate by.~~: Title to real property acquired by the Board of Control pursuant to authorization by the 58th General Assembly should be taken and held in the name of the State of Iowa for use of and by the Board of Control of State Institutions. (Recd to Bd of Control, 5/3/60) #60-5-6
— STATE INSTITUTIONS;

May 3, 1960

Board of Control of State Institutions
L O C A L

Attention: Jim O. Henry, Member

Gentlemen:

Reference is made to your letter under date of April 29, 1960, reading as follows:

> "Chapter 159, Acts of the 58th General Assembly, reads as follows:
>
> > 'SECTION 1. Chapter two hundred eighteen (218), Code 1958, is hereby amended by adding thereto the following section:
> >
> > "The board of control is authorized to accept gifts grants, devises or bequests of real or personal property from the federal government or any source. The board may exercise such powers with reference to the property so accepted as may be deemed essential to its preservation and the purposes for which given, devised or bequeathed."'
>
> and, Chapter 160, Acts of the 58th General Assembly, reads as follows:
>
> > 'SECTION 1. Chapter two hundred eighteen (218), Code 1958, is hereby amended by adding thereto the following section:
> >
> > "The Board of Control shall have full power, subject to the approval of the budget and financial control committee to acquire and sell real estate for the proper uses of said institutions. Real estate shall be acquired and sold upon such terms and conditions as the board may recommend subject to the approval of the budget and financial control committee. Upon sale of such real estate, the proceeds thereof shall be deposited with the

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> treasurer of state and credited to the general fund of the state. There is hereby appropriated from the general fund of the state a sum equal to the proceeds so deposited and credited to the general fund of the state to the state board of control, which with the prior approval of the budget and financial control committee, may be used to purchase other real estate or for capital improvements upon property under its control."'

Our question is this: When the Board of Control acquires or sells real property, is the Board of Control the grantee in the case of acquisition and the grantor in the case of sale, or must the title vest in or divest from the State of Iowa?

To cite a specific example: The Federal Government wishes to give a parcel of real property to be used for educational purposes by the Board of Control. Who is the grantee, the State of Iowa or the Board of Control?

We have several pending matters involving this question and we solicit an early reply."

In reply thereto, I would advise you that title to all real property acquired by the Board of Control of State Institutions, pursuant to the foregoing Acts of the 58th General Assembly, and any and all improvements erected thereon, should be taken and held in the name of the sovereign State of Iowa for use of and by the Board of Control of State Institutions.

Very truly yours,

Carl H. Pesch,
Assistant Attorney General

CHP:cg

ELECTIONS: Vacancy in candidacy - -

1. Verifying the number of signatures on nomination papers required by Section 43.20, Code 1958, is the duty of the county auditor.
2. The primary law makes no provision for the filling of vacancies in candidacies for primary elections. (Stanard to Gilmour, St. Sen., 5/3/60) #60-5-7

May 3, 1960

Hon. C. Edwin Gilmour

Grinnell, Iowa

Dear Senator:

This will acknowledge receipt of yours of the 2d inst. in which you stated:

> "On Thursday, April 21, 1960, at the Court House in Montezuma, the County Auditor, the County Clerk of Court, and the County Attorney of Poweshiek County, after a hearing, declared that the nomination papers of two Democratic candidates -- for the office of county auditor and county clerk of court -- had insufficient signatures and that, therefore, the names of these Democratic candidates should not be placed on the June 6 ballot."

and you ask for an opinion on two matters involved in the foregoing action:

> "one relating to the hearing itself and the other relating to the vacancies on the ballot resulting from the hearing.".

I advise as follows:

1. The number of signatures required on nomination papers is provided by Chapter 43, Code 1958, specifically Section 43.20. Verifying the number of signatures, according to an opinion of this department appearing in the Attorney General's Report of 1932, at page 197, is the duty of the county auditor. This opinion states the following:

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"ELECTIONS -- NOMINATION PAPERS: It is not the duty of the county auditor to check the nomination papers as to whether or not all the signers belong to a particular party. He only must determine whether there are sufficient signers. (Sec. 543, Code of 1931.)

"April 1, 1932. County Attorney, Fort Dodge, Iowa: We acknowledge receipt of your letter of February 11, 1932, requesting the opinion of this department on the following question:

> Where nomination papers are filed pursuant to the provisions of Chapter 36, Code of 1931, is it the duty of the county auditor to check these nomination papers with a view of determining whether or not those who have signed the nomination papers are all members of the party for which the candidate is nominated?

"We are of the opinion that the county auditor has nothing to do with the determining of whether or not persons whose names are signed to the nomination papers are or are not members of the particular party. It is only his duty to check the nomination papers for the purpose of determining only the number of signers thereon and that the affidavit required by Section 543, Code of 1931, has been properly executed."

2. As to the filling of the vacancies in candidacies resulting from the insufficiency of the number of signatures upon nomination papers, I refer you to the Opinion of this department issued June 9, 1958, to John W. Kellogg, Harrison County Attorney, Missouri Valley, Iowa, where a like situation was the subject of a ruling. Copy of this Opinion is enclosed herewith.

Very truly,

OSCAR STRAUSS

First Assistant Attorney General

OS:mmh4

Enc: 1

SCHOOLS: Teacher contracts -- Under section 279.13, a modification to an original contract constitutes a new contract for the ensuing year and precludes another school district from contracting with a teacher as a matter of law. (Rehmann to McDonald, Dallas Co. Atty., 5/4/60) #60-5-8 May 4, 1960

Mr. John C. McDonald
Dallas County Attorney
Dallas Center, Iowa

Dear Mr. McDonald:

This will acknowledge receipt of your letter of April 15 in which you state the following:

> "Chapter 279.13 of the 1958 Code provides with respect to contracts with teachers that the ' . . . said contract shall remain in force and effect for the period stated in the contract and thereafter shall be automatically continued in force and effect for equivalent periods, except as modified or terminated by mutual agreement of the Board of Directors and the teacher, until terminated as hereinafter provided. On or before April 15th of each year the teacher may file his written resignation with the Secretary of the Board of Directors . . .'.
>
> "In this case the teacher was serving under the regular first year contract with teacher form contract provided by the Iowa Association of School Boards. On approximately March 15, 1960 the Board of Education offered said teacher an extension of the contract for one year with slightly different provisions and for an increase in salary. The Board requested that the offer be accepted or rejected within approximately two weeks in order that they would be able to plan for the ensuing year. The teacher elected to accept the Boards offer and an agreement to modify teachers continuing contract was executed by the teacher and by the Board of Directors. The form

60-5-8

used was that provided by the Iowa Association of School Boards entitled 'Agreement to Modify Teacher's Continuing Contract'. Approximately one or two weeks after the teacher accepted the contract extension and modification in writing but prior to April 15, 1960, the teacher filed his written resignation with the Secretary of the Board of Directors, apparently having found a teaching position offering higher annual compensation.

"Apparently this practice has been rather widespread which leaves a Board of Education practically helpless. The Board feels that the modification agreement signed by the teacher for the ensuing year in effect constitutes a new contract and that the provision in the statute providing for the teachers right to resign in writing on or before April 15th in each year would not apply in this case until April 15, 1961.

"I am inclined to the view of the Board of Education since to hold otherwise would render new contracts with teachers meaningless. It would appear that teachers agreements should be as binding as agreements signed by any other person."

In reply thereto, we advise as follows:

As referred to in your letter, the applicable section involved is Section 279.13, as amended by the 58th General Assembly. The section is much too long to set out in full and is therefore deleted from this letter.

An examination of Section 279.13 discloses that all teachers' contracts must be in writing prior to the ensuing school year. The contract shall be for a specified period of time; namely, one year. It is elementary that, in the absence of statutory authority, a contract cannot confer a right of perpetuity, and if the instrument does, it should be avoided. Hess v. Iowa Light, Heat and Power Co., 207 Iowa 820, 221 N.W. 194. In Section 279.13, Code 1958, there is specific statutory authority providing for a continuation of a written contract unless avoided prior to a specific date.

In accordance with Section 279.13, Code 1958, the teacher's original contract with the school district does not cease, unless modified or terminated by mutual agreement. The privilege of resigning or modifying a teacher's contract refers only to the original contract in force for the current year, to take effect for the ensuing year. When an agreement is made by mutual consent of the parties, it terminates the original contract and creates a new contract for the ensuing year, even though the agreement only modified the original contract in part, and allowed the rest to stand. Hawkeye Clay Works v. Globe & Rutgers Fire Ins. Co., 202 Iowa 1270, 211 N.W. 660. Thus a resignation by the teacher would give notice of his intent to breach the contract for the ensuing year.

While it is true that the teacher would be liable for a breach of contract, more important is the statutory authority found in Section 279.13, Code 1958, which prohibits any school district in Iowa from hiring the teacher in question who is under contract for the ensuing year. Thus any teacher's contract for the ensuing school year in another school district is void and payment to the teacher would be illegal.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:bl
cc: Joe Davis
Paul Johnston

ELECTIONS; Electioneering--
Writing the names of persons seeking office on a blackboard within the polling place, or within 100 feet of the polling place, would constitute electioneering prohibited by Code section 49.107.
(Opinion to Draheim, Wright Co. atty., 5/5/60)
#60-5-9

May 5, 1960

Mr. A. F. Draheim, Jr.

Wright County Attorney

Clarion, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 19th ult. in which you submitted the following:

> "This office is requesting your opinion regarding the following:
>
> "FACTS: Certain Township Trustees, whose terms of office expire this year, failed to file nomination papers, and consequently their names will not appear on the ballot of their party for the coming primary election. It has been a custom that in such situations, the Township election officials would place the names of the individuals and the date their terms expire on a blackboard within the immediate voting area to inform the electors of the township. This method would avoid numerous questions being asked the election officials by the electors during the marking of the ballots.
>
> "QUERY: Does the practice of writing the names on the blackboard or posting them within 100 feet of the immediate voting area constitute electioneering as provided by the Iowa Code Section 49.107 (1958)?"

In reply thereto I would advise that in my opinion the practice of writing the names of persons seeking office

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on a blackboard within the polling place or within 100 feet of the polling place, would constitute electioneering prohibited by Code section 49.107.

Very truly,

OSCAR STRAUSS

First Assistant Attorney General

OS:mmh4

TAXATION: Sales Tax: Exemption: - Gas used by farmer to dry corn is not processing and is subject to sales tax. (Dalton to Harris, Greene Co. Atty., 5/5/60) #60-5-10

May 5, 1960

Mr. David Harris
Greene County Attorney
Courthouse
Jefferson, Iowa

Dear Mr. Harris:

This is in answer to your letter of April 8, 1960, in which you set out information concerning the use of L. P. Gas by a farmer to dry his corn. Your letter stated as follows:

> "He further contends that under Rule 26, that he is entitled to exemption under sub-section 8 thereof, which provides for the grinding of feed, hauling of oats, drying, sowing, etc. Apparently, the Sales Tax Division contends that this Section is applicable only for seed corn Producers or others who dry grain commercially although I am unable to see any distinction. The farmer must dry the grain before he can market it. This is also true of the Seed Corn Producers. Drying would not be done if the corn was of sufficient moisture content to permit it to be kept safely. In other words, if the grain is not dried, it will not bring it's full market value and certainly it is being prepared for market the same as the seed corn operator. He further contends that drying is processing as defined in the Rules."

In answer to your inquiry as to whether Rule 26 or Rule 94.1 exempts L. P. Gas from sales tax, I have set out your letter almost in its entirety because I want to offer suggestions on various parts of it. Initially, it is well to state that the Rules are the Tax Commission's interpretations of the governing sections of the code. Thus, the code sections are the guiding principles as determining the applicable law. Of course, Section

60-5-10

422.43 establishes the retail sales tax, but I should like to direct your attention to Section 422.42: Definitions. The portions of the latter section that are pertinent here are as follows:

> " 'Retail sale' or 'sale at retail' means the sale to a consumer or to any person for any purpose, other than for processing or for resale of tangible personal property * * *. Tangible personal property is sold for processing within the meaning of this subsection only when it is intended that such property shall by means of fabrication, compounding, manufacturing, or germination become an integral part of other tangible personal property intended to be sold ultimately at retail, * * *."

It is suggested that the processing referred to in the code is not the type indicated in your request for an opinion. Tax Commission Rule No. 26(8) indicates that "drying, sorting and grading grain for sale" is not subject to the sales tax. It is further suggested that this has reference to processing and in order to determine the applicability of the sales tax the term "processing" must be defined. In Kennedy v. State Board of Assessment and Review, 224 Iowa 405, the Court states in reference to processing:

> " '* * * a change in the form of the article itself by artificial or natural means' and as 'some change made in the natural product as the curing of meats, canning of vegetables and * * * the glazing of an eggshell to better preserve the egg * * *.' "

Also, in Cochrane v. Deener, 94 U.S. 780, the Court stated:

> "A mode of treatment of certain materials to produce a given result. It is an act, or a series of acts, performed upon the subject-matter to be transformed and reduced to a different state or thing."

In addition, the Court in Fischer, etc., Storage Co. v. State Tax Commission, 248 Iowa 497, stated:

> "We think the exemption we have upheld is within the spirit as well as the letter of the law. Courts have frequently pointed out that an important reason for processing exemptions is that the cost of the processing is included in the price of the product ultimately sold at retail, thus increasing the sales tax the consumer is required to pay. The purpose of this exemption may well have been to avoid double taxation and prevent an increase in the ultimate price to the consumer. After all it is he who bears the whole tax whether computed on the price he pays or included therein."

It is submitted that no exemption exists under Rule 26 or Rule 94.1 for the item considered in this matter. The fact that his corn is wet or dry will effect the price he is able to obtain for it and the purpose it is purchased for. But the drying of the corn is not processing in the sense that a change is made or that the cost of the processing is included in the price of the product ultimately sold at retail. In some cases, the drying of corn is necessary for it to be marketed at all; but is not a processing of the corn.

Tax Commission Rule No. 26(8) indicates "drying, sorting and grading grain" as the activities where no sales tax is necessary in the use of gas (and other fuels) to perform them. It is submitted that the seed corn operator does these things in preparation of selling tangible personal property to the consumer. Hence, the sales tax for processing purposes is passed on to the consumer. The gas used by the farmer for the drying of his corn is comparable to commercial drying in what it accomplishes, but under the strict construction of Section 422.42 he has not processed it. Therefore, in view of the aforementioned section, it is submitted the sales tax is properly applied to the L. P. Gas purchased by the individual farmer.

The reference to "operating farm equipment" in Rule 94.1 must be

considered with the remainder of the applicable sentence, which reads:

> "The term 'tangible personal property consumed in implements of husbandry,' as used above, is construed to include only motor vehicle fuel used in farm tractors or used in operating farm equipment drawn or propelled by farm tractors engaged in agricultural production."

Hence, it is submitted that no exemption is intended for L. P. Gas used in drying corn.

Very truly yours,

Donald J. Dalton
Assistant Attorney General

DJD:fs

ELECTIONS: Vacancy in nomination --

1. Insufficiency of nomination papers determined under Chapter 44 would not have the effect of creating a vacancy in the nomination.
2. Filling a vacancy in candidates, is restricted to a write-in vote.

(Strauss to Johnson, Poweshiek Co. Atty., 5/9/60)

#60-5-11

May 9, 1960

Mr. Vincent E. Johnson

Poweshiek County Attorney

Montezuma, Iowa

Dear Mr. Johnson:

This will acknowledge receipt of yours of the 2d inst. in which you submitted the following:

> "I would like to request an opinion in regard to the following:
>
> "Acting pursuant to the provisions of Section 44.7 of the 1958 Code of Iowa, the County Auditor, Clerk of the District Court, and County Attorney all in and for Poweshiek County, Iowa, considered objections filed with the County Auditor as to the sufficiency of nomination papers filed by certain candidates with said County Auditor, and as a result of said consideration, the Auditor, Clerk and County Attorney held that such nomination papers did not meet the requirements of law and therefore should be rejected.
>
> "The question now is, does a vacancy exist in respect to such nominations for candidacy as will permit such vacancy to be filled in compliance with the provisions of Section 44.11 by a convention or caucus of the particular political party whose candidate was affected by the determination that the nomination papers previously filed by such candidate were insufficient and therefore no candidate presently exists for such party at the June primary.
>
> "In the alternative, is there any other manner, except by the use of a write-in vote at the primary for the political party in question to establish a candidate for the particular office involved for the general election to be held in November, 1960?
>
> "Trusting that you will give me an immediate reply to this since it involves whether the County Auditor should accept

60-5-11

> and place the name of a candidate on the ballot at the primary election in the event such party should attempt to nominate a new candidate at a convention subsequent to the ruling of the Auditor, Clerk and County Attorney on the objections to the nomination papers filed."

In reply thereto I advise as follows:

1. It is a major premise that Chapter 44, Code 1958, is concerned with NOMINATIONS MADE BY CONVENTION OR CAUCUS, and that Chapter 43, Code 1958, is concerned with NOMINATIONS BY PRIMARY ELECTIONS, and that such nominations will not be made until the primary election to be held on June 6.

Chapter 44, Code 1958, deals with the legal sufficiency of the certificates of nomination, or with the eligibility of the candidates.

With regard to Section 44.4, Code 1958, any person having the right to vote may file objections to the legal sufficiency of the certificate of nomination, or to the eligibility of the candidate. Neither of these situations appears to exist. Objections filed were to the sufficiency of nomination papers and not to the certificate of nomination, and did not concern the eligibility of the candidate for office.

Therefore, under the foregoing circumstances, at the hearing, the County Auditor, Clerk of the District Court, and County Attorney passed on nomination papers, and not on certificates of nomination, under Chapter 43, Code 1958, and exceeded their power and authority, In other words, there was drawn in the question before that body neither a certificate of nomination

nor the eligibility of a candidate. Their decision of the insufficiency of nomination papers would not have the effect of creating a vacancy in the nomination.

2. In any event, the vacancy is not in nomination, but in the candidate for nomination. Chapter 44, Code 1958, concerns itself with NOMINATIONS. Chapter 43, Code 1958, concerns itself with the CANDIDATES FOR NOMINATIONS. If there be a vacancy, it is a vacancy in candidates, and neither convention nor caucus would have authority to fill the vacancy.

Section 44.11, Code 1958, provides for filling vacancies where a candidate declines a nomination, or dies before election day, or a certificate of nomination is held insufficient or inoperative, or any objection is made to a certificate of nomination, or to the eligibility of any candidate therein named. None of these situations is present in the situation you present. Therefore, filling a vacancy would be restricted to a write-in vote in the event a vacancy is declared.

See Opinion of Attorney General to John W. Kellogg, Harrison County Attorney, issued June 9, 1958, copy of which is enclosed.

Very truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh4
Enc: 1

ELECTIONS: Pasters--

A sticker with a candidate's name on it may be pasted on the ballot by the elector instead of writing in the name of the person for whom he desires to vote. These stickers may be legally distributed 100 feet from the polling place. (Strauss to Samore, Woodbury Co. Atty., 5/10/60) #60-5-12

May 10, 1960

Mr. Edward F. Samore

Woodbury County Attorney

204 Courthouse

Sioux City, Iowa

Dear Mr. Samore:

This will acknowledge receipt of yours of the 6th inst. in which you submitted the following:

> "A candidate desires to qualify as a candidate for the November 1960 election. He is conducting a write-in campaign and contemplates the providing of printed stickers to be used by the voter to place the name of the write-in candidate on the Primary ballot.
>
> "Your opinion is requested as to the use of such sttckers and under what conditions such use is proper. We desire an early opinion because of the nearness of the primary election of this year."

In reply thereto I would advise you that it has long been the view of this department that a sticker with a candidate's name on it may be pasted on the ballot by the elector instead of writing in the name of the person for whom he desires to vote. These stickers may legally be used one hundred feet from the polling place. See Opinion of Attorney General in the Report for 1925-26, at page 253; Opinion of the Attorney General in the Report for 1923-24, at page 162; Opinion of the Attorney General in the Report for 1916, at page 162.

Very truly,

60-5-12

OS;mmh4

OSCAR STRAUSS
First Assistant Attorney General

Mrs. Richards

A sticker with a candidate's name on it may be pasted on the ballot by the elector instead of writing in the name of the person for whom he desires to vote. These stickers may be legally distributed 100 feet from the polling place.

May 10, 1960

Mr. Edward F. Samore

Woodbury County Attorney

204 Courthouse

Sioux City, Iowa

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Very truly,

OS;mmh4

OSCAR STRAUSS
First Assistant Attorney General

ELECTIONS: Polling place outside precinct--
Code section 49.9 provides: No person shall vote in any precinct but that of his residence, except as provided in section 363.21. (Stamped to Neuzil, Johnson Co. Atty., 5/10/60) #60-5-13

May 10, 1960

Mr. Ralph L. Neuzil
Johnson County Attorney
603 Iowa State Bank Bldg.
Iowa City, Iowa

Dear Mr. Neuzil:

This will acknowledge receipt of yours of the 6th inst. in which you submitted the following:

> "Request is made for an opinion concerning the following proposition:
>
> "Can a polling place be set up outside the boundaries of a precinct in a city or town by the Mayor or Clerk, as set out in Section 49.22 of the 1958 Code of Iowa, or must each precinct have a polling place?
>
> "The City Council of Iowa City recently divided some of the existing wards into additional precincts. One of the precincts, particularly the second precinct of the third ward, does not have a suitable place in which to hold an election. There is, however, Horace Mann Public School available but it is located across the street and outside the boundaries of the second precinct of the third ward.
>
> "With reference to the above proposition, we are wanting to know whether or not the people who live in the second precinct of the third ward can go out of their precinct and vote at a polling place located outside their precinct. Only the people of second precinct third ward would be permitted to vote at the Horace Mann School which, as I said before, is located outside the boundary of second precinct third ward."

In reply thereto I call your attention, with respect to the voting place of electors, to Section 49.9, Code 1958, which provides:

60-5-13

"49.9 Proper place of voting. No person shall vote in any precinct but that of his residence, except as provided in section 363.21."

There appears to be no exception to this requirement except that provided in Section 363.21, Code 1958, and the provisions of Section 49.10, Code 1958.

Very truly,

OSCAR STRAUSS

First Assistant Attorney General

OS:mmh4

Code section 49.9 provides: No person shall vote in any precinct but that of his residence, except as provided in section 363.21.

May 10, 1960

Mr. Ralph L. Neuzil
Johnson County Attorney
603 Iowa State Bank Bldg.
Iowa City, Iowa

Dear Mr. Neuzil:

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>
> "With reference to the above proposition, we are wanting to know whether or not the people who live in the second precinct of the third ward can go out of their precinct and vote at a polling place located outside their precinct. Only the people of second precinct third ward would be permitted to vote at the Horace Mann School which, as I said before, is located outside the boundary of second precinct third ward."

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"49.9 Proper place of voting. No person shall vote in any precinct but that of his residence, except as provided in section 363.21."

There appears to be no exception to this requirement except that provided in Section 363.21, Code 1958, and the provisions of Section 49.10, Code 1958.

Very truly,

OSCAR STRAUSS

First Assistant Attorney General

OS:mmh4

MOTOR VEHICLES: Financial Responsibility -- Action Instituted -- An action for damages, within the contemplation of section 321A.7(2), is instituted when commenced, under the provisions of R.C.P. 48. (Craig to Statton, Comm'r Public Safety, 5/10/60) #60-5-14

May 10, 1960

Mr. D. M. Statton, Commissioner
Department of Public Safety
L O C A L

Dear Mr. Statton:

This will acknowledge receipt of your letter of April 14, in which you state:

"Your Opinion on the following matter is requested.

"Under the provisions of Section 321A.7 (2) the Drivers License Division must terminate 321A.5 suspensions if the subject proves to the Drivers License Division that one year from the date of the accident has elapsed and no action for damages has been instituted. In view of RCP 48 and 49, our question is 'When has an action been instituted within the contemplation of Section 321A.7(2)? We have a concrete case presented to us now where the answer to our question, here, will determine whether or not a driver should lose his driving privileges."

Section 321A.7(2), 1958 Code of Iowa, provides:

"321A.7 Duration of suspension. The license and registration and nonresident's operating privilege suspended as provided in section 321A.5 shall remain so suspended and shall not be renewed nor shall any such license or registration be issued to such person until:

"* * *

"2. One year shall have elapsed following the date of such accident and evidence satisfactory

60-5-14

to the commissioner has been filed with him that during such period no action for damages arising out of such accident has been instituted; or * * *"

Rule 48 of the Iowa Rules of Civil Procedure provides:

"48. Commencing actions. A civil action is commenced by serving the defendant with an original notice."

Rule 49 of the Iowa Rules of Civil Procedure provides:

"49. Tolling limitations. For the purpose of determining whether an action has been commenced within the time allowed by statutes for limitation of actions, whether the limitation in heres in the statutes creating the remedy or not, the delivery of the original notice to the sheriff of the proper county with the intent that it be served immediately (which intent shall be presumed unless the contrary appears) shall also be deemed a commencement of the action."

The Iowa Rules of Civil Procedure do not specifically mention instituting an action; the Rules refer to the commencement of an action.

Black's Law Dictionary, fourth edition (1951), defines the word "institute" in these terms:

"Institute, v. To inaugurate or commence; as to institute an action."

In Baugh v. Little, 140 Okla 206, 282 P. 459, at page 460 of 282 P., the Court stated:

"The term 'institute' when applied to legal proceedings signifies commencement thereof . . ."

In Latham v. Latham, 178 N. C. 12, 100 S. E. 131, at page 132 of 100 S. E., the Court stated:

". . . the word 'institute', when applied to legal proceedings . . . (signifies) . . . the commencement of the proceedings."

In Kaplan v. Meisser, 196 Misc. 6, 91 N.Y.S. 2d 363, the Court stated, at page 365 of 91 N.Y.S. 2d:

> "A motion is made and a special proceeding 'instituted', just as an action is commenced. . . "

In State v. Murphy, 120 Kan. 350, 243 P. 288, section 62-2317 of the Kansas Revised Statutes provided that ". . . prosecution under this act shall be instituted . . ." Section 60-301 of the Kansas Revised Code provided that "A civil action may be commenced in a court of record by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon." The Court held that instituting an action is the same as commencing an action, stating at page 289 of 243 P.:

> "The word 'instituted' in R. S. 62-2317, is tantamount to the word 'commenced' in R. S. 60-301."

Upon the basis of the above authority, it is my opinion that an action is instituted, within the contemplation of section 321A.7(2), 1958 Code of Iowa, when it is commenced, under the provisions of Rule 48, Iowa Rules of Civil Procedure.

Very truly yours,

FRANK CRAIG
Assistant Attorney General

FC:bl

→ Mobile Home Park -- Monthly license fees. A mobile home that is occupies space in a mobile home park is subject to monthly license fees required by Sec. 135D.9, Code of Iowa 1958. (Bianco to Winkel, Kossuth Co. Atty., 5/13/60.) 60-5-15

HEALTH:

May 13, 1960

Mr. Gordon L. Winkel
Kossuth County Attorney
Box 405
Algona, Iowa

Dear Mr. Winkel:

Reference is made to your letter under date of May 9, 1960 reading as follows:

> "I have a friend who owns a house trailer which he parks in a trailer park on Lake Okoboji. He occupys this trailer on weekends and has asked the question as to whether he is obligated to pay the monthly fee as set forth in Section 135D.9. This man's home is in Algona and as stated, he goes up to the trailer over weekends.
>
> "Your opinion in connection with this problem would be greatly appreciated."

In reply thereto we advise:

The pertinent statute applicable to this problem is contained in section 135D.9, Code of Iowa 1958, from which we quote:

> "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: * * *"
> (emphasis ours)

According to the facts stated in your letter, the house trailer is occupied and occupies space in the trailer park, and therefor it is our considered opinion that it is subject to the fees as prescribed by said statute, section 135D.9.

Respectfully submitted,

60-5-15

FRANK D. BIANCO
Assistant Attorney General

FDB:kvr

~~IOWA RECIPROCITY BOARD:~~ Refund of prorate registration fees -- Refund of prorate fees is governed by Section 321.126, Code 1958, and no refunds are permitted unless the conditions contained in said section are complied with. Erroneously collected fees returnable under Section 321.173, Code 1958. (Peck to Carlson, Reciprocity Bd., 5/16/60) #60-5-16
MOTOR VEHICLES:

May 16, 1960

Iowa Reciprocity Board
State Office Building
L O C A L

Attn: John F. Carlson, Member.

Gentlemen:

This will acknowledge receipt of your letter under date of May 3, 1960, reading as follows:

"An opinion is earnestly requested on the following questions:

"1. A fleet operator prorates his vehicles which are titled in his name. During the year one of the vehicles is dismantled. By compliance with Section 321.126 is he entitled to a refund for the unused portion of the license fee?

"2. A fleet operator leases a vehicle and it is prorated and licensed in his name as lessee. If the vehicle is dismantled is he entitled to a refund of the unused portion of the license fee under Section 321.126? It must be taken into consideration in this situation that the certificate of title surrendered will appear in the name of the lessor and the prorate registration receipt in the name of the lessee.

"3. A fleet operator deletes a vehicle from his prorated fleet which is not being replaced. Is he entitled to a refund of the unused portion and on a quarterly basis as provided for in Section 321.126 by surrendering the license plate and registration receipt to the Reciprocity Board, and would this disbursement be made from the funds carried by the Motor Vehicle Division, and accounted for as a disbursement in the monthly report of fees collected?

60-5-16

"4. A commercial vehicle is owned by a private individual and is licensed in his county of residence. He then leases the vehicle to a fleet operator who is prorated. Is this owner entitled to a refund for the unused quarter of the county license fees paid by surrendering the county plates and registration to the Reciprocity Board? If he is entitled to a refund would the disbursement be made from the State Motor Vehicle Division's refund account or would it be disbursed from the regular monthly collection of fees by the Motor Vehicle Division?"

In reply thereto you are advised as follows:

Section 321.126, Code of Iowa, 1958, reads in pertinent part to this opinion as follows:

"If during the year for which a motor vehicle was registered and the required registration fee paid therefor:

"1. Such vehicle is destroyed by fire or accident, or junked and its identity as a motor vehicle entirely eliminated or removed and continuously used beyond the boundaries of the state, then the owner in whose name it was registered at the time of such destruction, dismantling or removal from the state, shall return the plates to the county treasurer and within thirty days thereafter make affidavit of such destruction, dismantling or removal and make claim for refund. With reference to the destruction or dismantling of a vehicle, the affidavit shall be accompanied by the certificate of title as provided in section 321.52. With reference to the removal of a vehicle from this state as provided herein, the affidavit shall contain a statement indicating the foreign registration number of such vehicle, the name and address of the official of the foreign state to whom the Iowa certificate of title has been surrendered and the number of the foreign certificate of title issued for such vehicle, if registered in a title law state.

"2. Such vehicle is sold to a person, either individual, firm or corporation, whose residence or place of business is without the state, the owner who made the sale and gave notice in accordance with the provisions of section 321.52 shall return the plates to the county treasurer and within thirty days thereafter make affidavit of such sale and make claim for refund."

Chapter 250, Acts of the 58th General Assembly, entitled "An Act relating to reciprocity and apportionment of motor vehicle registrations and to the compensation tax on certain motor vehicles" reads in pertinent part, to this opinion, as follows:

"Sec. 2. The Iowa reciprocity board shall have authority to make reciprocity agreements with the duly authorized representative of any county, state, territory, federal district, foreign country, or political subdivision thereof, exempting nonresidents of this state using the highways of this state from the registration requirements of chapter three hundred twenty-one (321) and payment of any fees to this state with such conditions, restrictions, and privileges or lact of them as such board may deem advisable. Such agreements may provide for the denial of reciprocal privileges to one or more particular non-residents at any time if in the opinion of the board such nonresidents should not be granted exemption privileges provided, however, the contracting state of such nonresident consents thereto."

"Sec. 6. The board may, notwithstanding any provision of the Code to the contrary, enter into reciprocity or apportionment agreements which extend the benefits thereof to leased vehicles on the basis of the residence of the lessee."

Additionally, Sections 321.128 and 321.129, Code of Iowa, 1958, read as follows:

321.128:
"The department is hereby authorized to make such payments according to the above provisions, when sufficient proof of such destruction by accident, or the junking and entire elimination of identity as a motor vehicle, sale to a person whose residence or place of business is without the state, theft, storage by an owner entering the military service of the United States in time of war, or removal for continuous use beyond the boundaries of the state, is properly certified, approved by the county treasurer, and filed with the department.

"The decision of the department shall be final."

321.129:
"The county treasurer shall remit to the department one percent of all fees and penalties collected each year, to be used as a fund to cover refunds of motor vehicle fees as provided in sections 321.126 and 321.128."

On the basis of the foregoing statutes your questions as propounded are answered as follows:

Question number 1: Yes.

Question number 2: No, unless the lease is a conditional lease and contains a right of purchase upon performance of the conditions

stated in said lease and with an immediate right of possession vested in the conditional lessee, in which case the conditional lessee would be deemed the owner. (See: Section 321.1(36), Code of Iowa, 1958). However, this fact would not dispense with the requirement that with reference to the destruction or dismantling of a vehicle, the affidavit must be accompanied by the certificate of title as provided in Section 321.52. (See: Section 321.126(1), supra.).

Question number 3: No. Such a deletion is not provided for in Section 321.126, supra.

Question number 4: No. No provision for refund contained in Section 321.126, supra.

N. B. Refunds of motor vehicle registration fees paid are available only in those specific instances set out in Section 321.126, supra, and then only if all conditions precedent specified therein are met and when sufficient proof of same is properly certified, approved by the county treasurer, and filed with the department of public safety, as provided in Section 321.128, supra. Registration fees collected through error are refundable as provided in Section 321.173, Code of Iowa, 1958.

Very truly yours,

CARL H. PESCH
Assistant Attorney General

CHP:kvr

TAXATION: Boards of Review: (1) Upon the expiration of a prior term, appointment for a new member of the Board of Review shall be for a term of six (6) years. (2) The Conference Board has no authority to reduce the number of members of the Board of Review. (3) Where vacancy occurs in the Board of Review, appointment to fill vacancy shall be for the unexpired term of the replaced member. (4) Term of member of Board of Review appointed upon the expiration of a prior term shall commence as of January 1, of the year of appointment. (Gilee to O'Connor, Tax Comm., 5/17/60) #60-5-17

May 17, 1960

John J. O'Connor
Chairman
Iowa State Tax Commission
Local

Dear Mr. O'Connor:

This will acknowledge receipt of your letter dated May 3, 1960, in which you request an opinion of this department relative to the following questions:

"1. In the case of Boards of Review which existed under Chapter 405A of 1958 Code, are all new appointments under said Chapter 291 to be made for 6 year periods at the expiration of the respective terms, or must a new Board be first set up as provided in said Section 31?

"2. If the Conference Board has called for and appointed a five member board and 2 members resign, do the remaining three members constitute a valid 3 member board without any further action on the part of the Conference Board?

"3. In the case of a vacancy on a Board of Review, does the term of the member appointed to fill said vacancy commence immediately and coincide with the term of the original appointee or does his term commence January 1 of the year following his appointment? In the latter event does his term then run for 6 years or the remaining length of the original appointment?

"4. In the event an appointment is not made prior to January 1, 1960, to replace a member appointed under Chapter 405A, whose term expired January 1, 1960, when does the term of a new appointee appointed April 1, 1960, begin?"

60-5-17

In response to your first question, Section 67 of Chapter 291, Acts of the 58th General Assembly, provides in essence that the members of boards of review are to continue in office subject to the provisions of Chapter 291 until their present terms expire, at which time reappointments or new appointments are to be made for the terms prescribed in said chapter. Section 31 of Chapter 291, Acts of the 58th G. A., provides as follows:

> "Sec. 31. Board of review. The chairman of the conference board shall call a meeting by written notice to all of the members thereof for the purpose of appointing a board of review for all assessments made by the assessor. Such board of review may consist of either three (3) members or five (5) members. As nearly as possible this board shall include one (1) licensed real estate broker and one (1) registered architect or person experienced in the building and construction field. In the case of a county, at least one (1) member of the board shall be a farmer. Not more than two (2) members of the board of review shall be of the same profession or occupation and no two (2) members of the board of review shall be citizens of the same town or township except in the case of cities having their own assessor in which case the members shall be selected so as to give each of the townships included within the city the highest possible numerical representation. The terms of the members of the board of review shall be for six (6) years, beginning with January 1 of the year following their selection. In boards of review having three (3) members the term of one (1) member of the first board to be appointed shall be for two (2) years, one (1) member for four (4) years and one (1) member for six (6) years. In the case of boards of review having five (5) members, the term of one (1) member of the first board to be appointed shall be for one (1) year, one (1) member for two (2) years, one (1) member for three (3) years, one (1) member for four (4) years and one (1) member for six (6) years." (Underscoring supplied)

It is believed that by the use of the words "first board", the legislature, in view of its expression in Section 67, intended that the short terms prescribed by Section 31 shall be applicable only in the situation where a Board of Review

is being appointed for the first time and, therefore, it is our conclusion that upon the expiration of a prior term, a new member shall be appointed for a six (6) year period thereby insuring the continuance of the staggered expiration dates now in effect.

In reply to your second question, your attention is called to an opinion issued by this office on July 28, 1949, found in 1950 A.G.O. 82, which considered the problem of reducing the number of members of the Board of Review. This opinion concluded that under the law, as it then existed, the Conference Board had no authority to reduce the Board of Review from five (5) to three (3) members. Although the statutes dealing with the appointment of the Board of Review have been substantially changed by Chapter 291, Acts of the 58th General Assembly, the rationale for the conclusion reached in the 1949 opinion is applicable to the present statutes. This is so since, as was true in the old statutes, Sections 31 and 32 of Chapter 291, Acts of the 58th G. A., do not contain express authority to change the number of members of the Board of Review and, further, the said provisions contain no indication that this authority should be implied into the law.

As to your third inquiry, Section 32 of Chapter 291, Acts of the 58th G. A., provides that in case of a vacancy in the Board of Review, the Conference Board shall fill the vacancy, "in the same way as the original selection". It is believed that since the statute does not provide that the appointment filling the vacancy shall be for the same term as the original appointment, the legislature intended that the appointment to fill the vacancy shall be for the unexpired term of the member replaced. This interpretation is consistent with the staggered term provisions found in Section 31, supra, and will, therefore, have the affect of continuing these terms as intended by the legislature.

In response to your fourth question, your attention is directed to the following statement contained in Section 32, Chapter 291, Acts of the 58th G. A., "subsequent appointments, and an appointment to fill a vacancy, shall be made in the same way as the original selection". Section 31, Chapter 291, Acts of the 58th G. A., supra, provides a method of making the original selection of the members of the Board of Review. It states that the chairman of the Conference Board is to call a meeting for the purpose of appointing the members of the Board of Review and provides further that the composition of the Board, if possible, shall be made up of certain designated, qualified persons. Section 31 also contains the following language:

> " * * * The terms of the members of the board of review shall be for six (6) years, beginning with January 1 of the year following their selection."

It is believed that this provision for the commencement of the term on January 1, following the selection, applies only to the situation where the Board of Review is initially created and not the appointment of successor members or appointments to fill vacancies.

As noted, Section 32 states that the subsequent appointments shall be made in the "same way" as the original appointment. The reference in this section apparently is to the method of appointment by the Conference Board and not to the duration or commencement of the terms.

Section 33, Chapter 291, Acts of the 58th G. A., provides that the Board of Review shall be in session from May 1, and may continue in session no longer than August 1, of each year. Thus, from January 1, to May 1, the Board has no duties.

In view of the above, it is believed that where the appointment of a successor member of the Board of Review was made on April 1, 1960, the term of the appointee should commence as of January 1, 1960. This interpretation enables the Board of Review to continue in existence according to the legislative plan set down in Section 31, supra, at its full numerical capacity.

Very truly yours,

Gary S. Gill
Special Assistant Attorney General

GSG/WWR/bjf

TAXATION: Homestead Tax Credit: Disallowance by State Tax Commission of Homestead Tax Credit more than one year after receipt of certification of said credit by the county treasurer is invalid. (Ltr to Hanrahan, Polk Co. Atty., 5/18/60) #60-5-18

May 18, 1960

Ray Hanrahan
County Attorney
Room 406
Polk County Court House
Des Moines, Iowa

Dear Mr. Hanrahan:

This is in reply to your request for an opinion dated March 16, 1960, with respect to the following questions:

"The Polk County Auditor and the Polk County Treasurer have requested an opinion on several propositions arising under the provisions of Section 425.7 (3) of the 1958 Code of Iowa relating to Homestead Tax Credits and Military Exemption Tax Credits.

"Section 425.7 (3) among other things provides as follows:

> '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 receipt by the state tax commission of the certification of such credit . . . . set aside such allowance.'

"1. We would therefore appreciate your opinion as to the validity of an order disallowing such a claim made by the State Tax Commission after the expiration of one year after the receipt of certification of such credit.

"2. If such an order of disallowance is not valid, would it be necessary for the supervisors to appeal said order within the

60-5-18

period prescribed by statute, namely twenty (20) days after the disallowance of said claim?"

It is believed that the statutory appeal provisions are not applicable to this situation since the Commission, in setting aside the allowance after the expiration of the statutory one year period, exceeded its authority and thus, acted without jurisdiction over the matter.

Iowa Rules of Civil Procedure 306 provides:

> "A writ of certiorari shall only be granted when specifically authorized by statute; or where an inferior tribunal, board or officer, exercising judicial functions, is alleged to have exceeded its, or his proper jurisdiction, or otherwise acted illegally."

It is the opinion of this office that the above rule affords adequate remedy to a taxpayer or the Board of Supervisors under the present factual situation. A question may arise as to whether the Commission's function in this matter is of a "judicial" nature. The Iowa Court in Anderson vs. Hadley, 245 Iowa 550, 562, has stated that certiorari is the proper remedy even though the inferior tribunal was not exercising a judicial function, and that the writ will lie if the act is of a quasi-judicial character.

14 C.J.S. 144 provides:

> "The following acts, among others, have been held judicial or quasi-judicial: * * * rejecting a claim against the county, * * *."

Further, on page 145, it is provided:

> "Wherever an officer or a body is clothed with authority and undertakes to determine the law and the rights of parties in regard to a matter in controversy, such officer or body may be said to act judicially in the sense in which we are speaking."

It is, therefore, believed that in the situation described an act in certiorari rather than the statutory appeal provisions would be the proper remedy available to the Board of Supervisors.

Very truly yours,

Gary S. Gill
Special Assistant Attorney General

GSG/WWR/bjf

Board of Supervisors -- expenditure public funds - not authorized.
There is no statutory authority for the expenditure of public funds to conduct studies and surveys of county government operations, by private individuals or firms under the present statutes.
(Bianco to Scholz, Mahaska Co. Atty., 5/19/60)
#60-5-19
COUNTIES

May 19, 1960

Mr. Charles H. Scholz
Mahaska County Attorney
Oskaloosa, Iowa

Dear Mr. Scholz:

Reference is made to your favor of May 11th in which you request an opinion as to whether the Board of Supervisors has any authority to contract for the making of a study and survey of your county government operations for the purpose of obtaining recommendations from such firm or individuals with a view to increasing the efficiency of those operations and accomplishing resulting economies.

In reply thereto we beg to advise as follows:

It is a well known rule of construction that a county is a creature of statute and a quasi corporation and its officials have only such powers as are expressly conferred by statute or necessarily implied from the powers so conferred. (See In re Frentress' Estate, (1958) 249 Iowa 783, 89 N.W. 2d 367).

A study of the powers granted to Boards of Supervisors fail to reveal any authority granted by the legislature, which would authorize the expenditure of public funds for the study outlined in your letter.

This is a matter that goes directly to the organization of county government, which is within the sole province and perogatives of the state legislature. As an example we refer you to the recent legislative act of the 58th General Assembly, (chapter 253, S.F. 346) authorizing the combining of the duties of two or more county officers and employees.

Therefore it is our considered opinion that county boards of supervisors cannot expend public funds to conduct the study and survey as outlined in your letter above referred to.

Respectfully submitted,

FRANK D. BIANCO
Assistant Attorney General

FDB:kvr

60-5-19

SOCIAL WELFARE: LEGAL SETTLEMENT; COUNTY RELIEF. The payment of relief does not create a permanent disability to acquiring legal settlement in a new county. Settlement may be acquired in the new county by continuously residing in such county for one year without receiving relief. (Peterson to Smith, Chmn., Bd of Soc Welfare, 3/9/60) #60-6-1

March 9, 1960.

Mrs. Irene M. Smith, Chairman
State Board of Social Welfare
State Office Building
Des Moines, Iowa

Dear Mrs. Smith:

Reference is made to your letter of March 7, 1960, which states:

> "On February 17, 1960, an informal opinion was issued from the office of the Attorney General to Mr. G. A. Cady, County Attorney, Hampton, Iowa, interpreting Section 252.16, Subsection 3, relating to legal settlement.
>
> "There has been some confusion as to the proper interpretation of this opinion and I would appreciate it if a further opinion would be rendered to clarify the following question:
>
> "If a family has not lived in a new county for the prerequisite year to gain legal settlement in that county, does the payment of relief prevent them from acquiring settlement in that county for all time, or is it only a legal disability toward obtaining legal settlement in that county while they are receiving such relief?"

Legal settlement in this state is acquired in accordance with the provisions of Section 252.16, Code of Iowa, 1958, as amended by Chapter 181 of the Acts of the 58th General Assembly. The general effect of the changes made by the 58th General Assembly on legal settlement is interpreted in a formal opinion from this office dated June 5, 1960.

Your request has reference to subparagraph 3 of Section 252.16 which provides in pertinent part:

> "Any such person *** who is being supported by public funds shall not acquire a settlement in said county unless such person before **** being supported thereby, has a settlement in said county."

#60-6-1

The question arises specifically from the conclusions contained in an informal opinion directed to Mr. G. A. Cady, Franklin County Attorney, on February 17, 1960. In that opinion, it is stated:

> "Relief furnished by Franklin County to the relief client who has not yet acquired settlement in Franklin County will prevent such relief client from acquiring legal settlement in Franklin County ***"

and a subsequent statement:

> "For so long as such person continues to be supported by public funds, his settlement in the county from which he came will be continued *** "

Section 252.16, subparagraph 2, as amended by the 58th General Assembly, states:

> "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."

Section 252.16, subparagraphs 2 and 3, have been analyzed and reconciled several times in former opinions from this office and by the Supreme Court of Iowa. The Attorney General's opinion dated February 18, 1957 contains a summary of the expressions on this subject by stating:

> "The dictates of the legislature were specific and clear. Legal settlement cannot be obtained, even though no notice to depart has been served, when one continues to receive county poor support during the two year period of residence which by statutes, is a prerequisite to acquiring a new legal settlement. See Audubon County v. Vogessor, 1940, 228 Iowa 281; 1942 Report of Attorney General, page 37; 1938 Report of Attorney General, page 869, at notes 10 & 11, pp. 877-879; also see 1954 Report of Attorney General, 178."

The decision reached by the 1957 opinion is conclusive on this subject and is only changed by the recent amendment of the 58th General Assembly to modify the residence requirement of one year rather than two years in the county to gain legal settlement.

Thus, the payment of relief is regarded as a legal disability to acquiring settlement in the new county under the provisions of subsection 2 of this section. During the period such person is receiving relief, he cannot acquire a new settlement under that section. However, when such person who has received relief in the new county, resides in the new county for one year without receiving further relief, he will acquire legal settlement in that new county.

Respectfully submitted,

Carl E. Peterson
Special Assistant Attorney General

CEP/sp

TAXATION: Property Tax - Horticultural Crop Exemption -- Flowers purchased by a greenhouse operator are exempt from taxation under Section 427.1 (13), Code of Iowa (1958). (Gill to Branstad, Winnebago Co. Atty., 5/3/60.) #60-6-V

May 3, 1960

Nels W. Branstad
County Attorney
Forest City Bank & Trust Building
Forest City, Iowa

Dear Mr. Branstad:

This will acknowledge receipt of your letter dated April 25, 1960, which has been referred to me for reply.

In the aforementioned letter, the following problem was submitted:

"Today I have received from the County Assessor of Winnebago County a request for further information. For all practicable purposes, the request which I received today applies to two separate places. In Forest City, we have a regular green house with a substantial amount of hot house area and where most all the flowers sold by the operator are raised on large concrete trays, so to speak, or in flower pots, in which he plants bulbs, annual, bi-annual and perenial for growing flowers.

"In another community in Winnebago County, there is a florist shop, which for the most part, I believe, buys most all of the flowers they sell from a green house and in turn sells the flowers, pots or flowers, whatever the case might be.

"In order that this matter may be clarified and distinguished from an Attorney General's Opinion which was issued on May 22,1929, ruling on nursery items, I am enclosing herewith a copy of a letter handed me by the Winnebago County Assessor requesting an opinion relative to the facts therein stated and the questions propounded."

Questions attached to above letter:

"1. Are Commercial Greenhouse plants and flowers and bulbs when grown in containers separated from the land exempt from

#60-6-V

taxation under Section 427.1 (13) or are they taxable under the Official Opinion dated May 22, 1929 containing the ruling that nursery stock grown in containers separated from the ground and not a part of the land should be assessed as personal property.

"2. Shall a Greenhouse operator and or Florist be assessed on that portion of his business to the extent that he buys plants and flowers from an outside source for resale by him?"

Regarding your first question whether an opinion of this department found in the 1930 Report of the Attorney General, page 118, is controlling in the instant situation, your attention is directed to Section 6944, Subsection 13, Code of Iowa (1927), which reads:

"13. Agricultural produce. The agricultural produce harvested by or for the person assessed within one year previous to the listing, all wool shorn from his sheep within such time, all poultry, ten stands of bees, all swine and sheep under nine months of age, and all other domestic animals under one year of age."

This, of course, was the exemption statute in force at the time the foregoing opinion was written. In 1947, this exemption statute was amended by inserting the following words:

"Growing agricultural and horticultural crops and products, except commercial orchards and vineyards, and all horticultural and". (Acts of the 52nd G. A., Chapter 233, Section 1)

Thus, it is evident from the historical background of this exemption statute, presently Section 427.1 (13), that there was no exemption for growing agricultural or horticultural crops at the time of the 1929 opinion. Therefore, it is not controlling in view of the law in Iowa today.

In respect to your second question, your attention is directed to Section 427.1 (13), Code of Iowa (1958), wherein the only qualification for exemption of horticultural crops is that it be growing. It is submitted in the case of flowers,

this becomes somewhat difficult to determine, but for the purposes of this opinion this is assumed (Of course, this opinion cannot be construed as pertaining to "cut" flowers.). In fact, this exemption statute does except certain agricultural and horticultural crops as not coming within its provisions, i.e., commercial orchards and vineyards. In view of this exception to the exemption, it seems reasonable that if commercial greenhouses were intended to come within the exception to subsection 13, they would have been expressly named.

Therefore, the opinion of this department is that as long as a greenhouse operator owns growing horticultural crops, regardless of whether purchased from someone else or planted by him, they are within the purview of Section 427.1 (13), Code of Iowa (1958).

In conclusion, you are advised that the Attorney General's Opinion issued May 22, 1929, is not controlling in the foregoing situation and, further, if a person owns a growing horticultural crop, it is exempt irrespective of the fact that he purchased the crop from another.

Very truly yours,

Gary S. Gill
Special Assistant Attorney General

GSG:fs

TAXATION: Cities and Towns - Agricultural Lands - Taxation of personal property used in connection with agricultural lands that are exempt from municipal taxation. (Dalton to McDonald, Cherokee Co. atty., 5/3/60) #60-6-3

May 3, 1960

Mr. James L. McDonald
Cherokee County Attorney
Courthouse
Cherokee, Iowa

Dear Mr. McDonald:

This is in reply to your letter of April 5, 1960, in which you request an opinion pertaining to Section 404.15 of the 1958 Code of Iowa. Your letter proposed the following:

> "Supposing a large cattle feeder has a farm on the edge of a municipality and with the buildings and feed lots located within the city limits, and the bulk of the farm lands located outside the city limits. Are the farm implements stored within the city limits and the livestock fed in the lot within the city limits necessary to the use of the said lands and subject only to the one and one-fourth mill tax?"

The applicable section (404.15) of the Iowa 1958 Code reads as follows:

> "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 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."

The foregoing section clearly exempts land that is within the limits of cities and towns, and applied to the purpose as indicated. The main concern of Section 404.15 is the provision of an exemption for certain lands that

#60-6-3

would otherwise be taxable as a matter of normal principle. In this section there is entailed an exception to this exemption, or the fact that the land so within a city or town is subject to a tax of one and one-fourth mills. This circumstance being within the taxing power of the State.

However, Section 404.15 also has provision for the taxation of, "all personal property necessary to the use and cultivation of said agricultural or horticultural lands." Thus, the reference is back to the land itself and its use. In addition, the conjunctive (and) would indicate that cultivation is part of the usage. Hence, it is submitted that personal property that is necessary to fulfill the functions of adapting the land to agricultural purposes is the only type of personal property subject to the one and one-fourth mill taxation. This millage is an exception to normal municipal taxation and has reference to personal property as indicated in the prior sentence. Therefore, personal property that is stored within the municipal limits, and not qualifying under the above exception, is subject to taxation, but not at the one and one-fourth mill rate. Since this millage is actually an exception for personal property that might otherwise have a higher rate. Additionally, though feeder cattle are considered part of agricultural endeavor, it is submitted that the code section discussed here is directed toward cultivation of exempt property. Therefore, making feeder cattle subject to only a one and one-fourth mill tax would not be correct application of Section 404.15.

The above is additionally borne out by a consideration of the terms, "use and cultivation." By applying the doctrine of ejusdem generis these words

can be given an interpretation. The doctrine is nothing more than creating the principle that if a specific meaning one term (cultivation) is included in the meaning of the general term (use) coupled with it, the intent is that the statute is directed toward covering the lesser term under the over-all interpretation of the general term. In other words, "use" would be the land actually being applied to agricultural purposes. But cultivation is the specific term (included within the meaning of use) that would indicate that personal property would have to be devoted to cultivating the land before such property would be subject to only a one and one-fourth mill tax. Hence, when use and cultivation are coupled, the latter is the guiding factor as to what is meant by the term use.

It is further suggested that the exemption is directed toward land not capable of being used as city property, because of its adaptation to agricultural purposes. Hence, it is submitted that personal property subject to the one and one-fourth mill taxation is the type of property that is used to develope the land from the standpoint of actually changing the surface of the land. It being only relative that feeders and cattle happen to be located on land within the limits of a city or town.

A further guiding factor is that the land must not possess its value because of adaptation for the purposes of dwellings or business. Therefore, it is suggested the land must be committed, through cultivation, to agricultural purposes and that feeder cattle and farm implements stored on such

land are not "personal property necessary to the use and cultivation" of such land.

Therefore, it is submitted that cultivation is the crux as to the treatment of personal property for tax purposes under Section 404.15.

In summary, personal property that is stored within municipal limits, but not used to cultivate the land within those limits, is subject to taxation other than on a one and one-fourth mill basis. Thus, under Section 428.8, if the property is kept within another assessment district during the greater part of the year preceding the first of January, it is taxable within that district and not the district where the owner lives. In reference to feeder cattle, it is a question of fact whether they have remained within the assessing district long enough to be taxed there. The feeder cattle would fall under this same concept, since they would not be considered as personal property necessary to the use and cultivation of said agricultural land (as indicated above). The assessment and taxation of the personal property in this particular instance does not come within the purview of Section 404.15.

Very truly yours,

Donald J. Dalton
Assistant Attorney General

DJD:fs

TAXATION: Real Property - Apportionment - Taxes assessed on real property as of January 1 are payable by the then owner; unless contracted otherwise. There can be no apportionment of the tax due between state (nontaxable entity) and individual. (Ltr to Werling, Cedar Co. Atty., 5/10/60) #60-6-4

May 10, 1960

Mr. Max R. Werling
Cedar County Attorney
108 West Fifth Street
Tipton, Iowa

Dear Mr. Werling:

This is in reply to your letter of April 18, 1960, in which you state the following:

> "The Iowa State Highway Commission has purchased right-of-way for Interstate Highway No. 80 across Cedar County. In negotiating for the purchase of this ground some of the buyers informed the various farmers involved that the 1959 real estate taxes payable in 1960 would be canceled on the ground being taken for the right-of-way purposes and did not include an amount of money in the contract price for the purpose of paying these taxes. Some deeds were recorded prior to December 31, 1959 and some were not. The county was not notified that the state intended to take possession of any of this ground until after the 1st of January, 1960, except, of course, in those instances where the deeds were already recorded.
>
> "According to the Attorney General's Opinion dated Feb. 1, 1940, at Page 474 of the 1940 AG's, which Opinion refers to a 1938 Opinion found at Page 692 thereof where the whole tract of ground is taken the taxes must be canceled, but where only a portion of a tract of ground is taken the lien attaches to the remaining portion thereof.
>
> "It is recommended in the 1940 Opinion that the only remedy in such a case is by way of application to the Board of Supervisors for an apportionment before payment of the tax as provided by Chapter 449 of the 1958 Code. The specific question I have is this. Does Chapter 449 of the 1958 Code of Iowa authorize a County Board of Supervisors to apportion taxes upon application of a taxpayer between a non taxed or tax exempt entity and an individual."

#60-6-4

In discussing Chapter 449, it is submitted that the apportionment mentioned therein has reference to two (or more) taxable parties. Under Section 427.1, the State is exempt from taxation on property which it holds; with some exceptions for federal taxation. Therefore, apportionment would not appear to be the proper consideration for the problem inferred in your letter.

If the property is listed on the tax rolls as of the 1st of January in the name of the owner, the taxes for that year would be payable by him. If, in fact, there had been a valid transfer of a portion of the property to the State prior to December 31 (of preceding year), such portion would be exempt from state taxation but the portion of property not acquired would be taxed to the owner. In other words, where a transfer of realty has taken place prior to January 1, only the remaining portion will be assessed for taxation to the owner.

Chapter 449 does not allow apportionment between a nontaxable entity and an individual, with the result that the individual only pays a tax on property in his possession. If the contract of sale has not provided for apportionment of the payment of the tax, the tax is on the full value assessed as of January 1 to the then owner. Since state property is exempt from taxation by statutory provision, it is submitted that Chapter 449 contemplates full payment of the tax as assessed January 1. Thus, there can be no apportionment of the tax when the other party is a nontaxable entity.

It is advised that where there is no complete acquisition of property that "cancellation" of tax is not applicable. In addition, cancellation of a part of the tax (under this factual circumstance) must necessarily be coupled with an apportionment of the tax, and as above indicated tax cannot be levied against the state. Hence, there can be no cancellation of tax when less than the whole of the real property is acquired by the state.

Equity may seem to demand a contrareasoning, but only legislative enactment could alleviate the above problem.

Very truly yours,

Gary S. Gill
Special Assistant Attorney General

GSG:fs

ENGINEERS: Architects -- An engineer registered under Chapter 114, Code 1958, with an area of proficiency in architectural engineering, may hold himself out as an architectural engineer without violating the provisions of Chapter 118. (Richmann to Johnson, Lee Co. Atty., 6/16/60) #60-6-5 May 16, 1960

Mr. Robert N. Johnson
Lee County Attorney
516 Seventh Street
Fort Madison, Iowa

Dear Mr. Johnson:

This is to acknowledge receipt of your letter of May 13, in which you made certain inquiries with regard to an enclosed contract, between the Lee County board of supervisors and one Roland F. Krebill. Your specific question is whether or not Mr. Krebill falls within the provisions of Chapter 118, Code 1958, when holding himself out as an "architectural and structural engineer".

Your attention is directed to section 114.2, Code 1958, in pertinent part as follows:

> "The practice of 'professional engineering' within the meaning and intent of this chapter includes any professional service, such as consultation, investigation, evaluation, planning, designing, or responsible supervision of construction in connection with structures, buildings, equipment, processes, works, or projects, wherein the public welfare, or the safeguarding of life, health or property is or may be concerned or involved, when such professional service requires the application of engineering principles and data. * * *"

You will note that the term "professional engineer" encompasses practically everything that was specifically covered in the enclosed contract. In addition thereto, I can discover nothing in the contract itself which specifically states that Mr. Krebill is an architect. The enclosed resolution, which states:

> "Roland F. Krebill, a licensed Architectural and Structural Engineer, doing business as Krebill

#60-6-5

Engineering Company has made a proposal, which is hereto attached and made a part hereof, to assist and render professional services, and * * *"

indicates no violation, in view of Chapter 118, Code 1958.

Your attention is directed to the enclosed report of the State Board of Engineering Examiners, with specific reference to page 73, which discloses that the party in question, said Roland F. Krebill, is a qualified professional engineer registered under the laws of the State of Iowa, with areas of proficiency in architectural engineering, civil engineering, structural engineering and land surveying.

With regard to the term "architectural and structural engineer", as quoted above, it is in complete keeping with the statutes of this state, and there is no conflict between Chapters 114 and 118, Code 1958, with regard to this subject, based upon the facts disclosed in your letter.

Therefore, in answer to your first question, Mr. Krebill can legally hold himself out as an architectural engineer because he is licensed under Chapter 114, Code 1958. Since there is no violation of the law, the answer to your second question is unnecessary; there are no grounds for nullifying, voiding or rescinding the contract, based upon the answer to your first question.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:bl
cc: J. Woolson Brooks
Marvin Kruse

HIGHWAYS: Secondary roads --

-- Board of supervisors may not approve contributions toward the improvement of a road system located wholly within an adjoining county. (Lyman to Hoyman, Warren Co. Atty., 5/17/60) #60-6-6

May 17, 1960

Mr. James R. Hoyman
Warren County Attorney
Indianola, Iowa

Dear Mr. Hoyman:

You request an opinion on the following: "May the board of supervisors of a particular county make a considerable financial contribution towards the improvement of a road system in a neighboring county when said improvement would allow the contributing county to abandon a portion of its existing road system and reduce considerably the maintenance costs of the contributor's system."

Section 306.3, Code of 1958, provides in part:

> "Jurisdiction and control over the highways of the state are hereby vested in and imposed on....(2) the county board of supervisors as to secondary roads within their respective counties; ...." (Emphasis Ours)

Section 306.4 of the 1958 Code of Iowa provides in part:

> "In the construction, improvement, operation or maintenance of any highway, or highway system, the board or commission which has control and jurisdiction over such highway or highway system, shall have power,... to alter or vacate and close any such highway ... and to establish new highways ... which are or are intended to become a part of the highway system over which said board or commission has jurisdiction and control." (Emphasis Ours)

In the above two sections it is obvious that the board of supervisors

#60-6-6

has only jurisdiction to act within its respective county. The only exception, if it be an exception, is covered by Section 309.68 whereby the board of supervisors of adjoining counties, subject to the approval of the Highway Commission, may make connections between roads which cross county lines and adopt plans and specifications for road, bridge, and culver construction, reconstruction or repairs upon highways along and across county boundary lines and make equitable division between the counties of the cost of the work therein.

I find no authority which would allow a board of supervisors to approve contribution toward the improvement of a road system located wholly within an adjoining county.

MOTOR VEHICLES: Registration -- A vehicle which formerly was a registered motor vehicle but which is no longer capable of propelling itself need not display a registration plate while being towed on the highway from the premises of the former registered owner to a salvage yard. (Craig to Morr, Lucas Co. Atty., 5/20/60) #60-6-7

May 20, 1960

Mr. Richard D. Morr
Lucas County Attorney
Chariton, Iowa

Dear Mr. Morr:

This will acknowledge receipt of your letter of April 5, in which you state:

> "Your opinion on the following is respectfully requested:
>
> "Mr. 'X' is engaged in the automobile salvage business in Lucas County. It is the practice with Mr. 'X' and other parties in the junked auto business in this community to tow a junked vehicle from the place where it is purchased to the salvage yards. Mr. 'X' and the others in the business see to it that Section 321.52 of the 1958 Code of Iowa is fully complied with prior to their purchase and taking possession of the junked motor vehicles, - that is, the registration plates, registration card, and certificates of title have been surrendered to the County Treasurer with notation by owner that auto is being junked. All towing requirements with regard to safety are fulfilled when moving the junked vehicles. Recently, Mr. 'X', while in the process of towing a junked auto on the highway to his salvage yards was given a summons by an officer of the Iowa Highway Patrol, charging him with 'improper registration' on the towed vehicle. The tow truck was properly registered. The junked auto was unoccupied and incapable of being moved by its own power. The summons cited no specific statutes.
>
> "The question then is:

#60-6-7

"When a motor vehicle which has been dismantled or destroyed so that it cannot be used upon the public highways and the owner of the motor vehicle has surrendered to the County Treasurer the registration plates, registration card and certificate of title with a notation that the surrender of the title is being made because the motor vehicle is being junked, as provided in Section 321.52, and the junked motor vehicle is purchased by a salvaged auto dealer, does Section 321.18 of the 1958 Code of Iowa or any other statute or regulation require that the junked motor vehicle be registered before it can be moved to the dealer's salvage yards by towing upon the public highways?"

Section 321.18, 1958 Code of Iowa, provides:

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

"1. Any such vehicle driven or moved upon a highway in conformance with the provisions of this chapter relating to manufacturers, transporters, dealers, or nonresidents as contemplated by sections 321.53 and 321.56, or under a temporary registration permit issued by the department as hereinafter authorized.

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

"3. Any implement of husbandry.

"4. Any special mobile equipment as herein defined.

"5. Any vehicle which is used exclusively for interplant purposes, in the operation of an industrial or manufacturing plant, consisting of a single unit comprising a group of buildings separated by streets, alleys, or railroad tracks, and which vehicle is used solely to transport

materials from one part of the plant to another or from an adjacent railroad track to the plant and in so doing incidentally using said streets or alleys for not more than one thousand feet.

"6. Any vehicle which is propelled by electric power obtained from overhead trolley wires, but not operated upon rails."

Sections 321.98 and 321.104(1), 1958 Code of Iowa, which are also pertinent here, provide:

"321.98 Operation without registration. No person shall operate, nor shall an owner knowingly permit to be operated upon any highway any vehicle required to be registered and titled hereunder unless there shall be attached thereto and displayed thereon when and as required by this chapter a valid registration card and registration plate or plates issued therefor for the current registration year and unless a certificate of title has been issued for such vehicle except as otherwise expressly permitted in this chapter. Any violation of this section is a misdemeanor punishable as provided in section 321.482."

"321.104 Penal offenses against title law. It is a misdemeanor, punishable as provided in section 321.482 for any person to commit any of the following acts: * * *

"1. To operate any motor vehicle upon the highways upon which the certificate of title has been canceled, or while a certificate of registration of a motor vehicle is suspended or revoked. * * *"

In an Ohio case identical to the situation you outline, State v. Saul, 26 Ohio Law Abstract 253, 11 Ohio Opinions 179, 4 Ohio Supplement 97, it was held that a license plate need not be displayed on a motor vehicle, which could not propel itself, being towed down a public highway to a salvage yard. At page 180 of 11 Ohio Opinions, the Court stated:

". . . what is the result to be where a motor vehicle, or what was once, at least, a motor vehicle, is being towed along the highway

> for the purpose of putting it in a wrecking yard, which motor vehicle is in fact not a complete motor vehicle and could not be propelled under its own power? It appears that it may reasonably be understood that in such a case and for this one particular trip, with such a destination in view, the legislature did not intend that a license plate bearing a distinctive number would have to be displayed. And it seems to the court to be a reasonable conclusion that strictly upon the facts of the case at bar, and considering this legislative intent, and strictly construing the wording of the statute, this vehicle had ceased to be a motor vehicle in its strictest sense, and that the defendant here was not actually 'operating a motor vehicle'."

The Ohio statute there applied, section 12622, Ohio General Code, is similar to the Iowa statutes above set out. Section 12622 provided:

> "Operating vehicle of manufacturer or dealer without license plates; penalty. Whoever operates or causes to be operated upon a public road or highway a motor vehicle of a manufacturer or dealer unless it carries and displays, as provided by law, two placards, except as provided in section 12613, issued by the director of highways, bearing the registration number of the manufacturer or dealer of such machine, shall be fined not more than twentyfive dollars."

Upon the basis of the above authority, it is my opinion that a vehicle which formerly was a registered motor vehicle, but which is no longer capable of propelling itself, need not display a registration plate while being towed on the highway from the premises of the former registered owner to a salvage yard.

Very truly yours,

FRANK CRAIG
Assistant Attorney General

FC:bl

TAXATION: Personal Property-Assessment-- Personal property is to be assessed in the county where it is regarded as most permanently located.
(Dalton to Mather, Sac Co. Atty., 5/24/60) #60-6-8

May 24, 1960

Mr. Charles Mather
Sac County Attorney
Sac City, Iowa

Dear Mr. Mather:

This is in reply to your letter of May 12, 1960, in which you set out the following:

> "A question has arisen as to the right of Sac County to assess and levy a tax upon water softening tanks owned by an authorized Culligan Water Softening dealer which has its plant in Calhoun County.
>
> "The dealer holds a franchise to provide Culligan service in Sac and Calhoun Counties and has regular customers in Sac County who have tanks continuously in their homes. The tanks in Sac County are exchanged at least every 28 days for different tanks which have been re-charged at the plant in Calhoun County.
>
> "May Sac County assess the softener tanks of this dealer which are in Sac County at the time of assessment?"

The answer to your inquiry entails directing your attention to Section 428.8, Code of Iowa (1958), and Attorney General's Opinion, January 26, 1926, page 262, of 1925-26 volume. It is therefore advised that the article in question should be assessed (and taxed) in Calhoun County, unless it has been kept in another assessment district during the greater part of the year preceding the first of January, and in that event it should be taxed in the district where kept.

It is submitted that although the tanks are periodically changed

#60-6-8

and recharged, that they primarily are subject to being kept in Calhoun County. Since any one installment could be a temporary one of 28 days or less. In Rhyne v. Madison County, 43 Iowa 632, the Court in discussing the duty of the assessor in reference to the words "in (and) therein", presently contained in Section 441.11, stated:

> "* * *. So that, if the words in and therein in point of time refer to the first day of January, or the time when the assessment is made, then every person must be assessed in the township where he may happen to be on the first day of January, or when the assessor comes around. No one, we apprehend, would contend for such a construction. The words therein refer not to the location of the property upon any particular day, but to what may, in view of all the circumstances, be regarded as its most permanent location. * * *."

Thus, assessment would take place in Calhoun County as proposed above.

Very truly yours,

Donald J. Dalton
Assistant Attorney General

DJD:fs

TAXATION: Personal Property Tax Lien--County Treasurer does not have authority to apportion personal property tax lien. Section 445.29 does not create superior lien. (Nielsen to Draheim, Wright Co. Atty., 5/25/60) #60-6-9

May 25, 1960

A. F. Draheim
County Attorney
Wright County Court House
Clarion, Iowa

Dear Mr. Draheim:

This is in reply to your letter of April 29, 1960, in which you propose the following:

"On February 11, 1960, the Small Business Administration, an agency of the United States of America, purchased a building, machinery and equipment of a certain produce company located on leased ground in this County from certain trustees in bankruptcy. The County of Wright has a lien on the building, merchandise and equipment in the total amount of $4032.77 and this was certified to the County Treasurer in this single amount on the tax list.

"It has been requested of the Treasurer by the Small Business Administration to apportion the taxes on the building and exclude the taxes on the merchandise and equipment.

"1. Is such apportionment or separation within the purview of Iowa Code Section 445.29 (1958)?

"2. Is it possible for such apportionment or separation to be made by the Treasurer when the tax list shows it as a single item and is the authority for the Treasurer?

"3. Is the lien as provided by Iowa Code Section 445.29 (1958) a superior lien to all other liens and encumbrances? (See Cummings vs. Hunt, 1953, 244 Iowa 72, 56 NW (2d) 8).

#60-6-9

"4. What was the intent of the Legislature when it recently amended Iowa Code Section 445.29 (1958)?

In answer to question No. 1, I should like to direct your attention to Attorney General Opinion dated April 8, 1958, page 279 of the 1958 volume. Your proposal is comparable to waiver of a lien on one type of property by apportioning the amount of the lien to another type of property. Hence, it is advised that no express or implied authority is vested in the County Treasurer by Section 445.29 (1958), to waive any lien of personal property tax as levied. The above cited Attorney General Opinion bears out the fact that a county officer has only that authority that is conferred by statutory enactment. Therefore, reference to Section 445.29 (1958), shows no authority for the Treasurer to apportion as indicated in your question.

Thus, though the tax lien is listed as a single amount, the lien is on the building, merchandise and equipment. The fact that one amount is listed does not create an intent to have the lien attach to one item. This is indicated by the language, " * * * shall be a lien in favor of the county upon all the taxable personal property and rights to property belonging to the taxpayer, * * *" as set forth in Section 445.29. Therefore, it is not a selective authority that is vested in the County Treasurer. The above is submitted as an answer to question No. 2.

In answer to question No. 3, I direct your attention to Attorney General Opinion dated October 10, 1955, page 106 of 1956 volume. This opinion indicates that the lien created by Section 445.29 (1958), is not a first and prior lien, by virtue of the content of this code section.

The 1959 amendment to Section 445.29 was enacted to establish liens on personal property as effective January 1, of the year in which such personal property is assessed. Additionally, purchasers or mortgagees may acquire a clear interest in

realty (against which personal property tax lien is levied) if such is attained prior to the treasurer placing such personal tax on the delinquent personal tax list. This latter act existing as notice so that subsequent interests cannot be attained without being subject to the personal tax lien. Thus, an affirmative duty (entrance on delinquent tax list) is necessary before the personal tax lien is perfected beyond one year and prior to subsequent interests after one year.

Very truly yours,

Donald J. Dalton
Assistant Attorney General

DJD/bjf

STATE OFFICERS AND DEPARTMENTS: Mine Inspector -- Section 82.18 does not give the mine inspector authority to require an abandoned mine be re-sealed or re-filled if the original seal or fill proves inadequate. (Craig to Aubrey, Mine Insp., 5/31/60) #60-6-10

May 31, 1960

Mr. W. Dean Aubrey
State Mine Inspector
L O C A L

Dear Mr. Aubrey:

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

"This department requests an opinion on Sec. 82.18, relating to the filling or sealing of an abandoned mine.

"This section covers the filling or sealing of all the openings of an abandoned mine and in this instance the abandoned mine is the Indiana Consolidated Mine Number 2, at Melcher, Iowa. This mine was owned and operated by the Rock Island Railroad. It was abandoned by them in 1935, and the hoisting shaft and air shaft were sealed with concrete as provided by law. The property on which the mine is located was sold by the Rock Island Railroad in 1944.

"Sometime during the first part of this year the seal on the hoisting shaft at this mine fell in because the curbing in the shaft rotted out, and allowed the dirt under the seal to slide into the shaft until it was undermined enough to allow the area around the top of the shaft and seal to fall into the shaft. This shaft was 265 feet deep and is now very dangerous. Probably not more than 65 feet of it is filled by the cave in on top.

#60-6-10

"Under Sec. 82.18 who is now liable for the re-sealing or filling of this shaft?"

Section 82.18, 1958 Code of Iowa, provides:

"Filling or sealing abandoned mine. It shall be the duty of the owner, lessee, operator of the mine or owner of land on which mine is located, to permanently fill, or seal all openings to the same immediately after it is finished or abandoned, so as to prevent any person or animal from entering or falling into the said finished or abandoned mine; and before said filling or sealing is commenced or undertaken, the mine owner, lessee or operator shall notify the mine inspector of the district in which the mine is located, and the same shall be subject to the approval of said mine inspector who is hereby authorized and empowered to prescribe the manner and the kind of material with which the same shall be filled or sealed."

Mines abandoned before July 4, 1935, were not required to be sealed as provided in section 82.18. In 1936 Report of the Attorney General 282, at page 283, it is stated, in reference to section 82.18:

"While, as stated above, the better practice would be, because of the danger of injury and the question of liability for such injuries on the part of those responsible, to close the mine in accordance with this act, yet, in our opinion, a careful reading of the same does not make it retroactive, and therefore, we do not believe that it would apply to mines abandoned prior to the time this went into effect, which was July 4, 1935."

From your letter, I assume that section 82.18 was followed. You state, "It was abandoned by them in 1935, and the hoisting shaft and air shaft were sealed with concrete as provided by law." If the Rock Island Railroad did comply with the provisions of section 82.18 when the mine was sealed in 1935, they have discharged their obligation under the statute, and the mine inspector has no further jurisdiction over the mine. Section 82.18 provides that "It shall be the duty of the owner, lessee, operator of the mine or owner of land on which mine is located to permanently fill, or seal all openings

to same immediately after it is finished or abandoned . . . ", that the mine inspector may ". . . prescribe the kind and manner of material with which the same shall be filled or sealed" and that ". . . the same shall be subject to the approval of said mine inspector . . . ", but, although it provides that the seal or fill shall be permanent, it does not authorize the mine inspector to require the mine to be re-filled or re-sealed if the seal or fill subsequently proves inadequate.

The powers of the mine inspector are strictly limited to those given him by statute. In 1952 Opinions of the Attorney General 149, at page 150, it is stated:

> "The office of mine inspector is a creature of law; such office is unknown to the common law. Hence it follows, the powers and duties of the inspectors are those specifically named in the Code and such other powers as may be necessarily implied from the powers granted."

However desirable it might be to require all abandoned mines to maintain a fill or seal on all openings of an abandoned mine, section 82.18, 1958 Code of Iowa, does not so provide.

Therefore, it is my opinion that if all openings to an abandoned mine are permanently filled or sealed immediately after the mine is abandoned, and the fill or seal is approved by the mine inspector, the provisions of section 82.18, 1958 Code of Iowa, are satisfied and section 82.18 does not give the mine inspector authority to require the mine to be re-filled or re-sealed if the fill or seal subsequently proves to be inadequate.

Very truly yours,

FRANK CRAIG
Assistant Attorney General

FC:bl

TAXATION: Personal Property--Situs for Taxation--Personal property located permanently outside of the State of Iowa on assessment date is not subject to taxation. (Ltr. to Draheim, Wright Co. Atty., 6/3/60) #60-6-11

June 3, 1960

Mr. A. F. Draheim, Jr.
Wright County Attorney
Courthouse
Clarion, Iowa

Dear Mr. Draheim:

This will acknowledge receipt of your letter of May 12, 1960, wherein the following problem was set forth:

> "With reference to your opinion of May 19, 1959, regarding the above captioned matter, this office is requesting a supplemental opinion as follows:
>
> "FACTS: The producers of domestic mink pelts ship pelts out of the state of Iowa to other states to be stores for future sales. In these situations, the local producer does not have possession but only title to the pelts.
>
> "QUERY: Would such mink pelts or pelts, not in the possession of the producers, but in fact situated in another state, come within the purview of the opinion above stated?"

The general rule is that the state may not tax tangible personal property not located within its jurisdiction. In other words, the situs of the property is the controlling factor in determining where tangible personal property may be taxed by the state regardless of where the owner resides. Therefore, if on the first of January the mink pelts were not within the State of Iowa, they would not be subject to taxation.

#60-6-11

A word of caution must be expressed here in view of the case of Capital Construction Company v. City of Des Moines, 211 Iowa 1228, where property was located in Illinois on the assessment date--nevertheless it was held taxable. The decision apparently turns on the fact that the property was only temporarily out of the state and not permanently.

In conclusion, you are advised that, if the mink pelts were permanently located outside of the State of Iowa on January 1st, they would not be subject to taxation under the laws of this state.

Very truly yours,

Gary S. Gill
Special Assistant Attorney General

GSG:fs

STATE OFFICERS AND DEPARTMENTS: Public Safety -- Chapter 24, Acts of the 58th General Assembly, section 1, authorizes construction of two radio stations in addition to moving location of headquarters station. (Craig to Statton, Com'r Pub Safety, 6/3/60) #66-6-1V

June 3, 1960

Mr. D. M. Statton, Commissioner
Department of Public Safety
L O C A L

Dear Mr. Statton:

This will acknowledge receipt of your letter of May 27, in which you state:

> "The Iowa Radio Communications Division of the Department of Public Safety recently relocated its Des Moines station by moving its equipment and facilities from the previous location at the Iowa State Fairgrounds to the present location north of the city of Des Moines.
>
> "The division is also contemplating the construction of two new stations in the vicinity of Denison and Cedar Rapids.
>
> "With reference to Chapter 24, Section 1, Acts of the Fifty-Eighth General Assembly, your opinion is requested as to whether the relocation of the Des Moines station refers to: (a) 'moving or replacing buildings' (thus permitting the construction of both stations), or (b) 'construction of two (2) radio stations' (thus allowing for the construction of only one additional station).
>
> "You will find attached a copy of a letter from Boyd Porter, Director of the Iowa Radio Communications Division, directed to this office explaining the legislative history surrounding the enactment of this bill."

#60-6-1V

Section 1, Chapter 24, Acts of the 58th General Assembly, to which you refer, provides:

> "There is hereby appropriated to the division of radio communication, department of public safety, from the general fund of the state the sum of two hundred forty-six thousand eight hundred dollars ($246,800.00) to be used for, purchase and replace repeaters, equipment, tractors, cars, moving and replacing buildings and equipment, purchase of land, construction of two (2) radio stations, and miscellaneous items connected with these projects."

In answering your question, the dispositive question is: What did the legislature intend? In Knott v. Rawlings, 96 N.W. 2d 900, the Iowa Supreme Court stated, at page 903:

> "The legislative intent is the all important and controlling factor in the interpretation of statutes."

In determining legislative intent, one of the primary rules of statutory construction is that all provisions of a statute are presumed to have meaning and to be included for a purpose. In Board of Directors v. Beakerly, 240 Iowa 910, 36 N.W. 2d 751, the Court stated, at page 917 of 240 Iowa:

> "In the first place we should endeavor to construe our statutes so no part will be rendered superfluous and effect ordinarily should be given to every provision of the statute."

In stating the purpose of the appropriation therein made, section 1 of Chapter 24, Acts of the 58th General Assembly, specifically enumerates, among other things, "removing and replacing buildings and equipment" and "construction of two (2) radio stations". Applying the rule that each provision of a statute should be given effect, it appears that the legislature intended that the "construction of two (2) radio stations" should be in addition to the "moving and replacing buildings and equipment", i.e., moving the location of the headquarters station from the State Fairgrounds to its present location.

Therefore, based upon the above, it is my opinion that your alternative (a), the construction of two (2) radio stations in addition to moving the headquarters station, is

what the legislature intended by the provisions of section 1, Chapter 24, Acts of the 58th General Assembly. Of course, the Executive Council must approve any expenditure, as provided by section 2, Chapter 24, Acts of the 58th General Assembly.

Very truly yours,

FRANK CRAIG
Assistant Attorney General

FC:bl

TAXATION: Property Tax - Notice of Valuation - (1) Sections 23 and 26, Chapter 291, Acts of the 58th General Assembly (1958), require but one notice of valuation be given the taxpayer at the time of assessment. (2) Notice of valuation may be delivered only at the time of assessment, which must be made on January 1, 1961, or thereafter. (Gill to Salisbury, Jasper Co. Atty., 6/8/60) #60-6-13

June 8, 1960

Mr. Don C. Salisbury
Jasper County Attorney
Courthouse
Newton, Iowa

Dear Mr. Salisbury:

This will acknowledge receipt of your letter dated April 27, 1960, wherein the following problem was set forth:

"The J. M. Cleminshaw Company is presently making the appraisement for the cities and towns in Jasper County, Iowa to be used for the 1961 assessment.

"By the terms of the contract with said company, the County of Jasper and City of Newton are required to notify property owners of the amount of the appraisement arrived at for their property prior to a hearing in June of this year by said company with said property owners.

"In connection therewith there are three questions that do not seem to be answered by Chapter 291 of the laws of the 58th General Assembly, as follows:

"1. Does the notice referred to in Section 23 of said Chapter and the notice referred to in the assessment roll in Section 26 of said Chapter refer to one notice contained in the assessment roll or to two separate notices at different times?

"2. Secondly, how early can the assessment roll referred to in Section 26 of said Chapter be delivered to the property owner and in particular can it be delivered in the year 1960?

"3. Can the notice in the assessment roll referred to in

#60-6-13

Section 26 of said Chapter serve the requirements of Section 23 if said Sections require two separate notices?

"The answers to these questions are sought for the purpose of ascertaining whether or not time and money can be conserved by the giving of these notices in combined form.

"Also, if same can be done, the notice requirements of the contract with the J. M. Cleminshaw Company referred to above could be satisfied at the same time."

The applicable provisions of Chapter 291, Acts of the 58th General Assembly (1958), to the foregoing requests are as follows:

"Sec. 23. Notice of valuation. The assessor shall, at the time of making the assessment, inform the person assessed, in writing, of the valuation put upon his property, and notify him, if he feels aggrieved, to appear before the board of review and show why the assessment should be changed."

"Sec. 26. Assessment rolls and books. The state tax commission shall each year prescribe the form of assessment roll to be used by all assessors in assessing real and personal property, including moneys and credits, in this state, also the form of pages of the assessor's assessment book. Such assessment rolls shall be in such form as will permit entering thereon, separately, the names of all persons, partnerships, corporations, or associations assessed; shall contain a form of oath or affirmation to be administered to each person assessed, and shall also contain a notice in the following form:

" 'If you are not satisfied that the foregoing assessment is correct, you may file a protest against such assessment with the board of review on or after May 1, to and including May 20, of the year of the assessment, such protest to be confined to the grounds specified in section thirty-seven (37) of this Act. Dated _____ day of _____, 19___, _____, County/City Assessor.'

"Such assessment rolls shall be used in listing the property and showing the values affixed to such property of all persons, partnerships, corporations, or associations assessed, which rolls shall be made in duplicate. Said duplicate roll shall be signed by the assessor, detached from the original and delivered to the person assessed. It shall be lawful to combine the affidavit or form of oath or affirmation with reference

> to real and personal property, and the affidavit or form of oath or affirmation as to moneys and credits, into one (1) affidavit or form of oath or affirmation, and only the one (1) such affidavit or form of oath or affirmation shall be sufficient on the assessment roll. The pages of the assessor's assessment book shall contain colums ruled and headed for the information required by this chapter and that which the state tax commission may deem essential in the equalization work of the state board of review. The assessor shall return all assessment rolls and any schedules therewith to the county auditor, along with the completed assessment book, as provided in this chapter, and the county auditor shall carefully keep and preserve all such rolls, schedules and book for a period of five (5) years from time of filing of the same in his office."

Regarding your first inquiry, upon examination of Section 26 one finds a direction given to the assessor to deliver to the person assessed a copy of his assessment. This copy must also contain the notice set out in Section 26. Therefore, it seems apparent that Sections 23 and 26 relate to the same notice and not two separate notices, since both provisions require a notice fixing the values be given to the person assessed at the time of the assessment.

In respect to your second question, your attention is directed to Section 428.4, Code of Iowa (1958), to wit:

> "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 aforementioned section directs real property shall be listed and valued in 1933 and every four years thereafter; thus, it would appear that the earliest date upon which a value could be placed upon real estate would be January 1, 1961. Of course, this means that notice of valuation could

not be delivered to the property owner in the year 1960, since notice of valuation is given to the taxpayer at the time of assessment according to Sections 23 and 26 of Chapter 291, Code of Iowa (1958).

In view of the opinion expressed in reply to question number 1, it would appear that question number 3 has been answered.

In conclusion, you are advised that only one notice of valuation is required under the provisions of Chapter 291 and, further, the aforesaid notice cannot be delivered before January 1, 1961.

Very truly yours,

Gary S. Gill
Special Assistant Attorney General

GSG:fs

INSURANCE: Employee Welfare Funds -- Such funds are not insurance and contributions thereto are not taxable as premiums.

June 8, 1960

Mr. William E. Timmons, Commissioner
Insurance Department of Iowa
L O C A L

Attention: Robert J. Link

Dear Sir:

Receipt is acknowledged of your letter of May 23 as follows:

> "Recently, an inquiry has been directed to this Department concerning whether or not a health and welfare fund extending benefits for life, accidental death and dismemberment, accident and sickness weekly indemnity, hospitalization, medical and surgical benefits to employees (and dependents) residing in Iowa is subject to our insurance laws.
>
> "Also, we wonder if contributions received by the fund are subject to a gross premium tax if such contributions are made either by employers located in Iowa or employers located outside of Iowa.
>
> "Thank you for your early attention to this matter."

In general, it has been held that a plan to provide the members of a certain group with medical services and hospitalization is not insurance. See 29 Am. Jur., Insurance, par. 12 and cases cited thereunder. It has also been held that a company relief department having a fund, consisting of employer and employee contributions, from which sums are payable in case of sickness, injury or death, is not engaged in the insurance business. See 29 Am. Jur., Insurance, par. 13 and cases cited.

#60-6-14

Matters not considered as insurance under common law may, of course, by statute become insurance as a matter of law and subject to regulation as such. Examination of the Iowa insurance statutes, however, does not reveal any provision expressly defining company funds of the type described as insurance. In fact, if a broad construction be placed upon the word "society" in Code section 513.1, it could be argued that the funds in question are specifically exempted.

I am, therefore, of the opinion that whether the matter be viewed either as a matter of general common law in the absence of any express regulatory statute or as falling within the above-cited exemption statute, the fund in question is not insurance under the laws of Iowa and contributions to such fund are not subject to gross premium tax.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl

COUNTIES: Zoning -- Board of Supervisors can amend existing zoning ordinance under Code sections 358A.6 and 358A.7 so as to take advantage of additional power conferred by 58th G. A. amendment to section 358A.3 but, of course, there could be no retroactive enforcement as respects existing nonconforming uses. (Abels to Wilson, Muscatine Co. Atty., 6/9/60) #60-6-15 June 9, 1960

Mr. Robert H. Wilson
Muscatine County Attorney
110½ East Second Street
Muscatine, Iowa

Dear Mr. Wilson:

Receipt is acknowledged of your letter of May 23 as follows:

> "The Muscatine County Board of Supervisors, under the authority of Chapter 358A of the 1958 Code of Iowa, proceeded with the formulation, hearing on and adoption of, a county wide zoning program. At the time that the ordinance was adopted there was included Article 24, which Article provides as follows:
>
> > "'SECTION 1. WHEN EFFECTIVE. This Ordinance shall be effective from and after the date of its adoption as provided by law, but no regulations or restrictions shall apply in any township which has not approved of the ordinance by a majority of real property owners in said township, by petition.'
>
> "After the adoption of this county zoning ordinance there was passed by the 58th General Assembly Chapter 266 amending Section 358A.3 of the 1958 Code of Iowa which amendment would seem now to give the County Board of Supervisors the authority to adopt county wide zoning without any of the necessities as previously provided for petition or special election. The Muscatine County Board of Supervisors presently desires to eliminate Article 24 of the present zoning ordinance

#60-6-15

and make the county zoning ordinance, a copy of which is enclosed herewith, effective throughout Muscatine County.

"Would you further advise if they would have the authority under Section 358A.7 to amend the present zoning ordinance by repealing Article 24 after having given public notice and after having so done, proceeding under the authority of Chapter 266 of the Acts of the 58th General Assembly.

"Your opinion in this matter will be greatly appreciated."

In answer thereto, you are advised that the conditions under which such zoning ordinance may be amended are set forth in Code section 358A.7, which provides as follows:

"Changes and amendments. Such regulations, restrictions, and boundaries may, from time to time, be amended, supplemented, changed, modified, or repealed. In case, however, of a protest against such change signed by the owners of twenty percent or more either of the area immediately adjacent thereto and within five hundred feet of the boundaries thereof, such amendment shall not become effective except by the favorable vote of at least sixty percent of all of the members of the board of supervisors. The provisions of section 358A.6 relative to public hearings and official notice shall apply equally to all changes or amendments."

The language "Such regulations . . ." etc., on its face refers back to the language, "the board of supervisors . . . is hereby empowered to regulate". In other words, the procedure for amendment provided in sections 358A.6 and 358A.7, which is the only amendment procedure existing under the chapter refers to the amended version of section 358A.3 to exactly the same degree as it referred to the version existing prior to amendment. In this connection, see Code section 4.3, which provides as follows:

"References to other statutes. Any statute which adopts by reference the whole or a portion of another statute of this state shall be construed to include subsequent amendments of the statute or the portion thereof so adopted by reference unless a contrary intent is expressed."

Therefore, insofar as the power of the supervisors to adopt the proposed amendment to their zoning ordinance is concerned, I am of the opinion they may do so by the procedure and subject to the conditions set forth in Code sections 358A.6 and 358A.7.

However, insofar as the applicability of the amended ordinance is concerned, as affects current use of premises to which it would otherwise apply had the broadened version of the ordinance preceded the use in point of time, I call your attention to Code section 4.1(1) as follows:

> "Repeal -- effect of. The repeal of a statute does not revive a statute previously repealed, nor affect any right which has accrued, any duty imposed, any penalty incurred, or any proceeding commenced, under or by virtue of the statute repealed."

In other words, the new ordinance would have no effect as to <u>existing</u> use or occupancy of any premises newly covered by it but would be effective as to future changes therein.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl

TOWNSHIPS: Office rental -- No authority to pay. (Ltr. to Mather, Sac Co. Atty., 6/10/60) #60-6-16

June 10, 1960

Mr. Charles Mather
Sac County Attorney
Sac City, Iowa

Dear Mr. Mather:

Receipt is acknowledged of your letter of June 8 as follows:

> "The city of Sac City together with Jackson Township which surrounds Sac City jointly own a community building within the corporate limits of Sac City.
>
> "The trustees of Jackson Township are in charge of the poor relief program within the township and they are in need of office space to carry on their program.
>
> "Is it legal for a township to pay rent to the board in control of the community building for the use of office space in the building?"

The duties of township trustees with respect to the relief of poor persons are set forth in Code Chapter 252. Such duties are prescribed in general by section 252.25, which provides as follows:

> "Relief by trustees. The township trustees of each township, subject to general rules that may be adopted by the board of supervisors, shall provide for the relief of such poor persons in their respective townships as should not, in their judgment, be sent to the county home."

#60-6-16

However, the township appears to have no relief funds as such, but simply performs administrative duties in connection with applications for relief and in making recommendations for allowance by the county board of supervisors. See section 252.35, which provides as follows:

> "Payment of claims. All claims and bills for the care and support of the poor shall be certified to be correct by the proper trustees and presented to the board of supervisors, and, if they are satisfied that they are reasonable and proper, they shall be paid out of the county treasury."

Review of the various Code sections pertaining to the powers of township trustees to raise money by taxation fails to reveal any fund which may be expended for office rental.

There are opinions to the effect that a public body charged with the administration of a fund created for a certain public purpose may use a part of such fund for necessary administrative costs when no other provision is made. However, this is of no aid in connection with your problem for the reason that, as hereinabove pointed out, there is no township fund for the purpose of poor relief nor is there any other township fund from which payment of rent by a township is authorized.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl

TOWNSHIPS: Trustees -- interest in contract -- It is unlawful for a township trustee to sell services or supplies to the township, but where the transaction has been fully executed, no refund should be claimed in the absence of showing of fraud or corruption. (Allen to Gray, Calhoun Co. Atty., 6/13/60) #60-6-17

June 13, 1960

Mr. Jack R. Gray
Calhoun County Attorney
Rockwell City, Iowa

Dear Mr. Gray:

Receipt is acknowledged of your letter of June 8 as follows:

> "I have been requested by the Township Trustee of Union Township to request an Opinion from you concerning whether or not a Trustee of Union Township who is President of the Lohrville Savings Bank and who engages in the sale of insurance at the bank is violating the law when he sells liability insurance on the Township Fire Truck owned by Union Township.
>
> "Again, I am requesting this opinion due to the fact that some taxpayers, as well as a trustee, feel that this is illegal and that the Trustee should be removed from office or that the insurance should be cancelled and given to someone else.
>
> "If this is a violation of Conflict of Interests what is the proper procedure that should be followed in seeing that the same is terminated.
>
> "Your prompt attention to this matter will be appreciated."

In answer, I refer you to Code section 741.11, which provides as follows:

> "Interest in public contracts. Members of boards of supervisors and township trustees shall not buy from, sell to, or in any manner become parties, directly or indirectly, to any

#60-6-17

> contract to furnish supplies, material, or labor to the county or township in which they are respectively members of such board of supervisors or township trustees."

According to the decision of the Supreme Court of Iowa in the case of Beechley v. Mulville, 102 Iowa 602, insurance is a "commodity" and therefore would also apparently fall within the class of prohibited transactions in the quoted section.

Further, see Bay v. Davidson, 133 Iowa 688, in which the theory of common law rule of which the quoted statute is, in part, declaratory is explained in considerable detail.

Also see James v. City of Hamburg, 174 Iowa 301, 156 N.W. 394 at page 396:

> "James, the plaintiff, however, claims . . . that Baldwin was a member of the copartnership, interested in the bank financially and otherwise, and, at the same time, was a member of the city council . . . He was bound therefore to serve both faithfully; the bank of which he was an officer and in which he was financially interested, and the city of which he was also an officer and servant. It is an old saying that a man cannot serve two masters . . . It is not necessary that there be evidence of dereliction of duty to bring these contracts within the inhibition of the law. The inhibition applies when the contract is of such a character that, in the very contract and in the making of it, a temptation to dereliction of duty is created. The law intends that these public officers should, like Caesar's wife, be above suspicion and temptation . . ."

However, consideration should also be given to the case of Kagy v. Ind. Dist. of West Des Moines, 117 Iowa 694, 89 N.W. 972. In that case, contracts had been awarded to directors of a school board for the furnishing of services and supplies. Performance had been completed and payment made. The Court held that, although the policy of the law forbade such contracts, where the price was reasonable and the directors acted from no corrupt or fraudulent motive, repayment would not be compelled.

The Court said:

> "There is nothing morally wrong or inequitable in saying to a school district that it must pay a fair consideration for benefits received, before it will be permitted to repudiate an executed contract by virtue of which it has obtained and continues to hold, something of substantial value."

In the case described in your letter, a bank, of which the president was member of the township trustees, wrote, as agent, a policy of insurance on the fire truck. Presumably the bank received an agent's commission out of the premium charge for writing the policy. The insurance company would have received the balance for the term of protection furnished. Although it appears the period of the policy has some time left to run, there is nothing in your letter to indicate that any officer of the insurance company is on the township board. In other words, had the policy been written for the company by one of its agents other than the bank (of which a township trustee happened to be president), there would be no question about the transaction.

Under the Kagy case, it would seem that, insofar as the agent's service, for which the commission was paid, is concerned, that part of the transaction is fully executed and no refund should be claimed in the absence of clear showing of corrupt or improper motive on the part of the trustee.

As for the part of the payment which went to the insurance company, it apparently has no officers on the board of trustees and it has furnished and continues to furnish the protection sold and paid for.

I am of the opinion that the proper procedure is to advise the township to buy its insurance through an agency in which none of its trustees has a pecuniary interest at the expiration of the current policy.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl

Elections: Irregularities in ballots-- ~~counting.~~
Mere irregularities in ballots furnished electors, will not void ballot and should be counted. (Bianco to Samore, Woodbury Co. Atty., 6/13/60) #60-6-18

June 13, 1960

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

Dear Mr. Samore:

Reference is made to your favor of June 6th, requesting opinion of this office and reading as follows:

> "Reference is made to Section 49.52 of the Code of Iowa, of 1958, which requires that the names of a candidate for a township office shall not be placed upon the general official ballot for a precinct when the territory of said precinct is such that only a part of the precinct voters can legally vote for the said candidate. This section further provides that special ballots shall be prepared as 'hereinbefore provided.'
>
> "In one of our townships three candidates for three township offices, all of which candidates are unopposed, were inadvertently placed upon the general official ballot for a precinct such as is referred to in Section 49.52. My question is: Does the preparation and the exercising of voting on such a ballot disqualify the counting of such votes as are to be applied to all of the candidates on the general official ballot. We are not concerned with the problem of whether or not we can count the votes as applied to the candidates for the township offices."

In reply thereto we would advise:

The ballots you describe appear to fall within the category of defective ballots as defined in the following sections of the 1958 Code, to-wit:

#60-6-18

49.101 "Defective ballot does not nullify vote. No ballot properly marked by the voter shall be rejected:

"1. Because of any discrepancy between the printed ballot and the nomination paper, or certificate of nomination, or certified abstract of the canvassing board.

"2. Because of any error in stamping or writing the indorsement thereon by the officials charged with such duties.

"3. Because of any error on the part of the officer charged with such duty in delivering the wrong ballots at any polling place."

49.102 "Defective ballots. Said defective ballots shall be counted for the candidate or candidates for such offices named in the nomination papers, certificate of nomination, or certified abstract."

49.103 "Wrong ballots. Said wrong ballots shall be counted as cast for all candidates for whom the voter had the right to vote, and for whom he did vote."

We believe that your question is resolved in the case of State of Iowa v. Bernholtz, et. al., 106 Iowa, 157; 76 N.W. 662, which involved certain irregularities in the ballots offered to electors. The court held such ballots should be counted. We quote from said case beginning at p. 160. (Sec. 1122 of the Code of 1897 referred to therein, being now incorporated in the Code of 1958 as above quoted.) The court said:

"Section 1122 is as follows: 'No ballot properly marked by the voter shall be rejected because of any discrepancy between the printed ballot and the nomination paper or certificate of nomination, and it shall be counted for the candidate or candidates for such offices named in the nomination paper or certificate of nomination. No ballot furnished by the proper officer shall be rejected for any error in stamping or writing the endorsements thereon by the officials charged with such duties, nor because of any error on the part of the officer charged with such duty in delivering the wrong ballot at any pre-cinct or polling place, but any ballot delivered by the proper official to any voter shall, if properly marked by the voter, be counted as cast for all candidates for whom the voter had a right to vote, and

for whom he has voted.' It must be borne in mind that the election law was enacted to aid the elector in expressing his free choice, and not, by technical obstructions, to make the right of voting difficult and insecure. He has no part in the preparation of the ballots, and the object of this section is to prevent his disfranchisement without any fault on his part because of some mistake or willful misconduct of the election officers. The distinction between errors of such officers which would have the effect to deprive voters of the franchise, and a disregard of the law by the electors themselves, runs through all the cases. See Lindstrom v. Board, 94 Misc. 467 (54 N.W. Rep. 280); Miller v. Pennoyer, 23 Or. 364 (31 Pac. Rep. 830); Kirk v. Rhoads, 46 Cal. 399; Cook v. Fisher, 100 Iowa, 31, and authorities cited. The very evident purpose of section 1122 was the complete protection of the voter in the exercise of the right of suffrage, if himself without fault, regardless of the errors of the election officers. The clause in section 1121 prohibiting any 'but ballots provided in accordance with the provisions of this chapter' from being counted, evidently relates to ballots furnished the voter. He may not use a ballot of his own choosing, but must cast such as are provided by the proper officials. This is to be given him by the judges of election. Section 1114. When so received, he may rely upon it as genuine, and, when properly marked by him, have it counted as cast for all candidates for whom he had the right to vote and did vote. This is not a case where the electors have been deceived or misled by the mistake or fraud of the officers. The ballots were in all essential particulars like those prepared by the recorder. The use of the word 'Democratic' on the ticket could have deceived no one. The voters had the right, under section 1122, to have the ballots canted as cast, and when this was done the result was not in doubt. While the officers are without excuse in violating the plain provisions of the statute, their misconduct cannot be permitted to overturn the expressed will of the people."

Therefore in view of the above authorities, we are of the opinion that the ballots, described above in your letter, should be counted.

Respectfully submitted,

FRANK D. BIANCO
Assistant Attorney General

FDB:kvr

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

#60-6-19

June 14, 1960

Mr. Robert N. Johnson
Lee County Attorney
516 Seventh Street
Fort Madison, Iowa

Dear Mr. Johnson:

Receipt is acknowledged of your letter of June 1 as follows:

> "Recently, Lee County acquired a tract of land to be used for a county road equipment building. In acquiring the tract it was necessary that the property be surveyed in order to obtain an accurate legal description. The County Engineer is not only a registered engineer, but is also a registered land surveyor so that he was able to make the survey and certify thereto for the County's use. Of course, his services as the County Engineer are paid for by his salary. The question arises as to whether or not he would be entitled to an additional charge for the registered surveyor's certificate which was supplied to the County in this instance."

The office of County Engineer is created by Code section 309.17. Compensation of the County Engineer is fixed by the Board of Supervisors under Code section 309.18, and duties of the engineer are prescribed by the Board of Supervisors under Code section 309.19.

Garages or sheds for road equipment appear to fall within the general heading of activities financed by the secondary road fund. See Code section 309.9(7). Surveying in connection with road matters appears within the scope of duties of the County Engineer. See Code sections 309.35 to 309.38.

It, therefore, appears that the salary of the County Engineer is in full of all services performed by him for the county.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mmh4

#60-6-19

Mrs. Ruhland -

CITIES AND TOWNS: Airports -- Cities and towns may accept a gift of the donors' entire interest in property for airport purposes subject to the condition that the city pay for certain improvements necessary to fulfillment of such purposes. (Ltr. to Strack, Grundy Co. Atty., 6/14/60) #60-6-16

June 14, 1960

Mr. T. C. Strack
Grundy County Attorney
Grundy Center, Iowa

Dear Mr. Strack:

Receipt is acknowledged of your following letter:

> "The Grundy Center Development Corporation is attempting to obtain an airport for the City of Grundy Center. A contract has been made for the purchase of the site, and the State Aeronautics Commission has approved the site and development plans. Before full payment can be made for the site, it will be necessary to receive payment from the Aeronautics Commission of aid it is authorized to give. However, this aid cannot be paid to the Grundy Center Development Corporation, but must be paid to the City of Grundy Center.
>
> "Prior to the present time, the City passed and adopted a resolution agreeing to accept the airport from the development corporation when the airport was given debt-free. Objection was made to that procedure since the City would then have to pay over to the development corporation whatever sum the State Aeronautics Commission might contribute, and there would be no authority to make such payment since the resolution provided the airport was to be a gift and be debt-free.
>
> "To meet the objection referred to above, an amendment to the original resolution was drawn and submitted to the City Council, but objection was made to it since in effect the City would then be purchasing the property, rather than receiving it as a gift. A copy of the amending resolution is submitted herewith. Under this proposal the payment from the State Aeronautical Commission would be paid to the City and the City would then pay the sum to the seller of the land.

#60-6-16

"I would like an opinion from your office as to whether or not the City may legally proceed in accordance with the proposed amended resolution."

As I understand your question, it is essentially whether or not a city or town may accept as a gift something that is not entirely paid for. Code section 565.6 provides as follows:

"565.6 Gifts to municipal corporations. Counties, cities, towns, the park board of any city or town, and civil townships wholly outside of any city or town, and school corporations, are authorized to take and hold property, real and personal, by gift and bequest; and to administer the same through the proper officer in pursuance of the terms of the gift or bequest. No title shall pass unless accepted by the governing board of the corporation, township, or park board. Conditions attached to such gifts or bequests become binding upon the corporation, township, or park board upon acceptance thereof."

Code section 330.5 specifically applies the power to airports, as follows:

"330.5 Acquisition. Any such city or town is hereby authorized and empowered to acquire by purchase, gift, condemnation, lease or otherwise, either within or without its corporate limits and either within or without the territorial limits of this state, real estate and personal property for airport purposes; and in like manner to acquire or cause to be moved, removed, abated, eliminated, mitigated, or altered any structure or object protruding above the surface of the ground, or any use of land obstructing the airspace necessary for the safe and efficient flight of aircraft in landing or taking off at any airport, or otherwise constituting a hazard to such landing or taking off."

It is elementary that any interest in property may properly be the subject of a gift. In the case of cities and towns it would seem that the practical limitation would be in the case where acquisition of the outstanding interest would require exercise of a non-statutory power. This does not appear to be a problem in the case of acquisition of airports as the quoted language authorizes acquisition by means other than gift.

As I read the resolution, it is an acceptance by the city of a gift of land and certain improvements for airport purposes subject to the condition that additional improvements will be paid for by the city from a certain source. This would seem an entirely lawful exercise of power under the quoted statutes.

Of course, whether the project when carried out in such manner would qualify for aid from federal funds administered by the State Aeronautics Commission under Code sections 328.13 to 328.16 would depend upon "such terms and conditions as may be imposed by the United States government in making such grants" as is pointed out in Code section 328.14.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mmh4

HIGHWAYS: County hospital driveways -- If located within corporate limits and open to vehicular traffic bearing members of the general public seeking hospitalization, snow should be removed by city equipment pursuant to Code section 389.12. (Ltr to Harris, Greene Co. Atty, 6/14/60.) #60-6-X1

June 14, 1960

Mr. David Harris
Greene County Attorney
Jefferson, Iowa

Dear Mr. Harris:

Receipt is acknowledged of your letter of June 10 as follows:

> "Would you please furnish me with an opinion relative to the following questions?
>
> "The management of the Greene County Hospital at Jefferson, Iowa has had serious problems with snow removal from the driveways at the hospital, and particularly the emergency driveway.
>
> "Is Greene County obligated to remove the snow from either or both of the driveways? If not could they, if they wished, do so using secondary road funds and equipment?
>
> "Can the City of Jefferson, Iowa remove the snow from the driveways with city equipment, with or without reimbursement from the hospital?"

To start with, the driveways in question, being situated on public property and established for vehicular traffic, would seem to fall within the definition of "streets" or "highways" as set forth in Code section 321.1(48):

> "48. 'Street' or 'highway' means the entire width between property lines of every way or place of whatever nature when any part thereof is open to the use of the public, as a matter of right, for purposes of vehicular traffic."

#60.6.X1

Sections 306.1 and 306.2 classify all highways into road systems and define each road system.

Thus, by the process of elimination, the driveways in question are either "secondary roads" or "streets", depending upon whether the county hospital grounds are situated within or without the city limits.

If within the city limits, it would appear the proper function of the city to remove snow from the driveways, under Code section 389.12, to wit:

> "Duty to supervise. They shall have the care, supervision, and control of all public highways, streets, avenues, alleys, public squares, and commons within the city, and shall cause the same to be kept open and in repair and free from nuisances."

Section 389.2, requiring acceptance of dedication, would appear inapplicable to the right of way in question for the reason that, being already publicly owned by a governmental body, no dedication to public use by a "proprietor" is involved. Furthermore, see Code section 389.14, which provides:

> "'Roads' as streets. Such portions of all roads as lie within the limits of any city or town shall conform to the direction and grade and be subject to all regulations of other streets in such town or city."

In view of the statutory definition of "highway", it appearing that the driveways in question are located within the city and open as a matter of right to vehicular traffic bearing members of the general public in need of the county public hospital's services, I am of the opinion said driveways fall within the meaning of the requirement, the city "shall cause the same to be kept open", as set forth in Code section 389.12.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl

COUNTIES: ~~AND COUNTY OFFICERS~~ Cities and towns -- Municipal and county law enforcement officers are not authorized to enter into contracts for joint purchase, maintenance, and operation of radio equipment. (Craig to Statton, Comm'r Pub. Safety, 6/14/60) #60-6-VV

June 14, 1960

Honorable D. M. Statton, Commissioner
Department of Public Safety
L O C A L

Dear Mr. Statton:

This will acknowledge receipt of your letter of June 9, in which you state:

> "Your opinion is respectfully requested as to whether municipal and county law enforcement agencies may enter into contract for the joint purchase, maintenance, and operation of radio equipment; the equipment to be physically located in an adjacent city or county. The equipment, however, would be used by and would be for the benefit of all participating agencies.
>
> "Since there are many law enforcement agencies desiring this information, it would be appreciated if your opinion could be rendered as soon as possible, preferably before June 20, so that Boyd Porter, Director of the Radio Communications Division, could present same at a state-wide conference of law enforcement agencies on June 22."

It is well settled that a county has only such powers as are expressly given to it by statute. In In re Estate of Frentress, 249 Iowa 783, 89 N.W. 2d 367, the Iowa Supreme Court stated, at page 786 of 249 Iowa:

> "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. (citations)."

#60-6-VV

1956 Report of the Attorney General, 201, cites several additional Iowa cases holding that counties have only the powers expressly granted them by the legislature or reasonably and necessarily implied as incident to a power expressly conferred by statute.

Similarly, municipalities are creatures of statute and limited to powers expressly granted by statute or necessarily or fairly implied or incident to powers expressly granted by statute. The Iowa Supreme Court has so held in several recent cases, including City of Mason City v. Zerble, 93 N.W. 2d 94; Gritton v. City of Des Moines, 247 Iowa 326, 73 N.W. 2d 813; and City of Des Moines v. District Court of Polk County, 241 Iowa 256, 41 N.W. 2d 36.

In Stoner-McCray System v. City of Des Moines, 247 Iowa 1313, 78 N.W. 2d 843, 58 A.L.R. 2d 1304, the Court stated, at page 1322 of 247 Iowa:

> ". . . municipalities 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 of express powers." (Emphasis supplied)

I find no provision in the Iowa Code which expressly provides that municipal and county law enforcement agencies may enter into contracts for the joint purchase, maintenance, and operation of radio equipment, nor do I find any provisions that necessarily imply such authority.

Therefore, based upon the above authority, in my opinion the answer to your question is in the negative -- municipal and county officers may not enter into contracts for the joint purchase, maintenance, and operation of radio equipment.

Very truly yours,

FRANK CRAIG
Assistant Attorney General

FC:bl

WELFARE: County claim for relief furnished -- Code section 252.13 is the only statutory provision whereby a county may obtain reimbursement for relief furnished under Code Chapter 252. (Ltr to Greenfield, Guthrie Co. Atty., 6/15/60.) # 60-6-13

June 15, 1960

Mr. C. F. Greenfield
Guthrie County Attorney
Bayard, Iowa

Dear Mr. Greenfield:

Receipt is acknowledged of your letter of April 22 as follows:

> "Guthrie County would like to request an Attorney General's opinion on the following set of facts:
>
> "Mr. C. E. Scott of Casey, Iowa, on March 28, 1960, signed a warranty deed in which he deeded 18 acres of ground to Guthrie County, Iowa, for and in consideration of $1.00 and other valuable considerations. The Guthrie County Welfare Board and one Supervisor on the board had promised Mr. Scott that if this was done, Guthrie County would take care of Mr. Scott for the remainder of his lifetime, and the entire Guthrie County Board of Supervisors knew about this arrangement before Mr. Scott signed the deed. Mr. Scott signed the deed which I had prepared. The same was delivered tp the County Auditor of Guthrie County by me for safe keeping. The deed was not recorded as the same had not been officially accepted by the Guthrie County Board of Supervisors. The deed was being received under Iowa Code Section 569.1 in order to keep Guthrie County from having a complete loss in the care of Mr. Scott for the rest of his lifetime.
>
> "Mr. Scott died on April 15, 1960, at 11:45 A. M. The deed has not been recorded, and the same has not been officially accepted of record by the Board of Supervisors in session.

60-6-13

"The known claims against Mr. Scott are as follows:

"1.	State Institutional Lien for care of Mr. Scott at Clarinda, the same being duly recorded in the office of the Auditor of Guthrie County, Iowa . .	$847.13
"2.	Guthrie County real estate taxes on the land deeded	74.84
"3.	Dr. Todd, Guthrie Center, Iowa, care in last illness	69.00
"4.	Guthrie County Hospital, care in last illness	264.45
"5.	Mr. Hartze, care in last illness .	5.00
"6.	Evans Funeral Home, burial	200.00
"7.	A Mrs. Anderson, a niece of the decedent who says she has a claim for care, and the amount is unknown	Unknown

"QUESTIONS:

"1. Does the Guthrie County Board of Supervisors have the authority to record the deed and pay all of the claims listed and any other claims that might turn up; and if any funds are left over, keep the balance for Guthrie County?

"2. Could the Guthrie County Supervisors just tear up their deed and have one of the heirs open an estate for Mr. Scott and hope to collect their claim from the sale of the real estate?

"Under the above statement of facts, what procedure would your office recommend for the Guthrie County Board of Supervisors to follow?"

Your first question is whether a county may accept a deed under Code section 569.1 to reimburse it for relief given under Code Chapter 252.

The answer appears furnished by the decision of the Supreme Court of Iowa in a case titled, In re Estate of Frentress, 249 Iowa 783. There the county had accepted mortgages under Code section 332.3 to reimburse it for relief given under Code Chapter 252. The Supreme Court said, at page 788 of 249 Iowa:

"The county being a quasi corporation with its duties and powers being those specifically enumerated by statute or being

necessarily implied therefrom, the care of the poor being purely a statutory obligation, and the only statutory provision existing whereby the county may reimburse itself for funds expended being section 252.13, supra, we are constrained to hold that section 252.13 is exclusive and that the county in accepting the mortgages in question exceeded its authority and that the same are of no force and effect . . ."

In view of the holding of the Supreme Court that section 252.13 provides the exclusive means of recourse in such cases, it appears the county board of supervisors is without authority to accept the deed.

Section 252.13 provides as follows:

"Recovery by county. Any county having expended any money for the relief or support of a poor person, under the provisions of this chapter, may recover the same from any of his kindred mentioned herein, from such poor person should he become able, or from his estate; from relatives by action brought within two years from the payment of such expenses, from such poor person by action brought within two years after becoming able, and from such person's estate by filing the claim as provided by law."

The only recourse the county has thus appears to be a claim against the estate of the deceased relief recipient.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl

HIGHWAYS: Secondary roads –

Supervisors of several counties have no authority to enter into joint purchase of weighing machines for patrol purposes. (Abels to Larson, Ass't Story Co. Atty., 6/15/60) #60-6-24

June 15, 1960

Mr. George R. Larson
Assistant Story County Attorney
Nevada, Iowa

Dear Mr. Larson:

Receipt is acknowledged of your letter of April 25 as follows:

> "The County Engineer and Board of Supervisors have asked this office to request an Attorney General's Opinion with respect to the following:
>
> "(1) Could a board of supervisors, under Section 309.(2) of the 1958 Code of Iowa, pay the State Highway Commission for the services of a weighing crew with its portable scales to patrol a secondary road for the purpose of checking overloaded trucks which are damaging the secondary roads on the theory that such costs are incident to the maintenance and repair of such secondary road.
>
> "(2) If such weighing crew and scales were not available, could four or five counties band together, purchase the portable scales and pay a weighing crew to patrol the secondary roads of each county one day a week under the supervision and control of the State Highway Commission and each county pay its proportionate share of the costs involved from such county's secondary road fund.
>
> "(3) If either or both of these procedures are possible under the existing law, would the county's secondary road budget have to be amended pursuant to Sections 309.93-97 of the 1958 Code of Iowa, as amended by the 57th GA?"

In answer, it is my opinion the answer to all three questions is in the negative for the reason the board lacks express statutory authority. I base my opinion on the decision of the Supreme Court in the case of Gritton v. City of Des Moines, 247 Iowa 326, 73 N.W.2d 318.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

COURTS: Municipal -- executions -- Under Code section 602.16, the municipal court may issue writs of execution in the same manner as authorized for district courts in Code section 626.2, in any case of which the municipal court had jurisdiction. (Abels to Hanrahan, Polk Co. Atty., 6/15/6.)
#60-6-15

June 15, 1960

Mr. Ray Hanrahan
Polk County Attorney
Room 406, Courthouse
Des Moines, Iowa

Dear Mr. Hanrahan:

Receipt is acknowledged of your letter of April 28 as follows:

> "We have today received a letter from the Office of the Polk County Sheriff in which he requests that we secure an opinion from you. The letter is as follows:
>
> > "'I have been receiving executions from Municipal Courts throughout the State of Iowa directing me to do certain things under these executions. It has always been questionable to me that these executions are legal. Section 626.2 of the Code of Iowa, 1958 states that executions upon judgments of the District and Supreme Courts may be issued into any county which the party ordering may direct. Judgments of the Municipal Court can be transcripted and then, of course, the Clerk of the District Court could issue an execution to another county.
> >
> > "'I would appreciate your securing an opinion from the Attorney General of Iowa as to whether or not these executions are legal. There might be some liability on the part of the Sheriff if these executions are illegal and this is true if a Sheriff should levy an execution in his

#60-6-15

> county on an execution issued by a Justice of the Peace of another County.'
>
> "We shall appreciate receiving your opinion on the above request at your convenience."

The answer to your question appears furnished by Code section 602.16, which provides in pertinent part:

> " . . . In all matters of which the municipal court has jurisdiction, the court and the judges shall have the same powers in reference to injunctions, writs, orders and other proceedings in and out of court as are possessed by the district court and judges thereof." (Emphasis supplied)

Therefore, inasmuch as Code section 626.2 empowers district courts to issue such executions and section 602.16 gives municipal courts, in matters of which it has jurisdiction, the same powers with respect to writs as the district court, it follows the municipal court may issue such writs of execution in any case of which it had jurisdiction.

In support of the above conclusion, the Supreme Court has held, "execution only can issue out of the office of the Clerk of the Court which rendered the judgment". See Mudge v. Rivermore, 148 Iowa 473 at page 475; Brunk v. Moulton Bank, 121 Iowa 14 and cases cited therein.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl

HIGHWAYS; Secondary road maintenance -- Whether statutory mileage limitation in Code section 79.9 applies to one who furnishes his own truck in connection with tree removal depends on whether he is an employee or an independent contractor.

(Abels to Mather, Sac Co. Atty., 6/15/60)
#60-6-16

June 15, 1960

Mr. Charles Mather
Sac County Attorney
Sac City, Iowa

Dear Mr. Mather:

Receipt is acknowledged of your letter of May 2 as follows:

> "The Board of Supervisors of Sac County have entered into an agreement with an individual whereby he performs services in connection with the removal of trees along the public highway of the county and supplies his own truck in connection therewith.
>
> "According to the agreement he receives ten cents per mile for the use of his truck.
>
> "Is this compensation for the use of the truck permissable, or are the provisions of Section 79.9 of the Code applicable so as to limit the compensation to seven cents per mile?"

Section 79.9, Code 1958, provides as follows:

> "79.9 Charge for use of automobile. When a public officer or employee, other than a state officer or employee, is entitled to be paid for expenses in performing a public duty, no charge shall be made, allowed, or paid for the use of an automobile in excess of seven cents per mile of actual and necessary travel except as otherwise provided."

The answer to your question depends entirely upon whether the individual with whom the county has the agreement is an employee or an independent contractor.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:mmh4

#60-6-16

TOWNSHIPS: Fire Protection -- whether a telephone system can be paid for as a fire alarm system depends on actual use. Townships have no authority to pay for sending firemen to school. (Abels to Barlow, Palo Alto Co. Atty., 6/16/60) #60-6-7

June 16, 1960

Mr. Charles H. Barlow
Palo Alto County Attorney
Emmetsburg, Iowa

Dear Mr. Barlow:

Receipt is acknowledged of your letter of April 6 as follows:

> "I would appreciate an informal Attorney General's Opinion upon the following questions involving Township Government.
>
> "These involve a fire district under Chapter 359 of the Code.
>
> "1. The Ayrshire Farmer's Mutual Telephone Company of Ayrshire, Iowa is changing to a dial telephone system and purposes that Silver Lake Township enter into a contract with it by which the telephone company would install dial telephones in the houses of the firemen and maintain them at a cost of $180.00 a year over a 7 year period. I believe that I am correct in stating that the telephone could be used personally by the firemen at either a reduced charge or at no charge to them. My information as to the installation is very limited, but I imagine that it will allow the ringing of all firemen simultaneously. In your opinion, would this be fire equipment or apparatus within the contemplation of 359.42 Code of Iowa 1958?
>
> "2. Also, the same township contemplates sending its firemen to a school and would like to have your opinion as to whether such an expenditure would be authorized under chapter 359?"

#60-6-7

In answer to your first question, you are advised that whether a given item is fire equipment or apparatus is a question of fact. For example, an axe might be and frequently is fire equipment, depending upon the use to which put.

Whether or not the telephones in question could be classified as fire equipment would similarly depend on the use. Where the system is installed to serve as an alarm system, it would seem proper for the township to pay for the installation and service as fire equipment, but where the element of use as a means of personal or business communications is added, it is my opinion it would be a misapplication of public funds for the township to pay for more than the actual percentage of use made of the telephones as a fire alarm system.

In answer to your second question, you are advised that Chapter 359 of the Code contains no authorization for schooling of township firemen comparable to that provided in the case of city and town firemen by Code section 368.13. Therefore, on the precedent of Gritton v. City of Des Moines, 247 Iowa 326, 73 N.W. 2d 813, it appears statutory authority to provide the schooling in question is lacking.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl

~~CHILD~~ WELFARE ~~SERVICES~~: CARE OF CHILDREN - ~~USE OF STATE FUNDS~~: State funds appropriated for child welfare services may only be used for the payment of supervisory services as defined in Chapter 235 and to contribute to the proportionate share of the administrative expenses of the State Department. (Peterson to Smith, Chmn, Bd of Social Welfare, 6/17/60) June 17, 1960.

#60-6-18

Mrs. Irene M. Smith, Chairman
State Board of Social Welfare
State Office Building
Des Moines, Iowa

Dear Mrs. Smith:

Your letter of May 20, 1960 reads in part as follows:

> "In the formal opinion of the Attorney General given December 22, 1958 with reference to 'Child Welfare Services: Foster Care: Use of Federal and State Funds,' the State Board was found to have authority for using federal funds for the 'foster care of children who are homeless, dependent and neglected and in danger of becoming delinquent.
>
> "A second point in this opinion rules that 'state funds appropriated for child welfare services cannot be used for foster care expense under the present provisions of Chapter 235 of the Code.' In the informal discussion of the original opinion, there is suggestion that had the State Board asked the Legislature to appropriate an amount 'for foster care expenses' within the scope of responsibility the State Board carries for child welfare services, it might have been possible to approve the expenditure of such state funds for the 'care of children' as provided in the definition of 'child welfare services' in Section 235.1 Code of Iowa.
>
> "We would like to request ** opinion from the Attorney General's office with respect to the following questions:
>
> "1. May the State Board of Social Welfare include in its budget a request for funds to be used in the 'care of children' in carrying out its responsibility for 'planning, establishing, extending and strengthening public -- child welfare services within the state'?
> "2. May the State Board make rules and regulations governing the expenditure of such state funds as may be appropriated for the care of children?"

#60-6-18

Your inquiry is answered by the opinion referred to in your inquiry, which opinion is now reported at 1958 O.A.G., page 322. I quote three paragraphs from this opinion which relates to your inquiry:

> "***
>
> "The above rules of construction, and a study of the provisions of Chapter 235, constrains us to the belief that the legislature did not intend to provide for the actual expenditure of state funds for the payment of expenses for foster care of children, as defined in Section 235.1 of the Code.
>
> "***
>
> "As to state funds, there is no authority under the present statutes, permitting use of state funds for costs of foster care as such. Such state funds must be limited in use to the payment of the supervisory services spelled out in Chapter 235.
>
> "***
>
> "State funds, as appropriated for child welfare services, under the present provisions of the law, Chapter 235, as amended, cannot be expended for foster care, as such. Such funds may only be used for the payment of the supervisory services as defined in said chapter, with the additional burden of its proportionate share of the general administrative expenses of operating the state department."

The change in nomenclature from "foster care" to "care of children" does not change the nature of the expenditures and until the legislature amends Chapter 235, such expenditures are unauthorizedfrom the state appropriation.

Respectfully submitted,

Carl E. Peterson
Special Assistant Attorney General

CEP/sp

BEER: Advertising promotion ~~scheme~~. Under factual situation stated, manufacturers for a coupon, gave a free gift of 6-pack of beer. Held, not a violation of Chapter 124, Code 1958. (Bianco to Kuehl, Dir., State Permit Bd., 6/21/60) #60-6-19

June 21, 1960

State Permit Board
L O C A L

Attn: Ray O. Kuehl, Director

Dear Mr. Kuehl:

We have your favor of June 15th in which you state:

> "It is our understanding that the enclosed type folder has been sent through the mail to many Iowa residents. You will note that on the back of the enclosed folder is printed - 'If you haven't tried _____ since March 1st, let us buy your first 6-pack. Simply write the _____ Brewing Company, _____, and tell us you'd like to _____. We'll send you a certificate good for one Free 6-Pack at your favorite tavern, supermarket or package goods store. I cordially invite you to take advantage of this offer and discover for yourself the lighter, brighter taste of _____'.
>
> "Your opinion is requested as to the legality of giving away beer in Iowa through this procedure."

In reply thereto you are advised as follows:

It is noted by the circular in question that a customer must write a letter to the brewing company (manufacturer) accepting the offer of a free 6-pack of beer, (limit one per family). The offer is limited in time to two weeks from the receipt of the circular. Further investigation discloses that upon receipt of the letter the brewing company then forwards to the customer a coupon for one FREE 6-pack of beer. The customer takes the coupon to a class "B" or "C" retailer and receives without cost to him the 6-pack of beer. The retailer then presents these coupons, to his distributor, together with other proof (invoices etc.) that he has honored the coupons, and delivered the beer to the customers. The distributor (wholesaler) on the basis of the coupons, exchanges the coupons for

#60-6-19

the stock of beer which the retailer has used to honor the coupons.

This procedure in effect is only an exchange of stock, the manufacturer replacing by means of the coupons, the stock of beer already purchased by the retailer, through the agency of the wholesale distributor.

There is no provision in the law, Chapter 124, Code 1958 that prohibits a manufacturer from making a gift of beer as a part of an advertising promotion scheme. (See O.A.G., Erbe to Synhorst dated November 5, 1959).

The only prohibition in this respect is contained in Sec. 124.12 (Authority under Class "B" permit) which states: "* * * 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." It may readily be seen that said prohibition does not apply to manufacturers. Under the above factual situation the stock of the retailer has been replaced by the manufacturer, who in fact has made the gift to the customer and not the retailer.

Therefore it is our opinion that the above described advertising promotion scheme does not violate the beer law, Chapter 124, Code 1958.

Respectfully submitted,

FRANK D. BIANCO
Assistant Attorney General

FDB:kvr

HEALTH:
Cosmetology - ~~Electrolysis license~~ -- Under the provisions of Chapter 157, Code 1958, license to practice electrolysis is an auxiliary license and all requirements for a cosmetology license must be met as a prerequisite to obtaining an electrolysis license. (Bianco to Zimmerer, Comr Pub Health, 6/21/60) #60-6-30

June 21, 1960

Dr. Edmund G. Zimmerer
Commissioner of Public Health
L O C A L

Dear Dr. Zimmerer:

This is to acknowledge receipt of your letter dated June 8, 1960.

Therein, you requested opinions on the following questions:

> "1. Does the fact that one is a registered nurse exempt one from the practice of cosmetology under Section 157.1 of the Code if the nurse or other professional practices cosmetology or other profession exclusively? Is she engaged exclusively in the practice of her profession as a nurse?
>
> "2. Section 157.5 states that if an applicant desires a license authorizing him to remove superfluous hair, etc. Since the statute does not license the practice of electrolysis per se, must she be an applicant for a cosmetology license?"

The answers devolve to a study and interpretation of the applicable code provisions since the cases are silent on these questions. The relevant provisions of Section 157.2 as originally enacted in 1927 are as follows:

> "Exceptions. The preceding section shall not be construed to include the following classes of persons:
>
> 1. Licensed physicians, surgeons, osteopaths, nurses, dentists, optometrists, chiropractors or podiatrists." (Emphasis Supplied) Chap. 124-B1 Sec. 2585 -B2.

#60-6-30

In 1929 an amendment was adopted to limit the above cited section by adding the words "when (they are) engaged in the practice of their respective professions." Session laws 1929, 43 G.A., Chap. 70, Sec. 8.

The fair import of this amendment is that the legislature found this exception too inclusive as originally enacted and intended therefore, to limit its applicability. This, the fact that one is exempt under Section 157.2 while engaged exclusively in one of the specified professions has no effect when that person no longer practices only such cosmetology or electrolysis as is incidental to that specified profession. When such a person wishes to enter into the professions incompassed in Chapter 157 of the Code independently, he no longer comes within the express language of the exception and therefore, must comply with the provisions enumerated, therein.

On this rationale a nurse when engaged in the profession of electrolysis as a separate profession is not engaged exclusively in nursing but rather a separate and distinct profession. Thus she must comply with the provisions of the above mentioned chapter of the Code. To hold otherwise would be to broaden the interpretation given to an exception which the legislature has already narrowed by amendment, and would therefore be in derrogation of legislative intent.

Although it would appear that Section 157.5 on its face is open to the interpretation that an electrolysis license is a completely independent license the history of this provision indicates that it is merely an auxillary license.

The Code of 1927, Sec. 2585-b5, which was replaced by the present Sec. 157.5 by amendment in 1929,,read as follows:

> "If an applicant desires a license which also authorizes him to remove superfluous hair by the use of electricity, commonly defined as the practice of electrolysis, he shall present, in addition to that required by the preceding sections, further evidence satisfactory to said examiners of having also completed such a course in a school recognized by them which teaches a special course in the practice of electrolysis or of having had additional training, for at least three months, under the direct supervision and instruction of a practitioner of cosmetology licensed to practice electrolysis, which training shall include such practical and theoretical study as is required by such board of examiners."

Section 157.5, which replaced the above section, now requires the applicant to have a diploma from a school recognized by a board of examiners, and also satisfactorily pass a prescribed examination, in order to receive a license for the practice of electrolysis.

In addition to the repealing of old means of obtaining such a license, the words ". . . in addition to that required by the preceding section" were deleted from this subsection. However, in absence of an express provision illustrating a change in legislative intent, the electrolysis license must remain auxiliary, and subject to the requirement of first obtaining a license to practice cosmetology.

Additional support for this position is found in the fact that the practice of electrolysis may come within the definition of cosmetology as expressed in Sec. 157.1(2) of the Code.

> "For the purposes of this chapter the following classes of persons shall be deemed to be engaged in the practice of cosmetology: . . . (2) Persons who, with hands or mechanical or electrical apparatus or appliances, or by the use of cosmetic preparations, antiseptics, tonics, lotions, or creams, engage for compensation in any one or any combination of the following practices: . . ., or the removing of superfluous hair by the use of electricity or otherwise, on or about the body of any woman or child."

Therefore, it is the opinion of this office that under the existing Code provisions, one who qualifies under the exception of Sec. 157.2, is removed from this exception when he enters into the independent profession of electrolysis, not within the scope of his original exempt profession, and must comply with the provisions of this chapter. Furthermore, a license for the practice of electrolysis, dealt with in a subsection of this chapter, and not expressly declared an independent license, is an auxiliary license. Thus, the requirements for a cosmetology license must be met as a prerequisite to obtaining an electrolysis license.

Respectfully submitted,

FRANK D. BIANCO
Assistant Attorney General

FDB:RS:kvr

WELFARE: Legal settlement -- A mental incompetent with settlement in Iowa does not lose it by absence from the state for more than one year. (Opld to Flander, Bremer Co. Attny., 6/21/60) #60-6-21

June 21, 1960

Mr. Mervin J. Flander
Bremer County Attorney
123½ East Bremer Avenue
Waverly, Iowa

Dear Mr. Flander:

Receipt is acknowledged of your letter of June 16 as follows:

> "A man and his wife have resided in Bremer County, Iowa, continuously since 1925 with the exception of temporary absences. They have a 25 year old son who has resided with them since birth and who has been an incompetent for many years. The son's incompetence is of such a nature that he would be a fit subject for institutionalization at Woodward.
>
> "The son was placed by the parents in a private church institution designed for the care of such incompetents in Nebraska. If the incompetent son remains in the Nebraska institution for a period of more than one year under circumstances which prevent him from acquiring legal settlement in the State of Nebraska, will he have lost his legal settlement in Bremer County, Iowa, under the provisions of Section 252.17 of the 1958 Code of Iowa?
>
> "Your early opinion in this matter will be sincerely appreciated."

#60-6-21

The answer to your question seems furnished by an opinion appearing at page 585 of the 1934 Report of the Attorney General. At page 586 (citing authority) is advanced the proposition:

> "However, in so far as the change of residence or change of legal settlement is concerned, and so far as the law applies to a person who is insane or mentally incompetent, we believe it is governed by the same underlying principle, that is, that a person who is totally insane, or one who is so mentally incompetent that he is void of understanding, cannot establish a legal settlement or a domicile."

That a mental incompetent does not lose his settlement by absence from the state appears true, despite Code section 252.17, which provides:

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

The word "removed" in the statute seems to have been construed as voluntary removal, as distinguished from enforced absence due to mental affliction, illness, or war emergency. In this connection, see 1946 Report of the Attorney General, page 122 and 1904 Report of the Attorney General, page 24.

Thus, it would appear that the inmate of the Nebraska mental institution, who is the subject of your letter, never lost his settlement in Bremer County because he was mentally incapable of forming the voluntary intention requisite to either gaining or losing such settlement.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl

TOWNSHIPS: Fence viewers -- The party in whose favor the fence viewers made their decision is the proper party to bring suit to enforce it. (Allen to Samore, Woodbury Co. Atty., 6/21/60) #60-6-3

June 21, 1960

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

Dear Mr. Samore:

Receipt is acknowledged of your letter of June 14 as follows:

"I would appreciate very much your opinion on the following facts which pertain to Chapter 113 of the 1958 Code of Iowa.

"The township trustees have determined the fence line under this particular chapter between adjoining landowners, and their findings have been properly recorded in the Recorder's Office. The property owner who is adversely affected refuses to recognize the fence line as established by the township trustees, and further refuses to allow removal of the fence from its present location to the line established by the trustees. He has failed to appeal from the trustee's decision to the District Court as provided by this chapter.

"I would like your opinion as to whether the enforcement of the fence line decision is a duty of the County Attorney's Office, and if so how we should proceed. In the event that this is not a function of this office, in what manner is the fence line decision to be enforced?

"Thank you for your courtesy in this regard."

#60-6-3

Inspection of Chapter 113 and case decisions annotated thereunder indicates that, although the fence viewers have power to determine whether a line fence is of a lawful nature and who shall erect, rebuild, or maintain each part of it, they have no power to decide a disputed boundary line. McAvoy v. Saunders, 161 Iowa 651, 143 N.W. 548; Boyd v. Shoop, 107 Iowa 10, 77 N.W. 482; Peschongs v. Mueller, 50 Iowa 237.

Since your letter refers to moving the fence rather than building, contributing expense, or maintaining it, the problem may involve a question of title, proper only for decision in a civil action in district court.

Apart from the possible jurisdictional question, when the fence viewers have made their decision, having acted as judges and not as parties to the dispute, it would appear the burden of enforcing the decision by appropriate proceedings in district court would fall upon the party to whose benefit the decision resulted. According to 42 Am. Jur., Public Administrative Law, par. 167, action to enforce an administrative decision is properly brought by the real party in interest who, in the situation you describe, would seem to be the party in whose favor the fence viewers rendered their decision.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl

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

June 23, 1960

Honorable Lawrence D. Carstensen
State Representative, Clinton County
505 Wilson Building
Clinton, Iowa

Dear Mr. Carstensen:

Receipt is acknowledged of your letter of June 15 as follows:

> "Chapter 258 of the laws of the 58th General Assembly repealed all of Chapter 339 of the 1958 Code. In its place is set up a medical examiner system. The statute provides that this medical examiner system shall go into effect January 1, 1961.
>
> "Section 339.1 of the 1958 Code in part provides 'The coroner shall perform all the duties of sheriff, when that office is vacant; where it appears from the papers that the sheriff is a party to an action or proceeding in a court of record;' . . . .
>
> "I request an opinion as to whom would be the proper person or officer to serve notice on or arrest the sheriff after January 1, 1961. Do you think that this matter needs legislative correction?"

Code section 337.20 appears to provide a means whereby the office of sheriff may continue to function in the event of a vacancy. However, as you point out, a gap is left in the law by the repeal of section 339.1 where the sheriff is a party to an action or otherwise disqualified.

#60-6-33

This would pose no insurmountable problem so far as serving the sheriff in a civil action brought against him personally is concerned, as under R. C. P. 52 any person other than a party or his attorney could make the service.

Insofar as placing the sheriff under arrest is concerned, under Chapter 755 of the Code, it seems such could be accomplished either by another peace officer (marshal, constable, highway patrolman, etc.) or by a private person.

However, the situation could get complicated after the initial step of service or arrest in either proceedings. Difficulties could arise in impaneling a jury, as was the case in Gollosbitsch v. Rainbow, 84 Iowa 567, 51 N.W. 48 and Minott v. Vineyard, 11 Iowa 91. Complications could also arise in connection with levy of execution of a judgment against a sheriff.

It would, therefore, seem that justice might be expected to function more smoothly were some statutory provision made to fill the gap left by the repeal of Code sections 339.1 and 339.2.

I have prepared and enclose a rough draft for a bill that might do the job. Undoubtedly, many variations and improvements will suggest themselves to you. The language of the repealed sections provides working material for a model, but I am not sure whether the power should be conferred upon one of the other county officers or the selection left up to a judge.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl
Encl

A BILL FOR

An Act to provide for the performance of the duties of sheriff when he is a party to the proceedings, absent, or disqualified.

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

SECTION 1. The Clerk of Court or a suitable person appointed by him shall perform all the duties of sheriff where it appears from the papers that the sheriff is a party to an action or proceedings in a court of record; where, in any action commenced or about to be commenced, an affidavit is filed with the clerk of court, showing the absence of the sheriff or his deputy from the county, and that they are not expected to return in time to perform the service needed, or showing partiality, prejudice, consanguinity, affinity, or interest upon his part, in which case the clerk shall indorse upon the process the reason therefor, which he or his aforesaid appointee shall execute in the same manner and receive the same fees as if he were sheriff.

Explanation

The Repeal of Code sections 339.1 and 339.2, effective January 1, 1961, necessitates provision for someone to perform the sheriff's duties when he is a party to the proceedings, absent, or otherwise disqualified, but where the office is not vacant for the purpose of enabling the first deputy to act under section 337.20.

EMPLOYMENT AGENCIES: FEE LIMITATION LABOR; Employment Agencies

1. Matters of privity of contract may not be considered by this department.
2. Violation of fee limitation punishable as provided in Section 94.12, The Code 1958
3. Interest on principal secured by a promissory note, no provision appearing in the contract to the contrary, would not be a part of the fee subject to limitation of 94.6, The Code 1958 (Leach to Lowe, Com'r of Labor, 6/24/60)

#60-6-34

June 24, 1960

Don Lowe, Commissioner
Bureau of Labor
Local

Dear Sir:

This will acknowledge receipt of your letter under date of June 14, 1960, reading as follows:

"We would like a formal opinion concerning the issuance of a license to an employment agency as referred to in Chapter 95 of the 1958 Code of Iowa. It is important that we receive this opinion at a very early date inasmuch as we are holding a number of applications for renewal of license which must be in the possession of the various employment agencies by July 1, 1960, in order to be in compliance with the Code.

"You will find enclosed several contracts and schedules of fees. I would like those on the original forms returned at such time as they have served your purpose, the Thermo-Fax copies you may retain. I am enclosing a letter signed by Mr. Jones, Mr. Synhorst and myself which was mailed to he various agencies at the same time application for renewal of license was mailed.

"RE PRATT-YOUNGLOVE EMPLOYMENT AGENCY CONTRACT: I quote "In case extended payments are desired, I agree to sign a promissory note on terms acceptable to the Pratt-Younglove Employment Agency." Are the extended payments over and above the length of time allowed in their contract, such as 30-45-60- or 90 days? Is this contract legal under Chapter 94, Section 94.6?

"RE TAYLOR EMPLOYMENT SERVICE CONTRACT: I quote from the reverse side of that contract which I assume it is binding as it states above the applicant's signature that he agrees to the additional provisions. "I further agree that within 72 hours (exclusive of Sundays and holidays) after accepting employment I will appear at Taylor Employment Service and will execute a negotiable promissory note in he form attached hereto for the amount due in accordance with this contract with payments in accordance with the times specified by this contract." Is this contract legal under Chapter 94, Section 94.6?

#60-6-34

"RE CEDAR EMPLOYMENT SERVICE CONTRACT: I quote from the contract as follows: "I understand that if I voluntarily leave a permanent position which was secured through Cedar Employment Service, that it will in no way cancel my obligation to Cedar Employment Service." Should we issue a license to the employment agency if the above is included in their contract? Are we expected to determine whether the contract and schedule of fees, as referred to in Section 95.2, are in compliance with the limitation of fee in Section 94.6. Under Section 94.6 should not the quote requested in our enclosed letter, in which we asked for the limitation of 5% appear on the contract, be just as much a part of the contract as the limitation of 25%? Is this contract legal and should we issue license?

"RE CONFIDENTIAL EMPLOYMENT SERVICE CONTRACT: You will note that the same provisions regarding the signing of note and termination of employment also prevail in this contract. Again I ask if the contract is legal and should we issue license?

"If the Employment Agency Commission is within its right to issue a license to an employment agency that does not have the 5% limitation of fee, would this constitute a violation if the employment agency collected more than the 5% based on annual gross earnings, as referred in an Attorney General's opinion of June 2, 1959? Would interest charged on a promissory note be considered a part of the fee collected for the furnishing or procurement of any situation or employment as referred to in Section 94.6? Inotherwords, if an employment agency charges the full legal limit, as referred to in Section 94.6 and then charges an interest rate on a note covering this same situation, would they be in violation under this Section?"

In reply thereto:

Section 95.2, The Code 1958, in pertinent part provides that:

"Any person, firm, or corporation applying for a license, as provided in this chapter, to operate an employment agency for furnishing or procuring of employment shall furnish the commission with its contract forms, which form shall distinctly provide that no fee or other thing of value in excess of one dollar shall be collected in advance of the procuring of employment and no license shall be issued unless such contract form contains such provision. Thereafter, any person, firm, or corporation to whom a license has been issued that violates this provision of its contract shall have his license canceled." (Emphasis supplied).

If the schedule of fees which is required to be filed with the application for a license for an employment agency is included as a part of the contract form then such part of said contract must conform to and be in accord with the provisions of Section 94.6,

The Code 1958, which reads as follows:

> "No such person, firm, or corporation shall charge a fee for the furnishing or procurement of any situation or employment paying less than two hundred fifty dollars per month which shall exceed twenty-five percent of the wages paid for the first month of any such employment or situation furnished or procured, but in no event shall the charge for the furnishing or procurement of any situation or employment be in excess of five percent of the annual gross earnings. The provisions of this section shall not apply to the furnishing or procurement of vaudevill acts, circus acts, theatrical, stage or platform attractions or amusement enterprises."

In the absence of the inclusion of the aforementioned fee schedule in the contract, and except for the provision provided in Section 95.2, supra, which must be included as a part of the contract, the other matters contained in the contract are a matter of privity of contract, that is, that connection or relationship which exists between two or more contracting parties. There is no privity of contract between the commission and the agency or person seeking the services of the agency.

The question propounded in your letter relating to the Pratt-Younglove Employment Agency Contract; Taylor Employment Service Contract; Cedar Employment Service Contract; and the Confidential Employment Service Contract, go to matters of privity of contract, which this department must decline to answer.

In reply to your question, to wit: "If the Employment Agency Commission is within its right to issue a license to an employment agency that does not have 5% limitation of fee, would this constitute a violation if the employment agency collected more than the 5% based on annual gross earnings, as referred in an Attorney General's opinion of June 2, 1959?"
you are advised that the 5% fee limitation is imposed by law and any person, firm, or corporation violating any of the provisions of Chapter 94, The Code 1958, is subject to the punishment provided in Section 94.12, The Code 1958.

Our further observation dictates that, and in answer to your last question, interest on principal secured by a promissory note would not, in the absence of a provision appearing in the contract to the contrary, be considered a part of the fee collected for the furnishing or procurement of any situation or employment as referred to in Section 94.6, The Code 1958. The interest is a charge for credit extended as distinguished from services rendered in securing employment.

I am enclosing herewith the several contracts and schedules enclosed with your letter.

Yours very truly,

Carl H. Pesch
Assistant Attorney General

CHP: mk
Encls:

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

June 28, 1960

Mr. Ray Hanrahan
Polk County Attorney
Room 406 Court House
Des Moines, Iowa

Dear Mr. Hanrahan:

Receipt is acknowledged of your letter of June 24 as follows:

"We have received the following communication from the Chairman of the Board of Supervisors:

"'The 58th General Assembly repealed Chapter 339 of the 1958 Code making it possible for the Board of Supervisors to appoint the coroner and raising the statutory fees to which the coroner is entitled to collect.

"' * * *

"'We, therefore, would like for you to obtain an Attorney General's opinion as to whether or not it would be possible to enter into a contract with a doctor to perform all the duties of the office of coroner for a specific amount.'

"Inasmuch as this is a question that involves a statewide problem, will you please give us your answer on it?"

#60-6-35

Chapter 258, Laws of the 58th General Assembly, provides for the fees of the medical examiner but does not authorize a salary in lieu of fees. Had the General Assembly intended to authorize a salary in lieu of fees, it would have included a provision similar to that contained in the last sentence of Code section 367.13 on police judge, or 367.14 on bailiff, or the special provision on certain sheriffs contained in Code sections 338.1 as amended and 338.12.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl

COUNTIES - Public Improvement - Court House - Remodeling of court room, by lowering ceiling and installing complete new lighting fixtures, is a public improvement and not repairs; and where cost is less than $5,000.00 is exempt from provisions of Section 23.2, Code 1958. (Mailed to Hanrahan, Polk Co. Atty., 6/28/60) #60-6-36

June 28, 1960

Mr. Ray Hanrahan
Polk County Attorney
Room 406 Court House
Des Moines, Iowa

Attn: C. I. Becker, Assistant County Attorney

Dear Mr. Becker:

We have your letter of June 27, 1960 in which you request an opinion upon the following facts:

> "The Polk County Board of Supervisors is contemplating the lowering of the ceilings of one of our court rooms by installing a new panel ceiling in the heighth of about fourteen feet, and installing complete new lighting fixtures in said court room at an expense of somewhat less than $5,000.00 as estimated by Woodburn & O'Neil, Architects. It is imperative that this work be completed prior to September 1, 1960 as this work will have to be done while court is not in session. It appears that it would be difficult to complete this work by September 1, 1960 if the Supervisors are obliged to proceed under Sections 332.7 and 332.8 of the 1958 Code of Iowa, as Section 332.7 provides for three weeks public notice in the official newspapers of the county.
>
> "Section 23.2 of the 1958 Code of Iowa, relating to public contracts, apparently authorizes a county to enter into a contract involving less than $5,000 without being obliged to publish notice of the hearing.
>
> "Our question therefore, is as follows:
>
> > "Is the Polk County Board of Supervisors governed by the provisions contained in Section 23.2 of the 1958 Code of Iowa or must it comply with the provisions of Sections 332.7 and 332.8?"

#60-6-36

In answer thereto, I would advise you that in my opinion the proposed construction and installment constitutes a public improvement within the meaning of Section 23.1 Code of Iowa, 1958. Also it is our opinion that the foregoing described proposed construction does not constitute a repair. (See the case of Fuchs v. Cedar Rapids, 158 Iowa 392, 139 N.W. 903, 44 L.R.A.(N.S.) 590).

Therefore, it is our opinion that the proposed construction the cost thereof being less than $5,000 is exempt from the provisions of Section 23.2, with reference to notice of hearing.

Yours very truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:kvr

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

June 29, 1960

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

Dear Mr. Samore:

Receipt is acknowledged of your letter of June 28 as follows:

> "Your opinion is respectfully requested concerning burial fees in a municipally owned cemetery. It is the intention of the cemetery board to assess a burial fee for the burial of non-residents as well as residents of the township or municipality. This cemetery services two townships and each township is assessed $350.00. There is no charge made for the cost of the lot and the family assumes the responsibility for the payment of the grave digger.
>
> "Your opinion is desired upon the legality of an action of the cemetery board to assess burial fees, the amount of which fees contemplated is $25.00.
>
> "Because an answer to this problem is necessary inasmuch as it is so near July 1st, I will call you within the next day or two by telephone."

General powers of cities and towns with respect to cemeteries are set forth in Code section 368.28 as follows:

> "Burials, cemeteries -- crematories. They shall have power to regulate the burial of the dead; to provide places for the interment of the

#60-6-37

> dead; to cause any body interred contrary to such regulations to be taken up and buried in accordance therewith; to exercise over all cemeteries within their limits, and those without their limits established by their authority, the powers conferred upon township trustees with reference to cemeteries; or they may, by ordinance, transfer such duties and the general management of such cemeteries to a board of trustees; and to authorize the establishment of crematories for the cremation of the dead, within or without the limits of such corporation and regulate the same."

According to the quoted statute, the council or board of cemetery trustees has the powers of township trustees in such matters. Section 359.32 confers power upon township trustees as follows:

> "Sale of lots -- gifts. They shall have authority to provide for the sale of lots or portions thereof, in any cemetery under their control, and make rules and regulations in regard thereto, and may provide for perpetual upkeep by the establishment of a perpetual upkeep fund from the proceeds of sale of lots, and may accept gifts, devise or bequest, made to them for that purpose."

Section 359.37 provides as follows:

> "Regulations. The trustees, board of directors, or other officers having the custody and control of any cemetery in this state, shall have power, subject to the bylaws and regulations of such cemetery, to inclose, improve, and adorn the ground of such cemetery; to construct avenues in the same; to erect proper buildings for the use of said cemetery; to prescribe rules for the improving or adorning the lots therein, or for the erection of monuments or other memorials of the dead upon such lots; and to prohibit any use, division, improvement or adornment of a lot which they may deem improper.
>
> "The trustees, after such land has been advertised for sealed bids by the trustees, shall have authority to sell and dispose of any lands or parcels of lands heretofore dedicated for cemetery purposes and which are

> no longer necessary for such purposes, for the reason that no burials are being made in such cemetery, provided that any portion of said cemetery in which burials have been made shall be kept and maintained by said trustees. The proceeds from such sales shall be deposited in the tax fund established in accordance with section 359.30, to be used for the purposes of that fund."

The method of raising money for care and upkeep of such a cemetery, from an examination of the relevant township and municipal statutes, appears to be confined to taxation, bonds, sale of lots, gifts and income from investments. For the applicable city tax, see Code section 404.10. With respect to investments, see Code section 566.15.

In the absence of any express statutory authorization for charging a fee as such, the answer to your question appears to be furnished by the 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 the exercise of an expressly conferred power. See Gritton v. City of Des Moines, 247 Iowa 326, 73 N.W. 2d 813, and cases cited therein.

Thus, there appears no express statutory authority for charging the fee in question. Whether there is implied authority would depend on the fact question of necessity. Fact questions, of course, are not subject to determination by opinion. However, to aid your board in determining whether the power in question is "necessarily" implied in their circumstances, it should be noted that the Supreme Court has laid down the test of compelling necessity rather than mere convenience in determining whether implied powers exist.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl

STATE OFFICERS AND DEPTS: Highway patrol salaries

From the appropriation provided in Chapter 1, Section 47(3), Acts of the 58th General Assembly, additional increases in salary for highway patrolmen may be authorized by the Executive Council. (Issued to Sarsfield, St. Comp., 6/29/60.)

#60-6-38

June 29, 1960

Glenn D. Sarsfield, State Comptroller

Statehouse

L O C A L

Dear Mr. Sarsfield:

This will acknowledge receipt of yours of the 17th inst. in which you submitted the following:

"The base rate of pay for Highway Patrolmen in recent years has been set by the Executive Council pursuant to the authority vested in Section 8.5, Sub-Section 6, Code of Iowa, 1958, with the exception that effective July 1, 1959, an additional $300.00 was added to the preciously existing base rate of pay, in accordance with the provisions of Chapter 1, Section 47, Sub-Section 3, Acts of the 58th General Assembly which reads as follows:

> ' * * *
> '(3). DIVISION OF HIGHWAY PATROL
> For salaries, support, maintenance, miscellaneous purposes, and for the state's contribution to the peace officers' retirement, accident and disability system, provided in chapter 97A, Code 1958, in the amount of sixteen percent (16%) of the salaries of personnel included in the system, and including liability insurance and including a $300.00 increase to the annual base rate of pay for highway patrolman ..... $2,696,300.00'

"I respectfully request an opinion as to whether or not the above provision sets a maximum limit to the base rate of pay for Highway Patrolmen, or may additional increases be authorized by the Executive Council."

#60-6-38

In reply thereto I would advise you, in confirmation of oral advice given you by the Attorney General, that the foregoing appropriation does not preclude additional increases to be authorized by the Executive Council.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh4

INSTITUTIONS: Community mental health centers -

A county can merely expend funds for psychiatric examination and treatment in the community mental health center upon a specific individual bill being presented by the health center for services to a given patient in a specific amount. (Transmitted to Hultman, Black Hawk Co. Atty., 6/30/60) #60-6-39

June 30, 1960

Mr. Evan L. Hultman
Black Hawk County Attorney
Suite 201 First National Building
Waterloo, Iowa

Dear Sir:

This is to acknowledge receipt of your letter of June 28, 1960 which is as follows:

> "Black Hawk County Board of Supervisors are in the process of preparing their budget for next year and have asked a specific question concerning the County fund for Insane. The last sentence of Section 230.24 of the 1958 Code states as follows:
>
> "'Any county now or hereafter expending funds from the county insane 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.'"
>
> "The question which I submit to you is as follows:
>
> "Can Black Hawk County enter into an agreement wherein a lump sum of money is to be paid to our Community Mental Health Center for general services or can Black Hawk County merely expend funds for psychiatric examination and treatment in the community mental health center upon a specific individual bill being presented by the health center for services to a given patient in a specific amount?"

In reply thereto, enclosed herewith is a copy of an opinion dated September 25, 1956 to William Pappas, Cerro Gordo County Attorney.

#60-6-39

In accordance therewith, I am of the opinion that a county can merely expend funds for psychiatric examination and treatment in the community mental health center upon a specific individual bill being presented by the health center for services to a given patient in a specific amount.

Yours very truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:UHG:kvr

Encl.

ELECTIONS: A citizen may run for office short term on regular party ticket and long term on independent ticket, upon proper qualification at the same general election. (Issued to Hall, St. Rep., 6/30/60) #60-6-40

June 30, 1960

Hon. Fred W. Hall
State Representative
Humboldt, Iowa

My dear Sir:

This will acknowledge receipt of yours of June 25 in which you submit the following:

> "We have an unusual situation here in Humboldt county, last year one of our district supervisors died, and three of our county officers appointed a successor to serve until the next general election.
>
> "This year three members of the BLANK party ran for the nomination for the next regular term as district supervisor, and one of them also ran for the short term nomination.
>
> "'John Doe' won the nomination for the short term, but, lost the nomination for the regular term. Now his friends want him to run for the regular term on the independent ticket.
>
> "My question is this: Can a citizen run for supervisor; short term on the regular party ticket, and long term on the independent ticket in the same district at the same general election this fall?"

In reply thereto you will find enclosed herewith a copy of the Attorney General's Opinion dated February 8, 1932, found at page 179 of the official reports of the Attorney General. This opinion holds,"An 'office' is limited by the term for which the candidate is elected and a candidate may have his name placed on the ballot for an un-expired term and also for the new term

#60-6-40

commencing at the end of the un-expired term."

In a second opinion issued today and enclosed herewith, this office stated to the effect that the defeat of the candidate for nomination by the BLANK party would not prevent his name being placed upon the ballot pursuant to other statutory methods.

Your question is therefore, answered in the affirmative.

Yours very truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:JHG:kvr

Encl. 2

ELECTIONS: A defeated candidate in the primary election may qualify as a nominee in the general election by compliance with the provisions of Chapter 45, 1958 Code of Iowa. (Atkins to Samore, Woodbury Co. Atty., 6/30/60) #60.6.4,

June 30, 1960

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

Dear Sir:

Your letter of June 28, 1960 is as follows:

"Your opinion is respectfully requested concerning the following set of circumstances: a candidate in the primary election was defeated and seeks to have his name placed on the ballot for the general election in November seeking the same office for which he was defeated in the primary, which office is that of a County Board of Supervisor.

"Section 45.1 of the Code of Iowa, 1958, indicates that such a person or any person may have his name placed upon the ballot in the November election for township, city, or ward by such paper or papers signed by not less than 25 qualified voters, residents of such township, city, or ward.

"Yours opinion is desired as to whether or not a defeated candidate in the primary election as above set out may qualify as a nominee in the final election in November by obtaining a paper or papers signed by not less than 25 qualified voters as described in Section 45.1 of the 1958 Code of Iowa."

In reply thereto I wish to advise you that this office has previously ruled in a letter dated August 31, 1954 to Walter J. McCarthy, Johnson County Attorney, that a defeated candidate in

#60.6.4.

the primary election may qualify as a nominee in the general election by compliance with the provisions of Chapter 45, 1958 Code of Iowa.

Yours very truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:JHG:kvr

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

April 26, 1960

M. Gene Blackburn
Hamilton County Attorney
Dermand Building
Webster City, Iowa

Dear Mr. Blackburn:

Acknowledgment is made to your letter dated March 25, 1960 in which the following was requested:

> "Is it permissable for a county fair society, organized pursuant to Chapter 174 of the Iowa Code to hold dog races by class, requiring an entry fee and awarding premiums of cash or otherwise to the top winners of each class?"

First, may a county fair society hold dog races? Iowa Code 1958, section 174.2 states:

> "Each society may hold annually a fair to further interest in agriculture and....
> 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." (Emphasis ours)

Section 174.9 (1) and (2) Iowa Code 1958 states:

> "Each society shall be entitled to receive aid from the state if it files with the state fair board on or before November 1 of each year, a sworn statement which shall show:
>
> 1. The actual amount paid by it in cash premiums at its fair for the current year, which statement must correspond with its published offer of premiums.
>
> 2. That no part of said amount was paid for speed events, or to secure games or amusements. (Emphasis ours)

In Williams vs. Dean, 1907, 134 Iowa 216, 111 N.W. 931, which case involved the authority of a fair society to hold a ball game, the court

#60-7-1

by implication gave an agriculture society authorization to provide amusement and entertainment as its officers see fit. The court stated on page 220:

> "The general rule as to all corporations is that they have such powers as are expressly provided...and such others as are reasonably incident to exercise of such powers." (Emphasis ours)

The court further stated:

> "These societies are created and exist, not only for educational purposes, but to furnish the people with harmless amusement and entertainment...." (Emphasis ours)

By granting a fair society the power "to provide entertainment and amusement" without express provision, the court in the Dean case, supra, construed section 1661, Code Supplement 1902, which states:

> "Any county or district agricultural society, upon filing with the auditor of the state, affidavits of its president, secretary and treasurer showing what sum has actually been paid out during the current year for premiums, not including races or money paid to secure games or other amusements,...." (Emphasis ours)

Comparison of section 1661, Code Supplement 1902, and section 174.9 (1) and (2) indicates that 174.9 (1) and (2) is a derivative of section 1661, therefore, a fair society under Chapter 174, Iowa Code 1958, may provide for games, entertainment, races, and amusement as it sees fit.

Secondly, may an entry fee and premiums be awarded? The Dean case, supra, also states:

> "In Delier v. Plymouth Agri. Soc., 57 Iowa 481, it was held that such societies were authorized to offer premiums for trials of speed:" (Emphasis ours)

The court in the Dean case did not consider horse racing as being part of agriculture and premiums for such being authorized by statute as did the Delier case, but rather extended the doctrine laid down in the Delier to "trials of speed".

The court in Delier v. Plymouth County Agricultural Society, 57 Iowa 481, stated further:

> "The offering of a premium is not a bet or wager....A premium is an award or recompense for some act to be done." (Emphasis ours)

Stating further, the Delier case by implication also gave such fair societies the authority to require entry fees;

"He paid the entry fees thereby became entitled to the premius if earned." (Emphasis ours)

Therefore, it is the opinion of this office that as county fair societies may provide entertainment and amusement for their fair patrons such as horse racing, auto racing, ball games, and other forms of competition, dog racing is just another mode of this type of entertainment and amusement.

Sincerely,

James R. Haggert
Assistant Attorney General

JRH/k

INSURANCE: Benefit societies -- If outside the exemptions in Code sections 510.29 and 510.31, become subject to regulation as "insurance" by charging a fixed assessment for a fixed time in lieu of "death notices". (Abels to Timmons, Commissioner Ins Dept, 6-28-60) #60-7-2

June 28, 1960

Honorable William E. Timmons
Commissioner, Insurance Department
L O C A L

Attention: Robert J. Link, Chief Counsel

Dear Sir:

Receipt is acknowledged of your letter of June 13 as follows:

"You will recall that at various times in the past, this Department has submitted material from so-called Benevolent Societies for an opinion as to whether or not their operations constitute doing an insurance business in the State of Iowa. In the past, it has been your opinion that we have in no instance proved our contentions that these companies operate an insurance business.

"We have recently discovered a new assessment method being used by one society which leads us to believe we might possibly have a stronger talking point. We are enclosing a photostatic copy of a letter which the Ida Grove Home Benevolent Society has been using which is a speciel assessment letter fixing the amount of the assessment for a given period of time.

"We appreciate the fact that this letter in no way guarantees that benefits of a specific size will be paid. However, it definitely guarantees the premium for a specific period of time, and we would appreciate it if you would once again review this matter and give us your opinion concerning whether or not this will enable us to attempt to

#60-7-2

exercise some control over this society under our insurance laws."

As your letter suggests, the notice enclosed therewith now has gone beyond any previous printed material in our files concerning the association in question, and has definitely imposed an assessment as distinguished from an invitation to contribute. This appears to distinguish it from State ex rel Kuble v. Capitol Ass'n., which has always been the stumbling block with respect to regulation of similar societies, the assessment notice amounting to a "badge" of insurance.

The operation with the assessment feature added now appears to fall within Chapter 510, Code 1958, on Assessment Life Insurance. Since the society seems to have been organized subsequent to March 23, 1907 and is not composed wholly of members of one "occupation, guild, profession, or religious denomination", the exception in section 510.31, and the exemption in section 510.29, would appear inapplicable to it.

I am therefore of the opinion that the assessment notice, of which you enclosed a photostatic copy with your letter, being in a fixed amount, for a definite period of time, and expressly in lieu of "death notices", finally identifies the society's operation as insurance. That no fixed benefit is guaranteed does not alter the situation, in view of Code section 510.8.

Since the society hasn't incorporated as provided in Chapter 510, it would now appear proper for preliminary information to be filed under Code section 507.16. The same would hold for Code sections 506.1 and 506.6. Certificate holders would appear to have basis for civil action under Code section 506.7. It further appears proceedings under Chapter 507B may be resorted to.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl

ELECTIONS: Voting machines -- Use of voting machines in some precincts not equipped with party levers depends, under Code section 52.12, upon when ownership was acquired, rather than upon the model of machine used in other precincts. (Abels to Gray, Calhoun Co Atty, 6-29-60) #60-7-3

June 29, 1960

Mr. Jack R. Gray
Calhoun County Attorney
Rockwell City, Iowa

Dear Mr. Gray:

Receipt is acknowledged of your letter of June 28 as follows:

> "The County Auditor of Calhoun County has requested an opinion on the following matter, to-wit:
>
> "Calhoun County, Iowa, has a total of 31 automatic voting machines. Twenty-one of these machines are new and have the party lever attachment. Ten of the machines are of an older type and do not have the party lever attachment. Individual precincts have either all new machines or all old machines. The town precincts have all new machines and the strictly township (no towns) have the old machines.
>
> "Would it be legal for the County Auditor to use the party lever attachment on the new machines in the General Election on November 8, 1960, when ten of the old type machines in Calhoun County, Iowa, do not have the party lever attachment?
>
> "It would seem that there should be consistency throughout the county, but the county auditor feels that he should have an opinion from your office concerning this matter."

#60-7-3

The statute pertinent to your inquiry is Code section 52.12, which provides as follows:

> "Exception -- party circle and general form. The provisions of section 49.42 shall not be applicable to voting machines owned prior to April 1, 1921, by any county or municipality insofar as they relate to the party circle and the form of the ballot generally; but nothing herein contained shall prohibit the use of voting machines equipped to comply with the foregoing provisions."

Therefore, it would be legal for the county auditor to use the party lever attachment on the new machines in the General Election on November 8, 1960, when ten of the old-type machines in Calhoun County do not have the party lever attachment, if the old-type machines were "owned prior to April, 1921 by any county or municipality".

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl

HEALTH: Hospitals, county -- County hospitals organized under Code Chapter 347 cannot finance improvements by means of revenue bonds issued under Chapter 347A. (Nbels to Parkin, Jefferson Co Atty, 6-30-'60) # 60-7-4

June 30, 1960

Mr. Robert D. Parkin
Jefferson County Attorney
Fairfield, Iowa

Dear Mr. Parkin:

Receipt is acknowledged of your following inquiry:

> "Enclosed and attached to this letter you will find a letter of inquiry from the Jefferson County Hospital Board of Trustees, which I have received. In essence, this letter asks the question whether or not Chapter 347A of the Iowa Code, which does provide for the issuing of revenue bonds by a County Hospital, is in fact applicable to the Jefferson County Hospital, which was established under the old Iowa Statutes which have since become Chapter 347."

The answer to the question appears directly furnished by Code section 347A.4, as follows:

> "Independent method. This chapter shall be construed as providing an alternative and independent method for the acquisition, construction, equipment, enlargement, improvement, operation and maintenance of a county hospital, and for the issuance and sale of revenue bonds in connection therewith, and shall not be construed as an amendment of or subject to the provisions of any other law."

The use of the phrases "alternative and independent" and "shall not be construed as an amendment", plus the fact that Chapter 347A contains its own provisions for creation of a

60-7-4

trustee board, reveal the legislative intent that Chapters 347 and 347A are separate and independent means to an end and that counties having no hospital but desiring to acquire one may elect one method or the other; but, in the case of hospitals organized under Chapter 374, must thereafter pursue the course initially selected without reference to the other. This intent is further borne out by the fact that, in Code section 347A.5, the legislature felt it necessary to expressly spell out one instance in which a specific section of Chapter 347 should apply to hospitals operating under Chapter 347A.

In the case of hospitals organized under Chapter 347A, the legislature let down the bars by the enactment in 1959 of Code section 347.24, allowing 347A-type hospitals to avail themselves of powers set forth in Chapter 347. However, it made no corresponding concession allowing Chapter 347-type hospitals to use the provisions of Chapter 347A.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl
cc: Ray H. Johnson, Jr.
Attorney at Law
1115 Bankers Trust Building
Des Moines, Iowa

HEALTH: County hospital trustees -- The prohibition in Code section 347.9 against a "licensed practitioner" serving on the board of trustees was not intended to prevent a licensee who is not an actual practitioner from serving on such board. (Ltr to Parkin, Jefferson Co. Atty., 6-30-60) #60-7-5

June 30, 1960

Mr. Robert D. Parkin
Jefferson County Attorney
Fairfield, Iowa

Dear Mr. Parkin:

Receipt is acknowledged of your following inquiry:

> "I would appreciate an opinion as to whether or not an interpretation of Section 347.9 of the 1958 Code of Iowa, dealing with Trustees of a Hospital and in particular the last sentence thereof is applicable to registered nurses.
>
> "You will note that this last line of this above Section states that a physician or licensed practitioner cannot be a member of a Board of Trustees of a County Hospital. My query is whether or not the terms licensed practitioners deal with registered nurses. If this Section does bar a registered nurse from being on the Hospital Trustees, does it make any difference whether or not she is in truth and in fact a working nurse, or one who is retired, but still maintains her registration with the nurses state organization."

The phrase, "none of whom shall be physicians or licensed practitioners" appearing in Code section 347.9 is indicative of legislative intent. It is significant that the statute speaks of "licensed practitioners" rather than of "persons . . . licensed to practice a profession". The latter phrase is the one employed in Code Chapter 147, the practice acts. It appears from the comparative choice of words that the matter

#60-7-5

of primary interest in section 347.9 was that the licensed person was actually engaged in the practice, as distinguished from being competent to engage in the practice; "practitioner" signifying actually engaging in the practice as distinguished from mere licensee.

The intent of the statute thus seems to be to prevent persons actually engaged in practicing a profession in a hospital from taking over its policy-making functions.

I am therefore of the opinion that the statute was not intended to prevent a licensee (other than physician) not actually engaged as a practitioner of that which he or she is licensed to practice from serving on such board of trustees.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl

cc: Ray H. Johnson, Jr.
Attorney at Law
1115 Bankers Trust Building
Des Moines, Iowa

MOTOR VEHICLES: Mandatory revocations -- 1. It is the duty of the Motor Vehicle Department to revoke operator's and chauffeur's licenses. 2. Revocations of operator's and chauffeur's licenses upon conviction of an offense calling for mandatory revocation are effective as of the date made by the Department of Motor Vehicles. 3. Section 321.282 does not apply during the interval between the date of conviction or plea of guilty to July 7, 1960 an offense requiring mandatory revocation by the Department of Motor Vehicles. 4. Section 321.206 requires persons convicted of an offense requiring mandatory revocation to surrender their operator's or chauffeur's license to the Court.

Pocahontas C. Atty 7-7-60 (Craig to Hudson, #60-7-6

Mr. James W. Hudson
Pocahontas County Attorney
Pocahontas, Iowa

Dear Mr. Hudson:

This will acknowledge receipt of your letter of June 29, in which you state:

> "It has been called to my attention that there is some question as to the authority of the court under the above cited code section as to the revocation of a driver's license. It has been the practice of the court upon the conviction or plea of guilty under this section to have the defendant turn in his driver's license to the court at said time, and the court in turn instructs the clerk of district court to send said license along with a certified copy of the judgment entry to the department. Said judgment entry as provided by law sets out the period during which a new license tooperate a motor vehicle shall not be issued. I am particularly interested in the last sentence of the second paragraph of said section which provides in part as follows, 'the department may receive an application for and shall grant a new license at the expiration of the period provided in the judgment of the court not withstanding the provision of sections 321.177 and 321.212.'
>
> "It is my understanding that there are some persons in the department who take the position that the court merely recommends the period of suspension and that the court as such has no authority to take the operator's license from the defendant at the time of conviction. We have had instances in our county

#60-7-6

in recent months where the defendant turned his drivers license into the court on the day of conviction or plea of guilty, and said license alongwith a certified copy of the judgement entry was immediately transferred to the department in Des Moines, and then the department did not start the period of revocation until approximately three weeks after the day of conviction. The effect of this practice has resulted in the actual revocation extending over a longer period of time than that pronounced by the court in the judgement.

"Under the situation above explained and the above cited code sections, my particular questions in regard to the same are as follows:

"1. Does the court have authority to revoke the operators license on the day of conviction?

"2. Does the period of revocation begin to run on the day that the court takes the license and enters the judgement providing for said revocation, or does the period of revocation not begin until such time as the department desires to act upon said judgement entry?

"3. If the answer to question two is that the period of revocation begins to run at the time the department desires to act upon the judgement entry, what effect is given to the word shall as contained in the last sentence of paragraph two of the above cited code sections?

"4. If your answer to question two is that the period of revocation commences at the time the department desires to act on the entry, what is the effect and application of section 321.282 relative to the use of the operators license by the defendant between the date of conviction and the date the department acts on the judgement entry?

"5. If the period of revocation does not commence until the department desires to act upon the judgement entry, is it your opinion that in the future the court should not request the drivers license of the defendant but merely let the defendant keep his drivers license and tell him that the department will in due time revoke said license?

> "It would appear to me that a satisfactory solution to this problem would be to permit the courts to continue to take the license of the defendant at the time of conviction just as they have for many years and that the period of revocation commence on the same date.
>
> "Your early reply to these questions would be appreciated as I would like to be in a position to properly advise defendants as to the effect of this section at the time they enter a plea of guilty or are convicted."

Question number one (1) is answered by an opinion issued by this office. In 1940 Opinions of the Attorney General 193, at page 195, it is stated:

> "The theory of the law relating to the suspension and revocation of licenses is that the sole duty of revocation shall rest with the Motor Vehicle Department, the merits of the offense alone resting with the court, . . ."

Thus, the Court does not have the authority to revoke an operator's or chauffeur's license.

Question number two (2) is answered by an opinion issued by this office on October 23, 1958. In 1958 Opinions of the Attorney General 188, at page 191, it is stated:

> "In view of the foregoing, we are of the opinion that upon conviction of driving a motor vehicle while under the influence of intoxicating liquor, the date of the mandatory revocation, in this instance, is the date of revocation by the Department of Public Safety."

The period of revocation begins to run from the date made, which is the date of revocation by the Department of Public Safety.

In answer to question number three (3), the sentence you refer to in section 321.285, 1958 Code of Iowa, provides:

> "The department may receive an application for and shall grant a new license at the expiration of the period provided in the judgement of the court notwithstanding the provisions of sections 321.177 and 321.212."

The revocation is made by the Department of Motor Vehicles, and the period of revocation, as set by the Court, runs from the time the revocation is made. Therefore, it is my opinion that the word "shall" in the phrase "shall grant a new license at the expiration of the period provided" refers to the expiration of the period provided by the Court, computed from the date of revocation by the Department of Motor Vehicles.

In question number four (4), you state:

> "If your answer to question number two is that the period of revocation commences at the time the department desires to act on the entry, what is the effect and application of section 321.282 relative to the use of the operators license by the defendant between the date of conviction and the date the department acts on the judgement entry?"

Section 321.282, 1958 Code of Iowa, provides:

> "Violations. If any person who has been convicted or pleaded guilty to driving or operating a motor vehicle upon the public highways of this state while in an intoxicated condition is found driving or operating any motor vehicle in violation of the provisions of sections 321.174 and 321.209 he shall, without regard to any other punishment provided by law, be imprisoned in the county jail for a period of not to exceed thirty days."

Sections 321.174 and 321.209, 1958 Code of Iowa, cited in section 321.282, provide:

> "Operators and chauffeurs licensed. No person, except those hereinafter expressly exempted shall drive any motor vehicle upon a highway in this state unless such person has a valid license as an operator or chauffeur issued by the department of public safety. No person shall operate a motor vehicle as a chauffeur unless he holds a valid chauffeur's license."

> "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:

"1. Manslaughter resulting from the operation of a motor vehicle.

"2. Driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug.

"3. Any felony in the commission of which a motor vehicle is used.

"4. Failure to stop and render aid as required under the laws of this state in the event of a motor vehicle accident resulting in the death or personal injury of another.

"5. Perjury or the making of a false affidavit or statement under oath to the department under this chapter or under any other law relating to the ownership or operation of motor vehicles.

"6. Conviction, or forfeiture of bail not vacated, upon two charges of reckless driving.

"7. Conviction, or forfeiture of bail not vacated, upon three charges of any speed restriction violation under the provisions of sections 321.285 to 321.287, inclusive, committed within a period of twelve months."

Section 321.282 provides for a thirty-day jail sentence for anyone who has been convicted or pleaded guilty of driving a motor vehicle while intoxicated and who drives or operates a motor vehicle upon the public highways of Iowa "in violation of the provisions of sections 321.174 and 321.209." Section 321.174 prohibits driving a motor vehicle upon the public highways without an operator's or chauffeur's license, and section 321.209 provides for mandatory revocation of operator's and chauffeur's licenses in certain situations, including conviction of driving while intoxicated.

Considering all three cited sections, 321.282, 321.209 and 321.174, together, it is obvious that the purpose of section 321.282 is to provide a penalty for a person who drives a motor vehicle while his license is revoked for one of the reasons specified in section 321.209. No provision is made for a situation where a person has been convicted of driving while intoxicated, and his license will be revoked, but has not been revoked because of administrative

delay. Therefore, since no provision is made to cover such a situation, it is my opinion that section 321.282 does not apply and is not effective until the date of revocation.

It should be pointed out, however, that section 321.190 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."

In such a situation, there is serious doubt that a person who operated a motor vehicle upon the public highway could produce a valid license within a reasonable time, particularly in view of section 321.213, 1958 Code of Iowa, which provides:

> "Surrender of license. The department upon suspending or revoking a license shall require that such license be surrendered to and be retained by the department except that at the end of the period of suspension such license so surrendered shall be returned to the licensee."

In answer to question number five (5), section 321.206 states that the Court shall require anyone convicted of an offense calling for mandatory revocation to surrender his license to the Court. Section 321.206 provides:

> "Surrender of license -- duty of court. Whenever any person is convicted of any offense for which this chapter makes mandatory the revocation of the operator's or chauffeur's license of such person by the department, the court in which such conviction is had shall require the surrender to it of all operator's and chauffeur's licenses then held by the person so convicted

and the court shall thereupon forward the same together with a record of such conviction to the department."

Very truly yours,

FRANK CRAIG
Assistant Attorney General

FC:bl

COUNTIES: Attorney, vacancy appointed to fill vacancy

~~The present~~ County Attorney ~~of Woodbury County~~ will hold office until the next regular election in November, 1960, and until January, 1961, if a successor is not elected at said November election to fill the short term from November to January. The election for such short term could be accomplished under the provisions of ~~Chapter~~s 44 or 45, Code 1958, or by write in.

(Strauss to Samore, Woodbury Co. Atty, July 11, 1960)

#60-7-7

Mr. Edward F. Samore

Woodbury County Attorney

204 Courthouse

Sioux City, Iowa

Dear Mr. Samore:

This will acknowledge receipt of yours of June 7, in which you state:

> "Your opinion is respectfully requested on the following facts:
>
> "On or about the 15th day of March, 1959, the County Attorney for this County was killed, and the present incumbent was appointed by the Board of Supervisors to replace him. In the filing of the Petition for the June 6, 1960 Primary there were no Petitions filed for the short-term from the date of the final election in November until the end of the year. The only Petitions that were filed were for the term commencing in January, 1961.
>
> "Your opinion is respectfully requested as to whether or not the present incumbent continues to serve from the date of the general election in 1960 until the commencement of the new term in January, 1961."

In reply thereto I would advise that the present incumbent will hold until the next regular election at which the vacancy can be filled, which would be November, 1960, and could occupy the position until the term commencing January, 1961, if a successor is not elected at the November election to fill the short-term from November to January.

#60-7-7

The election for such short-term could be accomplished under the provisions of Chapter 44, or Chapter 45, Code 1958, or by write in.

See Section 69.11, Code 1958, and the Opinion of the Attorney General appearing in the Report for 1938, at page 701.

Yours truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh4

Mr. Richards

INSURANCE: Securities Division -- membership sales -- Promotion plan involving sale of coupon books appears within definition contained in Code section 503.2. (Abels to Ford, Des Moines Co Atty, 7-11-60) #60-7-8

July 11, 1960

Mr. T. K. Ford
Des Moines County Attorney
220 Tama Building
Burlington, Iowa

Dear Mr. Ford:

Receipt is acknowledged of your letter of July 7 as follows:

"An out of state advertising agency has contacted a number of our local merchants in order to promote an advertising project which works substantially as follows:

"1. The advertising agency will secure twenty-five or thirty retail businesses or services in the city of Burlington who will agree to give away without any charge whatever certain items of merchandise or service to the holder of a coupon or certificate who has purchased it from the advertising agency.

"2. The advertising agency will sell twelve or fifteen hundred booklets of these coupons for approximately $5.00 to citizens at random in the city of Burlington. Each booklet will contain coupons worth perhaps $50.00 in merchandise or service. Each of the coupon books will contain coupons from each of the subscribing merchants.

"3. The merchants would receive no consideration for their merchandise other than the value obtained through advertising media and an increase in foot traffic through their stores.

"It would seem that Chapter 503 may have some application to such an advertising project.

"We would very much appreciate your opinion as to the applicability or non-applicability of Chapter 503 of the 1958 Code of Iowa to such an

#60-7-8

advertising project.

"We are advised that the same type of advertising project is contemplated not only in Burlington but in as many towns as will support such a project."

Code section 503.2 provides as follows:

"Definitions. The term 'association' when used in this chapter shall mean any person, firm, company, partnership, association, or corporation other than building and loan associations, insurance companies and associations, and corporations and co-operative associations subject to the provisions of chapters 497, 498 and 501, which sell, offer for sale, and/or issue to the public generally memberships or certificates of membership entitling the holder thereof to purchase merchandise, materials, equipment, and/or services on a discount or cost-plus basis.

"The term 'issue' when used in this chapter shall mean issue, sell, place, engage in or otherwise dispose of or handle.

"The term 'membership' when used in this chapter shall mean certificates, memberships, share, bonds, contracts, stocks, or agreements of any kind or character issued upon any plan offered generally to the public entitling the holder thereof to purchase merchandise, materials, equipment, and/or service, either from the issuer or someone designated by the issuer, either under a franchise or otherwise, whether it be at a discount, cost plus a percentage, cost plus a fixed amount, at a fixed price, or on any other basis."

From the facts stated in your letter, it appears the method employed in getting the coupon books into circulation fits the statutory definition of "issue".

It further appears the contractual nature of the coupon book would bring it within the statutory definition of "membership".

The real question is whether the merchandise received in exchange for the coupons is a gift or a "purchase . . . on a discount or cost-plus basis."

Since your letter states that the coupon book costs $5.00 and the value of the merchandise is $50.00, it appears there is a purchase at at least a 90% discount if any part of the price paid for the book can be said to be paid for the merchandise.

In considering this question, it is noted that the $5.00 is paid to the promoter rather than to the merchants. However, in view of the elementary rule that consideration may move to or from a third party, this would not preclude the existence of a purchase by the coupon-holder from the merchant. See Anson on Contract, Corbin's 14th American Edition, ss 126, 287., Tracewell v. Sanborn, 210 Iowa 1324, Venz v. Ins. Assn., 217 Iowa 662.

This leaves the question whether all of the $5.00 consideration was paid for the coupons and none for the merchandise, thereby making the transfer of the merchandise from merchant to coupon-holder a gift rather than a purchase. This seems unlikely. If the $5.00 were paid only for the coupons, this would seem to make them a thing of value, a medium of exchange and therefore consideration when given to the merchant in exchange for the named merchandise. However, in any event, it would seem some part of the $5.00 was actually paid for the merchandise. As the Supreme Court said in State v. Mabry, 244 Iowa 415 at pages 420, 421:

> " . . . Whether a dinner patron did or could receive his full money's worth in the dinner defendant furnished would be immaterial. If his dinner ticket entitled him to play bingo then he paid for admission to the game . . . There need be no inquiry into the proportion of the price paid for the ticket which might be considered applicable to the right to play the game of bingo . . ."

It therefore appears that the sales promotion device described in your letter is at least technically within the statutory definition of "membership sales" and subject to the provisions of Chapter 503.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl
cc: Wm. E. Timmons,
Ins. Com'r.

Mrs. Richards

CONSERVATION: Condemnation --

Code section 111A.4(2) does not give the County Conservation Board authority to condemn land for public use. Nor may the County condemn land for the use of the County Conservation Board. (Grifton To Blackburn, Hamilton Co Atty, 7-12-60)
#60-7-9

July 12, 1960

Mr. M. Gene Blackburn
Hamilton County Attorney
Dermend Building
Webster City, Iowa

Dear Mr. Blackburn:

Your letter of June 30, 1960, is as follows:

"I have been asked to request an official opinion on the following question:

'Section 111A.4(2) grants unto the County Conservation Board the power to acquire real estate by gift, purchase, lease, agreement or otherwise for various purposes (emphasis supplied). Section 471.4 refers to the power of eminent domain as conferred upon counties and other persons.'

"(1). Is Section 111A.4(2) broad enough to give the County Conservation Board the authority to condemn land for public use?

"(2). If not, may the County condemn land for the use of the County Conservation Board?"

Section 471.4, Code 1958, is in part as follows:

"471.4 Right conferred. The right to take private property for public use is hereby conferred:
1. Counties. Upon all counties for such lands as are reasonable and necessary for the erection of courthouses or jails and the construction, improvement or maintenance of highways.
* * * "

18 American Jurisprudence Section 27, page 652, states the rule to be:

"* * * A municipal corporation or a county, however, has no inherent power of eminent domain and can exercise it only when expressly authorized by the legislature. Since the right is delegated, it can be exercised only within the ordinary scope of the delegation."

#60-7-9

The rule is stated in Sutherland Statutory Construction Vol. 3, page 249:

> "Section 6504. Statutes granting the power of eminent domain. The power to condemn property for public use upon just compensation is an inherent attribute of sovereignty. Grants of the power of eminent domain must be found expressly or by necessary implication in legislation, and the policy has become well established that such grants are to be strictly interpreted against the condemning party and in favor of the condemned property owner. The rule is attributed to the fact that the power of condemnation is in derogation of common right in that it constitutes an interference with traditional and long established common-law or statutory property rights. Where the power is sought to be exercised by a private, municipal or other quasi-public corporation this rule is coupled with the announced policy of narrowly interpreting corporate grants of power, which makes for an extremely rigid limitation of the power of eminent domain. A strict interpretation has been employed where the power is claimed by a constitutional officer of the state, a municipality, private corporation, administrative agency, county, school district and private individual."

The answer to both of your questions is, therefore, in the negative.

Yours truly,

JAMES H. GRITTON
Assistant Attorney General

JHG:nmh4

CONSERVATION: Professional Assistants--
County conservation boards may employ professional assistants for the excavation and recovery of archaeological relics.
(Gritton to Tierney, Ass't Webster Co. Atty. 7-12-60) # 60-7-10

July 12, 1960

Mr. Francis E. Tiermey
Assistant County Attorney
Webster County
State Bank Building
Fort Dodge, Iowa

Dear Mr. Tierney:

The June 30 letter of John J. Murray, Webster County Attorney, reply to which he requested in a subsequent letter, we send to you, is as follows:

> "The Conservation Board of Webster County is desirous of employing an archeological expert to explore certain Indian mounds in Webster County in an effort to make certain discoveries. Initial opinions of these mounds indicate that they are rich in Indian relics. The plan is to turn over such finds to the Webster County Museum.
>
> "They are located on Gypsum Company property, and the Gypsum Company is in the process of strip mining the area. They are coming closer to these Indian mounds all of the time, and they will not be in existence much longer. The Gypsum Company is cooperating in the effort to preserve these finds.
>
> "The Board has asked me to obtain an Opinion from you relative to the propriety of spending Conservation funds for this purpose.
>
> "Time is of the essence, so we would appreciate an early opinion from you."

The pertinent parts of the statutes are as follows:

> "111A.6 . . . to be known as the county conservation fund, to be paid out . . . for the payment of expenses incurred in carrying out the powers and duties of said conservation board."
>
> "111A.4 Powers and duties. The county conservation board . . . is authorized and empowered;

60-7-10

> 2. . . . In acquiring or accepting land, due consideration shall be given to its scenic, historic, archaeologic, recreational or other special features, and no land shall be acquired or accepted which in the opinion of the board and the state conservation commission is of low value from the standpoint of its proposed use.
>
> . . . . .
>
> 6. . . . The said executive officer shall have the power, subject to the approval of said board, to employ and fix the compensation of such assistants and employees as may be deemed necessary for carrying out the purposes and provisions of this chapter, but not in excess of those paid state conservation officers and employees for like services."

The Court has succinctly stated the general rule to be applied in the case of Gritton v. City of Des Moines, 247 Iowa 326, 331, as follows:

> "It is fundamental that municipal corporations are wholly creatures of the state legislature. They have no inherent power to do what was done here. They possess and can exercise only the powers (1) expressly granted by the legislature (2) necessarily or fairly implied in or incident to the powers expressly granted, and (3) those indispensably essential -- not merely convenient -- to the declared objects and purposes of the municipality."

Since the board may expressly acquire land with due consideration to its archaeologic features, I am of the opinion that it is necessarily or fairly implied in or incident to the power expressly granted that the board may employ a professional assistant for the excavation and recovery of the archaeological relics.

Very truly yours,

JAMES H. GRITTON
Assistant Attorney General

JHG:mmh4

COUNTIES: Zoning -- Supervisors have no direct authority to prescribe the width and number of streets in a subdivision under ~~Chapter~~ 358A, but may indirectly accomplish the same result by conditioning restrictions on erection, construction, use, etc., of buildings in terms of accessibility to a street or highway of dimensions adequate for purposes of safety and the like. (Abels to Neuzil, Johnson Co Atty, July 12, 1960) 7-12-60) # 60-7-11

Mr. Ralph L. Neuzil
Johnson County Attorney
603 Iowa State Bank Building
Iowa City, Iowa

Dear Mr. Neuzil:

Receipt is acknowledged of your letter of July 1 as follows:

"Request is made for an opinion as to whether or not the Board of Supervisors of Johnson County have authority to regulate the width and number of streets to be included in any sub-development which may be erected in Johnson County.

"At the present time Johnson County is in the process of organizing a County Zoning Commission and a tentative draft of the proposed Zoning Ordinance has been written. The question has arisen as to whether or not the Board of Supervisors are empowered to regulate the width and number of streets in any sub-development in their county and which is outside the corporate limits of the city.

"Within the provisions of Section 358a.3 several powers are granted but the specific power to regulate the width and number of streets is not included. In Section 358a.5 several objectives are set out with reference to what the regulations are intended to do. Amongst them there is the objective to secure safety from fire, panic and other dangers and to protect the health and general welfare, etc. The question is with reference to whether or not this section of the Code could be

60-7-11

construed as to give the Board of Supervisors the right to regulate the number and width of streets in any sub-development if it is to protect the health and general welfare of the people of this county and if it will protect the public in case of fire and other dangers.

"Johnson County has been experiencing a rapid growth of sub-developments in the Coralville Dam Area and the developers have been cooperative in making the roads or streets sixty or sixty-six feet in width. This is being done at the suggestion of the Johnson County Board of Supervisors. However, I have been unable to find anything in the opinions or Code which would give them the specific power in the event one of the developers would not be cooperative.

"An opinion to the above proposition at your earliest convenience would be appreciated as the proposed Ordinance is being held up for an answer from your office."

Since the regulation of the width and number of streets in a subdivision appears more related to matters of planning and platting than to zoning, it would follow that regulation of same would fall under Code Chapter 409 and be subject to the approval of the council or planning commission of the adjacent city or town rather than the zoning powers of the board of supervisors.

However, the board of supervisors, through their zoning powers and for the reasons stated in your inquiry, could indirectly influence the width and number of such streets by conditioning erection, construction, reconstruction, use and occupancy restrictions in terms of accessibility by means of a street specified as adequate for such health or other protective reasons.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl

CITIES AND TOWNS - Census --
Increases or deductions in salaries of city officials based on population changes are effective on the date the Secretary of State certifies and publishes the official census figures.
(Strauss to Hultman, Black Hawk Co Atty, 7-13-60) # 60-7-11A

July 13, 1960

Mr. Evan L. Hultman

Black Hawk County Attorney

Suite 201 First National Building

Waterloo, Iowa

Dear Sir:

This is to acknowledge receipt of your letter of July 12, 1960, which is as follows:

> "Inquiry has been made to me by the City of Waterloo concerning the effective date of a census to determine at what date salaries of city officials are to be increased when the population shows that a given city is in a new category. I specifically submit the following question:
>
> At what date does the 1960 Census become official for the purpose of determining the payment of salaries as set out in Section 602.49 of the 1958 Code of Iowa?"

In reply thereto I wish to advise that increases or deductions in salaries of city officials based on population changes are effective on the date the Secretary of State certifies and publishes the official census figures.

In support of the foregoing, I wish to cite to you Section 26.6, Code 1958, 1951 AGO 22, and 248 Iowa 222, and the cases cited therein.

Yours truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:JHG:MMH4

#60-7-11A

COUNTIES: Warrants -- Where treasurer gave notice to wrong holder of a warrant under Code sections 74.4 and 74.6, such notice would not be sufficient to stop interest from running for the balance of the year of issuance, but as to subsequent years, the holder's presumed knowledge of Code section 343.10 would make his interest claims for such subsequent years subject to the defense of laches where he sat idly by and made no inquiry as to July 13, 1960 availability of funds on or before December 31 of the year of issuance.

(Abels to Bruner, Carroll Co Atty, 7-13-60)
60-7-12

Mr. Robert S. Bruner
Carroll County Attorney
118½ West Fifth Street
Carroll, Iowa

Dear Mr. Bruner:

Receipt is acknowledged of your letter of May 11 as follows:

"The opinion of your office is requested in the following situation which arises under Chapter 74 of the Code:

"On February 28, 1953, a warrant on Drainage District #23, in the amount of $655.04 was issued by our then County Auditor to one Walter Otto of Sac City, Iowa, as payment for certain services rendered the district. On March 11, 1953, our County Treasurer received the following letter from the Sac City State Bank of Sac City, Iowa.

'March 10, 1953

"'Carroll County Treasurer
Carroll
Iowa

Dear Madam:

We are holding your Drainage Warrant No. 105 dated February 28, 1953, in the amount of $655.04, and drawn on Drainage District No. 23. This warrant was presented for payment on March 7, 1953, and was not paid for want of funds.

60-7-12

"'When the funds are available for this warrant, kindly let us know.

Yours very truly,

(s) F. D. Hutcheson
Cashier'

"The warrant was actually presented for payment on March 7, 1953, by the Carroll County State Bank of Carroll, Iowa, and the Carroll County State Bank was listed by the County Treasurer in her records as the assignee or holder.

"Sufficient funds for calling this warrant were available on April 27, 1953, and notice of that fact was on that date and on March 26, 1954, mailed to the Carroll County State Bank at Carroll, Iowa, as well as posted as required by Section 74.5 of the Code. Apparently these notices never came to the attention of the Sac City State Bank.

"Nothing further has been done and the warrant has remained unpaid. The Sac City State Bank, under date of April 8, 1960, makes demand for payment of this warrant plus statutory interest at 4%, claiming that the March 7, 1953, presentation by the Carroll County State Bank was simply a matter of 'regular banking channels', and that the Treasurer's notices to the Carroll County State Bank were not sufficient notices to it, the holder, that the warrant should be sent in for payment. The question is whether or not, under these circumstances, the notices by the County Treasurer to the Carroll County State Bank were sufficient to terminate (30 days thereafter) interest on this warrant."

Section 74.4, Code of Iowa, provides as follows:

"Assignment of warrant. When any warrant shall be assigned or transferred after being so indorsed, the assignee or transferee shall be under duty, for his own protection, to notify the treasurer in writing of such assignment or transfer and of his post-office address. Upon receiving such notification, the treasurer shall correct the aforesaid record accordingly."

It appears from the letter of March 10 quoted in your letter that the treasurer had notice on March 10 that the Sac City State Bank and not the Carroll County State Bank, which had presented the warrant three days earlier, was actually the "holder" of the warrant. The treasurer should accordingly have corrected the record as provided in Code section 74.4.

Section 74.6, Code of Iowa, provides as follows:

> "Mailing notice -- terminating interest. In addition to the posting aforesaid, the treasurer shall mail to each holder of a warrant, in accordance with the aforesaid record, a notice of his readiness to pay said warrant, describing it by number and amount, and note the date of such mailing on the record aforesaid. On the expiration of thirty days from date of said mailing, interest on said warrant shall cease irrespective of the posting aforesaid."

From the express terms of section 74.6, it appears, under the facts in your letter, that the required mailing for the purpose of stopping interest was never made for the reason that the bank to which the notice was mailed was not the "holder" within the meaning of section 74.4.

However, section 343.10, Code 1958, provides as follows:

> "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 an amount equal to the collectible revenues in said fund for said year, plus any unexpended balance in said fund for any previous years.
>
> "Any officer allowing a claim, issuing a warrant, or making a contract contrary to the provisions of this section, shall be held personally liable for the payment of the claim or warrant, or the performance of the contract."

Since every person is charged with knowledge of the law, any holder of a warrant should know that delay in payment of a lawful warrant is only occasioned by delay in collection by the county of revenue from taxes already levied and collectible in the current year. The holder of a warrant therefore knows or should know that funds will be collected for the payment of such warrant and interest before the end of the year in which it was issued. This being the case, a holder who sits idly by without further inquiry on or before the end of the year and, despite his presumed knowledge of the quoted law, continues to hold the warrant, would, in my opinion, be properly confronted by the defense of laches, should he attempt to enforce collection of interest beyond the end of the year of issuance.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl

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

July 14, 1960

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

Attention: C. W. Ward, Supervisor

Dear Sir:

Receipt is acknowledged of your letter of July 14 as follows:

"In behalf of a State Examiner from this department, I would like your opinion on the following: A City Councilman in a City of 7,000 population, who was elected January 1, 1960, for a two year term, would like, at this time, to resign and accept another appointive office of said City.

"The office which he seeks has not been created or emoluments of which have not been increased during the term for which he was elected. Chapter 368A, Section 368A.21, is the Chapter referred to, which my examiner and I are not clear on. Does emoluments apply to the Councilman's compensation or to the position for which he seeks appointment?"

Code section 368A.21 provides as follows:

"Ineligibility -- change of compensation. No member of any city or town council shall, during the time for which he has been elected, be appointed to any municipal office which has

60-7-13

> been created or the emoluments of which have been increased during the term for which he was elected, nor shall the emoluments of any city or town officer be changed during the term for which he has been elected. No person who shall resign or vacate any office shall be eligible to the same during the time for which he was elected, when, during the time, the emoluments of the office have been increased."

The pertinent clause of the statute prohibits a member of the council from being appointed, during the term for which he was elected, "to any municipal office which has been created or the emoluments of which have been increased during the time for which he was elected." Thus, the phrase "of which" refers back to the word "office".

Therefore, on the basis of the plain language of the statute, as well as my personal recollections of the deliberations of the Municipal Statutes Study Committee in connection with recodification of the quoted section, I would advise that the reference is to the compensation in the appointive position rather than to the compensation received as councilman.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl

TAXATION: Homestead and Military Service Exemptions: An "offer to buy" does not meet the statutory requirements for Homestead and Military Service Exemptions. (Adams to O'Connor, St. Tax Comm, 7-14-60) # 60-7-14

July 14, 1960

Mr. John J. O'Connor, Chairman
Iowa State Tax Commission
State Office Building
Des Moines, Iowa

Dear Mr. O'Connor:

You have requested an opinion on the following question:

"The Property Tax Division respectfully requests that an official Opinion be obtained as to whether applicants who hold only an 'offer to buy' can qualify for either a homestead tax credit or a military service tax exemption.

"The word 'owner', in the matter of the homestead tax credit, is defined in subsection 2 of Section 425.11, Code of Iowa 1958, and as amended by Chapter 301 of the Laws of the 58th G. A. reads as follows:

> " '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 formerly 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.'

"Said amended definition does not contain any reference to 'an offer

#60-7-14

to buy'.

"Section 427.5, Code of Iowa 1958, in the matter of the military service tax exemption contains the provision that:

> "'Said persons shall file with the city or county assessor, as the case may be, his claim for exemption or reduction in taxes under oath, which claim shall set out the fact that he is a resident of and domiciled in the state of Iowa, and a person within the terms of Section 427.3, and give the volume and page on which the certificate of satisfactory service, order of separation, retirement, furlough to reserves, inactive status or honorable discharge or certified copy thereof is recorded in the office of the county recorder, and may include the designation of the property from which he desires said exemption or reduction to be made, and shall further state that he is the equitable and legal owner of the property designated therein'.

"The laws pertaining to military service tax exemptions do not specifically provide that an 'offer to buy' qualifies the applicant as 'the equitable and legal owner of the property designated'.

"There appear to be a number of persons in the state who each year seek to qualify for either a homestead tax credit or a military service tax exemption where they in fact hold on or before July 1 of the year of their application only an 'offer to buy', and they do not as of July 1 hold a deed to the property on which they desire the credit or exemption applied and neither are they at that date buying the property under a contract to purchase. The Opinion is desired not only for the Property Tax Division personnel to have as a guide, but also will be of universal interest to the City and County Assessors, members of County Boards of Supervisors, and County Auditors in the state."

You have cited Iowa Code, Section 425.11(2), which reads as follows in regard to the homestead exemption:

"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, 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 formerly 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."

The general rule is that tax exemption statutes are strictly construed against those claiming the exemption and the claimant must show that he qualifies under the statute.

Also, it should be noted that in a general discussion of contracts there are several elements needed before a contract exists. Among them are offer and acceptance. Until an offer made by one party to the proposed contract is accepted by the other party, there is no contract.

In re the Homestead Exemption. As you have pointed out in your letter, the statute contains no reference to an "offer to buy". If an offer to buy were to be the basis for qualification for the exemption, it would have to be under the "contract of purchase" provision of the statute. But until there is an acceptance of the offer, there is no "contract" of any kind. Therefore, the exemption qualification is not met.

That this is correct can be illustrated. Any number of people could make an "offer to buy" a particular home on the same day. Now, if the "offer

to buy" was sufficient for the exemption, then any number of people could legitimately claim an exemption on a given homestead. Certainly, no one will argue that this was the intent of the Legislature as expressed by the statute.

Consequently, it is my opinion that an offer to buy will not entitle the offeror to the homestead exemption regardless of whether or not the tender of money accompanies the offer, or whether or not the offeror lives on the premises.

In regard to the Military Service Tax Exemption, the answer is the same.

In an Attorney General's Opinion, 1942, p. 44, the phrase "equitable and legal owner of the property designated" was discussed. This opinion, along with Attorney General's Opinion, 1925-26, at page 50, allows a veteran under a contract of purchase to receive the exemption. The reasoning above in regard to the contract of purchase in re Homestead Exemption is equally applicable here and would rule out the granting of the Military Exemption on the basis of an offer to buy.

Very truly yours,

Wm. E. Adams
Assistant Attorney General

WEA:fs

LABOR: Health standards at railroad stations -- Decision concerning accident reporting in railroad maintenance shops does not specifically cover situation of health standards at railroad stations. (Craig to Lowe, Labor Comm'r 7-14-60) #60-7-15

July 14, 1960

Honorable Don Lowe
Commissioner, Bureau of Labor
L O C A L

Dear Mr. Lowe:

This will acknowledge receipt of opinion request from your office, in which you state:

> "Under date of May 9th Mr. Kallem Deputy Commissioner, requested an Attorney General's Opinion as to whether or not the Bureau of Labor has jurisdiction over those persons employed at the Linwood Station.
>
> "As you know, Judge Needham handed down a decision in the Polk County District Court on January 28, 1959, placing railroads under Chapters 88 and 91 of the Iowa Code.
>
> "We would like to be informed at this time as to whether this decision concerning health measures is broad enough to place personnel of a railroad, employed in billing and other clerical duties, under our jurisdiction. They have taken up this matter with the Scott County Attorney and he in turn has referred them to us. We also have on file a letter from the State Health Department regarding this matter. It is our understanding this station regularly employs two persons -- that they have no drinking water and no washing facilities, however, they do have an outdoor privy."

#60-7-15

Mr. Kallem's letter of May 9, 1960, to which you refer, included a file which indicated that the Chicago, Rock Island and Pacific Railroad Company employed two persons in a clerical capacity at their Linwood Station, but provided no drinking water or washing facilities for them.

The opinion by Judge D. D. Needham of the Polk County District Court, to which you refer, handed down January 28, 1959, Equity No. 64905, held that a shop maintained by a railroad for the manufacture or the repair of engines and other rolling stock is a "workshop" within the meaning of Sections 88.11 through 88.13, 1958 Code of Iowa, and that therefore railroads were required to report accidents which occurred in such shops to the Bureau of Labor, under the provisions of Section 91.12, 1958 Code of Iowa.

This decision confirmed an earlier Attorney General's Opinion, reported at 1956 Opinions of the Attorney General 157, which held exactly the same.

Applicable statutes of the 1958 Code of Iowa provide:

"88.1 Enforcement. It shall be the duty of the commissioner of labor of the state, and the mayor and chief of police of every city or town, to enforce the provisions of this chapter."

"88.2 Water closets -- separate for each sex. Every manufacturing or mercantile establishment, workshop, or hotel in which five or more persons are employed, shall be provided with a sufficient number of water closets, earth closets, or privies for the reasonable use of the persons employed therein, which shall be properly screened and ventilated and kept at all times in a clean condition and free from all obscene writing or marking; and such water closets or privies shall be supplied in the proportion of at least one to every twenty employees; and if women or girls are employed in such establishment, the water closets, earth closets, or privies used by them shall have separate approaches and be separate andapart from those used by the men or boys."

"88.3 Washing facilities. In factories, mercantile establishments, mills, and workshops, adequate washing facilities shall be provided

for all employees; and when the labor performed by the employees is of such a character as to require or make necessary a change of clothing, wholly or in part, by the employees, there shall be provided a dressing room, or rooms, lockers for keeping clothing, and adequate washing facilities separate for each sex, and no person or persons shall be allowed to use the facilities assigned to the opposite sex. A sufficient supply of water suitable for drinking purposes shall be provided."

"91.1 Labor commissioner. The bureau of labor shall be under the control of a labor commissioner, who shall have his office at the seat of government and shall devote his entire time to the duties of his office."

"91.5 Other duties -- jurisdiction in general. The commissioner shall have jurisdiction and it shall be his duty to supervise the enforcement of:

1. All laws relating to safety appliances and inspection thereof and health conditions in manufacturing and mercantile establishments, workshops, machine shops, and other industrial concerns within his jurisdiction.

2. All laws of the state relating to child labor.

3. All laws relating to the state free employment bureau and employment agencies.

4. Such other provisions of law as are now or shall hereafter be within his jurisdiction."

"91.15 Definition of terms. The expressions 'factory', 'mill', 'workshop', 'mine', 'store', 'business house', and 'public or private work', as used in this chapter, shall be construed to mean any factory, mill, workshop, mine, store, business house, public or private work, where wage earners are employed for a compensation."

"474.10 General jurisdiction. The commission shall have general supervision of all railroads in

> the state, express companies, car companies, sleeping-car companies, freight and freight-line companies, interurban railway companies, motor carriers, and any common carrier engaged in the transportation of passengers or freight by railroads, except street railroads, and also all lines for the transmission, sale, and distribution of electrical current for light, heat, or power, except in cities and towns. It shall investigate any alleged neglect or violation of law by any such common carrier, its agents, officers, or employees."

Your specific question is:

> "We would like to be informed as to whether this decision (referring to Judge Needham's decision) concerning health measures is broad enough to place personnel of a railroad, employed in billing and other clerical duties, under our jurisdiction."

Judge Needham's decision concerned maintenance shops, not stations, and the reporting of accidents, not the applicability of health standards. Therefore, it is my opinion that the decision does not specifically cover the Linwood Station situation.

Very truly yours,

FRANK CRAIG
Assistant Attorney General

FC:bl

CITIES AND TOWNS: Police and Fire Retirement -- Section 411.6(5), as amended by Chapter 293, Acts of the 58th General Assembly, allows police and fire members disablement retirement upon a mere showing of heart disease. (Craig to Murray, Webster Co Atty, 7-15-60) #60-7-16

July 15, 1960

Mr. John J. Murray
Webster County Attorney
611 Snell Building
Fort Dodge, Iowa

Dear Mr. Murray:

This will acknowledge receipt of your letter of July 5, in which you state:

> "A question of scope and magnitude has come up with reference to the retirement of police officers and fire department members under the recent acts of the 58th General Assembly, specifically Chapter 293.
>
> "Formerly, for many years members of the Police and Fire Department could retire on physical disability pensions for injuries occasioned in the line of service. The 59th General Assembly brought in this service, but have added the following specific language: 'an injury or disease incurred in or aggravated by the actual performance of duty at some definite time or place'. The question previously with reference to injury has been relatively simple because usually there was overwhelming evidence of the man getting hurt at a definite time and place supported by the medical examiner's report that he could not any longer function in these duties.
>
> "Now, however, with reference to disease the section specifically states that 'this section shall mean heart disease' . . . and shall be

#60-7-16

presumed to have been contracted while on active duty as a result of strain or the inhalation of noxious fumes, etc.

"With reference to heart disease under the language of the section our question is: Must the applicant for pension, because of heart disease aggravated by the actual performance of duty, be required to set out in his application to the satisfaction of the pension board facts to show a definite time and place that the heart disease occurred and what connection it had with his work when it occurred. In other words does the section mean a mere showing of heart disease as to be presumed sufficient to automatically retire the man, or must he make a showing that it in some way was occasioned by his work."

Section 411.6(5), 1958 Code of Iowa, as amended by Chapter 293, Acts of the 58th General Assembly, provides:

"5. Accidental disability benefit. Upon application of a member in service or of the chief of the police or fire departments, respectively, any member who has become totally and permanently incapacitated for duty as the natural and proximate result of an injury or disease incurred in or aggravated by the actual performance of duty at some definite time and place, or while acting pursuant to order, outside of the city or town by which he is regularly employed, shall be retired by the respective board of trustees, provided, that the medical board shall certify that such member is mentally or physically incapacitated for further performance of duty, that such incapacity is likely to be permanent and that such member should be retired.

"Should a member in service or the chief of the police or fire departments become incapacitated for duty as a natural or proximate result of an injury or disease incurred in or aggravated by the actual performance of duty at some definite time or place of while acting, pursuant to order, outside the city or town

> by which he is regularly employed, he shall, upon being found to be temporarily incapacitated following an examination by the board of trustees, be entitled to receive his full pay and allowances until re-examined by said board and found to be fully recovered or permanently disabled.
>
> "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."

Under the Iowa Workmen's Compensation Statute, specifically section 85.61(5)(c), disability due to disease is not compensable unless the disease results from an injury. Under this statute, the Iowa Supreme Court has held that an award of compensation may be made for disability due to heart disease only if the disease was aggravated and accelerated by an accidental injury. Farrow v. What Cheer Clay Co., 198 Iowa 922, 200 N.W. 625.

However, section 411.6(5), as amended, specifically provides that injury or disease makes a member in service of the police or fire departments eligible for retirement. The last paragraph of 411.6(5) specifically provides that, "Disease under this section shall mean heart disease . . . and shall be presumed to have been contracted while on active duty." (Emphasis added)

It is a well-known rule of statutory construction that statutes must be construed to give effect to every part thereof, and that the Legislature does not enact a provision that serves no purpose. Holzhauser v. Iowa State Tax Commission, 245 Iowa 525, 62 N.W. 2d 229.

Therefore, since the Legislature amended section 411.6(5) to allow a member in service to be retired if disabled by disease, and specifically provided that disease should include heart disease and that it would be presumed that the heart disease was contracted while on active duty,

It is my opinion that the answer to the question you propound is that, because of the said presumption, a mere showing of heart disease is enough to retire a man under the provisions of section 411.6(5), 1958 Code of Iowa, as amended by Chapter 293, Acts of the 58th General Assembly.

Very truly yours,

FRANK CRAIG
Assistant Attorney General

FC:bl

STATE OFFICERS AND DEPARTMENTS: State Aid to School districts

The budget and financial control committee has power to make an allocation for aid to a school district which, by reason of reduction in area during the biennium resulting from reorganization, is unable to carry on a reasonable educational program as determined by the state department of public instruction, without levying a tax in excess of 100 mills. July 18, 1960

(Strauss to Paul, Bud and Con. Comm., 7-18-60)
#60-7-17

Bdgt Cntrl

Hon. George L. Paul
Budget and Control Committee
Brooklyn, Iowa

Dear Sir:

Receipt is acknowledged of your inquiry as to whether or not the budget and financial control committee can make an allocation for aid to a school district which, by reason of reduction in area during the biennium resulting from reorganization, is unable to carry on a reasonable educational program as determined by the state department of public instruction, without levying a tax in excess of 100 mills.

The authority of the budget and financial control committee to make allocation from the contingency fund is limited in Section 1, Chapter 57, Laws of the 58th G.A., by the following language:

> ". . . allocations therefrom may be made only for contingencies arising during the biennium which are legally payable from funds of the state."

Therefore, allocation in the circumstances described depends upon the existence of:

(1) A contingency,
(2) arising during the biennium,
(3) legally payable from funds of the state.

The facts given in your inquiry reveal that the matter meets the test of having arisen during the biennium. Pertinent to the two remaining qualifications is the following

#60-7-17

language appearing in Section 1, Chapter 13, Laws of the 58th General Assembly:

> ". . . Emergency aid for schools -----$100,000.00 (None of such aid shall be distributed to any school which the department estimates could maintain reasonable educational standards without levying a tax in excess of one hundred (100) mills) ..." (Emphasis supplied)

Prior opinions of this department define a "contingency" as an "emergency." See 1958 Report of the Attorney General, pages 238 to 242, 245, 246. Ordinarily the existence of an "emergency" is a question of fact to be determined by the committee but here, the condition of being unable to provide reasonable educational standards on a levy of 100 mills or less is defined as an "emergency" by the quoted statute. The committee should, however, obtain the "estimate" of the department of public instruction to that effect for the record.

The statute also reveals that aid to such school districts is legally payable from state funds as a fund was appropriated for that very purpose but has been exhausted.

The existence of the appropriation in the above-quoted extract from Chapter 13 also avoids objection to such allocation that might otherwise exist under the provision in Chapter 57 that:

> "The budget and financial control committee shall not allocate any funds for any purpose or project which was presented to the general assembly by way of a bill and which failed to become enacted into law."

The existence of the provision quoted from Chapter 13 shows that a bill covering the subject was enacted into law.

Therefore, we conclude that the committee has power to make the allocation.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:LCA:mmh4

BEER AND CIGARETTES

~~TAXATION—Cigarette~~ Permits: Retail seller of cigarettes selling them in two different businesses, which he owns, within single building needs only one permit.

(Adams to Brown, Mitchell Co. Atty, 7-19-60)
#60-7-18

July 19, 1960

Loren N. Brown
Mitchell County Attorney
Osage, Iowa

Dear Mr. Brown:

We are in receipt of your letter of June 24, 1960, requesting an opinion as to whether or not two permits are needed by a retailer under the following facts:

> "Mr. 'X' operates a restaurant and grocery store, both located in the same building, both having the same street address, in the Town of 'Y', Mitchell County, Iowa; Mr. 'X' sells cigarettes in the restaurant and also in the grocery store at retail;
>
> "There is an inside, connecting door between the grocery store and the restaurant; Customers freely and frequently pass through this door from the restaurant area to the grocery store area, and vice versa; there is a wall between the two areas, however; The owner keeps but one set of books for both the grocery store and the restaurant;
>
> "The grocery store and restaurant operate under the same name, or common name; Mr. 'X' personally owns and operates both the grocery store and the restaurant; Mr. 'X' intends to operate the grocery store and the restaurant as one place of business;
>
> "Mr. 'X' has but one retail sales act permit for both the grocery store and the restaurant;
>
> "The grocery store opens about 7:30 a.m. and stays open until about 1 a.m. of the following day; the restaurant opens about 5:30 a.m., and stays open until about 1 a.m. of the following day."

#60-7-18

Like you, the only authority which we find applicable is A.G.O of 1928, p. 162. This dealt with a retailer who sold cigarettes at more than one "stand" in a hotel building. The Attorney General ruled that this man needed only one permit. Iowa Code Section 98.1 (4) defines place of business:

> "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."

Iowa Code Section 98.13 (10) is also helpful:

> "98.13 Distributor's, wholesaler's, and retailer's permits
>
> " * * *.
>
> "10. Permit displayed. The permit shall, at all times, be publicly displayed by the distributor, wholesaler, or retailer, at his place of business, so as to be easily seen by the public and the persons authorized to inspect the same. 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 pease officer exhibit his permit to so keep and sell. His refusal or failure to so exhibit such permit shall be prima facie evidence that such cigarettes are kept for sale or with intent to sell in violation of the provisions of this chapter."

Note that it says, "proprietor or keeper of any building or place" and that the word "permit" rather than "permits" is used. It would appear from this that the legislature did not intend that a permit be required for <u>each</u> spot on the earth when

cigarettes were sold providing that only one proprietor was operating in the building or the place of business if the place of business did not take up the entire building. If two or more proprietors or keepers were selling cigarettes in one place of business or building, the result would be otherwise.

Therefore, we believe that the answer to your question is that only one permit is needed by Mr. "X".

Respectfully,

William E. Adams
Assistant Attorney General

WEA/bjf

ELECTIONS Constitutional Convention

~~The~~ Secretary of State does not have a duty to publish the question "Shall there be a Convention to revise the constitution, and amend the same?". (Strauss to Synhorst, Sec of State, 7-19-60) 60-7-19

July 19, 1960

Hon. Melvin D. Synhorst

Secretary of State

L O C A L

Dear Mr. Synhorst:

This is to acknowledge receipt of your letter of July 14, 1960, which is as follows:

> "Your formal opinion is respectfully requested on the question: Does the Secretary of State have a duty to publish the question 'Shall there be a Convention to revise the constitution, and amend the same?' in newspapers prior to the submission of this question to the voters of Iowa at the General Election to be held November 8, 1960?"

Sec. 3, Article X, Constitution of the State of Iowa, provides:

> "Convention. Sec. 3. 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."

Sections 39.4 and 39.5, Code 1958, provide:

> "39.4 Proclamation concerning revision of constitution. In the years in which the constitution requires a vote on the question of calling a convention and revising the

#60-7-19

constitution, the following question shall be included in said proclamation:

'Shall there be a convention to revise the constitution and amend the same?'"

"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."

There being no method of publication on this question contained in or required by the Constitution, the General Assembly has provided that the method shall be the same as that used for the publication of notice of general or special elections.

LAW DICTIONARY, by James A. Ballentine, page 474:

"Expressio unius est exclusio alterius. * * *
The meaning of the maxim is that the express mention of a thing implies the exclusion of another different thing."

Your question is therefore answered in the negative.

Yours very truly,

OSCAR STRAUSS

First Assistant Attorney General

OS:JHG:mmh5

BEER AND CIGARETTES:

~~BEER:~~ Sunday closing -- Under Code sections 124.20 and 124.34, cities have no discretion to permit Sunday sale of beer. (Abels to Branco, Ida Co Atty, 7-19-60)

60-7-20

July 19, 1960

Mr. Richard F. Branco
Ida County Attorney
Ida Grove, Iowa

Dear Mr. Branco:

Receipt is acknowledged of your letter of July 18 in which you submit the following question:

> "The question has come up in my county as to whether or not a town can control sale and consumption of beer in a private Golf and Country Club on Sunday. I would appreciate knowing whether you interpret Chapter 124.31 to mean that towns can not control the sale of beer by a Golf Club on Sunday or whether it merely refers to the closing hours during the week. I would appreciate receiving any previous opinion written on this subject or other citation or case which may be appropriate."

The specific provision of Code section 124.31 to which your letter refers reads as follows:

> "Cities and towns shall have the power and authority to adopt ordinances and county boards of supervisors shall have the power and authority to adopt resolutions fixing the hours during which intoxicating liquors may be consumed by any person on the premises of private clubs or associations, except fraternal organizations, service clubs and bona fide golf and country clubs."

#60-7-20

However, your question refers to beer and the quoted statute refers to intoxicating liquors. By statutory definition, beer is not intoxicating liquor. See Code section 125.2, which provides:

> "Definition. The word 'liquor' or the phrase 'intoxicating liquor' when used in this title, shall be construed to include alcohol, brandy, whiskey, rum, gin, beer, ale, porter, wine, spirituous, vinous, and malt liquor, and all intoxicating liquor whatever provided, however, that the words 'liquor' or 'intoxicating liquor' wherever used in this title of the Code shall not be construed to include beer, ale, porter, stout, or any other malt liquor containing not more than four percent of alcohol by weight."

Also, see Cook v. Bornholdt, 95 N.W. 2d 749.

Since the type of permit held by a club is a class "B" permit (see Code sections 124.15 to 124.18), Code section 124.20, which applies to all class "B" permittees, furnishes the answer to your question. It provides in pertinent part:

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

The matter of Sunday closing is thus directly controlled by statute and it is to be noted that exception to the statutory rule by way of local ordinance is expressly precluded in Code section 124.34, which provides in pertinent part:

> ". . . and said city and town councils are further empowered to adopt ordinances, subject to the express provisions of section 124.20, for the fixing of hours during which beer may be sold and consumed in the places of business of class "B" permittees . . ."

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl

ELECTIONS: Constitutional Convention -- The question, "Shall there be a Convention to revise the Constitution, and amend the same?" may be placed on voting machines at the discretion of the governing body of the governmental unit purchasing the machine, i. e., Board of Supervisors; city or town council.
(Strauss to Synhorst, Sec of State, 7-20-60)
60-7-21

July 20, 1960

Honorable Melvin D. Synhorst
Secretary of State
L O C A L

Dear Mr. Synhorst:

You have requested the opinion of this office on the following question:

> "At the November 8, 1960 General Election, will it be permissible to place the question 'Shall there be a Convention to revise the Constitution, and amend the same?' on voting machines, or shall this question be printed upon a separate ballot to be given to each voter in Counties where voting machines are used?"

Section 3, Article X, Constitution of the State of Iowa, is as follows:

> "Convention. SEC. 3. 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."

#60-7-21

Section 6, Chapter 95, Acts of the 58th General Assembly, is as follows:

"SEC. 6. 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.'

"Approved May 15, 1959."

This office has said, in 1928 Opinions of the Attorney General, page 417:

"September 26, 1928. Secretary of State: I wish to acknowledge receipt of your favor of the 25th in which you ask our opinion on the following question:

"'While this department does not have supervision of election supplies, we are daily receiving inquiries as to the legality of the use of voting machines to handle the special ballot to be voted on November 6th. This ballot will be approximately 17x22" in size, and carries both the Constitutional Amendment and the Public Measure, the law requiring both to be placed on one ballot.'

> "The question submitted appears to be more a mechanical than legal question. If the ballot containing the constitutional amendment and public measure to be voted upon can be contained in the voting machine, there is nothing in the statute to prohibit the use of the machine if the will of the voter can be properly registered thereon. The statute, however, in the chapter relating to the use of voting machines, does provide for and authorizes the use of separate ballots for constitutional amendments and other public measures. We refer you to Section 926, Code, 1927. (Section 52.24, Code of 1958). It would appear that the legislature contemplated the use of separate ballots for constitutional amendments and other public measures in precincts where voting machines are used."

Thus, this office has long been of the opinion that the manner of submission to the electors of constitutional amendments and other public measures is mainly a matter of mechanics subject to the direction of the General Assembly.

The further question remains: is the proposition as stated in Section 3, Article X, Constitution of Iowa, a public measure?

The Ohio Court, in the case of McFarlan v. City of Norwood, 26 Ohio Dec. 344, 19 Ohio N.P., N.S., 145 defined "measure". The Court said:

> "A 'measure' is anything devised or done with a view to the accomplishment of a purpose; a plan or course of action intended to obtain some objective; a legislative enactment proposed or adopted; any course of action proposed or adopted by a government."

In the case of Whipple v. Eddy, 43 N.E. 788, the Illinois Supreme Court said that the "proposition" for or against establishing a township high school in said township was a "public measure" under Illinois statutes.

In the absence of any statutory or judicial definition of a "public measure" in Iowa, I find no evidence of any legislative intent to exclude the proposition stated in Section 3, Article X, Constitution of Iowa, from the operation of Chapter 52 as amended, Code of 1958.

On November 29, 1915, the following proposition was submitted to the voters of the City of Des Moines on a printed ballot:

> "Shall the proposition to establish a municipal court in the City of Des Moines, Iowa, under and by virtue of the provisions of Section 694-c1 to 694-c51 of the Supplemental Supplement to the Code of Iowa, 1915 be adopted?"

In the case of Younker v. Susong, 173 Iowa 663, 669, 156 N.W. 24, which involved the results of the election, the Iowa Supreme Court said:

> "It is contended by defendants that Sections 1137-a7 to 1137-a27 of the Code Sup., 1913, (Chapter 52, Code of Iowa, 1958, as amended), providing for the use of voting machines 'at all state, county, city, town, primary and township elections hereafter held in the state of Iowa' apply only to elections of officers. Section 1137-a27 (Section 52.24, Code of 1958) provides:
>
> "'All of the provisions of the election law now in force and not inconsistent with the provisions of this act shall apply with full force to all counties, cities, and towns adopting the use of voting machines. Nothing in this act shall be construed as prohibiting the use of a separate ballot for constitutional amendments and other public measures.'
>
> "The last clause of this section expressly authorizes the use of the separate ballot in submitting 'other public measures', when the voting is by voting machine. This bill expressly comes under this head."

I am therefore of the opinion that, at the November 8, 1960 General Election, the question, "Shall there be a Convention to revise the Constitution, and amend the same?" may be placed on voting machines at the discretion of the governing body of the governmental unit purchasing the machine, i. e., Board of Supervisors; city or town council.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:JHG:BL4

TAXATION: Moneys and Credits: Where an executor has moneys and credits of an estate in his possession, he will list them in the county of his residence.

(Adams to Kreuter Ass't Linn Co Atty 7-20-60)
#60-7-22

July 20, 1960

Adam A. Kreuter
Assistant County Attorney
Linn County Court House
Cedar Rapids, Iowa

Dear Mr. Kreuter:

This will acknowledge your letter of June 24, 1960, in which the following question is asked:

> "A decedent dies a resident of Linn County, Iowa, leaving moneys and credits as part of the assets of his estate. The estate was opened in Linn County and the Executor qualified in Linn County. Thereafter, the Executor moved to another county within the State of Iowa where he took up his permanent residence. He took with him the moneys and credits to his new residence, where he continued to administer them as property of the estate.
>
> "In which county should the moneys and credits be assessed?"

Iowa Code Sections 428.1 (4); 428.2 and 428.8 are applicable.

> "428.1 Listing--by whom. Every inhabitant of this state, of full age and sound mind, shall list for the assessor all property subject to taxation in the state, of which he is the owner, or has the control or management, in the manner herein directed:
>
> " * * *.
>
> "4. The personal property of a decedent, by the executor or administrator, or if there is none, by any person interested therein."

#60-7-22

"428.2 Listing property of another. Any person required to list property belonging to another shall list it in the same county in which he would be required to list it if it were his own, except as herein otherwise directed; but he shall list it separately from his own, giving the assessor the name of the person or estate to which it belongs."

"428.8 Place of listing. Moneys and credits, notes, bills, bonds, and corporate shares or stocks not otherwise assessed, shall be listed and assessed where the owner lives, except as otherwise provided * * *."

Section 428.1 tells who lists property of the estate. 428.8 directs moneys and credits to be listed where the owner lives and 428.2 says that one having the property of another lists it as he would were it his own. Therefore, it would appear that the executor in your problem would list the moneys and credits of the estate for taxation in the county of his residence.

There is a line of four cases on this point which are discussed in 1940 A.G.O. 504. They are McGregor's Executors vs. Vangel, 24 Iowa 436; Cameron vs. The City of Burlington, 56 Iowa 322; Burns Executor vs. McNally, 90 Iowa 432; and Hinkhouse vs. Wilton, 94 Iowa 254.

The Vangel case is almost squarely on point with the problem you present. It holds that moneys and credits will be listed in the county in which the estate is probated.

However, it is criticized by both the Cameron and Burns cases. The Hinkhouse case states the McNally rule as being, "personal property in the possession of an executor in the township of his residence is taxable there". The court in Hinkhouse continues, "The same rule applies to cases where the guardian lives in one county and his ward resides in another county".

We feel that this case, Hinkhouse, effectively overrules the Vangel case and that the rule in Iowa now is that where an executor has moneys and credits of an estate in his possession he will list them in the county of his residence. I believe this answers your question.

Respectfully,

William E. Adams
Assistant Attorney General

WEA/bjf

MOTOR VEHICLES: Registration refund -- Power of attorney -- Power of attorney form provided under the provisions of section, 321.49(2), Code 1958, may not be used for the purpose of making a registration refund under section 321.126.

(Craig to Milani, Appanoose Co Atty, 7-22-60)
#60-7-23

July 22, 1960

Mr. James G. Milani
Appanoose County Attorney
107½ West Van Buren Street
Centerville, Iowa

Dear Mr. Milani:

This will acknowledge receipt of your letter of July 11, in which you state:

> "The Appanoose County Treasurer has raised the following question as to the use of the Power of Attorney form provided by the Motor Vehicle Department for use by the County Treasurers. I am attaching hereto one of these Power of Attorney forms, and I call your attention to Line 9 and following, which is 'to make and execute application for Certificate of Title, and/or to execute, acknowledge and deliver an assignment of a Certificate of Title (description of vehicle) and all of my title and interest in and to said vehicle.'
>
> "May the above Power of Attorney be used by the person granted the Powers thereunder for the purpose of making a claim for refund, or must another Power of Attorney be secured, granting the special power to make a claim for refund? Claim for refund is provided for in Sec. 321.126 of 1958 Iowa Code."

The power of attorney form you attached, MV-506-CP57, provides:

"POWER OF ATTORNEY
To complete application for Certificate of Title
and/or to assign Certificate of Title

#60-7-23

KNOW ALL MEN BY THESE PRESENTS:

That the undersigned _____ of _____ County of _____ Iowa, does hereby make, constitute and appoint _____ and _____ or either of them the undersigned's lawful attorney for undersigned and in undersigned's name to make and execute application for Certificate of Title, and/or to execute, acknowledge and deliver an assignment of a Certificate of Title numbered Iowa _____ covering the following described motor vehicle, to-wit:

Make	Style	Year
Motor Number	Factory or Serial No.	Model

and all of my title and interest in and to said motor vehicle. And the undersigned authorizes said Attorneys or either of them to include in such assignment, such statements and warranties as to mortgages, liens and encumbrances upon the said motor vehicle as they or either of them may believe to be true and the undersigned hereby ratifies and confirms each and every act which said attorneys, or either of them, may do pursuant to the power herein granted.

Signed at _____ this _____ day of _____ 19____.

_____, Owner"

Section 321.126, 1958 Code of Iowa, specifically sets out the requirements and procedure for refund of registration fees. It provides:

"Refunds of fees. If during the year for which a motor vehicle was registered and the required registration fee paid therefor:

"1. Such vehicle is destroyed by fire or accident, or junked and its identity as a motor vehicle entirely eliminated or removed and continuously used beyond the boundaries of the state, then the owner in whose name it was registered at the time of such destruction, dismantling or removal from the state, shall return the plates to the county treasurer and within thirty days thereafter make affidavit of

such destruction, dismantling or removal and make claim for refund. With reference to the destruction or dismantling of a vehicle, the affidavit shall be accompanied by the certificate of title as provided in section 321.52. With reference to the removal of a vehicle from this state as provided herein, the affidavit shall contain a statement indicating the foreign registration number of such vehicle, the name and address of the official of the foreign state to whom the Iowa certificate of title has been surrendered and the number of the foreign certificate of title issued for such vehicle, if registered in a title law state.

"2. Such vehicle is sold to a person, either individual, firm or corporation, whose residence or place of business is without the state, the owner who made the sale and gave notice in accordance with the provisions of section 321.52 shall return the plates to the county treasurer and within thirty days thereafter make affidavit of such sale and make claim for refund.

"3. Such vehicle is stolen the owner shall give notice of such theft to the county treasurer within five days, who in turn shall notify the department, and if it be not recovered by the owner before December 1 of the year for which the registration fee was paid he shall make affidavit of such theft and make claim for refund.

"4. Such vehicle is placed in storage by the owner upon his entering the military service of the United States, then said owner shall return the plates to the county treasurer and make affidavit regarding such storage and military service and make claim for refund. Whenever the owner of a vehicle so placed in storage desires to reregister such vehicle the county treasurer shall register such vehicle and shall compute and collect the fees for such registration on the basis of one-twelfth of the annual registration fee as provided in this chapter multiplied by the number of unexpired months in the year. Whenever any such fee so computed contains a fractional part of a dollar, it shall be computed as of the nearest fractional quarter dollar thereto."

In 1956 Opinions of the Attorney General 200, it is held that a registration refund under section 321.126(1) may be applied for only by the registered owner of the vehicle.

In a letter opinion issued by this office on May 20, 1958, a copy of which is enclosed, it is held that in order for refund to be made under section 321.126(4) the registration plates must be surrendered and an affidavit must be made.

Section 321.126(2) also requires that the registration plates be surrendered and an affidavit made in order to obtain a refund; section 321.126(3) requires an affidavit. None of the subsections of 321.126 make any provisions for powers of attorney.

The general rule regarding the authority that may be granted by a power of attorney, as stated in American Jurisprudence, Agent and Principal, section 31, Volume 2, page 32, is:

> "In determining the extent of the authority granted by, and of the validity of acts done under, a power of attorney, it is often said that powers of attorney are subject to a strict construction; it is more accurate, however, to say that the power must be strictly pursued. The instrument creating the power will be held to grant only those powers which are expressly specified and such others as are essential or usual in effectuating the expressed powers."

The power of attorney form you enclosed is specifically provided for by section 321.49(2). The form fulfills the requirements of that section, but a different situation is presented under the refund section.

Upon the basis of the above authority, in my opinion, the answer to your question is that the said power of attorney form may not be used for the purpose of making a refund under section 321.126, 1958 Code of Iowa.

Very truly yours,

FRANK CRAIG
Assistant Attorney General

FC:bl
Encl #58-5-10

CONSERVATION: Plans and Programs

Plans and programs which require approval of the State Conservation Commission pursuant to Code section 111A.4(3) are those plans and programs prepared and adopted under the authority and power vested in the County Conservation Board by Code sections, 111A.4(1) and 111A.4(4). (Gritton to Leir, Scott Co. Atty, 7-22-60) # 60-7-24

July 22, 1960

Mr. Martin D. Leir
Scott County Attorney
Third Floor, Courthouse
Davenport, Iowa

Dear Mr. Leir:

This is to acknowledge receipt of your letter of July 20, 1960, which reads in part as follows:

> "Supplementing my previous letter, I have been requested to obtain from your office a ruling with respect to the problems related below:
>
> "Your attention is directed to Section 111.4(3) of the Code of Iowa 1958 which provides:
>
> > 'The county conservation board shall file with and obtain approval of the state conservation commission on all proposals for acquisition of land, and all general development plans and programs for the improvement and maintenance thereof before any such program is executed.'
>
> "The Scott County Conservation Board has entered into a contract with a park planning firm known as Park Planning Associates, in some way affiliated with Harrison Associates, Ames, Iowa, for a preliminary master plan for a park in Scott County, which park is to be established on land acquired or to be acquired for such purpose. The preliminary master plan has been received by the Board and the sum of $10,000 paid to the firm therefor. In addition the firm was to prepare a dam site investigation for comparison report as a supplement to the preliminary master plan. This report also has been received and the sum of $4,000 has been paid by the Board to the park planning firm for the same.
>
> "On the basis of the material contained in the two aforementioned reports of plans, as well as the cost estimates contained therein, the Board has authorized the park planning firm to prepare plans for the construction of a lake and park, such plans to be at an

#60-7-24

additional cost of $15,000. The last mentioned plans have not as yet been received by the Board.

"The Board is now specifically confronted with the following questions:

'1. Do the two aforementioned plans and reports constitute "general development plans and programs for the improvement and maintenance thereof" within the purview of Section 111A.4(3) of the 1958 Code of Iowa so as to require submission to and approval of the state conservation commission?

'2. Does the authorization for preparation of plans for the construction of a lake and park constitute the execution of a program within the purview of Section 111A.4(3) of the 1958 Code of Iowa?'

"These matters will be under consideration at a meeting of the local conservation board and representatives from the State Conservation Board to be held on August 9th next. It is therefore highly essential that this information be available at that time."

The provisions of Code section 111A.4(3) are set out in your letter. The provisions of Code section 111A.4(1) and (4) also relate to these problems.

"111A.4( )Powers and duties. The county conservation board . . . is authorized and empowered:

1. To study and ascertain the county's park, preserve, parkway, and recreation and other conservation facilities, the need for such facilities, and the extent to which such needs are being currently met, and to prepare and adopt a co-ordinated plan of areas and facilities to meet such needs.

* * *

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.

In Volume 2, Sutherland Statutes and Statutory Construction, page 336, et seq, it is stated:

"The practical inquiry in litigation is usually to determine what a particular provision, clause, or word means. To answer it one must proceed as he would with any other composition -- construe it with reference to the leading idea or purpose of the whole instrument. A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in

connection with every other part or section so as to produce a harmonious whole. Thus it is not proper to confine interpretation to the one section to be construed.

"It is always an unsafe way of construing a statute or contract to divide it by a process of etymological dissection, and to separate words and then apply to each, thus separated from its context, some particular definition given by lexicographers and then reconstruct the instrument upon the basis of these definitions. An instrument must always be construed as a whole, and the particular meaning to be attached to any word or phrase is usually to be ascribed from the context, the nature of the subject matter treated of, and the purpose or intention of the parties who executed the contract or of the body which enacted or framed the statute or constitution.'

* * *

"The presumption is that the lawmaker has a definite purpose in every enactment and has adapted and formulated the subsidiary provisions in harmony with that purpose; that these are needful to accomplish it; and that, if that is the intended effect, they will, at least, conduce to effectuate it. That purpose is an implied limitation on the sense of general terms, and a touchstone for the expansion of narrower terms. This intention affords the key to the sense and scope of minor provisions. From this assumption proceeds the general rule that the cardinal purpose or intent of the whole act shall control, and that all the parts be interpreted as subsidiary and harmonious. 'A statute is to be construed with reference to its manifest object, and if the language is susceptible of two constructions, one which will carry out and the other defeat such manifest object, it should receive the former construction.' * * *

"If upon examination the general meaning and object of the statute is inconsistent with the literal import of any clause or section, such clause or section must, if possible, be construed according to that purpose. But to warrant the change of the sense to accommodate it to a broader or narrower import, the intention of the legislature must be clear and manifest.

* * *

"'It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.' A statute should be construed

> so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error."

I am, therefore, of the opinion that the plans and programs which require approval of the State Conservation Commission pursuant to Code section 111A.4(3) are those plans and programs prepared and adopted under the authority and power vested in the County Conservation Board by Code sections 111A.4(1) and 111A.4(4).

The plans and reports should therefore be submitted to the State Conservation Commission when they have been prepared in final form and adopted by the County Conservation Board.

Your second question is answered in the negative.

Yours truly,

JAMES H. GRITTON
Assistant Attorney General

JHG:mmh4

DRAINAGE--Obligation under Section 465.23. Where private landowners construct an artifical drainage ditch, the county is not required to construct a new drain across the secondary road at this point under Section 465.23; the present drain accomodating a natural waterway being a suitable outlet in the natural course of drainage.

DRAINAGE DISTRICTS: Drain --
(Knudson to Newell, Louisa Co. Atty, 7-25-60)
#60-7-25

July 25, 1960

Mr. Russell R. Newell
Louisa County Attorney
Columbus Junction, Iowa

Dear Mr. Newell:

This will acknowledge receipt of your letter concerning the construction of an artificial waterway by private landowners referred to as the "Colglazier group". Your letter sought an opinion on the following question:

> "Must Louisa County be responsible for the construction and maintenance of the additional drainage structure, made necessary by this alteration or change of water course, under the provisions of Section 465.23 of the 1958 Code, as amended by Chapter 313, 58th General Assembly, when the water course is to be altered or changed from its present course by an individual landowner or by several landowners under a private agreement; that present course being served by an adequate drainage structure?"

We assume that the ditch is to be constructed under the provisions of Chapter 465, 1958 Code of Iowa, and not as a mutual drainage district under Sections 455.152-455.155, or by private agreement.

Section 465.23, 1958 Code of Iowa, as amended by Chapter 313, Section 1, 58th G.A., in our opinion does not cause Louisa County to be responsible for the construction and maintenance of the additional drainage structure under the facts which you present. The section provides in part:

> "When the course of natural drainage of any land runs to a public highway, the owner of such land shall have

#60-7-25

> the right to enter upon such highway for the purpose of connecting his drain or ditch with any drain or ditch constructed along or across the said highway, . . .
>
> "If a tile line or drainage ditch must be projected across the right of way to a suitable outlet, the expense of both material and labor used in installing the tile line or drainage ditch across the highway and any subsequent repair thereof shall be paid from funds available for the highways affected."

You will note that this section refers to "the course of natural drainage". From the facts of your letter we understand that the natural water course is intended to be changed or altered and that the additional structure would not then be within the natural water course. Two cases support our reliance on the words "natural drainage". In Droegmiller v. Olson, 241 Iowa 456, 40 N.W.2d 292 (1949), the court states at page 461:

> "The statutes impliedly, if not expressly, prohibit the diversion of water into a public highway out of its natural course.
>
> "Code section 465.22 provides, 'Owners of land may drain the same in the general course of natural drainage by constructing open or covered drains * * *.' And section 465.23 continues, 'When the course of natural drainage of any land runs to a public highway, the owner of such land shall have the right to enter upon such highway for the purpose of connecting his drain or ditch with any drain or ditch constructed along or across the said highway, but in making such connections, he shall do so in accordance with specifications furnished by the highway authorities * * *.'" (Emphasis supplied by the court.)

See also Anton v. Stank, 217 Iowa 166,174, 251 N.W. 53 (1933).

In addition, the second paragraph of Section 465.23 uses the language "must be projected across the right of way to a suitable outlet . . ." (emphasis supplied). From the facts as stated, it may appear that a suitable outlet in the natural course of drainage has already been provided; hence, no necessity for a second structure.

Very truly yours,

M. H. Knudson

MHK:MS

SCHOOLS: Reorganization -- 1. Under sections 275.1 and 275.5, Code 1958, the county board of education has the duty of attaching those areas of less than three sections even though there may be a legal prohibition against attaching them. 2. The school district can exercise no jurisdiction over that territory which is included within federally-owned lands. 3. The portion of a school district which lies within federally-owned lands belongs July 25, 1960 to the school district for the purpose of ascertaining the eligibility of those to attend school tuition-free and in the determination of state aid. (Rehmann to Ford, Des Moines Co Atty, 7-25-60) # 60-7-26

Mr. T. K. Ford
Des Moines County Attorney
220 Tama Building
Burlington, Iowa

Dear Mr. Ford:

This will acknowledge receipt of your letter of July 11, in which you state the following:

"The Danville Community School District was recently enlarged and as a result of that enlargement it took in three or four sections of land in Henry County and a substantial portion of the Middletown School District. The result of this enlargement of the Danville School District is that there are now less than four government sections remaining in the Middletown School District. The remaining sections of the Middletown School District are contiguous only to the Danville School District and the Liberty Consolidated District. Liberty Consolidated District is not a twelve grade district.

"The Middletown School District embraces a residential section of the Iowa Ordinance Plant and the residential section of the Iowa Ordinance Plant has consistently been treated as a part of the Middletown School District.

"Answers to the following questions are imperative:

"1. Is the residential area of the government reservation known as the Iowa Ordinance Plant a part of any Iowa school district?

#60-7-26

"2. May the parents of children residing in the Iowa Ordinance Plant area in property owned by the United States of America designate whether their children may attend the Burlington or the Danville Elementary and High school insofar as the Iowa law is concerned?

"3. Can the remaining three sections of the Middletown School District be attached to the Danville School District in view of the fact that Danville is the reducing district?

"4. Can the remaining sections of the Middletown School District be attached to Liberty Consolidated District in view of its not being a twelve grade district?

"5. In the face of the statutory mandate which requires the attachment of the Middletown School District to either Danville or Liberty and in view of the prohibition against attaching to either, what legal course of action can the county board take to most effectively carry out the spirit of the law?

"6. Since a part of the Danville School District lies in Henry County, is it necessary for the Henry County Board of Education to pass on any proposed enlargement of the Danville School District even though the proposed additions to the Danville School District lie wholly in Des Moines County?"

In reply thereto, we advise as follows:

Article I, Section 8, Constitution of the United States, in pertinent part provides, to wit:

"To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings, * * *"

Section 282.6, Code 1958, provides in pertinent part:

"Every school shall be free of tuition to all actual residents between the ages of five and twenty-one years, * * *"

Section 274.42, Code 1958, provides in pertinent part:

" * * * The county board of education of the county wherein such district lies, shall have the power by resolution to adjust the boundaries of school districts wherein the federally owned property is located and the boundaries of adjoining school districts so as to effectively provide for the schooling of children residing within all of said districts. * * *"

The basic proposition of whether or not a child is entitled to free public education is determined by whether or not said child is a resident of the school district. Section 282.6, Code 1958. We have already ruled in a prior opinion that actual residence is to be determined by the board of directors of the school district, O.A.G. 1958, p. 196. The Supreme Court of Iowa has ruled, the test of residence which will confer school privileges is not the same as a test for taxation or for the exercise of the right of suffrage. Mt. Hope School Dist. v. Hendrickson, 197 Iowa 191, 197 N.W. 47. See also OAG 1948, page 152.

Because children in the State of Iowa are entitled to free public education under certain conditions, the legislature did not exclude those children from free education because of the fact said children reside on federally-owned land. Section 274.42, Code 1958. It is the duty of the county board of education to divide the land which is occupied by the federal government and attach same to some school district in order that the children who reside on the federally-owned land will have the opportunity of free public education in Iowa.

The legislature recognized the fact that school districts lose revenue when land is owned by the federal government. Thus, Chapter 284, Code 1958 provides for reimbursement of school districts for the loss of taxes because of federally-owned land within the school district. The school district is only entitled to receive reimbursement based upon that increment of the federally-owned land which is designated to a school district. Section 284.2, Code 1958; also see O.A.G. 1934, p. 396.

The board of directors of a school district is charged with the responsibility of providing education for all of those persons who come within its jurisdiction. While all the children which reside within an area designated as the school district are entitled to attend school tuition-free, the board of directors of a school district has no control over the portion of the school district which lies within the Iowa Ordinance Plant. Article 1, Section 8, United States Constitution. It is elementary that a school district cannot have authority greater than its sovereign creator. The state has no jurisdiction over the persons who reside in the Iowa Ordinance Plant, and the state has no power to enact legislation that will burden or otherwise encumber the federal government. Appeal of City of Dubuque Bridge Commission, 232 Iowa 112, 5 N.W. 2d 334.

Thus, the answer to your first question appears to be as follows: that portion of the Iowa Ordinance Plant which is a part of a school district is only an administrative division for the purpose of ascertaining the eligibility of those to attend a school tuition-free and the determination of state aid. However, this does not allow a school district any right to exercise authority over those persons who reside within the Iowa Ordinance Plant, because exclusive jurisdiction of those persons is vested solely in the Congress of the United States.

In answer to your second question, it is not within the jurisdiction of the State of Iowa to ascertain who may designate the attendance center for those children which reside within the Iowa Ordinance Plant. However, in accordance with the school laws, if the children are designated to the school district which is reimbursed under the provisions of Chapter 284, Code 1958, then the said school district must receive those students. On the other hand, if the children are designated to any other school district, the receiving school district has the option of accepting or rejecting said students.

Section 275.5, Code 1958, as amended by Chapter 190, Section 1, Acts of the 58th General Assembly, in pertinent part provides:

> " * * * the county board shall by resolution attach or subdivide and attach the remaining portion or portions of said district to another school district or districts."

Your attention is directed to the case of Robrock v. County Bd. of Ed., 250 Iowa 422, at 426, 94 N.W. 2d 101, in which the Supreme Court said:

> "Inasmuch as the lands here involved were taken out of the proposed reorganization district 'another school district or districts' naturally must refer to a different district or districts than this one from which it was separated."

Based upon the foregoing authority, the answer to your third question would appear to be in the negative.

The Supreme Court of Iowa in the Robrock case, supra, at page 426 of the Iowa Reports, said:

> "It is our conclusion it was the intention of the legislature to give to the 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. The lands of the plaintiffs must be in some school district. At least there is nothing in the record such is not the case. Likewise, there is no showing the electors in the 'part thereof' of the district had an opportunity to vote on the proposition whether they wished to be included in the Fredericksburg twelve-grade district, if such it was."

After the Robrock case, supra, the legislature amended section 275.1, which eliminated the necessity of an election before an attachment was valid. However, section 275.1 as amended by the 58th General Assembly confers discretionary authority to attach to a twelve-grade district without the approval of the electors. Such discretion is mandatory only when necessary to give effect to the legislature's policy and intention. Wolf v. Lutheran Mut. Life Ins. Co., 236 Iowa 334, 18 N.W. 2d 604. While section 275.5 as amended by the 58th General Assembly places the duty of attachment after the plans for reorganization are complete, there is no limitation upon what type of district to which the remaining portion of less than four sections should be attached. The Supreme Court said, in Monroe Comm. Sch. Dist. v. Marion Co. Bd. of Ed., filed June 4, 1960, the following:

> "We must presume the legislature did not intend to do a futile thing which would defeat the avowed policy of the state, and leave one small district unattached to a twelve-grade district. We must give effect to the statutes so as to accomplish the legislative intent if possible * * *

"Proceeding then in the only way open to us to give effect to the provisions of Chapter 275 as amended and other provisions of the Code and do as little violence as possible to conflicting provisions we hold that the final action of the County Board of Education of Marion County in attaching the disputed area to Pella district should be sustained."

In answer to your fourth question, where the only other attachment of the remaining portion is to a school district not maintaining a twelve-grade system, such decision rests solely with the county board of education.

In view of the previous answers, the response to your fifth question is moot.

Because of the special nature of the Iowa Ordinance Plant, section 274.42, Code 1958 makes special provisions for proportioning that area which lies within the Ordinance Plant. Therefore, the answer to your sixth question is the county board of education of the county wherein the federally-owned property is located has the power to proportion said property to any school district within the jurisdiction of the county board of education. The only exception to this rule is when the federally-owned property lies in more than one county, which we assume is not applicable, based upon the facts as presented to us.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:bl

HIGHWAYS : Road extension in towns

-- Establishment and location of an extension within city or town within sound discretion of board or commission in control of road system and may be improved in accordance with Section 314.5.

(Lyman to Nelson, Story Co Atty, 7-27-60)

II 60-7-27

July 27, 1960

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

ATTENTION: George R. Larson

Dear Sir:

This will acknowledge receipt of your letter of July 11, 1960, wherein you request an opinion on the following:

> "The County has been requested by the Town Council of the Town of Colo, Iowa, to pave Main Street from its intersection with West Street to its intersection with Fourth Street, all within the Town of Colo, Iowa. West Street is a North-South Street that runs along the West Corporation line of the Town of Colo and Main Street is an East-West street that forms a 'T' intersection with West Street.
>
> "A few years ago, the County paved West Street a distance of 0.72 miles south of its intersection with Main Street, which pavement connected with the County's secondary road South of the Town of Colo. The County, at that time, viewed this pavement as an extension of its secondary road and now questions whether it would have authority to use secondary road funds to pave Main Street under the theory that such project would be an extension of a secondary road. The County's attitude is that there must be a logical limit to the authority granted in Section 314.5 of the Code. Otherwise, it would seem, a county could be asked to pave the entire street system of a municipality provided such system at some point connected with a secondary road.
>
> "The Story County Engineer wishes to know the logical limit of such authority and, under a given fact situation, what constitutes an authorized extension."

#60-7-27

Section 314.5 of the 1958 Code of Iowa provides in part:

> "The board . . . 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. . . .
>
> ". . . The locations of such road extensions shall be determined by the board or commission in control of such road or road system." (Emphasis Ours)

By the force of this section the burden of locating the extension lies within the sound discretion of the board of supervisors. The courts will not interfere with that discretion unless abused. No hard and fast rule can be stated as to what constitutes an extension. In most instances the question is one of fact, not of law; and its determination depends largely upon the circumstances in each particular case. In determining the location and extent of an extension the judgment of the board of supervisors is entitled to deference because of its superior knowledge of highway, road and traffic matter; and, as previously stated, the courts will not interfere with the exercise of that discretion unless abused.

In your factual situation you state in part, "Otherwise it would seem a County could be asked to pave an entire street system of a municipality". I am sure you recognize that if a county did proceed to pave the entire street system of the municipality, such would no doubt be an abuse of discretion on the part of the board. Furthermore, in the instant case it is not a matter of the county paving an entire street system. It is a matter of determining whether or not a certain street within the town is to be designated as an extension and if so, improved and maintained as such.

The Iowa State Highway Commission has faced this same problem, and in order to be uniform in the administration of primary road extensions ending within cities and towns it has adopted a future policy on such extensions. For your information, the policy of the Highway Commission on such extensions is as follows:

1. That primary road extensions run through the town to the far end of the business section.

2. That those extensions which now stop short of the far end of the business section be extended to that point.

3. That those extensions that now run through the business sections be shortened to the end of the business district.

In answer to your question as to "what constitutes an authorized extension", the question is one of fact, not of law; and its determination depends largely on the circumstances in each particular case. The authority for an "authorized extension" is found in Section 314.5 of the 1958 Code of Iowa, namely "... The location of such road extensions shall be determined by the board or commission . . .".

In answer to your question on authority to pave Main Street as an extention of a secondary road if, in the exercise of its sound discretion, the board of supervisors establishes West and Main Streets as an extension of a secondary road, it may proceed to "construct, reconstruct, improve, repair and maintain" in accordance with Section 314.5 of the 1958 Code of Iowa.

Very truly yours,

C. J. Lyman

CJL:MS

TOWNSHIPS: Public contract --
Section 23.2, Code 1958, relative to the $5,000 limit for a public contract would apply where the total cost of the improvement exceeds $5,000, even though none of the five parties to the joint agreement under which the improvement is to be made, will be required to pay $5,000 as their proportionate share.
(Strauss to Hudson, Pocahontas Co. Atty, 7-28-6
60. 7-28

July 28, 1960

Mr. James W. Hudson
Pocahontas County Attorney
Pocahontas, Iowa

Dear Sir:

This is to acknowledge receipt of your letter of July 7, 1960, which reads as follows:

> "I would like to have an opinion from your office relative to the following fact situation as applied to Section 23.2 of the 1958 Code of Iowa.
>
> "In Pocahontas County there are four townships surrounding a town who are operating a joint fire department with said town by Agreement. The four townships and the town have previously been authorized by the required vote of the people to levy money for such fire protection, and they have purchased considerable fire fighting equipment. At the present time they are contemplating constructing a building to house such equipment which will cost approximately $8500.00 and which will be located in the town. By Agreement each of the townships and the town will pay a proportionate share of the cost of this building but no one unit will pay $5000.00 toward the same.
>
> "My particular question is whether or not Section 23.2 of the 1958 Code of Iowa relative to the $5,000.00 limit for a public contract would apply in this case where the total cost of the improvement exceeds the $5000.00 but where none of the townships or town will be required to pay up to that amount according to their Agrement."

In the case of Carlson v. City of Marshalltown, 212 Iowa 373, 378, the Supreme Court said:

> "Defendant appeals to the budget law. Code, 1924, Chapter 23. The purpose of the budget law, so far as we are here concerned, is to secure edonomy in and fair prices for building or other constructionwork to be paid for 'out of the funds of the municipality.' By

#60-7-28

> Section 351, 'the words "public improvement" as used in this chapter shall mean any building or other construction work to be paid for in whole or part by the use of funds of any municipality.' By Section 352, 'before any municipality shall enter into any contract for any public improvement to cost $5,000 or more, the governing body proposing to make such contract shall adopt proposed plans and specificiations and proposed form of contract therefor, fix a time and place for hearing thereon * * * and give notice thereof * * *' * * *
>
> "These sections have reference to 'public contracts,' to public works, which require plans and specifications or estimates, which may be the subject of competition and which involve the funds of the municipality, current or funded, and their expenditure and the local tax levies. The law, so far as we are now concerned, is directed to the promotion of economy in the letting of public contracts. The director of the budget is not the supervisor of, or a court of appeal in, the administration of municipal affairs."

I am, therefore, of the opinion that since the contemplated structure will require an expenditure in excess of $5,000, the procedures, as set forth in Chapter 23, Code 1958, must be followed.

Yours truly,

OSCAR STRAUSS

First Assistant Attorney General

OS:JHG:MMH5

TOWNSHIPS: Elections -- Polling place outside township. Necessity for new petition for each election under 57th G.A., Ch. 66.
(Gritton To Barlow, Palo Alto Co Atty, 8-2-60)
60-8-2

August 2, 1960

Mr. Charles H. Barlow
Palo Alto County Attorney
Emmetsburg, Iowa

Dear Sir:

This is to acknowledge receipt of your letter of July 29th ult., which reads as follows:

"In Palo Alto County we are confronted with the following problem concerning the interpretation of Section 49.10 Polling places for Certain Precincts. Prior to the primary election Nevada Township submitted petitions signed by voters in the proper number stating to the effect that they had no Polling Place and that they were petitioning the Board of Supervisors to establish their Polling Place in the County Court House. To this date, there have been no plans for erecting a public building for a Polling Place and there are no other suitable buildings which can be used within the township. It would appear that this will be a continuing circumstance from election to election which raises the question, does Section 49.10 require that the petition procedure preceed each election, or would their Polling Place continue to be at the County Court House unless changed?

"I have found no case or Attorney General's Opinions which clarify this point, and would appreciate your thoughts on this matter as soon as possible in order that preparation can be made for the forthcoming General Election."

Enclosed herewith you will find thermo-fax copy of Opinion dated March 10, 1958, to Richard H. Wright, which I believe answers your questions.

Yours truly,

JAMES H. GRITTON
Assistant Attorney General

JHG:mmh4
Enc:

#60-8-2

WELFARE: County liens -- Assistance furnished under sections 227.16 to 227.18 is not basis for a lien under section 230.25, but may be otherwise claimed by the county. (Abels to Oeth, Dubuque Co Atty, 8-2-60) 60-8-3

August 2, 1960

Mr. Robert L. Oeth
Dubuque County Attorney
701 Bank & Insurance Building
Dubuque, Iowa

Attention: William W. Thinnes

Dear Mr. Oeth:

This will acknowledge receipt of your letter of July 28 in which you state the following:

> "We respectfully request an opinion from your office regarding the following matter:
>
> "Under Sections 227.16 through 227.18 of the Iowa Code, a State Mental Aid Fund is created and payments are provided for to counties, upon proper verification, at the rate of Three Dollars per week for each patient received on transfer from a State Hospital for the Insane under the provisions of Section 227.11 or committed to a county home by a commission of insanity. Section 227.18 provides that such payments shall be credited by the county to the county fund for the insane levied under the provisions of Section 230.24 of the Iowa Code.
>
> "Chapter 230 of the Iowa Code provides that necessary and legal costs and expenses attending the arrest, care, investigation, commitment, and support of an insane person committed shall be paid by the county in which such person has a legal settlement or by the State when such person has no legal settlement in Iowa, or when such settlement is unknown. Chapter 230 further provides for liability of the estates of such persons, and persons legally liable for the formers' support. Section 230.25 provides for a lien of assistance.

#60-8-3

"The following questions arise:

"(1) Does the State of Iowa have a lien against an insane person, his estate or those legally liable for his support where such person was received on transfer under the provisions of Section 227.11 or committed to a county home by a commission of insanity, for the Three Dollars per week payment made to the county of the insane person's settlement where such payment has been made under Sections 227.16 through 227.18?

"(2) In the event the answer to question number one is in the affirmative, then is the county's claim against such insane person, his estate or those legally liable for his support reduced by Three Dollars per week (assuming payment by State to County)?

"(3) In the event the answer to question number one is in the negative, then is the county's claim against such insane person, his estate or those legally liable for his support reduced by Three Dollars per week (assuming payment by State to County)?"

Section 230.25, Code 1958, provides:

"Lien of assistance. Any assistance furnished under this chapter shall be and constitute a lien on any real estate owned by the person committed to such institution or owned by either the husband or the wife of such person." (Emphasis supplied)

This section was referred to in the 1950 Report of the Attorney General, at page 135, as follows:

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

The terms of the statute are clear and unambiguous; the lien must arise as the result of assistance furnished under Chapter 230. The three-dollar payment provided for in sections 227.16 through 227.18, Code 1958, is created under the terms of another chapter, was enacted into law in 1949 (Acts of the 53rd General Assembly, Chapter 99) as opposed to 1939 (Acts of the 48th General Assembly, Chapter 98) for section 230.25, and was specifically provided by the legislature to be an amendment to Chapter 227.

It is therefore our opinion that the State of Iowa does not receive a lien under section 230.25 for payments to a county under sections 227.16 through 227.18.

By its nature, your question number two is disposed of by the above negative answer.

Your question number three is answered in the negative.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl

STATE OFFICERS AND DEPARTMENTS

Natural Resources Council--Non-regulated use; When permit required--A permit may be required when a "non-regulated" use is beyond the realm of being ordinary. (Maggert to McMurray, Nat Resources Counc 8-3-60) # 60-8-4

August 3, 1960

Mr. Othie R. McMurray, Director
Natural Resources Council
State House
L O C A L

Dear Mr. McMurray:

Reference is made to your letter dated June 10, 1960 in which you requested the following:

> "The Iowa Natural Resources Council requests an opinion from your office as to whether a permit is required under the provisions of Chapter 455A, Iowa Code 1958, as amended, for the use of water in excess of 5,000 gallons per day in connection with operation of a commercial livestock feeding business where the number of livestock thus supplied with water is substantially greater than could be supported by the unit of land involved."

In reply thereto, I refer you to two sections of Iowa Code 1958. First, section 455A.25:

> "When permit required. For the purpose of administering sections 455A.19 to 455A.32, inclusive, a permit as herein provided shall be required for the following:
>
> 2. Except for a nonregulated use, any person using in excess of five thousand gallons of water per day, diverted, stored, or withdrawn from any source of supply except a municipal water system or any other source specifically exempted under the provisions of sections 455A.19 to 455A.32, inclusive." (Emphasis ours)

Second, section 455A.1: Definitions

> "Nonregulated use" means the use of water for ordinary household purposes, use of water for poultry, livestock and domestic animals,..." (Emphasis ours)

Section 455A.25 (2), specifically exempts one who uses over 5,000 gallons of water per day from a supply of water other than a municipal water system, who uses the water for a non-regulated use.

A non-regulated use as defined by section 455A.1 supra, includes use of water for livestock purposes.

The problem exists as to the word "ordinary" in the definition i.e. whether "ordinary" as a descriptive word is to be applied to only "household purposes" or is descriptive of the entire phrase of "household purposes, use of water for poultry, livestock and domestic animals".

Willis v. City of Perry, 92 Iowa 297, 60 N.W. 727 a case involving the diversion of a subterranean channel, the court stating the general principles of riparian rights construed "ordinary or natural uses" as:

> "Ordinary or natural uses have been held to include the use for domestic purposes...and supplying an ordinary number of horses or stock with water..." (Emphasis ours)

The court by its own words construes "ordinary" as applying to the use of water for livestock purposes. However, the Willis case was prior to the creation of the Natural Resources Council, and it is necessary to consider the effect of Chapter 455A on the then existing law.

8 Drake Law Review, Dec. 1958, page 59 states:

> "Contained within the new sections of Chapter 455A (1958) are definite references to and provisions for the preservation of the rights of private riparian owners."

The article then cited the definition of "non-regulated" use as stated previously. It concluded that:

> "The rights of a private riparian owner in Iowa remains substantially as the Iowa Supreme Court has stated them."

The creation of the Natural Resources Council was to enable a more efficient use of Iowa's water supply by regulation. Therefore, the council was created to "enlarge the beneficial use of water" (41 Iowa Law Review 103) rather than restrict private riparian rights. Consequently, the act has no great effect upon private riparian rights and the existing case law prior to the act is substantially the same. As a result, the words "ordinary use" would apply to supplying water to livestock and domestic animals as well as the other specific items named in the definition of "non-regulated" use.

In conclusion, it is the opinion of this office, that where a use of water is a non-regulated use then the same must be ordinary. Whether the use is ordinary or not is a matter of policy with the administrative agency involved. Therefore, where a non-regulated use is extraordinary the council may require a permit.

Sincerely,

James R. Maggert
Assistant Attorney General

JRM/k

TAXATION: Property Tax - Homestead Exemption: Deed to hand for which Homestead credit is claimed need not be recorded for claim to be allowed.
(Adams To McGee, Mills Co Atty, 8-3-60) #60-8-5

August 3, 1960

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

Dear Sir:

This is in answer to your letter of June 22, 1960 in which you ask the following question:

> "In 1953 A purchased land from X and directed X to convey the property to A's son B. Subsequently, B gave his father A a deed dated January 2, 1954, which has not been recorded. A resides on this property and uses this unrecorded deed as the basis for claiming homestead tax exemption. B is the record title owner of his own home on which he has homestead tax exemption.
>
> "Question: Is A entitled to homestead exemption on these facts?"

The applicable statute is 425.11(2) which reads:

> "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 formerly 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."

#60-8-5

If A is entitled to the exemption it is because he "holds the fee simple title to the homestead".

In Johnson v. Board of Sup'rs of Jefferson County, 237 Iowa 1103, the court discusses "fee simple". It said:

> "'A "fee simple" estate is one by which the owner holds lands to himself and his heirs forever, without mentioning what heirs, but referring that to this own pleasure or to the disposition of the law. The estate may be either legal or equitable, since the term "fee simple" is not used to distinguish between legal and equitable estates, but is used to denote the quantity or duration of estates, whether the enjoyment is limited or unlimited in duration. 31 C.J.S., Estates sec. 8, pp. 18, 19; 19 Am. Jur. 472, 473, section 14. At common law, the term "fee simple" was used in contradistinction to such terms as "fee tail," " " life estate," or "term for years." 19 Am. Jur. 471, section 12. We have no reason to doubt that the legislature here used the term "fee simple" in much the same sense.
>
> "'The substance of the classic definition of "title" is: The means whereby the owner has the just possession of his property. Black's Law Dictionary, 3d Ed., 1733; 2 Bouv. Law Dict., Rawle's Third Revision, p. 3281; Henderson v. Beatty, 124 Iowa 163, 167, 99 N.W. 716. But "title" is frequently used to mean ownership. 41 Words and Phrases, Perm. Ed., pp. 673, 674. See also Scofield v. Moore, 31 Iowa 241, 245. * * * '"

In Hoyue v. Iowa T & L Co., 219 Iowa 282, the court said, "As between the original partys, the filing of the deed for record was not necessary to its validity. * * * Section 10105 (now 558.41) of the Code relating to the recording of instruments is for the benefit of subsequent purchasers for value."

In Potter v. Potter, 185 Iowa 559 at page 567, the court said, "The recording of a deed is not essential to passing title."

The case of In Re Estate of Arness, 142 Iowa 40; Galen v. Galen, 108 Iowa 496; and Reeve v. Howard, 118 Iowa 121, cited for the proposition that title to real property can be effectually passed by an inter vivor gift. The court in the Reeve case states:

> "That a man may lawfully convey his lands as a gift or as a token of love and affection, and that such grantee holds by as perfect title as the grantor could convey, none will deny."

Applying the above to your problem, the non-recorded deed giving Fee Simple Title to A, would entitle him to the Homestead exemption.

However, it should be noted that it is possible that there is a later unrecorded deed from A to someone else which would change the ownership and if this were true, A, of course, would not be the owner of the property. However, this is beyond our ken.

Respectfully,

William E. Adams
Assistant Attorney General

WEA/bjf

HEALTH:
Pharmacists -- vitamins -- sale -- Vitamins or vitamin products in concentrated form can be sold only in a licensed pharmacy, under the immediate personal supervision of a registered pharmist. (Bianco to Rabe; Bd of Pharm Ex, 8-4-60) 60-8-6

August 4, 1960

Mr. J. F. Rabe
Secretary
Board of Pharmacy Examiners
L O C A L

Dear Sir:

We herein acknowledge your request for our opinion on the legality of dispensing vitamin preparations by means of vending machines in eating establishments, etc.

Under the existing law of Iowa, vitamin products in concentrated form, whether pills, capsules, tablets, or drops, are "drugs" and not proprietary medicine. O.A.G. 1944, p. 164. Subsection 155.1 of the Code states any person who engages ". . . in the business of selling, or offering or exposing for sale, drugs and medicines at retail" is deemed to be engaged in the practice of pharmacy, and as such is regulated under the police powers of this State. Reppert v. Utterback, 206 Iowa 314, 217 N.W. 545 (1928).

Under such regulations, no person may engage in the practice of pharmacy with out first obtaining a license from the State Department of Health. Subsection 147.2 of the Code.

More direct authority on the point in question is found in subsection 155.6 of the Code which states that "No unlicensed person or licensed pharmacist shall allow anyone who is not a licensed pharmacist to sell or dispense any drugs . . . unless the same be done under the immediate, personal supervision of a licensed pharmacists. . .".

The terms "sell or dispense" would appear to be broad enough to include any methods of disbursement from a display rack to a vending machine. It follows the sale of

60-8-6

vitamins in concentrated form intended to be used for the mitigation, prevention or cure of disease of man or animal, (regardless of method of disbursement) must be made in a licensed pharmacy, under the direct, personal supervision of a licensed pharmacist in the State of Iowa. O.A.G. 1944, p. 164, 166.

A "pharmacy" as defined in chapter 155.3(2) is ". . . a drug store in which drugs and medicines are exposed for sale or sold at retail, . . .". A retail pharmacy license under subsection 155.10, must be obtained in order to establish, conduct or maintain such a pharmacy.

By reason of the above authorities, the answer to your question is found in the conclusions stated in O.A.G. 1944, p. 164, 166 which holds:

> "1. That vitamins or vitamin products in concentrated form, whether sold in pills, capsules, tablets or drops come under the classification of drugs, within the meaning of the Iowa Pharmacy Law.
>
> "2. That the sale of vitamins in concentrated form intended to be used for the mitigation, prevention or cure of disease of man or animal, must be made in a licensed pharmacy, under the supervision of a licensed pharmacist in the State of Iowa."

Respectfully submitted,

FRANK D. BIANCO
Assistant Attorney General

FDB:kvr

COUNTIES: Hospitals -- County treasurer not authorized to carry special fund.
(Abels to Harris, Greene Co Atty, 8-5-60) #60-8-7

August 5, 1960

Mr. David Harris
Greene County Attorney
Jefferson, Iowa

Dear Mr. Harris:

Receipt is acknowledged of your letter of August 2 as follows:

> "I would appreciate your opinion upon the following question:
>
> "'Can a County Treasurer be required under Section 347.12 of the Code as amended by Section 4 of Chapter 262 of the Acts of the 58th General Assembly, to maintain a separate checking account on county hospital business.'"

Your question is answered in the negative, for the reason that the statutes do not authorize the treasurer to carry such special fund.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl

#60-8-7

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

August 5, 1960

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

Dear Mr. Fischer:

Receipt is acknowledged of your letter of July 30 as follows:

> "This week the County Board of Supervisors asked me to find out if it would be legally possible for them to sell the County Farm and hold the money separate and aside for the purpose of constructing a County Convalescent Home. If such a result could not be accomplished under existing regulations, would there or could there be anything in the proposal which could be accomplished by a legalizing act by the next legislature?
>
> "Anything which you can do to shed some light on this problem will be very much appreciated."

In answer thereto, the statutes do not authorize creation of such special fund by counties and, in my opinion, general legislation rather than a legalizing act would be necessary to confer such authority.

Very truly yours,

LEONARD C. ABELS
Assistant Attorney General

LCA:bl

#60-8-8

SCHOOLS: Election of treasurer -- Under Article XI, Section 6, Constitution of Iowa, the office of treasurer should be filled for the unexpired short term at the general school election in September, 1960. In addition, under Section 277.26, a treasurer should be elected to fill the two-year term commencing July 1, 1960. (Rehmann to Greenfield, Guthrie Co Atty, 8-5-60) #60-8-9 August 5, 1960

Mr. C. F. Greenfield
Guthrie County Attorney
Bayard, Iowa

Dear Mr. Greenfield:

This is to acknowledge receipt of your letter of July 20, as follows:

"Under Chapter 277 of the 1958 Code of Iowa entitled, 'School Elections', it is set out how the Directors and Treasurer of a school district are elected. Section 277.24 deals with the Board of Directors. Section 277.26 deals with the Treasurer.

"This Code section provides a Treasurer shall be chosen at the regular election. He shall serve without pay and his term shall begin on the first secular day of July following his election and continue for two years and until his successor is elected or appointed and qualified. This Statute became effective July 4, 1959.

"Under the new Iowa school election laws, the school election takes place the second Monday in September. Apparently the Treasurer that is elected on the second Monday in September doesn't take over his office until the following July 1. This would create a vacancy in office from July 1, 1960, to the second Monday in September, 1960. If someone wasn't elected in September of 1960 for the short term to July 1, 1961, a vacancy would exist. In view of the way Iowa Statute 277.26

#60-8-9

reads, he shall serve without pay and his term shall begin on the first secular day of July following his election and continue for two years and until his successor is elected or appointed and qualified.

"Would a Treasurer now acting automatically hold over until July 1, 1961, or should the Treasurer be appointed by the Board until the second Monday in September, 1960, and then an election held on the short term from the second Monday in September, 1960, to July 1, 1961; and at the same election, elect a Treasurer for the regular term commencing July 1, 1961, and expiring July 1, 1963?"

In reply thereto, we advise as follows:

Section 69.1, Code 1958, provides for a hold-over in office when there has not been an election. It would appear that, if the Treasurer qualified within the time allowed, then he would hold over until July 1, 1961, at which time the Treasurer elected this forthcoming September will take office.

However, if the vacancy has not been filled by hold-over, then by operation of law there is a vacancy in the office of Treasurer as of July 1, 1960. Pursuant to the authority in section 279.6, Code 1958, the board of directors should appoint a treasurer to fill this vacancy. Ind. Sch. Dist. of Manning v. Miller, 189 Iowa 123, 178 N.W. 323.

Article XI, Section 6, Constitution of Iowa, provides:

"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."

Under the provisions of the Constitution, the treasurer so appointed by the board of directors will hold office until the next general school election. The Supreme Court of Iowa

has defined what the next general election means, in the case of State ex rel Halbach v. Claussen, 216 Iowa 1079, 250 N.W. 195, wherein the Court said:

> "The next general election means the next general election at which, in pursuance of law, a vacancy may legally be filled. Under all of the authorities called to our attention dealing with the subject, it is held that this does not necessarily mean the next ensuing general election, but the election at which the vacancy can be legally filled."

Therefore, in answer to the question propounded in your letter, it would appear that the board of directors should appoint the treasurer to fill the vacancy from July 1, 1960 to the next general school election in September, at which time two elections should be held -- one for the short period from September 1960 to July 1, 1961, and one for the regular term of treasurer to commence July 1, 1961.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:bl

MOTOR VEHICLES: Financial Responsibility -- Sections 321A.14, 321A.17 and 321A.29 -- (1) Privileges suspended under 321A.14 and 321A.17 may never be recovered until proof of future financial responsibility is posted; (2) Once proof is posted, licensee may cancel proof and surrender privileges, and three years from date first required to post proof, recover privileges.

(Croig to Statton, Comm Public Safety, 8-8-60
60-8-10

August 8, 1960

Honorable D. M. Statton
Commissioner, Department of Public Safety
L O C A L

Dear Mr. Statton:

This will acknowledge receipt of your request for opinion, in which you state:

"Your Opinion on the following matter is requested.

"Considering Sections 321A.14, 321A.17, and 321A.29, if a person is required to post proof of future financial responsibility but in fact never does post any such proof, for what period of time would the Drivers License Division be required to deny licensing privileges to such an individual?

"The above question does not relate to those exceptional cases where Section 321A.13 (2)(3), or Section 321A.16 would apply. The question here presented is important because the answer to it will determine whether or not persons who never post proof shall receive their license privileges back after going without a license for three years, or whether they shall be denied a license indefinitely until such time as they do post proof of financial responsibility for at least a three-year period. The meaning of Section 321A.29(3) has caused some confusion due to the fact that apparently an individual could file proof for one day, then cancel the proof, and go without a license for a three-year period and be entitled to receive his license back at the

#60-8-10

expiration of that period. This may be inconsistent with the basic intent of the Financial Responsibility Law, namely, that no one receive their privileges to operate a motor vehicle once they have been required to post proof until such time as they have posted proof and maintain such proof for at least a three year period. Your Opinion is necessary for the guidance of the Drivers License Division personnel so that they may know under what circumstances, if any, would an individual be entitled to his license privileges restored to him when he has been required to post proof of financial responsibility and in fact never has done so."

The statutes here involved, sections 321A.14, 321A.17 and 321A.29, 1958 Code of Iowa, provide as follows:

"321A.14 Suspension to continue until judgments paid and proof given.

"1. Such license, registration, and nonresident's operating privilege shall remain so suspended and shall not be renewed, nor shall any such license or registration be thereafter issued in the name of such person, including any such person not previously licensed, unless and until every such judgment is satisfied in full or to the extent hereinafter provided, and until the said person gives proof of financial responsibility subject to the exemptions stated in sections 321A.13 and 321A.16.

"2. A discharge in bankruptcy following the rendering of any such judgment shall not relieve the judgment debtor from any of the requirements of sections 321A.12 to 321A.29, inclusive."

"321A.17 Proof required upon certain convictions.

"1. Whenever the commissioner, under any law of this state, suspends or revokes the license of any person upon receiving record of a conviction or a forfeiture of bail, the commissioner shall also suspend the registration for all motor vehicles registered in the name of such person, except that he shall not suspend such registration, unless otherwise required by law, if such person has previously given or shall immediately give and thereafter maintain proof of financial responsibility with respect to all motor vehicles registered by such person.

"2. Such license and registration shall remain suspended or revoked and shall not at any time thereafter be renewed nor shall any license be thereafter issued to such person, nor shall any motor vehicle be thereafter registered in the name of such person until permitted under the motor vehicle laws of this state and not then unless and until he shall give and thereafter maintain proof of financial responsibility.

"3. If a person is not licensed, but by final order or judgment is convicted of or forfeits any bail or collateral deposited to secure an appearance for trial for any offense requiring the suspension or revocation of license, or for operating an unregistered motor vehicle upon the highways, no license shall be thereafter issued to such person and no motor vehicle shall continue to be registered or thereafter be registered in the name of such person until he shall give and thereafter maintain proof of financial responsibility.

"4. Whenever the commissioner suspends or revokes a nonresident's operating privilege by reason of a conviction or forfeiture of bail, such privilege shall remain so suspended or revoked unless such person shall have previously given or shall immediately give and thereafter maintain proof of financial responsibility."

"321A.29 Duration of proof -- when proof may be canceled or returned.

"1. The commissioner shall upon request consent to the immediate cancellation of any bond or certificate of insurance, or the commissioner shall direct and the state treasurer shall return to the person entitled thereto any money or securities deposited pursuant to this chapter as proof of financial responsibility, or the commissioner shall waive the requirement of filing proof, in any of the following events:

"a. At any time after three years from the date such proof was required when, during the three-year period preceding the request, the commissioner has not received record of a conviction or a forfeiture of bail which would require or permit the suspension or revocation of the license, registration, or nonresident's operating privilege of the person by or for whom such proof was furnished; or

"b. In the event of the death of the person on whose behalf such proof was filed or the permanent incapacity of such person to operate a motor vehicle; or

"c. In the event the person who has given proof surrenders his license and registration to the commissioner;

"2. Provided, however, that the commissioner shall not consent to the cancellation of any bond or the return of any money or securities in the event any action for damages upon a liability covered by such proof is then pending or any judgment upon any such liability is then unsatisfied, or in the event the person who has filed such bond or deposited such money or securities has within one year immediately preceding such request been involved as an operator or owner in any motor vehicle accident resulting in injury or damage to the person or property of others. An affidavit of the applicant as to the nonexistence of such facts, or that he has been released from all of his liability, or has been finally adjudicated not to be liable, for such injury or damage, shall be sufficient evidence thereof in the absence of evidence to the contrary in the records of the commissioner.

"3. Whenever any person whose proof has been canceled or returned under paragraph c of subsection 1 of this section applies for a license or registration within a period of three years from the date proof was originally required, any such application shall be refused unless the applicant shall re-establish such proof for the remainder of such three-year period."

The question presented in the last sentence of your request is:

" . . . Under what circumstances, if <u>any</u>, would an individual be entitled to (have) his license privileges restored to him when he has been required to post proof of financial responsibility and in fact never has done so."

Chapter 321A, 1958 Code of Iowa, is a "model" law, drafted by a national group for adoption in all states. 33 Iowa Law Review 522. Many of the provisions of Chapter 321A are identical to financial responsibility statutes in other states.

In Commonwealth v. Page, 84 D.&C. (Pennsylvania) 381, the Court construed Title 75, section 1277.29, Purdon's Pennsylvania Statutes Annotated, which is the same as section 321A.17, 1958 Code of Iowa. In that case, the Court held that a driver never could recover his driving privileges, once such privileges had been suspended under the Pennsylvania equivalent of 321A.17, until the driver posted proof of financial responsibility for the future.

Sections 321A.14 and 321A.17 were enacted by the Iowa Legislature in the same Bill, are in pari materia, and must be construed together. Therefore, based upon the above-cited Page case, it is my opinion that, once a license is suspended or revoked under the provisions of either section 321A.14 or section 321A.17, said license can never be restored until the licensee posts proof of future financial responsibility. Of course, the other statutory requirements for restoration must also be met.

Section 321A.29, 1958 Code of Iowa, provides the period of time proof must be maintained. It is clear, under the provisions of subsection one, paragraph a of section 321A.29, that, subject to the exceptions of subsection two of section 321A.29, if a person maintains proof for the three years immediately following the date proof was first required and during that three-year period the Public Safety Commissioner does not receive notice of a violation which would require or permit the suspension or revocation of license privileges, that person no longer is required to post proof in order to obtain and maintain an operator's license or to have registration privileges.

The question you present, which arises under subsection one, paragraph c and subsection three of section 321A.29, is whether an individual can originally post proof, then cancel his proof and go without license and registration privileges for three years, then be entitled to receive his license and registration privileges back without any further requirement of posting proof of financial responsibility.

Subsection three of section 321A.29 provides:

> "Whenever any person whose proof has been canceled or returned under paragraph c of subsection 1 of this section (subsection c provides for voluntary surrender of license and registration privileges) applies for a license or registration within a period of three years from the date proof was originally required, any such application shall be refused unless the applicant shall re-establish such proof for the remainder of such three-year period." (Emphasis supplied)

It is a cardinal rule of statutory construction that effect is to be given to every part of a statute, as it is assumed that the legislature does not enact provisions that have no meaning or purpose. Holzhauser v. Iowa State Tax Commission, 245 Iowa 525, 62 N.W. 2d 229. It is reasonable to assume that the qualifying phrase underlined above in subsection three of section 321A.29 is included to restrict the applicability of section 321A.29(3) to the three years immediately following the date proof was originally required.

Therefore, it is my opinion that a person who is required to post proof of future financial responsibility or lose his operating license and registration privileges, under the provisions of sections 321A.14 and 321A.17, 1958 Code of Iowa, can never recover said license and registration privileges until he does post such proof. Once such proof is posted, it must be maintained for the three-year period immediately following the date such proof was first required if the person involved wishes to keep his license and registration privileges during that three-year period. However, if the person originally posts proof, then cancels his proof and voluntarily surrenders his license and registration privileges, as provided under section 321A.29(1,c), said person is entitled to recover said privileges at the end of the three-year period following the date proof was first required, provided, of course, all other pertinent provisions of Chapter 321A are met.

Very truly yours,

FRANK CRAIG
Assistant Attorney General

FC:bl

ELECTIONS - Township Nominations -

The name of a candidate for a township office who was not legally nominated at the primary election under the provisions of Code section 43.53, may not be nominated by the county convention for such office, and his name may not legally be printed on the ticket of his party affiliation at the general election. (Strauss to Brown, Mitchell Co. Atty, August 8, 1960)

9-8-60) II 60-8-11

Mr. Loren N. Brown
Attorney at Law
Osage, Iowa

Dear Loren:

This will acknowledge receipt of yours of the 3rd Inst. in which you state the following facts:

"Subject: Party Nomination of Justice of the Peace.

"The county auditor of Mitchell County Iowa, has requested an opinion as to whether or not he should place the name of Mr. "X" on the general election ballot for November 8, 1960, on the Republican ticket for the office of Justice of the Peace of Osage Township, Mitchell County, Iowa - the facts and circumstances being as follows:

"No candidates filed for the office of Justice of the Peace of Osage Township, Mitchell County, Iowa, on the Republican ticket in the primary election of June 6, 1960, and therefore the name of no candidate appeared printed on the Republican ballot in the said primary election.

"Mr. "Y" received 237 "write-in" votes for the above office on the Republica ballot in the said primary election. Mr. "Z" received 33 "write-in" votes for the above mentioned office on the Republican ballot in the said primary election. Mr. "X" received 19 "write-in" votes for the above mentioned office on the Republican ballot in the said primary election. There were 1041 votes cast for the Republican candidate for Governor of Iowa in the general election held in November, 1958, in Osage Township, Mitchell County, Iowa, which township contains and includes the City of Osage, Iowa. There were 964 votes cast on the Republican ballot for the office of Governor of Iowa in the primary election, held June 6, 1960, in Osage Township, Mitchell County, Iowa.

"Under the provisions of Section 43.89 of the 1958 Code of Iowa, the Republican party held a county convention at the courthouse in Osage, Iowa - the county seat

#60-8-11

on the fourth Friday following the primary election held June 6, 1960, this being on July 1, 1960. At the said county convention on July 1, 1960, Mr. "X" was nominated as the Republican party candidate for the office of Justice of the Peace of Osage Township, Mitchell County, Iowa.

"Mr. "Y" intends to remain a Republican candidate for the said office of Justice of the Peace of Osage Township, Mitchell County, Iowa, and wishes his name to be printed on the Republican ticket on the general election ballot for the election to be held November 8, 1960.

"We have no municipal court in Osage Township, and are not included within the territorial limits of any municipal court, so therefore, under the provisions of Section 39.21 of the 1958 Code of Iowa, Osage Township, Mitchell County, Iowa, is entitled to have two justices of the peace elected to hold office for a period of two years. There have been no vacancies in that office in 1960.

"My own opinion is that the Republican county convention called under the provisions of Section 43.89 of the 1958 Code of Iowa, and held on July 1, 1960, did not have the authority to nominate Mr. "X" as a Republican party candidate for the office of Justice of the Peace of Osage Township, Mitchell County, Iowa, and that the name of Mr. "X" should not be placed on the Republican ticket on the general election ballot to be voted upon at the coming election to be held November 8, 1960."

And after stating your views of the law covering the foregoing, you conclude as follows:

"Therefore it is my opinion that there is no method whereby Mr. "X" may legally have his name printed on the Republican ticket on the General Election ballot for the office of Justice of the Peace of Osage Township, Mitchell County, Iowa, in the election to be held on November 8, 1960."

In reference thereto, I would advise you that I agree with your conclusions.

Section 43.21, Code 1958, provides the method by which the name of a candidate for office to be filled by voters of any subdivision of the county may be printed on the official primary ballot. This section provides the following:

"43.21 Township or precinct office. The name of a candidate for an office to be filled by the voters of any subdivision of a county, including the office of party committeeman, shall be printed on the official primary ballot of his party:

1. If a nomination paper signed by ten qualified voters of said subdivision is filed in his behalf with the county auditor at least fifty-five days prior to such primary election, or

2. If the candidate files with the county auditor, fifty-five days prior to such primary election, his personal affidavit as provided by sectkon 43.18."

Section 43.53 provides when and how a candidate is nominated for a township office. This section provides the following:

"43.53 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."

It appearing that Mr. X, not having received five percent of the votes cast in such subdivision for governor on the ticket of the party with which he is affiliated, was not nominated at the primary and his name may not legally be printed on the Republican ticket at the general election. See Opinion of Attorney General appearing in the Report for 1909, page 342, copy of which is hereto attached.

Very truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh4

REPORT OF ATTORNEY GENERAL -- 1909

Page 342:

"PRIMARY ELECTIONS -- TOWNSHIP OFFICERS. -- If a candidate for township office files no affidavit to that effect, the only way his name can get on the ballot is to be written in.

Des Moines, May 2, 1908.

HENRY GRAFF, County Auditor,
Maquoketa, Iowa

My dear Sir:

Replying to your letter of a day or two ago, I have to say, that if no affidavits are filed by candidates for township offices there is no way that their names can be placed upon the primary ballot except by the voter on primary election day writing in such names as he desires to vote for for the several township positions.

In response to your second question I have to say, that if John Jones received ten or twenty votes, as you indicate, for assessor he would be nominated. If no township officers are voted for at the primary then the only way these officers can get their names on the official ballot for general election would be by petition.

Very truly yours,

H. W. BYERS"

TAXATION: Cigarette -- ~~Unfair~~ Cigarette Sales Act: Cigarette promotions wherein gift item is supplied with the purchase of cigarettes, must be made available to all cigarette wholesalers and retailers. (Gill to O'Connor, St Tax Comm, 8-9-60) 60-8-12

August 9, 1960

John J. O'Connor
Chairman
State Tax Commission
Local

Dear Mr. O'Connor:

This will acknowledge your letter of April 22, 1960, in which you request the opinion of this department relative to the following problem:

> "In the past few months cigarette manufacturers have been promoting sales in which they provide a gift article with the purchase of a carton of cigarettes. These promotional sales have been conducted mostly through super markets, which we believe has a damaging effect on our tobacco distributors and their retail merchants in the State of Iowa.
>
> "This department desires an opinion as to whether, under Code of Iowa 1958, Chapter 551A, these promotions must be made on proportionately equal terms to all competitive retailers dealing in the manufacturer's products."

This office, on August 13, 1958, issued an opinion in which we held that the practice of the manufacturer providing, through wholesale channels, a gift item to all retailers does not violate the Iowa Unfair Cigarette Sales Act (Chapter 551A.4, Code of Iowa (1958)).

The opinion did not specifically pass on the question of whether the law requires that the promotion be made available to all retailers who deal in the manufacturer's product, although it apparently assumes that such is the law.

#60-8-12

In determining this question, the principal consideration is, of course, the legislative intent. The preamble to the Act (Chapter 226, Acts of the 53rd G. A.) sets forth the intent of the legislature in enacting the Cigarette Sales Act. It provides that the purpose of the Act is to safeguard competition in the industry. The Iowa Supreme Court in May's Drug Stores v. State Tax Commission, 242 Iowa 319, a case upholding the constitutionality of Chapter 551A, Code (1958), in discussing the purpose of such legislation stated the following:

> "Courts generally have recognized that one of the revealed purposes of legislation prohibiting sales below cost is to save the small independent merchant who cannot afford to sell below cost, and is unable to compete with stores that do. With the small independent merchant driven from the field the way is open for the establishment of a monopoly."

Although, as pointed out in our opinion of August 13, 1958, the practice of providing the gift item by the manufacturer through wholesale channels is not violative of section 551A.4, since the gift item is supplied at no cost to the wholesaler or retailer; it is nevertheless true that a promotion made available to one retailer places him at a competitive advantage over the retailer who is not given the opportunity to run the same promotion.

In view of the legislative enactment and the apparent intent of such legislation, we must conclude that promotions of the nature herein under discussion must be made available to all cigarette wholesalers and retailers. To permit the manufacturer to make the promotions available to only certain retail or wholesale outlets would in effect place the omitted outlets at a competitive disadvantage.

Although the statute does not specifically allude to this problem, it is believed that this interpretation will insure that the purpose of the statute be maintained, and that fair competition be protected.

Very truly yours,

Gary S. Gill
Special Assistant Attorney General

GSG/WWR/bjf

MOTOR VEHICLES: Financial Responsibility -- Licensee whose license continues to be revoked under section 321A.17, Code 1958, must be given notice by personal service or restricted certified mail.

Dept Pub Safety 8-10-60 (Craig to Statton Conv. #60-8-13

August 10, 1960

Honorable D. M. Statton
Commissioner, Department of Public Safety
L O C A L

Dear Mr. Statton:

This will acknowledge receipt of your request for opinion, in which you state:

> "Your opinion on the following matter is requested.
>
> "In your opinion directed to this office dated September 1, 1959 you stated that 'no notice is required to be given by the department to the licensee when such licensee has had his or her operator's or chauffeur's license revoked pursuant to and in accordance with the mandate of the legislature appearing in Section 321.209'.
>
> "For the question to be asked, here, relevant provisions of Section 321A.17(1) and (2) are: '(1) Whenever the Commissioner, under any law of this state, . . . revokes the license of any person upon receiving record of a conviction . . . , (2) Such license . . . shall remain . . . revoked and shall not at any time thereafter be renewed nor shall any license be thereafter issued to such person, . . . until permitted under the motor vehicle laws of this state and not then unless and until he shall give and thereafter maintain proof of financial responsibility . . .'.

#60-8-13

"In view of your previous opinion dated September 1, 1959, and in consideration of the relevant provisions of Section 321A.17 quoted above, what, if any, notice to an individual is required in order to effectively place such an individual under a 321A.17(1)(2) financial responsibility license revocation?"

Section 321A.17, 1958 Code of Iowa, the statute which your letter cites, provides in full:

"Proof required upon certain convictions. 1. Whenever the commissioner, under any law of this state, suspends or revokes the license of any person upon receiving record of a conviction or a forfeiture of bail, the commissioner shall also suspend the registration for all motor vehicles registered in the name of such person, except that he shall not suspend such registration, unless otherwise required by law, if such person has previously given or shall immediately give and thereafter maintain proof of financial responsibility with respect to all motor vehicles registered by such person.

2. Such license and registration shall remain suspended or revoked and shall not at any time thereafter be renewed nor shall any license be thereafter issued to such person, nor shall any motor vehicle be thereafter registered in the name of such person until permitted under the motor vehicle laws of this state and not then unless and until he shall give and thereafter maintain proof of financial responsibility.

3. If a person is not licensed, but by final order or judgment is convicted of or forfeits any bail or collateral deposited to secure an appearance for trial for any offense requiring the suspension or revocation of license, or for operating an unregistered motor vehicle upon the highways, no license shall be thereafter issued to such person and no motor vehicle shall continue to be registered or thereafter be registered in the name of such person until he shall give and thereafter maintain proof of financial responsibility.

> 4. Whenever the commissioner suspends or revokes a nonresident's operating privilege by reason of a conviction or forfeiture of bail, such privilege shall remain so suspended or revoked unless such person shall have previously given or shall immediately give and thereafter maintain proof of financial responsibility."

The opinion to which your letter refers, dated September 1, 1959, stated that "no notice is required to be given by the department to the licensee when such licensee has had his or her operator's or chauffeur's license revoked pursuant to and in accordance with the mandate of the legislature appearing in section 321.209." This opinion was confirmed by State v. Sonderleiter, 99 N.W. 2d 393, handed down by the Iowa Supreme Court on November 17, 1959.

The Court stated, in State v. Sonderleiter, supra, at page 395 of 99 N.W. 2d, in referring to license revocations under section 321.209, 1958 Code of Iowa:

> "And we find no statute requiring the Department to give defendant notice under such circumstances. It is not the notice that revokes the license but the provisions of section 321.209."

The Court held in the Sonderleiter case that an individual whose license had been suspended under the provisions of section 321.209, 1958 Code of Iowa, could not be tried under the provisions of 321A.32, 1958 Code of Iowa, which applied only to suspensions or revocations under Chapter 321A.

The Court stated, at page 395 of 99 N.W. 2d:

> "Chapter 321 and Chapter 321A are two separate chapters of the Code. And inasmuch as the license was revoked under section 321.209, a section in Chapter 321, and section 321A is in Chapter 321A, the conviction for driving while the operator's license was revoked cannot be sustained."

The Court thus pointed out that a revocation under 321.209 is not the same thing as a suspension or revocation under Chapter 321A. Section 321A.17 does not provide that a license can be initially revoked under its provisions. It provides

only that, once a license is revoked, revocation may be continued until proof of financial responsibility is posted and thereafter maintained.

Revocation is made under 321.209 because of conviction of one of the stated offenses. Revocation is continued under 321A.17 because of a failure to post and thereafter maintain proof of financial responsibility. The reason no notice must be sent to licensees whose license is revoked under 321.209 is because they have actual notice of the revocation, when they stand in open court, are convicted, and have possession of their license taken by the court. There is no such actual notice of continuing revocation under 321A.17.

An operator's or chauffeur's license is, of course, a privilege and not a right. Doyle v. Kahl, 242 Iowa 153, 46 N.W. 2d 52. However, where a substantial privilege such as revocation of a license is involved, notice is required. In re Ryan, 180 Misc. 478, 40 N.Y.S. 2d 592.

Section 321.16, 1958 Code of Iowa, provides:

> "Giving of notices. Whenever the department is authorized or required to give any notice under this chapter or other law regulating the operation of vehicles, unless a different method of giving such notices is otherwise expressly prescribed, such notice shall be given either by personal delivery thereof to the person to be so notified or by restricted certified mail addressed to such person at his address as shown by the records of the department. Return acknowledgment is required to prove such latter service.
>
> "Proof of the giving of notice by personal service may be made by the certificate of any officer or employee of the department or affidavit of any person over eighteen years of age, naming the person to whom such notice was given and specifying the time, place, and manner of the giving thereof."

Upon the basis of the above authority, it is my opinion that whenever a license revocation is continued under section

321A.17, 1958 Code of Iowa, notice of such revocation must be given to the licensee, either by personal delivery or by restricted certified mail.

Very truly yours,

FRANK CRAIG
Assistant Attorney General

FC:bl

MOTOR VEHICLES: Minors -- Application for operator's license -- A person under the age of 18 years cannot make application for an operator's license unless he complies with the requirements of section 321.184, 1958 Code of Iowa.

Morr, Lucas Co Atty, 8-15-60) II (Craig to 60-8-14

August 15, 1960

Mr. Richard D. Morr
Lucas County Attorney
Chariton, Iowa

Dear Mr. Morr:

This will acknowledge receipt of your letter of August 9, 1960, in which you state:

"The drivers' license examiner of the Department of Public Safety in and for Lucas County has requested an interpretation of Section 321.184 of the 1958 Code of Iowa relative to applications by persons under 18 years of age when both parents are deceased, no guardian has been appointed and the minor is living by himself and supporting himself. 'X', a 17 year old boy, made application for an Iowa driver's permit. He stated that both parents were deceased, that he has no guardian and lives by himself. He has no employer.

"Our question: When a person under the age of 18 years makes an application for an operator's permit under Section 321.184 of the 1958 Code of Iowa, and has no living parents, appointed or acting guardian, and is living by himself and has no employer, can the drivers' license examiner issue an operator's permit to the minor on the basis of his application alone?"

Section 321.184, 1958 Code of Iowa, provides:

"Applications of minors. The application of any person under the age of eighteen years for an instruction permit, operator's license, or permit issued under section 321.194 shall be signed and verified before a person authorized to administer oaths by both the father and mother of the applicant, if both are living

#60-8-14

and have custody of him, or in the event neither parent is living then by the person or guardian having such custody or by an employer of such minor."

Section 321.185, 1958 Code of Iowa, provides:

"Death of person signing application -- effect. The department upon receipt of satisfactory evidence of the death of the persons who signed the application of a minor for a license shall cancel such license and shall not issue a new license until such time as a new application, duly signed and verified, is made as required by this chapter. This provision shall not apply in the event the minor has attained the age of eighteen years."

Construing the two above-cited statutes together, it is obvious that the signature and verification required on a minor's application is a continuing requirement. It appears a reasonable assumption that the reason for this is to have someone responsible for the actions of licensees under the age of eighteen years. Many states, (i. e., California, Section 17707, California Vehicle Code), hold the person or persons who sign a minor's application financially responsible for any damage caused by the minor while operating a vehicle.

No one has a right to an operator's license. An operator's license is a privilege, not a right. Doyle v. Kahl, 242 Iowa 153, 46 N.W. 2d 52. In a Delaware case, Bispham v. Mahony, 36 Del. 318, 175 A. 2d 320, where the statute involved was nearly identical to 321.184, the Court stated, at page 321 of 175 A. 2d:

"Granting, therefore, the right of the State to restrict the issuance of licenses to operate a motor vehicle to those who have reached a prescribed age, it follows that the State has the power to license those under that age, upon meeting required tests as to ability, and to require the consent of parent, guardian or employer thereof."

The Iowa statute is plain and unequivocal. It provides the conditions under which a person under the age of eighteen years may secure an operator's license, instruction permit or school license. It does not authorize the issuance of a license in the situation you describe.

Upon the basis of the above authority, it is my opinion that the answer to the question you propound is in the negative. A person under the age of 18 years, who has no living parents or appointed guardian, is living by himself and has no employer, cannot be issued an operator's permit on the basis of his application alone.

Very truly yours,

FRANK CRAIG
Assistant Attorney General

FC:bl

STATE OFFICER AND DEPARTMENTS. Orphan's educat. fund

Under Sec. 35.9, Code 1958, a minor child of a veteran who was killed in service during specific war periods, must be a graduate from a high school or its equivalent, and must have lived in Iowa for two years preceding his application therefor, to be eligible to educational aid from the state's Orphan's Educational Fund.

(Strauss to Patterson, Bonus Board) 8-15-60)
August 15, 1960
60-8-15

BONUS BOARD
State Capitol
L O C A L

Attention: Frost P. Patterson, Executive Secretary
Iowa Bonus Board

Dear Mr. Patterson:

This will acknowledge receipt of yours of the 11th inst. in which you submit the following:

"Sections 35.7 through 35.11 of the 1958 Code of Iowa cover the Orphans Educational Fund. Section 35.9 states 'Said Bonus Board is authorized to expend not to exceed three hundred dollars per year for any one child who shall have lived in the State of Iowa for two years preceding application for aid hereunder,'.

"We have two specific cases and we ask for an opinion regarding their eligibility for this aid.

"1. Richard's father was killed in service between specified war dates. Richard, who is now eighteen years of age, had lived with his mother in Sioux City, Iowa from the time he was born until May of 1960. At that time his mother remarried and moved to Osmond, Nebraska. Richard decided to stay in Sioux City, make his home with his grandmother and attend college in Sioux City.

"Would Richard, who is a minor and whose only living parent is now living in Nebraska, be eligible for assistance from the Orphans Educational Fund?

"2. Mary is the daughter of a World War II veteran who was killed in service during war periods. She has lived with her mother in Clinton, Iowa all of her life. She plans to attend college at Lincoln, Nebraska, for one school year. The following year she plans to attend college at the State University of Iowa.

#60-8-15

eligibility to the fund is established. Legislative intent therefore, would seem to require the use of the language "two years residence" as a qualification for eligibility. If such actually be the legislative intent, I am of the opinion that the word "lived" as used in the foregoing statute means being an inhabitant, or living, in fact. This was the view of the court in the case of Turner v. City Board of Education, 231 S.W. 2d 27, where it was observed;

> "Every child of school age has the privilege of attending the public school in the district in which he lives. KRS 158.030. This does not mean legal domicile in the technical and narrow sense of residence of a person for purpose of taxation or suffrage. It means the place where the child is an inhabitant or where he lives in fact. Board of Trustees of Stanford Graded Common School District v. Powell, 145 Ky. 93, 140 S.W. 67, 36 L.R.A., N.S., 341, Ann. Cas. 1913B, 1016; Crain v. Walker, 222 Ky. 828, 2 S.W.2d 654; Jefferson County Board of Education v. Goheen, 306 Ky. 439, 207 S.W. 2d 567."

1. In answer to your Question #1, I would advise that under the facts stated in your request, Richard, who is now eighteen years of age, is eligible to receive the three hundred dollars under Section 35.9, Code 1958, for the reason that he has lived in the State of Iowa for two years preceding his application for educational aid.

2. In answer to your Question #2, I would advise that Mary's attendance in school in Nebraska for nine months would disqualify her for educational aid until such time as she shall have lived in Iowa for two years after she has returned from attending college in Nebraska.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:nmh4

STATE OFFICERS AND DEPARTMENTS; Soldiers' Relief Comm

The reasonable cost of the bond required of members of the Soldiers' Relief Commission under Code sec. 250.6; also of an executive secretary of said Commission, shall be paid from the General Fund of the county in which the bond is filed, as provided by Code secs. 64.11, and 64.15 as amended by Ch. 98, 58th G.A.

(Strauss t. Patterson, Bonus Board, 8-18-60)

#60-8-16

August 18, 1960

IOWA BONUS BOARD
State Capitol
B U I L D I N G

Attention: Mr. Frost P. Patterson
Executive Secretary

Dear Mr. Patterson:

This will acknowledge receipt of yours of the 11th Inst. in which you state the following:

> "Chapter 250 of the 1958 Code of Iowa covers Relief for Soldiers, Sailors and Marines. Section 250.6, in speaking of Soldiers' Relief Commissioners, states that 'They shall qualify by taking the usual oath of office, and give bond in the sum of five hundred dollars each,'.
>
> "Soldiers' Relief Commissioners are appointed by the members of the Board of Supervisors and are paid from County Soldiers' Relief funds after approval of the Board of Supervisors.
>
> Chapter 98 of the Acts of the Regular Session of the 58th General Assemoly amended Section 64.15, Code of 1958 to read ", clerks and cashiers employed by county officers' for whom the county should pay performance bond.
>
> "We would appreciate an opinion from your office if the bonds of Soldiers' Relief Commissioners should be paid from the County General Fund. Also if, in your opinion, the bonds of the Solders' Relief Commissioners cannot be paid from the County Soldiers' Relief Fund? In the event the County Soldiers' Relief Commission employs an Executive Secretary, should the bond of the Executive Secretary be paid for from the County General Fund?"

1. In reply to your question as to whether the bond of members of the Solders' Relief Commission may be paid from the General Relief Fund, I would advise you that Section 64.11

#60-8-16

provides that the bonds of such officers should be paid by the county. This section provides the following:

64.11 Expense of bonds paid by county.

> If any county treasurer, clerk of the district court, county attorney, recorder, auditor, sheriff, coroner, members of soldiers relief commission, members of the board of supervisors, engineer, steward or matron shall elect to furnish a bond with any association or incorporation as surety as provided in this chapter, the reasonable cost of such bond shall be paid by the county where the bond is filed.

"Paid by the county" means payment from the County General Fund.

2. Insofar as the bond of the executive secretary is concerned, I would advise that Code section 64.15, as amended by Chapter 98 of the 58th General Assembly, now provides the following:

64.15 Bonds of deputy officers.

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

The bond of an executive secretary, who should be regarded as a clerk, likewise is payable from the County General Fund.

Yours truly,

OSCAR STRAUSS

First Assistant Attorney General

OS:mmh4

O.M.V.I. - -

CRIMINAL LAW: Provisions of section 789.13, 1958 Code of Iowa, the indeterminate sentence law, are not applicable to third offense OMVI under section 321.281 of the Code, and the Court must sentence such person to a specific term of years.

(Neely to Bennett, Warden St Pen., 8-18-60)

#60-8-17

August 18, 1960

Board of Control of State Institutions
State Office Building
L O C A L

Attention: John E. Bennett, Warden

Gentlemen:

This is in reply to your letter of August 9, 1960, in which you request the following:

> "We are writing to you in regard to the above named subject, (Lloyd E. Anfinson, Our No. 26680) who was received at this institution on July 29, 1960 from Emmet County, Estherville, Iowa, for the crime of O.M.V.I., and was sentenced to a term of not less than one year nor more than five years under Section 321.281, 1958 Code of Iowa.
>
> "We have written to the Clerk of District Court, Emmet County, requesting that they issue us a new Mittimus and specify the exact term of years for this crime so that we can figure this man's Good and Honor time. We are under the impression that under Section 321.281, 1958 Code of Iowa, a person sentenced under this section must be sentenced to a specified term of years. We are enclosing a copy of the Mittimus we have, a copy of the letter we wrote them, and a copy of the reply we received from their County Attorney in Estherville, Iowa.
>
> "We would appreciate it very much if you would give us a ruling on this case for further reference and advise them how this section applies to this

#60-8-17

> crime so that they will issue us a new Mittimus on this man and specify the exact term of years so we can figure his time."

Your problem seems to have arisen from the conclusion of the Emmet County Attorney that a specific term of years was unnecessary in this particular case, said conclusion apparently being based upon the opinion that the provisions of the indeterminate sentence law are applicable to section 321.281 of the 1958 Code of Iowa.

Some credence for this position might be gained by an analysis of the case of Cave, Keener v. Haynes, 221 Iowa 1207, 268 N.W. 39; however, even in that case, the Court recognized that the indeterminate sentence law will not be applicable where expressly excluded by the wording of the statute.

In the recent case of Masteller v. Board of Control of State Institutions, --- Iowa ---, 100 N.W. 2d 111, the Court extended its position on this matter as follows:

> "In Section 698.1 providing punishment for the crime of rape certain penalties are set out and it is then further provided that 'the court may pronounce sentence for a lesser period than the maximum, the provisions of the indeterminate sentence law to the contrary notwithstanding.' A similar provision appears in section 698.4 relating to assault with intent to commit rape. The same specific provisions do not appear in Section 204.22 which, so far as material to this case, is: 'Any person violating any provision of this chapter, except as otherwise provided, shall upon conviction * * * be fined not more than two thousand dollars and be imprisoned in the state penitentiary not less than ten or more than twenty years. * * * 4. For violation of the provisions of this chapter the imposition or execution of sentence shall not be suspended and probation or parole shall not be granted until the minimum imprisonment herein provided for the offense shall have been served.' (Emphasis supplied.) We cannot ignore the provision of subsection 4 that probation and parole shall not be granted until the minimum imprisonment herein provided for the offense shall have been served. We are concerned at this point however with the words 'minimum imprisonment herein provided for the offense.' How could anything be plainer

than that the legislature intended, in this statute, to provide for a minimum as well as a maximum sentence for this particular offense, the indeterminate sentence law to the contrary notwithstanding. It is a well-established principle that penal statutes must be strictly construed and doubts, if any, resolved in favor of the defendant. Lever Brothers Company v. Erbe, 249 Iowa 454, 87 N.W. 2d 469; State v. Di Paglia, 247 Iowa 79, 90, 71 N.W. 2d 601, 607, 49 A.L.R. 2d 1223.

" * * * * Section 204.22 of the Code of 1950 was repealed in 1953 by the Fifty-fifth General Assembly and the section in its present form was enacted. Before repeal the material part of the section read, 'and for any subsequent offense, (after the first) by a fine not exceeding two thousand dollars, or by imprisonment in the state penitentiary not exceeding ten years, or by both such fine and imprisonment.' (Emphasis supplied.) Subsection 4 of Section 204.22 was a new enactment (55th G. A.). It changed the imprisonment portion from a sentence of not exceeding ten years to a term of 'not less than ten or more than twenty years.' It seems incredible that the legislature in its wisdom, having in mind the indeterminate sentence law, section 789.13, and having used in the repealed statute the words 'not exceeding ten years' would in the new statute change to the provision 'not less than ten or more than twenty years' unless it had definitely intended to provide a minimum sentence of ten years. Had it intended the indeterminate sentence statute to apply surely it would have said 'not exceeding twenty years.' (Emphasis supplied.)"

"It is quite obvious this recent enactment was intended to establish a minimum sentence, the provisions of the indeterminate sentence law to the contrary notwithstanding. * * * "

Similarly, prior to July 4, 1957, section 321.281 read as follows:

" * * * and for a third offense by imprisonment in the penitentiary for a period not to exceed three years."

Effective July 4, 1957, the legislature changed this provision to read:

> " * * * and for a third offense and each offense thereafter, by imprisonment in the penitentiary for any term of years not less than one nor more than five, and the Court may pronounce sentence for a lesser period than the maximum, the provisions of the indeterminate sentence law notwithstanding." (Emphasis supplied)

It is clearly evident therefore, by the decision in the Masteller case, that where the wording of a statute is changed to include the express provision that the indeterminate sentence law shall not apply, this provision adds another exception to the applicability of the indeterminate sentence law in addition to those already enumerated in that law, section 789.13.

This being true, the rule established in the recent case of State v. Jackson, --- Iowa ---, 101 N.W. 2d 731 becomes applicable. The Supreme Court therein stated the standard as follows:

> "We are of the opinion the sentence lacks the definiteness required in punishment for crimes. The judgment of the trial court should be stated so certainly that the warden or other officer may understand and execute it. 15 Am. Jur., Criminal Law, § 443, p. 103; 24 C.J.S., Criminal Law, § 1581(b), p. 104; Ex parte Frazier, 164 Tex. Cr. R. 572, 301 S.W. 2d 655, 656; People v. Jackson, 399 Ill. 488, 78 N.E. 2d 211, 212; State ex rel Petcoff v. Reed, 138 Minn. 465, 163 N.W. 984, 985. Measured by this rule, we find the sentence too indefinite to be permitted to stand * * * * Any term of years from seventy down at least to ten, the minimum sentence permitted by the statute, meets the stated requirement of 'not to exceed seventy years'. We have ourselves disapproved this form of sentence, in State v. Nova, 206 Iowa 635, 637, 220 N.W. 41, 42; and in State v. Sayles, 173 Iowa 374, 383, 155 N.W. 837, 840." (Emphasis supplied)

In view of the above-cited authorities, it is the opinion of this writer that the provisions of section 789.13,

1958 Code of Iowa, (the indeterminate sentence law) are not applicable to persons convicted of third offense OMVI under section 321.281, and that the sentence under such a conviction must be for a specific term of years.

Yours very truly,

MARION R. NEELY
Assistant Attorney General

MRN:RLS:bl

TAXATION: Grain Tax: - The grain tax under Section 428.35, Code of Iowa (1958), is imposed upon the handling or receiving of grain and not on the loading out or the purchasing of grain. (Gill to O'Connor, St Tax Comm'r, 8-29-60) # 60-8-18

August 29, 1960

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 a letter written by Ballard B. Tipton, Director of the Property Tax Division of the State Tax Commission, wherein the following problem was submitted:

"Section 428.35, Code of Iowa (1958), contains provisions for taxing 'grain handled'. Subsection 22, Section 427.1, provides that grain handled, as defined under Section 428.35, shall not be taxed. Numerous questions have in the past been raised by assessors in attempting to properly administer the law on taxing 'grain handled', and there have been several legal opinions heretofore requested and issued relative to such questions, but there still appear to be new questions arising.

"The Property Tax Division respectfully asks that a legal opinion be requested on the following questions:

"A trucker, who is a resident of the state of Iowa, buys and sells corn and grains. Most of his sales are to cattle feeders in Iowa. He advertises that he is a dealer in hay, grain and livestock, and does corn shelling. With respect to the grain that he buys, he uses the storage facilities of the seller of the grain until such time that he finds a market for it, then loads it on his truck and hauls same to the purchaser thereof. The grain is not handled or moved at the time and place of purchase by the trucker, and it sometimes is a matter of a few weeks before he removes it from that storage place. Is the grain handling tax to be applied on the grain so purchased by the trucker at the time of purchase where it is left for an indefinite time where stored? Is such tax to also be applied at the time the trucker loads the grain on his truck for delivery to a purchaser? In the case that at the time of purchase of the grain, the trucker immediately

#60-8-18

loads it on his truck and delivers it to a purchaser, is the grain handling tax to be applied and charged to him on the grain he purchased, and in turn applied and charged to the purchaser thereof on the grain put in the said purchaser's storage facilities? If so, would such tax not apply to the trucker if he made the showing that he make no profit on such transactions other than the regular charges for trucking and shelling?

Section 428.35, Code of Iowa (1958), must be considered here and the applicable parts thereof are set forth below:

"428.35 Grain handled.

"1. Definitions. 'Person' as used herein means individuals, corporations, firms and associations of whatever form. 'Handling or handled' as used herein means the receiving of grain at or in each elevator, warehouse, mill, processing plant or other facility in this state in which it is received for storage, accumulation, sale, processing or for any purpose whatsoever. * * *.

"2. Tax imposed. An annual excise tax is hereby levied on such handling of grain in the amount hereinafter provided. * * *.

"* * *.

"5. Computation of tax. The rate imposed by subsection 2 of this section shall be applied to the number of bushels of grain so handled, and the computed amount thereof shall constitute the tax to be assessed."

In response to the aforementioned request, certain preliminary remarks should be made. The tax discussed herein is an excise tax and is imposed upon the privilege of "handling" grain by receiving and not a tax upon the grain. To establish an assessment under Section 428.35, the number of bushels of grain handled is important only as a basis in computing the tax.

Regarding your first question, the grain tax should be assessed against the person storing the grain for the trucker-purchaser. If the trucker-purchaser

leases or owns these storage facilities, then he should bear the tax. Also see the 1950 Report of Attorney General, p. 79.

In respect to your second problem, the answer would be in the negative, since the tax falls upon the receiving of the grain at or in the elevator, warehouse, etc. The situation where the trucker takes it out of storage to transport it to another location would not be considered to be receiving, rather it is a loading out of the grain from the storage facility.

In response to your third inquiry, your attention is again directed to the terms of the aforementioned statute which uses the word "receiving". Therefore, the trucker cannot be taxed on the unloading of the grain at the purchaser's facility, because he is not receiving the grain. Nevertheless, the purchaser in this instance is receiving the grain or handling it and should be assessed on the number of bushels of grain he has received; unless the purchaser is a consumer, in which case the buyer would not be receiving the grain for any of the enumerated purposes found in the statute and, therefore, would not be subject to tax.

Lastly, it is of no importance that the trucker-purchaser makes no profit on such transactions; if he receives grain for any one of the reasons set forth in the statute, he is subject to the tax imposed thereby.

Very truly yours,

Gary S. Gill
Special Assistant Attorney General

GSG:fs

BEER - permits -- Under stated facts, County Board of Supervisors, had no authority to issue a Class "C" permit to owner of restaurant located outside of a platted village.

Cady, Franklin Co Atty, (Bianco to 8-30-60) # 60-8-20

August 30, 1960

Mr. G. A. Cady
Franklin County Attorney
Hampton, Iowa

Dear Mr. Cady:

We have your request of August 27 reading as follows:

"I request an opinion from your office concerning Section 124.5 of the 1958 Code of Iowa.

"In Franklin County we have a situation where a young man operates a restaurant in the country and not in a platted village, and the Board of Supervisors is in favor of granting him a Class "C" beer permit if they have the right to do so under the above stated section.

"My question is: Does the Board of Supervisors have the right to issue said permit in view of said section, or are they prohibited from issuing the permit, in view of the fact that the location of the premises is not within an area platted prior to January 1, 1934?"

In answer thereto we enclose herewith thermo-fax copies of three opinions issued by the Attorney General as follows: O.A.G. 1934, page 558, O.A.G. 1938, page 390, O.A.G. 1934, p. 575.

Under the authority of the opinions above referred to it is our opinion that the Franklin County Board of Supervisors do not have the right to issue a Class "C" permit under the facts stated in your letter.

Yours very truly,

FRANK D. BIANCO
Assistant Attorney General

FDB:kvr

ELECTIONS: Independent names on official ballot --

Where there are two independent candidates at the general election, the names of the candidates must be placed in separate columns under appropriate headings.

Winneshiek Co Atty, 8-30-60) (Strauss to Strand, # 60-8-19

August 30, 1960

Mr. Paul D. Strand
Winneshiek County Attorney
204 West Main
Decorah, Iowa

Dear Mr. Strand:

This will acknowledge receipt of yours of the 27th inst. in which you state:

> "The Winneshiek County Auditor has requested from me an opinion as to the following:
>
> 1. The facts of the situation are that 2 candidates for supervisor from a district in the county have filed the necessary petitions and qualified to be named on the independent ticket in the fall election. These 2 men running on the independent ticket, both having been qualified, how are their names to appear on the official ballots in their districts?
>
> 2. Will they be listed alphabetically or in the various polling places in the district will some of the ballots be to list one of them first and the other one second in a form of rotation as some of the offices are done.
>
> "I have checked Chapter 45 and the people have qualified as to that section and the only question that remains now is that where we have 2 candidates on an independent ticket for the office of Winneshiek County Supervisor, how are their names to be listed on the ballot? Please advise as soon as possible as we must get our ballots printed for the coming election. Thank you very much for your cooperation."

In reply thereto I advise as follows:

1. In answer to your Question #1, I advise that on the authority of the opinion appearing in the Report for 1928, at page 417, copy of which is herewith enclosed, two men running

#60-8-19

for the same office as independents, should have their names placed on the ballot in separate columns.

2. In view of the answer to your Question #1, there appears to be no necessity for answering your Question #2. The situation set forth in such question will not arise.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh4
Enc

ELECTIONS: Eligibility for office.

A resident of X township has no voting residence in Y township and therefore lacks eligibility to be elected or hold the office of justice of the peace in Y township. (Strauss to Johnson, Poweshiek Co. Atty., 8/11/60) #60-9-1

August 11, 1960

39.21
49.9

Mr. Vincent E. Johnson
Poweshiek County Attorney
Montezuma, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 10th inst. in which you submit the following:

> "I should like to request an opinion in regard to the following matter.
>
> "Section 39.21 of the 1958 Code of Iowa sets forth the fact that each township shall be entitled to two justices of the peace who shall be elected biennially. The section is silent in regard to the qualifications of an individual elected as such justice of the peace.
>
> "May an individual who is a resident of X township be elected as justice of the peace for Y township and effectively and validly hold such office and transact the business of such office without being a resident of such township or residing in such township?"

In reply thereto I would advise you that in my opinion an individual who is a resident of X township cannot be elected and serve as a justice of the peace in Y township. In support of that conclusion, I refer you to the case of State v. Van Beek, 87 Iowa 569, 577, where it is said the following:

> "Our first inquiry is, whether an alien can hold the office of sheriff under the laws of Iowa. There is no provision in our constitution or statute upon that subject, yet it is certainly a fundamental principle of our government that none but qualified electors can hold an elective office unless otherwise specially provided."

#60-9-1

This rule was reaffirmed in the case of Blodgett v. Clarke, 177 Iowa 575, 577:

> "To be eligible to an elective office created by the Constitution, a person must be a qualified elector."

Among the requirements of eligibility of an elector is that he can vote only in the precinct of his residence. Code section 49.9 provides the following:

> "49.9 Proper place of voting. No person shall vote in any precinct but that of his residence, except as provided in section 363.21."

A resident of X township has no voting residence in Y township and therefore lacks eligibility to be elected or hold the office of justice of the peace in Y township.

Yours truly,

OSCAR STRAUSS

First Assistant Attorney General

OS:mmh4

TAXATION: Real Property Tax--Easement to County for Public Highway: Where county acquires easement for use as public highway, such property as is devoted to use as public highway is exempt from general property tax. (Ltr to Poh. Co. Mahaska Co. Atty., 8/12/60) #60-9-2

August 12, 1960

427.2
428.4
446.60
443.3
443.6

Charles H. Scholz
Mahaska County Attorney
Mahaska County Court House
Oskaloosa, Iowa

Dear Mr. Scholz:

This will acknowledge receipt of your letter dated March 31, 1960, in which you request the opinion of this department relative to the following questions:

"1. In view of the provisions of Section 427.2, providing that real estate occupied as public roads shall not be taxed, are the portions acquired for public highways purposes exempt from taxation for the year 1959, and for subsequent years, in view of the fact that easements are involved, as distinguished from outright conveyances of complete title to the portions involved?

"2. If so, what procedure should be followed, either by the County Assessor, the County Board of Review, the County Auditor, the County Treasurer, or the County Board of Supervisors, with respect to the adjustment of the existing assessments of the entire tract for the purpose of excluding the portion thereof which has become exempt from taxation, with reference: (a) to the taxes for the year 1959, and (b) to the taxes for the year 1960, and (c) to the taxes for the year 1961, the year in which a new assessment of the real estate will be made pursuant to the provisions of Section 428.4 of the 1958 Code of Iowa?

"3. With reference to the taxes for the year 1959, in the situation altered by the fact that the easement involved was obtained

#60-9-2

after the date of levy, in view of your Attorney General's opinion, dated March 26, 1959, addressed to T. K. Ford, Des Moines County Attorney?"

In respect to your first question, it must be borne in mind that Section 427.2, which is set out below is an exemption statute, and as such must be strictly construed, Readlyn Hospital v. Hoth, 223 Iowa 321; Trustees of Iowa College v. Baillie, 236 Iowa 235; Boss v. Polk County, 236 Iowa 384.

"427.2 Roads and drainage rights of way. Real estate occupied as a public road, and rights of way for established public levees and rights of way for established, open, public drainage improvements shall not be taxed."

With this rule of statutory construction in mind, the statute must be construed to exempt only property actually used as a public road. The mere acquisition of the easement by the county will not exempt the property. The question, as submitted does not indicate whether the property was actually in use as a public road during 1959, or when it first became so used. If, however, it is so used, the fact that the county has acquired an easement rather than fee title to the property will not deprive it of the exemption. This office has held previously that an easement is sufficient to come within the exemption provisions of Section 427.2, supra, see 1934 A.G.O. 299.

In answer to your second question, we will first consider the question relating to the 1959 real property taxes, payable in 1960. You will recall that in our previous opinion dated October 12, 1959, directed to you, neither the assessor, auditor, or treasurer, has any authority to cancel, remit, or apportion the taxes, since the property was presumably assessed correctly, and was not withheld from taxation, nor did it constitute overlooked or omitted property. Further, it is our opinion that the Board of

Supervisors has no authority to apportion the taxes in this matter, since as we have stated in our opinion dated May 10, 1960, directed to Mr. M. R. Werling, Cedar County Attorney, the County Board of Supervisors may not apportion taxes between a nontaxable entity and an individual. This conclusion is based on Section 449.1, Code (1958), which contemplates that there be two or more owners who are unable to agree as to what portion of the tax each portion of the real estate shall bear. This is not the case herein, since that part under easement to the county is by statute exempt from the tax.

Therefore, it is necessary to proceed pursuant to Section 445.60, Code (1958), which provides as follows:

> "445.60 Refunding erroneous tax. The board of supervisors shall direct the treasurer to refund to the taxpayer any tax or portion thereof found to have been erroneously or illegally exacted or paid, with all interest and costs actually paid thereon."

In order to fall within this provision, it should be established that the tax was erroneously or illegally exacted or paid. Where the easements were acquired before the date of levy, under our holding of March 26, 1959, and the cases cited therein, the tax should not have been levied on that portion of the property subject to the easement. If the property was so acquired and the taxes levied, the taxes were erroneously exacted, and the Board of Supervisors is authorized to direct a refund in an amount which the taxes on the property under easement bears to the total property.

For the 1960 taxes due and payable in 1961, the proper procedure would be for the auditor on or before January 1, 1960, to correct the tax list by showing the transfer of the easement to the county in accordance with Section 443.3, Code (1958). Where, however, this was not done, a further remedy appears available in Section

443.6, Code (1958), which provides as follows:

> "443.6 Corrections by auditor. The auditor may correct any error in the assessment or tax list, and the assessor or auditor may assess and list for taxation any omitted property."

The auditor under this section has power to correct the tax list until such time as the tax is paid or otherwise legally discharged, Read v. Schulmeister, 229 Iowa 844. Since he has authority under section 443.3, Code (1958), to correct the tax list to record transfers, prior to the assessment date, it would follow that under Section 443.6, supra, he has the authority to make the correction at any time after such date up to the date of payment. The auditor, therefore, by virtue of this provision, has authority to record the transfer on the tax list and in such way, reduce the assessment so as to exclude that portion of the property under easement.

For the year 1961, a regular real estate assessment year the county assessor presumably will assess only such part of the property as is owned by private individuals and not under easement.

In answer to your final question, you are advised that under the prior holdings of this department the taxable or exempt status of property is determined as of the date of levy. Wesleyan College v. Knight, 207 Iowa 1238, A.G.O. March 26, 1959, to T. K. Ford, Des Moines County Attorney. Thus, where the easements were acquired in 1959, by the county after the date of levy the entire property should be taxed for that year.

Very truly yours,

Gary S. Gill
Special Assistant Attorney General

GSG/WWR/bjf

TAXATION: Moneys and Credits Tax; Interest Bearing Contracts. - A subsequent writing that makes the original contract a non-interest bearing one may relate back to the date of the first payment thereunder, depending on whether it is a modification or a waiver. (Letter to Draheim, Jr., Wright Co. Atty., 8/31/60) #60-9-3

August 31, 1960

Mr. A. F. Draheim, Jr.
Wright County Attorney
Court House
Clarion, Iowa

Dear Mr. Draheim:

This will acknowledge receipt of your letter of August 5, 1960, wherein the following inquiry was submitted:

"This office is requesting an opinion concerning the following matter:

"FACTS: An opinion from your office to Mr. William G. Klotzbach, dated November 1, 1957, #57-11-3, states in part that any written contract failing to mention interest shall be presumed to be drawing interest and an assessment shall be made for a tax based on the legal rate of interest.

Pursuant to such an opinion, an assessment was made for a tax on two written contracts recorded in this County in 1958 which lacked any provision mentioning interest whatsoever. The vendor paid a Moneys and Credits tax in 1959 on one of the contracts as assessed, and in December, 1959, and on June 4, 1960, the Vendor recorded a written supplemental agreement to the two contracts whereby the parties stated that no interest has ever been paid to or received by the vendor (taxpayer in this case), and that it was never the intention of the vendees to pay any interest on the contracts.

"QUERY: In view of the two supplemental agreements, would the earlier assessments constitute an erroneous or illegal tax whereby the taxpayer is entitled to a refund or abatement?"

In response thereto, it appears a factual determination must be made as to what is this subsequent agreement. In other words is it a modification of the prior contract, or a waiver? Since, in view of the opinion by this office to

#60-9-3

Mr. Klotzbach, the seller had a right to interest by statute, whether expressly stated or not, and, without a provision to the contrary, it was an interest bearing contract.

It is a general rule of law that a contract in writing cannot be varied, altered or modified by parol evidence of what was said at the time the contract was made. Notwithstanding the foregoing rule, a written contract may be modified or altered by a subsequent oral or written agreement. If it is modified by subsequent action, all elements of a new contract must be present to effectuate the modification. If this is the case in the situation outlined above, it is submitted the contract would be non-interest bearing from the date of modification.

On the other hand, the seller may have waived his right to interest by subsequent conduct, i.e., applying all payments to principal or by an express oral statement to that effect. If this latter statement is in fact true, the statement subsequently filed would be only a writing evidencing such a waiver, which may well go back to the first installment payment, and could be determined only by investigating the facts.

Without going into an extensive discussion of all of the ramifications of this subsequent writing, you are advised that, before a determination can be made as to whether the taxpayer is entitled to a refund or abatement, facts must be gathered as to whether the subsequent writing constitutes a modication of the original contract or a waiver by the seller of his right to interest.

Very truly yours,

Gary S. Gill
Special Assistant Attorney General

GSG:fs

COUNTIES AND COUNTY OFFICERS:

Voting machines -- The county auditor has no mandatory duty to permit the school board to use the county voting machines in a local school board election in the county where such use conflicts with the county's use of the machines at the general election.

(Strauss to Salisbury, Jasper Co. Atty., 9/6/60)

#60-9-4

September 6, 1960

9/8

Mr. Don C. Salisbury
Jasper County Attorney
Newton, Iowa

277.15
~~52.22~~
277.13
277.14
~~52.1~~
~~52.7~~
~~52.3~~

Dear Mr. Salisbury:

This will acknowledge receipt of your inquiry of September 1, 1960, which states:

"Our county auditor has received a request from one of the local school boards to use the voting machines purchased by the county board of supervisors in their local school board election on September 12, 1960, and may receive similar requests from other school boards.

"Section 277.15 of the 1958 Code of Iowa states the following, to wit:

> '277.15 Voting machines. Voting machines may be used for all school elections in all precincts where the same are in use at general elections and the names of the candidates and the propositions to be voted upon shall be arranged thereon as by law provided. The state and county, or either, as the case may be, shall without charge permit the use for school elections of voting machines used at the general elections, and the same shall be used according to the general election law so far as applicable.'

"Section 52.22 of the 1958 Code of Iowa as amended by Chapter 95, Section 2 of the 58th G.A. provides among other things that the voting machines shall remain locked until thirty days after the proclamation of the results of said election. Section 277.22 of the 1958 Code states that school elections may be contested as provided by law for the contesting of other elections.

"If the county auditor permitted said school board to use the voting machines as directed by Section 277.15, same would result at least in great inconvenience to the county auditor inasmuch as it would leave him very little time to prepare the machines for the general election. Of course, the more school boards using the voting machines, the greater the inconvenience.

#60-9-4

"Further, if a contest arose in one or more of said school elections, it could mean that the voting machines could not be used at all in the coming general election.

"Therefore, in view of the language of Section 277.15 of the 1958 Code of Iowa, must the county auditor permit the school boards to use the voting machines purchased and owned by the county in local school board elections in the county.

"Since the time for a decision is growing very short, I would appreciate a reply at your earliest convenience."

In reply thereto, I advise as follows:

Section 277.13, Code 1958, provides that "voting at all school elections shall be by ballot or voting machines."

Section 277.14, Code 1958, makes it the duty of the board of directors of the school corporation to "provide the necessary ballot box or voting machine and pollbooks for each precinct."

Section 277.15, Code 1958, states the method of providing such machines in the following language:

"277.15 Voting machines. Voting machines may be used for all school elections in all precincts where the same are in use at general elections and the names of the candidates and the propositions to be voted upon shall be arranged thereon as by law provided. The state and county, or either, as the case may be, shall without charge permit the use for school elections of voting machines used at the general elections, and the same shall be used according to the general election law so far as applicable."

While under said section, such machines may be used for voting in school elections, and this power may be exercised by the school board in its discretion, no power is vested in the board to provide itself with such voting machines. If the power to use is exercised by the board, the only method for providing such machines for a school election is the following contained in the foregoing section 277.15:

> "* * * The state and county, or either, as the case may be, shall without charge permit the use for school elections of voting machines used at the general elections, and the same shall be used according to the general election law so far as applicable."

Thus, if only a school district were involved in the problem, the obligation of the county or city, as the case may be, to permit use of such machines, would be imposed. However, the situation that might arise out of use of such machines in the school election at the time stated, brings into the situation the obligation of the county or city (vested therein under the provisions of sections 52.1, 52.2, and 52.3, Code 1958) to use the same machines at the general election to be held on November 8, 1960. Potentially this would deprive the county or city of its duty and obligation to use the machines at such election. Thus the discretionary power to use the voting machines by the board of directors of the school district must yield to the absolute obligation of the county or city to use such machines at the general election, where such use has been ordered by the city or county.

As a result, the apparently mandatory duty of the county or city as evidenced by the word "shall" used in Section 277.15, Code 1958, permitting the use of such machines requires conversion into the term "may" and thus to effectuate the legislative intent. Substituting the word "may" for "shall" to effectuate such intent is a principle of law adhered to by our Supreme Court. See cases so holding in Callaghan's Iowa Digest, title "Statutes," section 101.

In the case of Lodge v. Drake 243 Iowa, 628, 51 N.W. 2d 418, the Court said: (page 630)

> "The word 'shall' is to be construed as permissive for the statute is designed as a grant of a right or benefit. See 59 C.J., Statutes, section 635, at page 1086: 'Where a statute makes that legal and possible which otherwise there would be no authority to do, it will be construed as permissive only, although using the word "shall"' See also Carpenter v. Newland, 92 Misc. 596, 156 N.Y.S. 438."

In view of the foregoing, the county auditor would have no mandatory duty to permit the school board to use the county voting machines in a local school board election in the county.

Very truly,

OSCAR STRAUSS

First Assistant Attorney General

OS:mmh4

STATE OFFICES AND DEPARTMENTS

MINE INSPECTOR: Pitless scales -- Section 215.14 does not apply to coal mine scales. (Craig to Aubrey, St. Mine Insp., 9/6/60) #60-9-5

September 6, 1960

215.14

Mr. W. Dean Aubrey
State Mine Inspector
L O C A L

Dear Mr. Aubrey:

This will acknowledge receipt of your request for opinion, in which you state:

"This department requests an opinion as to the exact meaning of Section 215.14, Code 1958: -

"1. Does this section apply to all scales in the state.

"2. If so, would it be legal for operators of coal mines to install so-called 'pit-less' scales for use at coal mines.

"I was told at the time this bill was passed that it would not apply to scales used at coal mines, but would like to have an opinion on how it is being applied now."

Section 215.14, 1958 Code of Iowa, provides:

"Approval by department. No scale known in the commercial field as a truck or livestock scale shall be installed in the State of Iowa without first being approved by the state department of agriculture. Said approval being based upon the recommendations of the U. S. bureau of standards. All motor truck scales, livestock scales, and grain dump scales, hereafter installed and regardless of capacity shall have a clearance of not less than four feet from the finished floor line of scale pit to the bottom of the 'I' beam of the scale bridge."

#60-9-5

It is a tenet of statutory construction that the express mention of one thing implies the exclusion of others. The Latin phrase is "expressio unius est exclusio alterius".

Section 215.14 requires truck and livestock scales to be approved by the Iowa Department of Agriculture. All motor truck scales, livestock scales and grain dump scales must have a four-foot pit. No mention is made of coal mine scales, so they are impliedly excluded from the provisions of section 215.14 of the Code.

Therefore, the answers to your questions, in my opinion, are:

1. No, section 215.14 does not apply to all scales in the State of Iowa.

2. Section 215.14 does not prevent coal mine operators from installing so-called "pitless scales".

Very truly yours,

FRANK CRAIG
Assistant Attorney General

FC:bl

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

~~174.16~~
~~174.19~~
~~174.15~~
~~174.16~~
174.24
174.25
174.26
~~332.3(13)~~

September 6, 1960

Mr. Asher E. Schroeder
Jackson County Attorney
Maquoketa, Iowa

Attention: Walter J. McCarthy, Assistant

Dear Mr. Schroeder:

This will acknowledge receipt of your letter of August 16, in which you state the following:

> "With reference to Section 174.25, we have a question with regard to moneys received from the State Highway Commission for land condemned from the Jackson County Fair Grounds for road purposes.
>
> "With the taking of the land from one side of the fairgrounds, the Fair Association was forced to buy additional ground on the other side.
>
> "The question is whether or not the money which was received from the sale or condemnation can be used for permanent buildings on the fair-ground site."

In reply thereto, we advise as follows:

The purpose of sections 174.24 through 174.26 inclusive, Code 1958, is to enable the board of supervisors to accept legal title to a new site for the county fair and to provide for disposition of the old site. The facts presented in your letter do not indicate this proposition.

#60-9-6

Under section 174.15, Code 1958, the county board of supervisors, with the approval of the electors, has the power to purchase property for fair grounds and to pay for same out of the general fund. Once the board of supervisors has purchased said fair grounds, sections 174.13 and 174.17 provide for the necessary monies to maintain the grounds. Opinions of the Attorney General, 1938, page 55. The fair grounds are held in trust for a fair society; however, this does not prevent the board of supervisors from disposing of the land under section 332.3(13), Code 1958, for adequate consideration. Ind. Sch. Dist. v. DeWilde, 243 Iowa 685, 53 N.W. 2d 256.

The board of supervisors is under a duty to protect the fair ground fund and this property under the control of the society, unless otherwise terminated by section 174.16, Code 1958. If the board of supervisors does sell lands belonging to the fair grounds, the proceeds from such sale should be placed in the fair ground fund.

Fair ground funds may be expended for the erection and repair of permanent improvements on real estate which is under the jurisdiction of the society. Opinions of the Attorney General, 1930, page 369.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:bl
Encl HF 45

HIGHWAYS

Maintaining private roads:- Private lanes or entrances may not be maintained with public machinery and cannot be elevated to the status of public roads or highways.

1 Faulkner to Fromm, Shelby Co. Atty., 9/7/60) #60-9-7

740.20

September 7, 1960

Mr. Leonard W. Fromm
Shelby County Attorney
Harlan, Iowa

Dear Mr. Fromm:

In your letter of August 24, 1960, inquiry was made with respect to the following proposition:

> "In the year 1947 the County road was laid out and maintained on a line one-fourth mile south of theCounty Section line and proceeded through land owned by Farmer A and upon which a river bridge existed and was maintained across a river which intersected said County road. As a result of the flood which took place at that time, the bridge was washed out and Farmer A agreed with Farmer B, whose land and buildings were located to the north and adjacent to the property owned by Farmer A, and as a result of the agreement Farmer A, upon title given to him of the abandoned County roadway, agreed to give access or right of way to Farmer B of a strip of land 50 feet wide for a private entrance lane or roadway to Farmer B off the north portion of his farm and along the Section line for his use and convenience.
>
> "The original county roadway was abandoned by the County and the agreement which is of record between Farmers A and B does not contain any requirements for maintenance on the part of the County. The subsequent private roadway to Farmer B's residence from the present County maintained highway is approximately one-half mile long and since it is not maintained, the school bus will not travel the same for the purpose of picking up Farmer B's tenant's children.

#60-9-7

> "Under the foregoing facts, I respectfully request your opinion as to authority and procedure which may be available to the Board of Supervisors to correct their position to assume maintenance of said private entrance so that County equipment might be used to maintain said roadway without violating the law governing problems of this nature."

There are two Attorney General Opinions which have a direct bearing on the above problem. The first of these is in the 1938 Report of the Attorney General at page 837. In that opinion reference was made to what is now Section 740.20, 1958 Code of Iowa, which states:

> "No public officer, deputy or employee of the state or any governmental subdivision, having charge or custody of any automobile, machinery, equipment, or other property, owned by the state or a governmental subdivision of this state, shall use or operate the same, or permit the same to be used or operated for any private purpose."

This opinion holds that the board of supervisors cannot authorize the grading of farm lanes with public machinery where there is no benefit to the county road system.

A second opinion is in the 1956 Report of the Attorney General at page 9 wherein the conclusion is that farm home lanes cannot be elevated to the status of "public roads or public highways" and thus cannot qualify to benefit from the proceeds of public funds for improvement. It is further pointed out that an expenditure of public funds for grading such lanes would be an illegal expenditure.

It, therefore, clearly appears that the board of supervisors may not maintain a private entrance or private lane under the circumstances outlined in your letter.

Very truly yours,

HVP:ms

HIGHWAYS
Secondary road extension:--Extension of a secondary road located wholly within one county may be improved by that county even though no part of the secondary road, as such, is located within that county. Faulkner to Newell, Louisa Co. Atty., 9/7/60) #60-9-8

September 7, 1960

314.5
309.68

Mr. Russell R. Newell
Louisa County Attorney
Columbus Junction, Iowa

Dear Mr. Newell:

This will confirm our telephone conversation and your memo of August 25, 1960, in which you inquired whether the County Board of Supervisors might, under Section 314.5, 1958 Code of Iowa, improve a secondary road extension in the town of Letts. As I understand the facts, the county secondary road is located in Muscatine County, no part of which is in Louisa County other than that portion of the secondary road extension in the town of Letts.

As pointed out by you, Section 314.5, supra, would appear to prohibit the Louisa County Board of Supervisors from improving the extension in that the board is not in control of the secondary road, that being in Muscatine County. However, Section 314.5, supra, must be considered together with Section 309.68, 1958 Code of Iowa, which imposes the following duty upon a Board of Supervisors:

> "Boards of supervisors of adjoining counties in this state shall, subject to the approval of the state highway commission:
>
> 1. Make proper connections between roads which cross county lines and which afford continuous lines of travel.
>
> 2. Adopt plans and specifications for road, bridge, and culvert construction, reconstruction, and repairs upon highways along and across county boundary lines, and make an equitable division between said counties of the cost and work attending the execution of such plans and specifications." (Emphasis supplied)

#60-9-8

Subject to the approval of the Highway Commission the board is required to make the proper connections upon roads which cross county boundary lines and, in addition, improve roads across county lines and to equitably divide the cost between the counties involved.

Under well-known rules of statutory construction, conflicting provisions, unless irreconcilably repugnant should be construed so that no part will be rendered superfluous. I.C.A. Section 4.1, Note 34. And where two statutes are related to the same subject matter they should be construed, if possible, so that both may have full force and effect. I.C.A., Section 4.1, Notes 62 and 69.

It is, therefore, concluded that the Louisa County Board of Supervisors may, in their discretion, improve the extension of the Muscatine County secondary road even though no part of the secondary road as such is within Louisa County.

Very truly yours,

HVP:lle

TAXATION: Cities and Towns: - Personal property used in the cultivation of agricultural or horticultural lands or tracts of 10 acres or more included within cities or towns, are not exempt from taxation. Section 404.15, 1958 Code of Iowa, does not extend that benefit to personal property.

(Adams to Brown, Mitchell Co. Atty.; 9/7/60) #60-9-9

September 7, 1960

404.15
6210 '35 Code

Mr. Loren N. Brown
Mitchell County Attorney
Court House
Osage, Iowa

Dear Mr. Brown:

This will acknowledge receipt of your letter of August 22, 1960. You ask whether or not personal property used in the cultivation of land lying within the corporate limits of a town and used for agricultural purposes is subject to the general municipal tax levy.

The applicable code section is Section 404.15, Code of Iowa, 1958.

> "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 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."

Also, germane to the issue is Section 6210 of the 1935 Code of Iowa.

> "Agricultural lands. No land included within the limits of any city or town which shall not have been laid off into lots of ten acres or less, or which shall not subsequently be divided into parcels of ten acres or less by the extension of streets and alleys, and which shall also in good faith be occupied and used for agricultural or horticultural purposes, shall be taxable for any city or town purpose, except that

#60-9-9

> said lands and all personal property necessary to the use and cultivation of said agricultural or horticultural lands shall be liable to taxation for city and town road purposes, at not exceeding one and one-fourth mills, and for library purposes."

This precise question was presented in 305 AGO 1938 in regard to Section 6210 of the 1935 Code of Iowa. It says:

> "It is therefore the opinion of this department that personal property used in the cultivation of agricultural or horticultural lands or tracts of ten acres or more included within cities or towns is not exempt from taxation."

Therefore, the only problem herein involved is whether subsequent changes in the wording of the statute has changed its meaning on this point. We believe not.

The changes are these: "municipal corporation" has been substituted for the former "city or town". The phrase "which is not laid off into lots" replaces the phrase "which shall not have been laid off into lots". The phrase "or which shall not subsequently be divided into parcels of ten acres or less by the extension of streets and alleys" has been deleted. And "not to exceed one and one-fourth mills in any year, for municipal street purposes" has replaced "for city and town road purposes, at not exceeding one and one-fourth mills, and for library purposes".

It should be noted these changes were made by the Fifty-fourth General Assembly in Chapter 159. Chapter 159 rewrote Chapter 404, consolidating existing law and making the language briefer and clearer in line with modern thoughts on statutory language.

It is our opinion that none of the changes in Section 6210 of the

1935 Code of Iowa have altered the content of the statute on the point you have raised. Therefore, 385 AGO 1938 is still valid and the answer to your question is that personal property used for the cultivation of exempt agricultural land within a municipality is not exempt from municipal taxes by virtue of Section 404.15, Code of Iowa (1958), relating to exemption of agricultural land from such taxes.

Very truly yours,

William E. Adams
Assistant Attorney General

WEA:fs

MOTOR VEHICLES: Certificate of title -- Liens -- Liens should be recorded upon the certificate of title in the order presented to the county treasurer. (Craig to Davidson, Page C. Atty., 9/7/60) #60-9-11

September 7, 1960

321.50

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

Dear Mr. Davidson:

This will acknowledge receipt of your request for opinion, in which you state:

"The following situation has arisen, to-wit:

"A first-lien holder, living in Omaha, Nebraska, has been given proper notification of a junior lien having been filed in the Office of the Page County Treasurer. However, in returning the Certificate of Title to the Page County Treasurer, the first-lien holder requests that they have an additional lien placed on said vehicle with priority over the junior lien.

"Our request to the Attorney General for his opinion is based on the question of what criteria a Treasurer should use to determine the priority according to the order of time in which the same are noted thereon by the county treasurer."

Section 321.50 further provides:

" * * * The holder of a chattel mortgage, trust receipt, conditional sales contract, or similar instrument, upon presentation of such instrument or certified true copy thereof, to the treasurer of the county where such certificate of title was issued, together with the certificate of title and a fee of one dollar, may have a notation of such lien made on the face of such

#60-9-11

> certificate of title. The county treasurer shall enter said notation and the date thereof over the signature of such officer or deputy and the seal of office, and he shall also note such lien and the date thereof on the duplicate of same on file, and on that day shall notify the department on forms provided by the department, which shall note such liens on the duplicate title in its file. The county treasurer shall also indicate by appropriate notation on such instrument itself or certified true copy thereof, the fact that such lien has been noted on the certificate of title. The county treasurer upon receipt of a lien duly executed in the manner prescribed by law governing such lien instruments, together with the fee prescribed for notation of lien, shall mail a notification to the first lienholder at the address of such first lienholder as indicated by records of the county treasurer, to deliver to the county treasurer, within fifteen days from the date of notice, the certificate of title to permit notation of such junior lien * * *"

The above-cited statute provides that the holder of a chattel mortgage, trust receipt, conditional sales contract, or similar instrument may have the instrument recorded "upon presentation . . . to the county treasurer". The statute makes no other provision regarding priority of noting the liens upon the certificate of title. It is the general rule in regard to the priority of liens that the first in time is the first in right. United States v. City of New Britain, Connecticut, 347 U.S. 81, 74 S. Ct. 367, 98 L. Ed. 520.

In the situation you present, the junior lien-holder presented his lien to the treasurer before the request for an additional lien was made by the senior lien-holder. The junior lien-holder was entitled to have his lien entered at the time of presentation, and the only reason it was not so entered was because the certificate of title was not in the physical possession of the treasurer. The statute does not give the senior lien-holder right to have any additional liens he may have entered prior to all other liens.

It is the general rule, in regard to statutory liens, that the lien has only the effect given it by statute. 53 C.J.S. 847, Section 5, Liens.

Therefore, based on the above authority, it is my opinion that the junior lien-holder's lien should be entered prior to the additional lien of the first-lien holder.

Very truly yours,

FRANK CRAIG
Assistant Attorney General

FC:bl

WELFARE: Neglected, dependent and delinquent children -- 1. Expenses of a delinquent child placed in other than a state institution should be paid from the county poor fund. 2. All of the rules that apply to delinquent children do not apply to dependent or neglected children. 3. Only the board of supervisors, not the overseer of the poor or county director of welfare, may determine amount of expenses. (Craig to Martin, Keokuk Co Atty., 9/7/60)

September 7, 1960

#60-9-10

Ch 232
~~240.5~~
~~252.15~~
~~252.16~~
~~252.17~~
~~334.11~~
~~234.12~~

Mr. J. Leo Martin
Keokuk County Attorney
Post Office Box 273
Sigourney, Iowa

Dear Mr. Martin:

This will acknowledge receipt of your letter of August 26, 1960, in which you state:

"I would appreciate your opinion on the following questions, to-wit:

"Please refer to Chapter 232 of the 1958 Code, having to do with delinquent and dependant and neglected children; after the Juvenile Court, acting pursuant to the provisions of this Chapter, has committed a child, either as a dependant and neglected child or as a delinquent child, to a home other than a state institution; I would like your opinion on the following:

"1. As regards a delinquent child, should the expenses of care and keep, medical and other necessary expenses, be paid from the County Poor Fund, the County General Fund or from the Court Fund?

"2. Do the same rules apply insofar as a dependant and neglected child is concerned?

"After it has been determined from what fund the expenses are to be paid, I would like your opinion as to the following:

#60-9-10

"1. Does any other department of county government, other than the Board of Supervisors, have any authority to determine what amount shall be reasonable as expenses for board, room, clothing and other necessary expenses for the care and keep of a dependant and neglected child or a delinquent child when placed in other than a state institution?

"2. Does the Director of Social Welfare of the County or the Over-seer of the Poor have any authority to determine whether or not such expenses and expenditures are reasonable?"

The Iowa statute dealing with the commitment of neglected, dependent, or delinquent children, section 232.21, 1958 Code of Iowa, provides:

"Alternative commitments. The juvenile court, in the case of any neglected, dependent, or delinquent child, may:

"1. Continue the proceedings from time to time and commit said child to the care and custody of a probation officer or other discreet person.

"2. Commit said child to some suitable family home or allow it to remain in its own home.

"3. Commit said child to any institution in the state, incorporated and maintained for the purpose of caring for such children.

"4. Cause the child to be placed in a public or state hospital for treatment or special care, or in a private hospital which will receive it for such purpose, when such course seems necessary for the welfare of the child.

"5. At any time, terminate the proceedings and order the child released from the control of the court."

Sections 1 and 5 of the above-quoted statute are not applicable, and you have excluded section 4. Thus, we are only concerned with 232.21(2) and 232.21(3), foster homes and private institutions.

I find no statutory authority regarding the payment of expenses for foster homes; however, section 240.5, 1958 Code of Iowa, regarding private institutions, provides:

"Monthly allowance. The institution receiving and caring for a child under eighteen years of age and under commitment from the juvenile court, shall receive, from the county of the legal settlement of such child, a monthly allowance for the welfare of said child in such an amount as the board of supervisors in their judgment and discretion may determine."

An opinion from this office under date of July 29, 1948, reported at 1948 Opinions of the Attorney General 232, stated, at page 235:

"In the view that maintenance of a poor fund evidenced the county's conclusion that the general fund cannot be burdened with the foregoing expenditures, such expenditures required by section 240.5 should be budgeted and paid from the poor fund in all counties maintaining such fund."

It is thus evident that payments to a private institution should be made from the poor fund.

In the interpretation of a particular statute, all statutes having the same purpose are to be construed together, so that they may be construed as one system, and governed by one spirit and policy. All parts of a section or chapter should be harmonized, if at all possible. Sinclair Refining Company v. Burch, 235 Iowa 594, 16 N.W. 2d 359.

Therefore, in my opinion, the answer to your first question is that the expenses of care and keep, medical and other expenses, whether to a private institution or a foster home, should be paid from the county poor fund.

Sections 232.25 and 232.26, 1958 Code of Iowa, make provision for the payment of expenses, to a greater or lesser extent, by the parents of a dependent or neglected child. They provide:

"Compelling support by parent. The court, in any proceeding hereunder relative to a neglected or dependent child, shall have jurisdiction, on reasonable notice to the parents of said child, to inquire into the ability of said parents to support said child and make all proper orders in reference thereto. The court may require such parent to enter into a bond, with or without surety, and in a reasonable sum, conditioned for the proper care,

support, and supervision of such child. If it finds that the parent is able to support such child in any reasonable degree, it may require such parent to pay a reasonable amount of money into court at such times as it may provide, which sum shall be applied to the care of said child. Orders for the payment of money may be enforced by execution and in such case the parent ordered to make payment shall not be entitled to hold any property as exempt from such execution. All orders may be enforced by process of contempt until such orders are complied with."

"Action on bond. In case of the breach of a bond given as required in section 232.25, the amount thereof shall be deemed liquidated damages, which, when collected, shall, under the orders of the court, be applied to the care of said child. The county attorney shall, on the order of the court, prosecute all actions on such bonds."

Therefore, in answer to your second question, the rules that apply to delinquent children do not apply, in toto, to dependent or neglected children.

Section 240.5, 1958 Code of Iowa, specifically states that the amount shall be set ". . . as the board of supervisors in their judgment and discretion may determine." It is a well-kpown rule of statutory construction that if a statute states that a certain act is to be done in a particular mode, that includes the negative of any other mode. State ex rel Hutt v. Anthes Force Oiler Company, 237 Iowa 722, 22 N.W. 2d 324.

Therefore, in answer to your third question, it is my opinion that only the board of supervisors has authority to determine what amount shall be reasonable as expenses for board, room, clothing and other necessary care and expenses.

Sections 252.25, 252.26 and 252.27, 1958 Code of Iowa, establish the duties of the Overseer of the Poor. They provide:

"Relief by trustees. The township trustees of each township, subject to general rules that may be adopted by the board of supervisors, shall provide for the relief of such poor persons in their respective townships as should not, in their judgment, be sent to the county home."

"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."

"Form of relief -- condition. The relief may be either in the form of food, rent or clothing, fuel and lights, medical attendance, or in money. The amount of assistance issued to meet the needs of the person shall be determined by standards of assistance established by the county boards of supervisors. They may require any able-bodied person to labor faithfully on the streets or highways at the prevailing local rate per hour in payment for and as a condition of granting relief; said labor shall be performed under the direction of the officers having charge of working streets and highways."

Sections 234.11 and 234.12, 1958 Code of Iowa, establish the duties of the county director of Social Welfare. They provide:

"Duties of the county board. The county board shall be vested with the authority to direct in the county old-age assistance, aid to the blind, aid to dependent children and emergency relief with only such powers and duties as are prescribed in the laws relating thereto."

"County board employees. The county board shall employ a county director and such other personnel as is necessary for the performance of its duties. The number of employees shall be subject to the approval of the state board. The county director and all employees shall be selected solely on the basis of the fitness for the work to be performed, with due regard to experience and training, but graduation from college shall not be made a prerequisite of any such appointment. It shall be a prerequisite to obtaining an appointment that the applicant shall have been a legal resident of Iowa for at least two years prior to the time of making said application.

> "Any appointment made by the county board, other than clerical or stenographic help, shall be subject to review by the state board in this respect, that if any appointee is not properly carrying out the duties for which he is appointed, or if any appointee is not qualified or capable of handling the duties for which he is appointed, and the state board so finds, it shall certify a copy of such finding to the county board and the county board shall then discharge the said employee and shall fill the vacancy."

The above-cited sections do not authorize the county director of social welfare or the overseer of the poor to determine whether or not such expenses and expenditures are reasonable. Therefore, in answer to your fourth question, it is my opinion they do not have any such authority.

Very truly yours,

FRANK CRAIG
Assistant Attorney General

FC:bl

CRIMINAL LAW: Rewards -- Reward payable only if conditionsof reward offer are met. (Craig to Charlton, Delaware Co. Atty., 9/9/60) #60-9-12

September 7, 1960

Mr. Wm. Stuart Charlton
Delaware County Attorney
Manchester, Iowa

Dear Mr. Charlton:

This will acknowledge receipt of your letter of September 2, in which you state:

"This office has been presented with the question as to whether a local police officer, while off duty and on a personal pleasure trip, investigated and found the stolen property in the possession of two individuals during the early morning hours of August 9, 1960, who had stolen a quantity of used copper a short period of time (not over two hours) prior thereto, is entitled to the reward, the only offer of which is presented in the news article appearing in the local newspaper on Thursday, June 23, 1960, a copy of which is attached hereto. The reward was offered on the basis of two break-in losses occurring on May 11 and June 21, 1960. There were no facts or confessions obtained linking the two apprehended to either of the prior two losses.

"May I have your formal opinion regarding the propriety of this reward being paid?"

The news article to which you refer reads, in pertinent part, as follows:

"A quantity of salvage copper wire was stolen Tuesday night in a break-in at the Iowa Electric Light and Power company warehouse at the Marion street hydro plant.

"Sheriff George Ponsford said insulation is burned off the used wire and it is sold for the value of the copper. He said it was probably stolen to be marketed through a junk dealer for cash.

#60-9-12

"The Iowa Electric Light and Power company is offering a reward of $50 for information leading to the arrest and conviction of those responsible. Any information should be reported to Sheriff Ponsford."

In 77 C.J.S. 372, section 20, Rewards, it is stated:

"The question whether a reward for the arrest and conviction of a criminal applies to past or future offenses or both is a question dependent upon the terms of the offer."

A reward applies to future offenses only if the reward is, by its terms, a "standing" reward. Central Railroad Co. v. Cheatham, 85 Ala. 292, 4 So. 828, 7 Am. St. Rep. 48.

It is clear from reading the reward offer printed in the above-cited newspaper clipping that the reward offer applies only to "those responsible" for the June 21, 1960 break-in. It is not a standing reward. The persons apprehended on August 9, 1960 have not been connected with the June 21st break-in. Thus, the persons responsible for the June 21st break-in have not been apprehended, and the terms of the reward have not been met. A reward offer is enforceable only if it is accepted by the performance of the act specified in the reward offer. State v. Malm, 143 Conn. 462, 123 A. 2d 276.

Therefore, on the basis of the above authority, it is my opinion that the police officer is not entitled to the reward.

Very truly yours,

FRANK CRAIG
Assistant Attorney General

FC:bl

CONSERVATION ~~(County)~~:

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

(Smith to Johnson, Poweshiek Co. Atty., 9/9/60)

#60-9-13

September 9, 1960

9-9-1960

111A.7
404.11

Mr. Vincent E. Johnson
Poweshiek County Attorney
Montezuma, Iowa

Dear Sir:

Your letter of August 24, 1960, reads as follows:

"I would like to request an opinion upon the following matter.

"A city has levied a tax in compliance with the provisions of Section 404.11 of the Code of Iowa for the purpose of constructing a ball park. This city now wishes to enter into an agreement with the Poweshiek County Conservation Board, whereby the city will lease to said board the real estate upon which said ball park is to be constructed; this to be done in compliance with the provisions of Section 111A.7.

"It is my understanding that any agreement entered into between the city and the County Conservation Board must give complete and exclusive control and jurisdiction of the land in question to said board. If this is true, may the city continue to levy a tax to help pay the cost of construction of such a ball park upon real estate which has been turned over by the city to the County Conservation Board, the funds from the tax to be used simultaneously with the expenditure of funds by the County Conservation Board in said construction, or should the city first collect the funds from the tax levy and use the same so far as said funds would go in the construction and then proceed to enter into the agreement whereby the County Conservation Board would then take over complete jurisdiction and control of the project and the real estate on which the same is situated and proceed to complete the project from its own funds.

"My question really is whether there is any conflict between the provisions of the two sections above set out or whether a city may continue to raise funds from a tax levy and spend those funds in conjunction with the County Conservation Board even after an agreement has been entered

#60-9-13

into between the two agencies whereby the city has divested itself from all jurisdiction and control of the property."

The pertinent parts of the statutes to which you refer are as follows:

"404.11 Recreation. Municipal corporations shall have power to annually cause to be levied for a fund to be known as the recreation fund a tax not to exceed five mills on the dollar on all taxable property within the corporate limits and allocate the proceeds thereof to be used for the following purposes:

1. *****

2. For the development, improvement, maintenance, or operation of community centers, playgrounds, and swimming pools.

3. * * * *

4. * * * *

5. * * * *

6. Procuring a site and for constructing swimming pools, bathing beaches, bathhouses, exhibition halls, armories, ice rinks, dance pavilions, shelter houses, wading pools, river walls, field house, athletic or recreational facilities, and for paving, macadamizing, and otherwise improving roadways, drives, avenues, and walks in parks.

* * * * *"

"111A.7 Joint operations. * * * * 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. * * * * *" (Emphasis supplied.)

I am, therefore, of the opinion that a city may continue to raise funds from the tax levy (section 404.11, Code 1958) and appropriate such money for equipping, operating and maintaining a recreation center where conduct and supervision of the program of activities, and property, are vested in the exclusive jurisdiction and control of the county board of conservation.

If there is any question as to the accounting procedure recommended to be followed by either of these agencies in this matter, I suggest that a representative of the auditor of state be contacted.

Yours truly,

JAMES H. GRITTON
Assistant Attorney General

JHG:mmh4

COUNTIES AND COUNTY OFFICERS: Domestic Animal Fund -- Canadian Geese and wild turkeys are not domestic fowl, within the contemplation of Chapter 352, Code of Iowa 1958.

(Craig to Bruner, Carroll Co. Atty., 9/14/60) #60-9-14

September 14, 1960

CL 352

Mr. Robert S. Bruner
Carroll County Attorney
118½ West 5th Street
Carroll, Iowa

Dear Mr. Bruner:

This will acknowledge receipt of your opinion request, in which you state:

> "The opinion of your office is requested in the following situation:
>
> "May the board of supervisors allow a claim under the provisions of Chapter 352 of the Code (Domestic Animal Fund) for the killing by dogs of domesticated wild turkeys and domesticated wild canadian geese?
>
> "I am familiar with the opinion of your office which appears in the 1940 Report of Attorney General at page 39 in which the term 'domestic animal' is defined. Claimant maintains that the turkeys and geese in question were completely tamed and domesticated and that they fall within that part of the definition which states 'or by his industry have been subjected to his will, and have no disposition to escape his dominion'.
>
> "Claimant is properly licensed to own and raise these fowls and purchased them for a price greatly in excess of the market price of their domestic counterparts. In the event that this claim may properly be allowed, on what monetary basis should the damages be figured."

#60-9-14

Section 352.1, 1958 Code of Iowa, provides:

"Claims. Any person damaged by the killing or injury of any domestic animal or fowl by wolves, or by dogs not owned by said person, may, within ten days from the time he or his agent has knowledge of such killing or injury, file with the county auditor of the county in which such killing or injury occurred a claim for such damage."

The definition of a domestic animal for the purposes of Chapter 352 was stated thus in 1940 Opinions of the Attorney General 39, at page 39:

"'Domestic animals include those which are tame by nature, or from time immemorial have been accustomed to the association of man, or by his industry have been subjected to his will, and have no disposition to escape his dominion.'"

In a situation analogous to the one you present, where Canadian Geese being kept on a farm were killed by dogs, it was held that Canadian Geese are not domestic fowl under the provisions of Chapter 352. The opinion, by Mr. Oscar Strauss, present First Assistant Attorney General, cited the 1940 opinion above mentioned. A copy of the opinion by Mr. Strauss is included herewith.

It is therefore the opinion of this office that Canadian Geese, and by the same reasoning, wild turkeys, are not domestic fowl, within the meaning of Chapter 352, 1958 Code of Iowa.

Very truly yours,

FRANK CRAIG
Assistant Attorney General

FC:bl
Encl Strauss to Riter,
Lyon Co. Atty.,
12/14/53

STATE OFFICERS AND DEPARTMENTS
BOARD OF EUGENICS- PERSONS TO BE REPORTED: Epileptics are Not among those persons to be reported to the state board of eugenics. (Reach to St Bd of Eugenics, 9/19/60) #60-9-15

145.2

September 19, 1960

State Board of Eugenics
State office Building
L O C A L

Attention: Mrs. L. Joanne Kain
Executive Secretary

Dear Ladies and Gentlemen of the Board:

You have requested an opinion of this office as to whether sterilization of epileptics falls within the jurisdiction of the State Board of Eugenics.

In reply thereto:

Section 145.2, Code of Iowa 1958, as amended by Chapter 152, Sec. 168, Acts of the 58th General Assembly of the State of Iowa, reads as follows:

> "Each member of said board, and the warden of the penitentiary and the warden of the men's reformatory, shall, annually, on the first day of January, April, July and October, report to the state board of eugenics the names of all persons, make or female, living in this state, of whom he or she may have knowledge, who are mentally ill or retarded, syphilitic, habitual criminals, moral degenerates, or sexual perverts and who are a menace to society." (Emphasis added).

You will note that the word "epileptic" is not included in the designated classes set out above in Section 145.2, supra.

The Iowa Supreme Court in the Case of State v. Flack, _____ Iowa_____, 101 N.W. 2d 535 (1960) applied a rule of statutory construction which is applicable here. This Court stated at page 538 of 101 N.W. 2d:

#60-9-15

"Also to be applied is the familiar rule of statutory construction that the express mention of one thing * * * implies the exclusion of others, * * . The Latin maxim is 'expressio unius est exclusio alterius.' Thus the legislative intent is expressed by omission as well as by inclusion. (Citing cases).

A fortiori, epileptics are not among the classes expressly mentioned and you are therefore advised that epileptics are not among those who may be reported to the state board of eugenics and your question is therefore answered in the negative.

Very truly yours,

CARL H. PESCH
Assistant Attorney General

CHP:mk

TAXATION: Property Tax: Assessors: - The assessor cannot mail an assessment roll to the taxpayer to fill out. (Ltr to Fisher, Atty., 9/19/60)

60-9-16

ck 2-91
58g:2,

September 19, 1960

Honorable Raymond Fisher
State Representative
Grand Junction, Iowa

Dear Mr. Fisher:

This will acknowledge receipt of your letter of July 30, 1960, wherein the following problem was submitted:

> "I am writing in regard to the 'Directive of the State Tax Commission relating to the listing and assessing of real and personal property for taxation purposes by assessors'. In about the center of the first page the State Tax Commission refers to the procedure used by some of the assessors in Iowa, and the State Tax Commission regards that such system and procedure offer the opportunity for some taxable property to escape being listed and assessed for taxation and could result in a loss of revenue to the state or political sub-division thereof.
>
> "I am enclosing some figures regarding the value of taxable property assessed in Greene County for 1947 before we had a county assessor, 1948, the first year we had a county assessor and used field men, and 1949 to 1960 when we mailed out the assessment rolls and permitted the taxpayers to fill out the roll and mail it to the assessor, or at his convenience he could bring it to the county assessor's office and receive some help in filling it out. The assessment rolls that were not returned were assessed by the regular personnel from the county assessor's office.
>
> "The county assessor keeps a complete file of each person in the county and assess all the property therein, personal and real, except such as is exempted by statute or otherwise assessed. I believe when you examine the figures you will note the sizeable increase in amount of taxable property assessed when the taxpayers were put on their honor and given the responsibility of turning in the property to be assessed. A taxpayer is put on his honor when paying income tax and I think this is the American way to do the assessing.

#60-9-16

"The directive refers to Sec. 18, Chapter 291 of the 58th G. A. This Sec. 18 says 'each assessor shall with the assistance of each person assessed---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.' I believe our system fills the requirements of the law as stated in this section of Listing and Valuation. As you know, the State Tax Commission sent out a Valuation Guide and Depreciation Schedule to each county assessor upon which to base the value of property, and the assessor of Greene County uses this guide.

"May a County Assessor mail an assessment roll to the taxpayer so he can list his taxable property and either mail it in or bring it to the assessor's office at his convenience?"

In answering your inquiry, first consideration must be given to the applicable provisions of the Iowa Code. The latest enactments on the subject are found in Chapter 291, Acts of the 58th General Assembly, they are as follows:

"Sec. 17. Duties of assessor. The assessor shall:

"* * *.

"2. Cause to be assessed, in accordance with section twenty-one (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.

"* * *.

"4. Co-operate with the state tax commission as may be necessary or required, and he shall obey and execute all orders, directions, and instructions of the state tax commission, insofar as the same may be required by law.

"* * *.

"6. Make up all assessor's books and records as prescribed by the state tax commission, turn the completed assessor's books and records required for the preparation of the tax list over to the county auditor when the board of review has concluded its hearings and co-operate with the auditor in the preparation of the tax lists."

"Sec. 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."

"Sec. 19. Owner to assist. The assessor shall list every person in his county or city as the case may be and assess all the property therein, personal and real, except such as is heretofore exempted or otherwise assessed. Any person who shall refuse to assist in making out a list of his property, or of any property which he is by law required to assist in listing, or who shall refuse to make either of the oaths or affirmations or combinations thereof required by section twenty (20) of this Act, shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined in a sum not to exceed five hundred (500) dollars."

"Sec. 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."

"Sec. 27. Uniform assessment rolls. The state tax commission shall from time to time prepare and certify to each assessor such instructions as to a uniform method of making up the assessment rolls as it thinks necessary to secure a compliance with the law and uniform returns, which shall be printed upon each assessment roll, and also prepare instructions for the same purpose as to making up the assessment book, which shall be printed therein."

Many of the foregoing provisions have been copied verbatim from the prior law. As may be observed, there is no express statutory direction relating to the

procedure the assessor shall follow in listing and affixing values; especially, in relation to the question submitted.

Failing to find the statute completely clear on this point, a search was made for case authority. Authority was found to be lacking, although in two Iowa cases statements were found that indicate there is a duty imposed on the assessor to call on the taxpayer.

The first of these cases is McCallum v. Board of Review, 178 Iowa 468; 159 N.W. 1036 (1916), wherein the Iowa Supreme Court was confronted with whether the assessment was arbitrarily made, said:

> "It is equally clear that he may call upon the owner either at his residence or at his place of business, or wherever he may be found within the city or township, for the purpose of making the assessment which the law requires; and, while he may not search the premises for that purpose, he may, and it is his duty to, search the owner's conscience by administering the required oath and demanding that he make the verified list or roll which the statute prescribes. * * *. The duty of the owner is to 'assist' in making this list by reporting and making true answers to proper questions concerning his taxable property, and not until the assessor or deputy has offered to perform his official duty, as above indicated, and has been met with refusal by the owner, is the latter chargeable with the penalty. * * *. The law evidently contemplates that the officer shall call upon the owner for the assistance and information desired, and to secure his personal verification of the list."

The second case is McDonald v. Clarke County, 196 Iowa 646; 195 N.W. 189 (1923). In this case the issue was whether the assessment was excessive. The assessor had failed to give her notice of the assessment. The Court in an opinion by Justice Evans, stated:

> "Though it be true that the assessor failed in his directory duty to call upon the plaintiff and to take her signature to a list of

> the property, it is also true that the plaintiff failed in her duty to call upon the assessor and to list the property with him."

When it is considered that the assessor must personally affix values as directed by Section 18, Chapter 291, Acts of the 58th General Assembly, supra, it becomes more difficult to see how the assessor could do this without viewing the property. As you are well aware, there are a number of factors to be considered in determining the valuation of any property. The Iowa Supreme Court has recognized that a formula devised for accomplishing this would not always reflect the "actual value". Trustees of Flynn's Estate v. Board of Review, 226 Iowa 1353; 286 N.W. 483 (1939).

Further, your attention is directed to the 1917-18 Report of Attorney General at p. 242. In the aforementioned opinion, the question was whether the person could be required to appear at the courthouse to be assessed. The following is an excerpt from the Attorney General's answer:

> "It is our opinion that you had no right to require the property owner to appear at any particular place to list his property, but that it was the duty of the assessor to visit him at his residence, where the property is located, for the purpose of assessing his property. There can be no doubt about it being the duty of the taxpayer to render the assistance required by the statute to the assessor in listing his property, and a failure so to do makes him amenable to the provisions of Section 1334, and also subject to the penalty provided in the last section, and we believe it would be your duty now to advise the assessor to visit the man's premises and offer to assess his property and ask the assistance of the owner for such purpose. If he then refuses so to do, you may resort to the provision of the last named section, or punish him for his failure and refusal to do what the law requires of him, as provided in Section 1354."

Research failed to disclose any case or opinion of this department

overruling the 1917 opinion. Secondly, nothing in the present statutory law indicates a contrary procedure, although the previously cited 1917 opinion has been around for a number of legislative sessions. In fact, there have been several attempts to amend the assessing laws of this state. All of these amendments related to "assessing by mail". The following list of bills all pertained to this point:

1949 - H. F. 356
1951 - S. F. 123
1953 - H. F. 206
1955 - S. F. 303

Needless to say, the above bills failed to pass both houses of the Legislature. These bills provided for supplemental forms to be mailed to the taxpayer, and, when returned, the assessor would use in making up his assessment roll.

It is noteworthy that we have similar provisions in the Iowa Code, today, allowing certain types of businesses to file verified statements of their property. You are referred to Chapters 429, 430, 430A and 431 of the Iowa Code (1958). Apparently, these are statutory exceptions to the usual manner of assessment.

Lastly, even if it could be assumed that "assessing by mail" is not prohibited, that does not in turn prohibit assessing by a personal call on the property owner. In other words, there is no statutory prohibition against assessing by calling on the owner and viewing the property. This being the case, the State Tax Commission, in issuing Memorandum #101,

directed all assessors to assess by calling on the owner, and not to assess by mail. Therefore, in view of Sections 17 (4) and 27 of Chapter 291, Acts of the 58th General Assembly (1959), supra, the assessor has no choice but to assess property in the manner directed by the State Tax Commission, since the prescribed method is in accordance with the Iowa law.

In conclusion, you are advised that the assessor cannot mail an assessment roll to the taxpayer to fill out.

Very truly yours,

Gary S. Gill
Special Assistant Attorney General

GSG:fs

ELECTION: Qualification of Judges

Judges and clerks of elections shall be both residents and eligible voters in the precincts in which they are appointed to serve. (Strauss to Hultman, Black Hawk Co. Atty., 9/20/60)

#60-9-17

September 20, 1960

49.12 to 49.18

51.2

Mr. Evan L. Hultman
Black Hawk County Attorney
Suite 201 First National Building
Waterloo, Iowa

Attention: Mr. William C. Ball
Assistant Black Hawk County Attorney

My dear Mr. Ball:

This will acknowledge receipt of yours of the 15th inst. in which you submitted the following:

> "Chapter 49 of the Iowa Code sets forth the Method of Conducting Elections. Section 49.12 states that the election boards shall consist of a certain number of judges and clerks depending upon the makeup of the precinct and the use and number of voting machines. Based upon this section and Sections 49.13, 49.14, 49.15, 49.16, 49.17, and 49.18, all of which concern themselves with the appointment of said election boards, we wish to inquire as to whether the members (both judges and clerks) must be residents and/or qualified voters of the same precinct to which they have been appointed to serve upon the election board."

In reply thereto I advise the following:

There appears to be no express statutory provision that judges and clerks of elections should be residents or voters of the precinct in which they are appointed to serve as members of the election board, subject to the following exception:

Section 51.2, Code 1958, with respect to qualifications of election counting boards, provides the following:

#60-9-17

"51.2 Qualifications. Each of such appointees shall be of good moral character, well informed, able to read, write, and speak the English language, shall be a voter in the election precinct in which he is to serve, and entitled to vote therein."

1. Insofar as your question relates to judges of elections, this department in an opinion appearing in the Report of 1938, at page 856, stated definitely that such officers must be from the precinct wherein the board acts. (Copy of this opinion is attached hereto and made a part hereof.) In view of the fact that the foregoing statute, being now sections 49.12 to 49.17, Code 1958, is concerned with the election boards, both clerks and judges alike, on the authority thereof I conclude that both judges and clerks comprising election boards, are required to be residents of the precinct in which they are appointed to serve.

2. Insofar as the question of being voters is concerned, as well as residents of the precinct in which they are appointed to serve, in addition to the express provision of said section 51.2 heretofore quoted, the foregoing numbered sections referred to in the foregoing opinion plainly imply that such judges and clerks should be voters in the precincts in which they are appointed to serve.

See related opinions in the Reports of the Attorney General: for 1909, page 347; for 1922, page 65.

Very truly,

OSCAR STRAUSS

OS:nmh4

First Assistant Attorney General

REPORT OF ATTORNEY GENERAL OF IOWA for 1938, pages 856, 857:

ELECTIONS: JUDGES OF ELECTION: VACANCY: POLITICAL PARTIES: Where a vacancy occurs in the office of the election board in a particular precinct on the day of election, such vacancy is to be filled by the remaining members of the board from the membership of the political party entitled thereto.

November 8, 1938. Honorable Robert E. O'Brian, Secretary of State: We acknowledge receipt of your request for the opinion of this department upon the following matter:

> You state: that in one of the precincts in Des Moines, Iowa, one of the Democratic election judges did not qualify as such by reason of his removal from the city of Des Moines to Mason City, Iowa. That this fact was not known until the polls opened in that precinct. That thereaf er the remaining members of the election board in that precinct selected an additional judge affiliated with the Republican party, so that the set-up of the election board in that precinct at the time the polls opened consisted of three Republican judges.

Section 736, Code of Iowa, in the opinion of this department, controls the described situation, It provides as follows:

> "If at the opening of the polls in any precinct, there shall be a vacancy in the office of clerk or judge of election, the same shall be filled by the members of the board present, and from the political party which is entitled to such vacant office under the provisions of this chapter."

There is no question but what a vacancy existed in the office of one of the election judges for this precinct. In virtue of such vacancy existing, it became the statutory duty of the remaining members of the election board present to fill the vacancy by selecting a judge from the political party entitled to such vacant office. In other words, under the stated facts, a Democratic judge must necessarily be selected to fill this vacancy. Furthermore, by virtue of the sections of the 1935 Code of Iowa pertaining to election boards, viz.: Sections 730 to 735 inclusive, such selected officer must be from the precinct wherein the board acts.

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

September 21, 1960

37.15
37.9

Mr. Vincent E. Johnson
Poweshiek County Attorney
Montezuma, Iowa

Dear Mr. Johnson:

This is to acknowledge receipt of your letter of September 14 in which you made the following inquiry:

> "Section 37.15 of the 1958 Code of Iowa states in effect that in case a Memorial Hall or building shall be a city auditorium, the mayor of such city may be an ex-officio member of the commission provided for under Chapter 37, in which case there shall be selected only four (4) commissioners as otherwise provided.
>
> "Does the provisions of this section make it permissive for the Mayor to declare himself to be one of the commissioners if he so desires so that in the event he wishes to take advantage of the provisions of this section he automatically has the right to become one of these commissioners, or is it within the jurisdiction of some individual or individuals to deny such mayor the right to become such ex-officio member and appoint 5 commissioners without permitting such mayor to act?"

In reply thereto, we advise as follows:

Section 37.9, 1958 Code of Iowa, provides in pertinent part:

> "When the proposition to erect any such building or monument has been carried by a majority vote, the board of supervisors or the

#60-9-18

city or town council, as the case may be, shall appoint a commission consisting of five members, in the manner and with the qualifications hereinafter provided, which shall have charge and supervision of the erection of said building or monument, and when erected, the management and control thereof."

Section 37.15 provides:

"In case any such memorial hall or building shall be a city or town hall, coliseum or auditorium, the mayor of such city or town may be an ex officio member of the commission heretofore provided for, in which case there shall be selected but four commissioners as otherwise provided, and such four, together with the mayor, shall constitute a commission of five."

Under the provisions of section 37.9, it appears that the city or town council is the proper body to designate who the commission shall consist of. If the city or town council designates the mayor under the provisions of section 37.15 then the general qualifications as set out in 37.9 are not applicable to the mayor, for his qualifications are specifically waived by 37.15.

Therefore, in answer to your question, the mayor has no authority to designate himself as a member of the commission, said authority being vested solely in the city or town council.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:bl

HEALTH:
Mobile Home Park - application for license. There is no relationship between the provisions of Chapter 135D and Chapter 358, as to "municipalities" contemplated in Sec. 135D.3. (Branco to Zimmerer, St Dept of Health, 9/22/60) #60-9-19

September 22, 1960

135D.3
358.11
358.12

Dr. Edmund G. Zimmerer
Commissioner
State Department of Health
L O C A L

Attention: Paul J. Houser

Dear Sir:

We have your favor of September 8, 1960 requesting an opinion in which you state:

> "Section 135D.3 specifies that the application for annual license to operate a mobile home park shall be made to this Department, 'provided that when such mobile home park is located within a municipality, the application shall be filed with the local board of health who shall forward the same to the state department of health'. This procedure provides a means for municipal officials to determine if, and to certify that, any park involved is in compliance with all pertinent local regulatory measures.
>
> "Section 358.11, Code of Iowa, 1958, provides that:
>
> > "'Each sanitary district organized under this Chapter shall be a body corporate and politic, with the name and style under which it was organized, and by such name and style may sue and be sued, contract and be contracted with, acquire and hold real and personal property necessary for corporate purposes, adopt a corporate seal and alter the same at pleasure, and exercise all the powers conferred in this Chapter.
> >
> > "'All courts of this state shall take judicial notice of the existence of sanitary districts organized hereunder.'
>
> "A proposal has been received to the effect that the above provisions, along with the powers conferred to sanitary districts in Section 358.12, Code of Iowa, 1958, place sanitary districts in the same category as municipalities.

#60-9-19

"What relationship does a sanitary district have to a municipality, as referred to in Section 135D.3, Code of Iowa? Should the operator of a mobile home park located within the limits of a sanitary district file the application for annual license with the board of trustees of the district for certification on the same basis as specified for a park located within a municipality?"

In reply thereto we beg to advise as follows:

We advert to the following provisions of the statutes for an answer to your request.

135D.3"Application for annual license. The application for annual license to operate and maintain a mobile home park shall be made to the state department of health, at such office and in such manner as may be prescribed by regulations of that department; provided that when such mobile home park is located within a municipality, the application shall be filed with the local board of health who shall forward the same to the state department of health." (Emphasis supplied)

135D.20 "Powers delegated to local boards. The state department of health shall have the power to delegate to local boards of health the duties of inspection and regulation of mobile home parks located within the jurisdiction of such local board of health, where, in the opinion of the state department of health, such delegation can best effectuate the policies of this chapter. When said duties are so delegated, fifty percent of the annual license fee collected therefrom shall be turned over to the treasurer of the jurisdiction involved, and there is hereby appropriated from the general fund of the state an amount sufficient to pay the proportionate fees allowable to the jurisdiction involved, as provided in this section. (Emphasis supplied)

358.11 "Sanitary district to be a body corporate. Each sanitary district organized under this chapter shall be a body corporate and politic, with the name and style under which it was organized, and by such name and style may sue and be sued, contract and be contracted with, acquire and hold real and personal property necessary for corporate purposes, adopt a corporate seal and alter the same at pleasure, and exercise all the powers conferred in this chapter.

"All courts of this state shall take judicial notice of the existence of sanitary districts organized hereunder."

> 358.12 "Board of trustees - powers. The trustees elected in pursuance of the foregoing provisions of this chapter shall constitute a board of trustees for the district by which they are elected, which board of trustees is hereby declared to be the corporate authority of such sanitary district, and shall exercise all the powers and manage and control all the affairs and property of such district. A majority of the board of trustees shall constitute a quorum, but a smaller number may adjourn from day to day. Said board of trustees shall have the right to elect a president, a clerk, and a treasurer from their own number and, from without their own number, such employees as the board may deem necessary, who shall hold their employment during the pleasure of the board, and shall prescribe the duties and fix the compensation of all employees of said sanitary district and the amount of bond to be filed by the treasurer of the district and by any employee for whom they may require bond, provided, however, that the compensation of members of the board of trustees is hereby fixed at not to exceed five dollars per day for each day the board is actually in session and five dollars per day when not in session but employed on committee service, and five cents for every mile traveled in going to and from sessions of the board and in going to and from the place of performing committee service; provided further, that members of said board shall not receive compensation for more than sixty days of session and committee service each year.
>
> "Said board of trustees shall have full power to pass all necessary ordinances, resolutions, rules and regulations for the proper management and conduct of the business of said board of trustees and of said corporation and for carrying into effect the objects for which such sanitary district is formed. (Emphasis supplied)

The question therefor is: Does the reference in Section 135D.3 to "municipality" include sanitary districts as a municipal corporation within the purview of Chapter 135D?

The real question is the construction of the statute. Otherwise stated, it is whether under chapter 135D sanitary districts can act as a local board of health as contemplated by said chapter.

The purpose of statutory construction is to ascertain and declare legislative intent as expressed in the statute. In construing an act or connected statutes the sections thereof should be considered

together in the light of their relation to the whole. City of Dubuque v. Menser, 239 Iowa 446, 452, 31 N. W. 2d 882.

Municipal corporations in a strict and proper sense, include only cities and incorporated towns with powers of local self-government, but in common speech includes all public corporations having corporate powers. Board of Park Commissioners v. City of Marshalltown, 244 Iowa 844, 58 N.W. 2d 394, 400. See also Olson v. District Court 243 Iowa 1211.

Municipal corporations are creatures of Legislature; they exist by reason of statutes enacted within power of Legislature and they may not question that power which brought them into existence and set bounds of their capacity. Brunner v. Floyd County, 226 Iowa 583, 284 N.W. 814.

The statute Sec. 135D.3 requires that the application shall be filed with the local board of health. Chapter 137 provides for only two categories of municipal corporations in which local boards of health are authorized to function i.e. cities and towns and counties.

Section 358.12 which defines the powers of the trustees of sanitary districts makes no provision for such trustees to act as a local board of health. Therefore within the bounds of their capacity it was not the intent of the legislature under Chapter 135D to authorize or permit the filing of an application with such trustees for a license to operate a mobile home park, for the reason that said trustees, acting for the sanitary district, do not have express authority, within the powers granted to them, to act as a local board of health with whom such application must be filed under the provisions of Section 135D.3.

In answer to your question, if the mobile home park is situated outside a city or town, the application should be filed with the local board of health of the county in which it is located, since the "objects for which such sanitary district is formed" does not include the power to act as a local board of health, and therefore there is no relationship between the provisions of Chapter 135D and Chapter 358, as to "municipalities" contemplated in Section 135D.3.

Respectfully submitted,

FRANK D. BIANCO
Assistant Attorney General

FDB:kvr

ELECTIONS:

Voting qualifications -- Personnel of the United States Airforce based in Woodbury County, Iowa, who are residents of the Capehart housing project located on land in the name of the United States, acquire no right to vote by virtue of their residence in said housing project. (Letter to Samore, Woodbury Co. Atty., 9/26/60)

September 26, 1960

#60-9-20

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

Dear Mr. Samore:

This will acknowledge receipt of your letter of September 16, 1960, in which you submitted the following:

> "Your opinion is respectfully requested concerning the voting privileges so far as the United States Airforce personnel who are attached to the United States Airforce base in Woodbury County, and which airforce personnel are housed in the so-called Capehart housing project within Woodbury County. The title to the land upon which this housing is located is in the name of the United States. However, the housing units are owned by a private corporation which receives rent pursuant to a long-term lease and at the termination of which lease term the housing units revert to the United States.
>
> "Residents of this Capehart housing project want to vote. They want to vote in the County elections as well as the State election this fall. Your opinion is respectfully requested as to what voting privileges or rights such residents are entitled to, and we would appreciate an answer at the earliest convenience in order that they may have your opinion sufficiently in advance of the November elections."

In reply thereto I advise you that on the authority of the opinion appearing in the Report of the Attorney General for 1948, at page 152, and the opinion appearing in the Report for 1938 at page 748, the foregoing described residents are not entitled to voting privileges.

#60-9-20

The headnote to the 1948 opinion states:

"ELECTIONS: Residents on federal military reservation at Fort Des Moines. A resident of the veterans' village at Fort Des Moines acquires no right to vote by virtue of his residence on the military reservation."

and the headnote to the 1938 opinion states:

"ELECTIONS: SOLDIERS: CCC CAMP ENROLLEES: VOTING RIGHTS: Soldier stationed at Ft. Des Moines, whether single or married, may gain voting residence in this state if he resides in state and off army reservation with intention of establishing residence in this state. Same applies to CCC Camp enrollees and officers when camp is not on military reservation."

Very truly,

OSCAR STRAUSS

First Assistant Attorney General

OS:mmh4

STATE OFFICERS AND DEPARTMENTS:

Workmans Compensation paid by Adjutant General under Code section 29.27. -- The amount of compensation to be paid is measured by chapter 85. However, such payment is not made under section 85.49.

(Letter to Johnson, Asst. Adj. Gen., 9/27/60) #60-9-21

September 27, 1960

THE ADJUTANT GENERAL
State of Iowa
P.O. Box 616
Des Moines 3, Iowa

29.27
85.42
85.43
85.49

Attention: DONALD B. JOHNSON
Col, AGC, Iowa ARNG
Asst. Adjutant General

Dear Sir:

This will acknowledge receipt of your letter of 29 August 1960, in which you submitted the following:

"Section 29.27, Code of Iowa 1958, provides in part: ' * * in the event any officer or enlisted man shall be killed * *, his dependents, as defined by the Workmans Compensation Law of the State shall receive the maximum compensation provided by that law'.

"Section 85.42 provides in part as follows: 'The following shall be conclusively presumed to be wholly dependent upon deceased employee * * 2. A child or children under 16 years of age * *'.

"Section 85.43 provides in part as follows: 'If the deceased leaves dependent child, * * and the surviving spouse remarries, then and in such case, the unpaid portion of the compensation shall be paid to the proper compensation trustee for the use and benefit of such dependent child or children'.

"Section 85.49 provides in part as follows: 'When * *, or a minor dependent, * * is entitled to compensation under this chapter, payment shall be made to the clerk of the district court for the county in which the injury occurred, who shall act as trustee, and the money coming into his hands shall be expended for the use and benefit of the person entitled thereto under the direction and orders of a judge of the district court * *'.

"It is desired to point out that benefits provided by Section 29.27 are not administered by the Industrial Commissioner, but are paid on approval by the Adjutant

#60-9-21

General by warrant drawn on funds not otherwise appropriated, to dependents as designated by the Workmans Compensation Law in an amount equal to the maximum compensation provided by the State law.

"Opinion is respectfully requested as to whether payments to a minor dependent, whose mother has remarried thereby invalidating her right to further benefits, shall be paid to the clerk of the district court of the county of residence of the minor as trustee for imcompetents as provided by Section 85.49, or is Section 85.49 considered not applicable in administering the above referenced provisions of Section 29.27 by this department in this connection."

In reply thereto I am of the opinion that payments to a minor dependent under the circumstances described in your letter may not be paid to the clerk of the district court of the county in which the injury occurred as provided by Section 85.49. My reason therefor is that such payments so made are not made as "compensation under this chapter" as provided by the foregoing section 85.49. Such payments are made under the provisions of Chapter 29, Code 1958, and not under Chapter 85. Section 29.27 merely adopts the definition of "dependents" from Chapter 85 and fixes the amount to be paid as measured by the Workmans Compensation Law.

Very truly,

OSCAR STRAUSS

First Assistant Attorney General

OS:mmh

CITIES AND TOWNS: Airports -- An airport is not exempt under section 427.1(21) of the Code unless there has been a conveyance to a city or town. (Rehmann to Berlin Dr. Aero C. 9-30-60) # 60-10-1

427.1(21)

September 30, 1960

Frank W. Berlin, Director
Iowa Aeronautics Commission
L O C A L

Attention: Robert W. Nemmers, Assistant Director

Dear Mr. Berlin:

This will acknowledge receipt of your letter of September 12, in which you made certain inquiries as to whether a privately-owned airport should be taxed when it has been devoted to public use.

In reply thereto, we advise as follows:

Section 427.1(21), Code 1958, provides:

"Exemptions. The following classes of property shall not be taxed:

"1. * * *

"21. Public airports. Any lands, the use of which (without charge by or compensation to the holder of the legal title thereto) has been granted to and accepted by the state or any political subdivision thereof for airport or aircraft landing area purposes."

In order for the airport in question to be exempt from taxation, it would be necessary that a grant to, and acceptance by, the State or municipality be given by the legal titleholder thereto without charge or compensation. Normally, governmental functions exercised by the municipality are public in nature, and are performed by the municipality for the convenience, comfort and welfare of the public. Abbott v. City of Des Moines, 230 Iowa 494.

60-10-1

A public airport, in order to come within the meaning as defined in section 427.1(21), Code 1958, must be under the express control of the municipality and the power to confer upon a private individual the right to operate the airport on behalf of the city must be expressly granted by statute, 6 Am. Jur., Sec. 35, 36, p. 23, 24.

Therefore, in answer to your question, in the absence of any conveyance by the legal titleholder to the State or a municipality, such airport does not qualify as a public airport and therefore does not fall within the exemption as set out in section 427.1(21), Code 1958.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:bl

MOTOR VEHICLES: Operator's license -- Minor's school license — School operator's license only valid for driving to and from the particular school for which necessity thereof was shown upon granting license. (Craig to Cady, Franklin Co Atty 10-5-60) # 60-10-2

321.194

October 5, 1960

Mr. G. A. Cady
Franklin County Attorney
Hampton, Iowa

Dear Mr. Cady:

This will acknowledge receipt of your opinion request, which states:

> "I hereby request an official opinion from your office concerning the interpretation of Section 321.194 of the 1958 Code of Iowa, the pertinent part of which is as follows:
>
> > ". . . which license shall entitle the holder thereof, while having such license in his immediate possession, to operate a motor vehicle during the hours of 7:00 o'clock a. m. to 6:00 o'clock p. m., over the most direct and accessable route between the licensee's residence and his school of enrollment, for the purpose of attending duly scheduled courses of instruction at such school . . ." (Underscoring hours).
>
> "A young man 15 years of age was granted a school driving permit under Section 321.194. On Sunday, while returning from Sunday School and Church, he was involved in an automobile accident.
>
> "I would like to know whether, in the opinion of your office, Section 321.194 gives him the right to drive the vehicle back and forth to Sunday School, or whether this provision covers only public or parochial schools. The Sunday School operated by the church which he is attending is a regular course of instruction, meeting every Sunday morning."

60-10-2

The Iowa Supreme Court, in McCann v. Iowa Mutual Insurance Company, 231 Iowa 509, 1 N.W. 2d 682, stated that section 321.194, 1958 Code of Iowa, was enacted for the safety of the public. The Court in that case construed 321.194 strictly, pointing out that a school license is valid only under specified conditions.

Section 321.194, 1958 Code of Iowa, provides that a restricted school license will only be issued when a necessity therefor is shown. Applications for restricted school licenses must be accompanied by an affidavit, from the school board or superintendent of the applicant's school, which states the facts deemed to justify the issuance of such a license. Such affidavits are not binding upon the Department of Public Safety, but are considered by the Department in determining whether to issue the license.

Since such restricted school licenses are only issued upon a showing of a particular need, and since such licenses' validity is strictly restricted to such need, it is apparent that a license issued because it is shown that there is necessity to drive to and from a particular school is not valid for driving to and from any other school, be it a Sunday School, a dancing school, etc.

Therefore, it is my opinion that an individual issued a restricted school license for driving to and from a particular school may not lawfully use that license to drive to and from some other school, such as a Sunday School.

Very truly yours,

FRANK CRAIG
Assistant Attorney General

FC:bl

MOTOR VEHICLES - BOARD OF SUPERVISORS - If the County Board of Supervisors has adopted a resolution limiting the weight of trucks or other commercial vehicles on certain bridges on secondary roads, and if the limitations are designated by appropriate signs, under Section 321.473, 1958 Code of Iowa, a truck or other commercial vehicle operation in excess of such limitation would constitute an illegal act, unless the truck or other commercial vehicle is within the exceptions stated in Section 321.453, 1958 Code as amended. (Faulkner to Schroeder, Jackson Co. Atty 10-5-60)

321.473
~~321.455~~
321.463

#60-10-3

October 5, 1960

Mr. Asher E. Schroeder
Jackson County Attorney
Maquoketa, Iowa

Dear Mr. Schroeder:

In your letter of September 12, 1960, the following questions were submitted:

> "In Jackson County, we have a number of rather ancient bridges, which are posted with rather low load limits throughout our county road system. With the size of our modern vehicles that serve the farmer, it has been brought to my attention that many that use the bridges, exceed the posted limit. The question that arises in my mind is first of all, whether or not the operation by a trucker of a vehicle in excess of posted load limits is doing so illegally. And secondly, if it is not illegal, would he be civilly liable to the county for any damage he might cause to a bridge?"

The County Board of Supervisors is within the meaning of "local authorities", as defined in Section 321.1(46), 1958 Code of Iowa. Such authorities are granted the following power under Section 321.473, Code of Iowa:

> "Local authorities with respect to highways under their jurisdiction may also, by ordinance or resolution, prohibit the operation of trucks or other commercial vehicles, or may impose limitations as to the weight thereof, on designated highways, which prohibitions and limitations shall be designated by appropriate signs placed on such highways." (Emphasis added)

Since the Board of Supervisors, as a local authority, has the power to limit the weight of trucks or other commercial vehicles on highways under its jurisdiction, it logically follows that it may in like manner limit the weight of trucks or other commercial vehicles on bridges as a part of the highway system over which

60-10-3

Mr. Asher E. Shoreeder
Jackson County Attorney
Maquoketa, Iowa

the County Board of Supervisors has jurisdiction. The word "highways" is defined in Section 321.1(48) as follows:

> "'Street' or 'highway' means the entire width between property lines of every way or place of whatever nature when any part thereof is open to the use of the public, as a matter of right, for purposes of vehicular traffic."

If the Board of Supervisors has adopted a resolution restricting the weight of trucks or other commercial vehicles on certain bridges in the county, and if the limitations are designated by appropriate signs, a truck or other commercial vehicle operation in excess of such designated limitation would constitute a violation and hence an illegal act, unless the truck or other commercial vehicle is within one of the exceptions stated in Section 321.453, 1958 Code of Iowa, as amended by the 58th General Assembly.

In view of the answer to your first question, it is not necessary to answer the second question.

Very truly yours,

HVP:mj

ELECTIONS:

Assistance in casting vote

No one may enter the booth with the voter to assist him in marking his ballot, except as provided in sections 49.90, 52.18, and 52.19, Code 1958. (Strauss to Scholz, Mahaska Co Atty 10-6-60) # 60-10-4

49.90
52.18
52.19

October 6, 1960

Mr. Charles H. Scholz
Mahaska County Attorney
Oskaloosa, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 5th inst. in which you submitted the following:

"Your opinion on the following question is requested:

'Is it a violation of the laws pertaining to the conduct of elections for a judge of election to enter a voting booth then occupied or about to be occupied by a voter and point out to the voter the location on a voting machine or paper ballot where the voter must move a voting lever or mark a ballot in order to cast his vote for or against any particular public measure or for a particular office to be filled at that election, without first being requested to do so by the voter?'

"Our Mahaska County Auditor has informed me that he intends to instruct each and every judge of the general election to be held on November 8, 1960 that the judge should make it a point to draw the voters' attention to the fact that there is a public measure to be voted on at that election, namely, 'Shall there be a convention to revise the Constitution and amend the same', and for such purpose to enter the voting booth and point out on the voting machine the levers which must be pulled to vote 'Yes' or 'No' on that question. I find no statutory provision authorizing or directing a judge of election to in any manner instruct a voter as to how he shall proceed to cast his ballot, either by machine or paper ballot, until a proper request is made therefor by the voter in compliance with the provisions of Section 49.90 of the 1958 Code of Iowa.

"The statute referred to does require that assistance be given by two members of the election board only if the voter has made request therefor and has taken the oath specified in that statute.

60-10-4

> "I have expressed the opinion to our County Auditor that such proposed action by a judge of election, in accordance with his instructions, is improper and not authorized by statute, but he disputes my opinion and I, therefore, request that you furnish me with your advisory opinion on the subject. Fundamentally, my position is that since the statutes do not specifically provide for such act by a judge of election, it should be refrained from for the reason that it provides too much opportunity for a judge of election to consciously, or unconsciously, influence a particular voter as to the manner in which he shall cast his vote on any public measure or for any office to be filled at an election."

In reply thereto I advise that I agree with your reasoning and conclusions. They have confirmation in an early opinion of this department appearing in the Report of 1909, at page 345, where it is said:

> "Third. No one may enter the booth with the voter to assist him in marking his ballot except as provided in section 1118 of the code."

What is designated as section 1118 in the foregoing opinion, now appears in substantially like terms as section 49.90.

Confirmation is also found in section 52.18, Code of 1958, which provides the following:

> "52.18 Method of voting. After the opening of the polls, the judges shall not allow any voter to pass within the guardrail until they ascertain that he is duly entitled to vote. Only one voter at a time shall be permitted to pass within the guardrail to vote. The operating of the voting machine by the elector while voting shall be secret and obscured from all other persons, except as provided by this chapter in cases of voting by assisted electors. No voter shall remain within the voting machine booth longer than one minute, and if he shall refuse to leave it after the lapse of one minute, he shall be removed by the judges."

And specific confirmation is found in section 52.19, Code of 1958, providing the method of assisting voters in terms as follows:

"52.19 Instructions. In case any elector after entering the voting machine booth shall ask for further instructions concerning the manner of voting, two judges of opposite political parties shall give such instructions to him; but no judge or other election officer or person assisting an elector shall in any manner request, suggest, or seek to persuade or induce any such elector to vote any particular ticket, or for any particular candidate, or for or against any particular amendment, question, or proposition. After receiving such instructions, such elector shall vote as in the case of an unassisted voter."

Very truly yours,

OSCAR STRAUSS

First Assistant Attorney General

OS:mmh4

STATE OFFICERS AND DEPARTMENTS

Flection proclamation,

Cost of publication of governor's general election proclamation is payable by the county in which said publication originates.

(Strauss to Loveless, Gov. 10-7-60) #60-10-5

618.11

October 7, 1960

Hon. Herschel C. Loveless
Governor of Iowa
Statehouse
L O C A L

My dear Governor:

Reference is herein made to the printing bill of the Sioux Center News for publication of your general election of November, 1960 proclamation, in the amount of fifty-six dollars. This bill is payable by the county, under the provisions of Section 618.11, Code 1958, and Opinion of the Attorney General appearing in the Report for 1909 at page 370.

Very truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh5
Encl: 2
CC to State Comptroller
CC to Secretary of State

60-10-5

CONSERVATION: Radio facilities

A county conservation board organized under chapter 111A of the 1958 Code of Iowa, cannot properly expend funds allocated to it by the county board of supervisors to equip a state conservation officer with a two-way radio to facilitate the performance of his duties as a state conservation officer. (Gritton to Fischer, St Rep, 10-12-60) tt 60-10-6 October 12, 1960

111A.6
111A.4

107.13 Harold O. Fischer, State Representative
Wellsburg
Iowa

W. W. Sindlinger, Assistant County Attorney
Suite 201 First National Building
Waterloo, Iowa

Dear Gentlemen:

Within one day of each other, you have submitted an identical question to this office for our consideration.

Your question can be stated as follows:
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 the performance of his duties as a state conservation officer?

111A.6, Code of 1958, provides for a levy and collection of a tax to be utilized by the county conservation board in "carrying out the powers and duties of said conservation board."

111A.4, Code of 1958 makes a rather lengthy enumeration of the powers and duties of the county conservation board.

107.13, Code of 1958 provides for the appointment of state conservation officers "to enforce the laws, rules, and regulations, the enforcement of which are herein imposed on said (state conservation) commission."

In the case of Gritton v. City of Des Moines, 247 Iowa 326, the supreme court had occasion to reiterate some of the rules applicable to governmental agencies. The court said:
"They possess and can exercise only the powers
(1) expressly granted by the legislature
(2) necessarily or fairly implied in or incident to the powers expressly granted, and
(3) those indispensably essential -- not merely convenient -- to the declared objects and purposes of the municipality. * * *

60-10-6

> The powers conferred upon municipalities are to be strictly construed and when there is uncertainty or reasonable doubt as to the existence of power it will be denied."

In the enumeration of the powers and duties of the county conservation board as set out in section 111A.4, Code of 1958, I find no powers or duties related to the enforcement of the laws, rules and regulations of the state conservation commission.

I am therefore of the opinion 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.

Yours very truly,

JAMES H. GRITTON
Assistant Attorney General

JHGL:mmh5

ELECTIONS: Constitional convention

Whether the constitutional convention question is submitted to the voters on voting machines, or by separate paper ballots, is in the discretion of the boards of supervisors of the respective counties, or the city or town councils; the duty of the county auditor in the printing of ballots for use on the voting machines is ministerial. (Strauss to Scholz, Mahaska Co Atty, 10-12-60)*

October 12, 1960

#60-10-7

49.51
52.24
52.2

Mr. Charles H. Scholz

Mahaska County Attorney

Oskaloosa, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 7th inst. in which you submitted the following:

> "I have examined a copy of your opinion dated July 20, 1960 on the matter of whether or not the constitutional convention question may be placed on voting machines.
>
> "I note that the final paragraph of your opinion states that such question 'may' be placed on voting machines 'at the discretion of the governing body of the governmental unit purchasing the machine, i.e., Board of Supervisors, City or Town Council.' I am wondering whether in making this statement you have given any consideration to the provisions of Section 49.51, which provide that the County Auditor shall have charge of the printing of ballots in his county.
>
> "Here in our county there is a disagreement between our Board of Supervisors and our County Auditor as to whether or not the constitutional convention measure shall be placed on the voting machine, or voted on a separate ballot. I, therefore, request confirmation of the statement made in your original opinion that it is the Board of Supervisors that has the discretion as to the placing of the question on the voting machine."

In reply thereto, I advise as follows:

In confirming the views expressed in the foregoing opinion, that the Board of Supervisors has the discretion as to the placing of the constitutional convention question upon the

60-10-7

voting machine as authorized by Section 52.2, Code 1958, providing as follows:

> "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 two-thirds 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."

It seems clear that by reason of the provisions of section 52.24, Code 1958, providing 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 constitutional amendments and other public measures."

the county auditor, under the provisions of section 49.51, Code 1958, providing as follows:

> "49.51 County auditor to control printing. For all elections held under this chapter, except those of cities or towns, the county auditor shall have charge of the printing of ballots in his county, and shall cause to be placed thereon the names of all candidates which have been certified to him by the secretary of state, in the order the same appear upon said certificate, together with those of all other candidates to be voted for thereat, whose nominations have been made in conformity with law."

has a ministerial duty to perform in the printing of the ballots for use on the voting machine.

This situation had the consideration of the Institute of Public Affairs, State University of Iowa, Iowa City, where on page 10 of the brochure titled: "A Preliminary Report of an Analysis of the Effects of the Use of Voting Machines in Voting on Special Questions in Iowa -- 1920 to 1956" the same view was

held in the following terms:

> "On July 20, 1960, the Attorney General issued an opinion in which it was stated that voting machines may be used in voting on the question of Constitutional revision in the 1960 general election.
>
> "Therefore, it would seem that the question whether voting machines or separate paper ballots are to be used in voting on special questions remains to be settled by local officials. For state and county issues, this means that each county board of supervisors, probably acting in conjunction with the county auditor, as the officer charged with the responsibility of providing ballots and other election supplies, must decide whether machine or paper ballots are to be used in voting on each special question in its county."

Yours very truly,

OSCAR STRAUSS

First Assistant Attorney General

OS:mmh4

TAXATION: Property Tax: Homestead & Military Service Tax Exemption: One holding an accepted offer to buy qualifies as an owner for purposes of the Homestead & Military Service Tax Exemption. (Adams to O'Connor, Ch, Tax Comm, 10-13-60) # 60-10-8

October 13, 1960

425.11 (2)

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 request of October 12, 1960, which reads as follows:

> "In regard to an opinion of the Attorney General's Office of July 14, 1960, there is confusion as to the manner of distinguishing between an 'offer to buy' and a 'contract of purchase' in regard to Homestead & Military Service Tax Exemption. The Property Tax Division respectfully requests an opinion in this matter."

First, it should be noted that the opinion of July 14, 1960, simply held that a person holding only "an offer to buy or purchase" real estate is not entitled to either Homestead or Military Service Tax Exemption. This is absolutely correct. Iowa Code Section 425.11(2) requires a recorded contract of purchase with a 10% down payment. As you have stated, the confusion has arisen in distinguishing between a "contract of purchase" and an "offer to buy".

As stated in the opinion of July 14, 1960, two of the elements necessary for the creation of a contract are offer and acceptance. First comes the offer, then the acceptance. When the offer has been accepted, the arrangement is no longer an offer to buy--it is a contract of purchase.

60-10-8

Therefore, the statutory requirement of a "contract of purchase" is met.

Now, this type of arrangement can be physically carried out either by use of one or by use of two documents. In the latter case, a written offer is made by the buyer and given to the seller. The buyer then can execute a separate document referring to and accepting the offer of the seller. Together, the documents make up a contract of purchase to meet the statutory requirement.

We believe more confusion is caused when a single document is used, because it will usually have a heading saying "Offer to Purchase Real Estate" or "Offer to Buy Real Estate". Following this heading usually will be the terms of the offer, including the price, then comes the signature of the prospective buyer, also known as the offeror. Below this will be a statement of acceptance followed by the signature of the seller. An example of the acceptance statement is:

"I hereby accept the foregoing offer this _____ day of _____, 19____, and agree to pay the real estate agent's commission amounting to _____ Dollars.

Seller_____

Spouse of Seller_____"

Once this document is signed by both parties, a valid contract of purchase is created provided the remaining requisites of a contract have been met. For all practical purposes, we need not consider these remaining requisites. The important thing is that with the signed offer and the signed acceptance, a contract of purchase is created notwithstanding the fact that the

document is labeled an "offer to buy or purchase".

In addition, this document will frequently contain a statement as one of the terms of the offer, saying that if the offer is accepted, a contract of purchase is created. An example is:

> "13. If this offer is accepted, it becomes a binding contract for the sale and purchase of the above described real estate."

It is our opinion that this single document type of offer to buy, containing an acceptance statement, need not contain a statement similar to the one just quoted to become a valid contract of purchase, but frequently such a statement will be found.

In conclusion, an "Offer to Buy" that shows that it was expressly accepted by the seller of the property, and which clearly shows that not less than 10% of the purchase price named therein has actually been paid to the seller, and which has been recorded in the office of the County Recorder of the county in which the property involved is located, definitely comes within the requirements of Subsection 2, of Section 425.11, 1958 Code of Iowa.

In addition, such an "Offer to Buy" with such "acceptance" by the seller is sufficient to enable the holder or offeror to apply for a Military Service Tax Exemption as the equitable or legal owner of the property. This, again, is because the accepted offer to buy is a "contract of purchase". The "Offer to Buy", with the acceptance clause, in such cases need not be recorded, and neither is it required that 10% of the purchase price named be actually paid. (Section 427.5, Code of Iowa (1958)).

An offer to buy with acceptance clause is enclosed for illustrative purposes. When signed by both seller and buyer, it becomes a contract of purchase sufficient to meet the statutory requirements for both Military Service and Homestead Tax Exemptions.

Very truly yours,

William E. Adams
Assistant Attorney General

WEA:fs

STATE OFFICERS AND DEPARTMENTS:

Vocational and educational facilities -- Sec 246.27

Controls the manner in which fund may be used for vocational and educational facilities at institutions under the jurisdiction of the Board of Control

246.27

October 14, 1960

(Pesch to Burke, Bd of Control, 10-14-60)

60-10-9

Board of Control of State Institutions
State Office Building
L O C A L

Re: W. H. Burke, Director
Iowa State Industries

C O P Y

Gentlemen:

Mr. Burke's letter to this department reads as follows:

"1. There is established at the State Penitentiary at Fort Madison and also the Reformatory at Anamosa, respectively, an industries revolving fund, which is composed of the receipts from the sales of articles and products produced, and from the sale of obsolete and discarded property belonging to the various industrial departments. Would it require legislative action to consolidate these two revolving funds?

2. Amendment by the 1959 Legislature, section. 246.27, permits the use of such funds, if available, at the discretion of and with the approval of the Board of Control, to be used to provide vocational and educational facilities and services for such inmates at the institutions named. Payments from said funds to be made in the manner as are payments from the appropriations, salaries, support and maintenance of the institutons under the jurisdiction of the Board of Control.

Our question is this: Can the Board Utilized funds from one institutons for the benefit of others; for instance if Anamosa has a surplus, can part of these funds be used to provide the vocational and educational facilities at Fort Madison."

60-10-9

Section 246.27, Code of Iowa 1958, as amended by the 58th General Assembly reads as follows:

> "The funds created and described in section 246.26 shall be used only for establishing and maintaining industries for the employment of the inmates at the respective institutions named, except that such funds, if available, may, at the discretion of and withethe approval of the board of control, be used to provide vocational and educational facilities and services for such inmates at the institutions named, and payments from said funds shall be made in the same manner as are payments for the appropriations, salaries, support and maintenance of the institutions under the jurisdiction of the board of control."

and on the basis of this statute which is clear and unambiguous your question is answered in the negative.

Very truly yours,

CARL H. PESCH
Assistant Attorney General

CHP:mk
cc: Board (3)
Mr. Baer
Mr. Brown
Mrs. Wright
File ✓

BANKS AND BANKING Liability of share accounts

Share account or shares in a building and loan association pperating under Chapter 338, Laws of the 58th G.A., means part of the savings liability of the association credited to the account of the holder of such shares. (Strauss to Carson, Sup Sav. & Loan Dept. 10-19-60) # 60-10-10

October 19, 1960

Ch 338 Acts 58 GA

Hon. Chet B. Akers

Auditor of State

L O C A L

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

Dear Mr. Carson:

This will acknowledge receipt of your letter of October 12 in which you state the following:

> Enclosed is a copy of a letter from the Federal Savings and Loan Insurance Corporation, Washington, D. C., in response to a letter from Mr. Robert H. Bush, President, Federal Home Loan Bank of Des Moines, with regard to forms of Optional Share Certificate and Full Paid Share Certificate submitted by the Cedar Falls Savings and Loan Association, Cedar Falls, Iowa.
>
> The letter requests an opinion from the Attorney General.
>
> The forms submitted by the Cedar Falls Savings and Loan Association make provision for a certain number of shares at a stated par value of $100.00. We do not believe as such they are authorized under the new law.
>
> We believe that the word 'share' describes mutuality in that the members share equal status in earnings of the association but that the word does not properly describe the fixed amount of dollars that is in the savings account of a member, or is represented in the Certificate. We believe further that the 'share' certificates should evidence the money value of the savings account either as a fully paid sum or as reflected from time to time by additions and withdrawals. The Iowa statutes state 'The savings liability of an association is not limited, but shall consist only of the aggregate amount of share accounts of its members, plus dividends credited to such account, less redemption and withdrawal payments.'

60-10-10

> It further states '..... a member may make additions to his share account in such amount and at such times as he may elect. Share accounts shall be opened for cash.' Section 11.2, chapter 338, reads as follows: "An account book may be issued to each share account holder on the books of the association and such account book shall, if issued, indicate the withdrawal value of the share account. A separate certificate for a share account may be issued in lieu of an account book in form to be approved by the supervisor.'

In reply to the foregoing, I would advise you that I now concur in the views expressed by you therein. In addition, and as confirmation thereof, I call attention to the definition of 'share account or shares' as set forth in section 2, sub-section 16, chapter 338, Acts of the 58th General Assembly, as follows:

> 'Share account or shares' shall mean that part of the savings liability of the association which is credited to the account of the holder thereof.'

Very truly,

OSCAR STRAUSS

First Assistant Attorney General

OS:mmh4

ELECTIONS: Vacancies

Where a vacancy in county nomination exists, and such vacancy is filled by the County Central Committee, the County Auditor has no other authority or duty than to place the name of such vacancy nominee on the ballot. (Strauss To Nelson, Story Co Atty 10-20-60) # 60-10-11

43.88

October 20, 1960

Mr. Donald L. Nelson

Story County Attorney

Nevada, Iowa

Dear Mr. Nelson:

This will acknowledge receipt of yours of October 17, in which you state the following:

"Request for an Opinion.

"(1) One Thomas Joseph Kenworthy filed a petition in the Story County District Court on August 4th, 1960, in which he asked for a declaratory judgment. In his petition (copy of same being included herein, and marked Exhibit A), he alleged that on June 22nd he made application to register to vote in Ames, and that the City Clerk refused for the reason that he was not a resident.

"(2) The case proceeded to trial, and on October 3rd, 1960, District Judge John M. Schaupp handed down a decision (thermofax copy of the same being enclosed herein, marked Exhibit B), wherein he found that he was not a resident on June 22nd, 1960.

"(3) On September 2nd, the same Thomas Joseph Kenworthy filed an affidavit of candidate for the office of County Recorder. Attached to it was a certificate of nomination executed by the County Chairman and County Vice-Chairman of the Democratic Party. (Photostatic copy of affidavit and other papers, marked Exhibit C enclosed herein.)

"In view of the Court's ruling in the case first referred to, the County Auditor has submitted the question to me as to whether or not he is legally a candidate for the office of County Recorder. (Thermo-fax copy of the County Auditor's request for an opinion enclosed herein also.)

60-10-11

"I hereby submit to you a request for an opinion with respect to the questions submitted to me by the Story County Auditor. It so happens that in addition to serving as County Attorney here in Story County, I am also Chairman of the Story County Republican Central Committee. Therefore, I am somewhat apprehensive that a decision handed down by my office might be misconstrued as a political decision rather than a legal decision. For that reason, I am making this request to your office.

"While I have not made an exhaustive research with respect to the questions raised herein, I would like to direct your attention to Section 44.15 of the Code, and also to opinion of the Attorney General, 1911-1912, page 601, which is indexed under Section 39.17 of the Iowa Code Annotated. (line 4 at page 86).

"I might also give you the questionable benefit of my off the top thinking with respect to this problem. It would appear to me that we might well have one factual situation on June 22nd, when he made application to register as a vote, and we might still have another factual situation on September 2nd, 1960, when he filed his affidavit of candidacy. I do not believe that the findings in Judge Schaupp's opinion would be necessarily binding so far as a second lawsuit involving his candidacy is concerned. It would appear to me that the only way that his name could be questioned on the ballot would be by still another action for a declaratory judgment in which the same issue was raised. And if the Court found that the same facts still existed with respect to his residency on September 2nd as they did on June 22nd, perhaps the holding would be that he was not a resident of Story County, and thus not qualified to hold office. I hope that the matters set forth in this last paragraph will not make this problem any more difficult for you. It may well be that there are many other considerations to be taken into account.

"In closing one final question. If it appears that there is a serious question as to his residency, is it the duty of any officer here in Story County to raise the question? Or would it be a matter for some citizen to raise independently?"

I advise as follows:

It appears from the foregoing, and from other facts presented, in the nominations made at the June 1960 primary, that in the nomination there was a vacancy for the office of county recorder, this vacancy arising after the holding of the county convention.

It appears also such vacancy in nomination could be, and was, filled by the naming of Thomas Joseph Kenworthy, pursuant to the terms of section 43.78, Code 1958, by the party County Central Committee.

The party County Central Committee having so acted, and certified the nomination of Thomas Joseph Kenworthy to the County Auditor, the effect of such certification, and the duty of the County Auditor in the premises, is prescribed by Code section 43.88, which provides the following:

> "43.88 Certification of nominations. Nominations made in case of vacancies, and nominations made by state, district, and county conventions, shall, under the name, place of residence, and post-office address of the nominee, and the office to which he is nominated, and the name of the political party making the nomination, be forthwith certified to the proper officer by the chairman and secretary of the convention, or by the committee, as the case may be, and if such certificate is received in time, the names of such nominees shall be printed on the official ballot the same as if the nomination had been made in the primary election."

So, as stated in the foregoing section, the duty of the County Auditor, upon receipt of the certificate, was to print the name so certified, on the official ballot, if the certification was received in time. Such ballot now having been printed, bearing the name of such nominee for the office of county recorder, there appears to be no duty or authority in the County Auditor to act further in respect to this matter. In this connection, see section 44.4, Code 1958.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh4

Mrs Linder

COUNTIES AND COUNTY OFFICERS: Zoning -- Section 358A.4 does not expand those powers enumerated in section 358A.3 in providing for a county building code. Rehmann to Nazette, Linn C. Atty, 10-21-60) #60-10-12

358A.4
358A.3

October 21, 1960

Mr. Richard F. Nazette
Linn County Attorney
Cedar Rapids, Iowa

Attention: Adam A. Kreuter,
Assistant County Attorney

Dear Mr. Nazette:

This is to acknowledge receipt of your letter of October 19, 1960 in which you ask, in pertinent part, the following:

> "Our problem concerns the interpretation of section 358A.4 particularly with respect to the language in which it says 'and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures or land.' Does this expand the power of the board of supervisors enumerated in Section 358A.3. If it does expand those powers, is this broad enough to permit the board of supervisors to create a county building code so as to regulate the type of construction within the various districts of Linn County which have been zoned under the county zoning ordinance? Further, does it give power to the board of supervisors to prohibit the use of a quonset type building for residential purposes? In a more broad sense, does it give power to the board of supervisors to regulate the style of architecture?"

In reply thereto, we advise as follows:

Section 358A.3 sets out the general powers of the county board of supervisors to regulate and restrict the type of structures which may be occupied or built outside of the corporate limits of any city or town. In order to accomplish

60-10-12

uniformity in restriction, the board of supervisors is given the option to divide the county into districts in order to carry out the purpose of the powers which were conferred upon the board of supervisors in section 358A.3, Code 1958. The purpose of districting is to impose uniform restrictions and regulations but not to arbitrarily prevent the owners from improving their property. Rehmann v. City of Des Moines, 200 Iowa 286, 204 N.W. 267. Therefore, in answer to your question, section 358A.4, Code 1958, does not expand those powers enumerated in section 358A.3, Code 1958.

If the board of supervisors wishes to restrict or regulate the type of construction to be used in the districts of the county as they now exist, the proper procedure for amending or changing the restriction is found in section 358A.6, Code 1958. In regard thereto, your attention is directed to a very recent case, Bd. of Supv. Scott Co. v. Paaske, 250 Iowa 1293, 98 N.W. 2d 827, wherein the Supreme Court pointed out that where a person is granted a permit to erect structures in compliance with the then existing zoning ordinance, the permittee is vested with the right to erect the structure he desires, keeping within the compliance of the zoning ordinance. However, where the permittee had knowledge of the pendency of the zoning amendment, even though he was issued a permit, this vests him with no right to commence work should the zoning law be changed. In the absence of specific statutory authority, the county has no authority to adopt a building code such as that found in Chapter 413, Code 1958. However, this does not mean that the restriction placed upon certain districts might not preclude the structures because of height restrictions or size of building, or any portable or potentially portable structures which may be used for residential purposes.

Therefore, in answer to the other questions propounded in your letter, the county board of supervisors does not have the power to enact a building code such as that provided for in Chapter 413, Code 1958, but it does have the power to regulate the type of structure which may be used for residential purposes if they come within the provisions as found in section 358A.3, Code 1958; but this in no way gives the board of supervisors the power to regulate the architecture of said buildings within those limits.

Very truly yours,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:bl

STATE OFFICERS AND DEPARTMENTS
Reciprocal compacts

The Governor has no authority under section 247.5, Code 1958, to enter into a reciprocal compact that embraces within its provisions all juveniles. (Strauss to Ringgenberg, Leg Res. Bu 10-21-60) # 60-10-13

October 21, 1960

247.5

IOWA LEGISLATIVE RESEARCH BUREAU
Statehouse
L O C A L

Attention: Clayton Ringgenberg, Director

Dear Mr. Ringgenberg:

Reference is herein made to yours of the 29th ult. in which you stated the following:

> "The Legislative Research Bureau has been requested to conduct a study on juvenile laws in Iowa. It has been suggested that the Interstate Compact on Juveniles be considered for adoption in this state.
>
> "Paragraph 10 of chapter 247 authorizes the Governor of Iowa to enter into probation and parole compacts. Does the Governor have authority under this paragraph to enter into the Interetate Compact on Juveniles?
>
> "I am enclosing a copy of the compact under consideration. We will be happy to furnish you any additional information that you might need in making this opinion."

In reply thereto, I call your attention to the statute referred to, being section 247.10, Code 1958, which provides the following:

> "247.10 Reciprocal agreements with other states. The governor of the state of Iowa is hereby authorized and empowered to enter into compacts and agreements with other states, through their duly constituted authorities, in reference to reciprocal supervision of persons on parole or probation and for the reciprocal return of such persons to the contracting states for violation of the terms of their parole or probation."

I am of the opinion that the foregoing section does not provide authority in the governor to enter into a probation and parole compact involving juveniles, except such juveniles

60-10-13

as have been convicted of an indictable offense. I find support for this view in the fact that under section 247.5, Code 1958, the board of parole power extends only to those persons convicted of crime and committed to either the penitentiary or to the men's reformatory. There is no provision for committing juveniles to such institutions, except those guilty of an indictable offense for which they may be committed to the penitentiary or to the reformatory.

Therefore, the Governor has no authority under section 247.10, Code 1958, to enter into a reciprocal compact that embraces within its provisions all juveniles, as the proposed one does.

Yours truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh4

HIGHWAYS: County road equipment - -
-County road equipment and labor may not be used on county fairgrounds whether owned by the county or by a fair association or society in the absence of express statutory authority authorizing such use. (Lyman to Larsen, St Highway Comm, 10-24-60
60-10-14 4CI.12

October 24, 1960

Iowa State Highway Commission
Ames, Iowa

Attention: Melvin Larsen
Secondary Road Engineer

Dear Mr. Larsen:

You have requested an opinion as to the following questions:

1. May county road equipment and labor be used for work on county fairgrounds?

2. Does the answer to question one depend upon whether the fairground property is owned by the county or by a fair association?

3. If county equipment and labor may be used on county fairgrounds is payment therefor required?

In answer to the first question you are referred to Section 174.13, 1958 Code of Iowa, which provides for a tax levy upon all the taxable property of the county to establish a fund known as the fairgrounds fund to be used for the purpose of "fitting up or purchasing fairgrounds" for the society. Under Sections 174.14 and 174.15, 1958 Code of Iowa, fairgrounds may be established with a county or district fair society acting as agent for the county in the erection of buildings, maintenance of grounds and buildings or any improvements constructed on such grounds. The fairground fund referred to in Section 174.18, 1958 Code of Iowa, may be expended only for the erection and repair of the buildings or other permanent improvements on real estate acquired for fairgrounds or for the payment of debts contracted in such erection or repair.

60-10-14

A review of the above statutory provisions indicates that acquisition of property for and improvement and repair of fairgrounds is to be accomplished from the fund established for that purpose.

Section 111.58, 1958 Code of Iowa, is specific statutory authority for the county to permit use of maintenance equipment under its control in state parks and other lands of the conservation commission. In addition 455.135(2), 1958 Code of Iowa, is authority for county equipment and labor to be used for minor repairs or eradication of brush and weeds along open drainage ditches. In the latter instance the secondary road maintenance fund* or the weed fund, as the case may be, is reimbursed from the drainage district fund benefitted.

These are two instances in which there is specific statutory authority for the use of county road equipment or labor for purposes other than road purposes. In the absence of such express authority it is well established that a municipal corporation or governmental sub-division may not use its road equipment other than as statutorily authorized. 1952 Attorney General Report, page 116; 1956 Attorney General Report, page 201. In the 1952 opinion the following appears:

> "The limited express power to use secondary road equipment provided by the foregoing statute enacted by the 53rd General Assembly, is, in our judgment, confirmation of the lack of any previous general power, express or implied, in the board of supervisors to permit the use of county equipment for other than county purposes with or without compensation.
>
> Subject to the provisions of the portion of section 455.135, heretofore quoted, we are of the opinion that county equipment cannot be used for other than county purposes with or without compensation to the county for such use."

* Secondary Road Fund by Sec. 18, Chap. 139, 57th G.A.

In the 1956 opinion the following is reported:

> "For further evidence of legislative intent see Section 455.135 as amended by Chapter 222, Section 1, Acts of the 56th General Assembly, wherein use of county road machinery in connection with minor repairs to the works of levee and drainage districts is expressly authorized. That the legislature deemed it necessary to make the express authorization therein contained further demonstrates legislative awareness of the limitations on the powers of the Board of Supervisors hereinabove set forth.
>
> "Thus, in conclusion, unless the machinery or equipment to which your letter refers is no longer needed for county purposes, no authority exists for its lease or other disposition to any city, town or, for that matter, to anyone in the absence of express statutory authorization. In short, the answer to your question is in the negative."

Therefore, county road equipment and labor may not be used on county fairgrounds in the absence of statutory authority authorizing such use.

In answer to your second question, it would not be significant whether the fairgrounds are owned by the county or owned by a fair association. The answer to question number one would be the same.

It is unnecessary to answer question 3 in view of the answer to question 1.

Very truly yours,

ELECTIONS: Exam and test voting machines--

An individual holding and performing a contract to install voting machines is not barred thereby from representing his political party as a witness to the testing, and certifying as to the condition of the voting machines. For so witnessing and certifying he is not entitled to compensation, but such witnessing and certifying would not bar him from compensation provided by his contract.

(Strauss to Schroeder, Jackson Co Atty 10-26-60)

#60-10-15

October 26, 1960

ch 95 Acts 58 GA

Mr. Asher E. Schroeder
Jackson County Attorney
Maquoketa, Iowa

Dear Mr. Schroeder:

This will acknowledge receipt of your letter of October 19, 1960, in which you state the following:

> "A question has been raised in this County, in regard to Chapter 95, Section 1, of the Acts of the Regular Session of the 58th General Assembly (pages 127-128), which concerns the examination and testing of voting machines to be used in the County.
>
> "In this County, the individual selected by one of the political parties, for such examination and testing, has also been hired by Jackson County, to set up and install said machines. It would appear as though he is not only examining and testing his own work, but is, in addition being paid by the Couty for his work.
>
> "The questions then would be: (1) Under the law, can one individual act as both a representative of his party as an examiner of the machines, and also install and set them up as an employee of the County: and (2) if the answer to No. 1 be yes, would this effect his right to payment for his services as an employee, since under the law, no provision is made for payment to one who acts as an examiner on behalf of a political party."

Section 1 of Chapter 95 of the Acts of the 58th General Assembly provides the following:

> "SECTION 1. Section fifty-two point nine (52.9), Code 1958, is hereby amended by adding thereto the following: 'It shall be the duty of the county auditor or the city clerk or their duly authorized agents not less than twelve (12) hours before the opening of the polls on the

60-10-15

morning of the election to examine and test said machines. The chairman of each political party shall be notified in writing of the time said machines shall be examined and tested so that they may be present, or have a representative present. Those present for the examination and testing shall sign a certificate which shall read substantially as follows:

"The Undersigned Hereby Certify that, having duly qualified, we were present and witnessed the testing and preparation of the following voting machines; that we believe the same to be in proper condition for use in the election of _____19__, that each registering counter of the machine is set at 000; that the public counter is set at 000; that the seal numbers and the protective counter numbers are as indicated below.

Signed _____
Republican

_____
Democrat

_____

_____
Voting machine custodian

Dated _____19___

Machine Number	Seal Number	Protective Counter Number

"

'On those voting machines presently equipped with an after-election latch and on all machines placed in use after January 1, 1961, in this state, the after-election latch shall be fully used by the election officials.' "

In the view that I take of this statute, there is a duty imposed upon either the County Auditor or the City Clerk, or their authorized agents to examine and test the voting machines before the opening of the polls on election day.

Insofar as the agent appointed by a political party is concerned, which is the situation described by you, it is to be said that such agent does not examine or test the machine; he only certifies to the result of the testing and the examination by the County Auditor or the City Clerk, or their authorized agents.

In that situation, I find no incompatibility between so acting and his situation as contractor to set up and install the machine. As a matter of fact, his certification that he believes the same to be in proper condition for use at the election is a plainly-implied contractual obligation made by him as part of his contract.

I think, therefore, that he is not disqualified to act as an agent of a political party to perform this statutory duty. For the service performed, he would not be entitled to compensation. His action in so witnessing and certifying, while being in a sense political activity, would have no affect upon his right to the compensation provided to be paid for installing the machine, such political activity being authorized by statute.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh4

SCHOOLS: Reorganization. Under section 275.12 a petition for reorganization cannot be reactivated once it has been dismissed except by re-petitioning provisions in said section.

(Rehmann to Greenfield, Guthrie Co Atty, 10-26-60)
#60-10-16

October 26, 1960

275.12

Mr. C. F. Greenfield
Guthrie County Attorney
Bayard, Iowa

Dear Mr. Greenfield:

This is to acknowledge receipt of your letter of September 13 in which you made certain inquiry with respect to the reactivated petition for reorganization of a school district which has been dismissed in a prior action. Your attention is directed to the case of Lewis Cons. Sch. Dist. v. Bd. of Ed., 250 Iowa 1107, 97 N.W. 2d 166, wherein the court held that the subject matter no longer exists when the petition for reorganization has been dismissed. The proper procedure for presenting a petition for reorganization is found in section 275.12 et seq. which provisions are exclusive and controlling to all school reorganizations.

There is no express statutory authority to accomplish which you have outlined in your letter. Therefore, the petition for reorganization cannot be reactivated once it has been disposed of and the decision final.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:kvr

60-10-16

WELFARE, Soldier relief

A nonmilitary husband of an indigent wife who served in the military forces is not entitled to the benefits provided by Chapter 250, Code 1958. (Strauss to Pappas, Cerro Gordo Co. Atty, 10-27-60) # 60-10-17

October 27, 1960

250.1

Mr. William Pappas
Cerro Gordo County Attorney
Mason City, Iowa

Dear Mr. Pappas:

This will acknowledge receipt of the letter of Mrs. Alice C. Sweeney, Executive Secretary of the Soldiers Relief Commission, Cerro Gordo County, in which she stated the following:

"I am writing you for an opinion!

"According to the Iowa Code - Relief for Soldiers, Sailors and Marines, Chapter 250 it reads: for the relief of, and to pay the funeral expenses of honorably discharged indigent men and women of the United States who served in the military or naval forces of the United States in any war, and their indigent wives, widows and minor children not over eighteen years of age, having legal residence in the county.

"Now I have a case where the veteran happens to be the wife and mother of five children. The husband is totally disabled and in a serious condition needing medical care on a local level until he can be admitted to the University Hospital.

"When the veteran is the male, father of the children and his wife is in need of medical care and he qualifies, care can be given from our funds. Can this law be construed to mean that the veteran, who happens to be the wife, can be given assistance from Soldiers Relief funds? Does it work both ways?

"I called the county attorney and he suggested that I get an opinion from your office.

"Trusting I have made the point clear and that I may expect a reply as soon as possible, I am,"

60-10-17

In reply thereto I advise that in my opinion a nonmilitary husband of an indigent wife who served in the military forces is not entitled to the benefits provided by Chapter 250, Code 1958. My reason for this conclusion is found in the legislative history of that chapter describing those entitled to the benefits thereof. Such history discloses: (Iowa Code Annotated, Volume 11, page 630)

> "Immediately prior to its amendment in 1945, this section provided that the beneficiaries of the fund thereby authorized should include honorably discharged, 'indigent United States soldiers, sailors, marines, and nurses who served in the military or naval forces of the United States in any war and their indigent wives, widows, and minor children, not over fourteen years of age if boys, nor sixteen if girls, having a legal residence in the county.' The present parallel provision in this section was substituted for the quoted provision by the 1945 amendment."

The amendment referred to appears as Chapter 124, Laws of the 51st General Assembly. Section 1 thereof amended section 3828.051, Code 1939, by striking all after the word "indigent" in lines seven and eight, and substituting therefor, "men and women of the United States who served in the military or naval forces of the United States in any war, and their indigent wives, widows and minor children not over eighteen years of age, having a legal resident in the county." Said section 3828.051, Code 1939, as amended now appears as section 250.1, Code 1958.

Section 6 of said Chapter 124, 51st G.A., amended section 3828.061, Code 1939, by striking the words, "soldier, sailor, marine, or nurse," and substituting therefor the words, "man or woman." Section 3828.061, Code 1939, as amended, appears in the Code of 1958 as section 250.13.

Section 3828.065, Code 1939, by section 8 of the foregoing named chapter 124, was amended by strking the words, "deceased soldier or sailor" and substituting therefor the words, "such deceased service man or woman." Said section 3828.065, Code 1939, as amended, now appears as section 250.17, Code 1958.

The foregoing exhibits a plain legislative intent by substitution, that "man or woman" is entitled to the benefits of Chapter 250, instead of "soldier, sailor, marine, or nurse."

The specific manner in which such change was made in these statutes resulted in each one providing that the benefits now are to "honorably discharged men or women and their indigent wives, widows and minor children not over eighteen years of age, having legal residence in the county. No mention therein is made that the husband of any such woman is entitled to the benefits.

Under the rule to which the Supreme Court is committed, stated in Eittreim v. State Beer Permit Board, 243 Iowa 1148, 1155, 53 N.W. 2d 893, such omission may not be supplied. The rule there stated is this:

> "A Court, by interpretation, should not write into a law provisions which are not covered by the particular legislation. We have so held in the case of Case v. Olson, 234 Iowa 869, 872, 14 N.W. 2d 717, 719, where we stated: 'The courts confine themselves to the construction of the law as it is, not to amend or change under the guise of construction.' See also Greene County Rural Electric Cooperative v. Nelson, 234 Iowa 362, 367, 368, 12 N.W. 2d 886, 889."

Very truly yours,

OS:mmh4

OSCAR STRAUSS
First Assistant Attorney General

and County Officers;

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

October 31, 1960

358A.7
358A.10

Mr. Robert H. Wilson
Muscatine County Attorney
110½ East Second Street
Muscatine, Iowa

Dear Mr. Wilson:

This is to acknowledge receipt of your letter of August 30, 1960, in which you made the following inquiry:

"The Muscatine County Board of Supervisors has requested that I submit the following three questions for an opinion from your office:

"1) After the Zoning Commission has rendered its final report to the Board of Supervisors and said Board has adopted and passed a zoning ordinance, is it necessary for the Zoning Commission to continue?

"2) After a county is fully zoned, can the Board of Supervisors change restrictions, regulations and boundaries of districts without first having recommendations from the Zoning Commission?

"3) Under Section 358A.10, does the Board of Adjustment have the final authority over the Board of Supervisors in changing of regulations, restrictions or district boundaries?"

In reply thereto, we advise as follows:

Before the county board of supervisors can avail itself of the provisions found in Chapter 358A, Code 1958, it must comply with the provisions found in section 358A.8. This section makes reference to a county zoning commission which must be appointed prior to the time the county board of supervisors takes any action with respect to county zoning. The

60-10-18

said section also makes reference to the fact that the zoning commission may, from time to time, make recommendations to the board of supervisors as to amendments, supplements, changes and modifications in the zoning law. It is elementary that counties are recognized as quasi-corporations, and it is universally held that the board of supervisors has only such powers as are expressly conferred by statute or necessarily implied in order to accomplish those specific aims which are conferred upon it by the statutes. Hilgers v. Woodbury Co., 200 Iowa 1318, 206 N.W. 666.

Therefore, in the absence of specific statutory authority to the contrary, there is no express provision for the discontinuance of the zoning commission. Thus the answer must be affirmative.

In answer to your second question, your attention is directed to section 358A.7, which provides as follows:

> "358A.7 Changes and amendments. Such regulations, restrictions, and boundaries may, from time to time, be amended, supplemented, changed, modified, or repealed. In case, however, of a protest against such change signed by the owners of twenty percent or more either of the area included in such proposed change, or of the area immediately adjacent thereto and within five hundred feet of the boundaries thereof, such amendment shall not become effective except by the favorable vote of at least sixty percent of all of the members of the board of supervisors. The provisions of section 358A.6 relative to public hearings and official notice shall apply equally to all changes or amendments."

You will note that section 358A.7 makes no reference to the zoning commission which is established by virtue of 358A.8. Only the board of supervisors has the power to change the zoning ordinances, and again, in the absence of specific statutory authority, the recommendation by the zoning commission is not a necessary prerequisite to amendments to the zoning ordinance by the board of supervisors. Thus the answer to your second question is affirmative.

Under section 358A.10, Code 1958, the board of adjustment is conferred with certain powers to make adjustments over those restrictions placed upon individual property owners by the board of supervisors. In this connection, your attention is directed to the case of Anderson v. Jester, 206 Iowa 452, 221 N.W. 354, in which the court held that, where the zoning laws are adopted and the regulations therein would work an

unnecessary hardship upon the individual, it does not invalidate the total zoning unless such a restriction would be confiscatory in operation and imperil the constitutionality of the ordinance as to all. The court went on to hold that, in order to avoid an unreasonable or arbitrary and unconstitutional operation in specific instances, it is the duty of the board of adjustment to pass upon individual cases and not upon the total effect of the ordinance. Therefore, in answer to your third question, the board of adjustment does have final authority over the board of supervisors in changing the regulations and restrictions placed upon individual property owners within the district and such a decision is a primary prerequisite to any further appeal as provided in section 358A.18, Code 1958. Thus, the answer to your third question would be affirmative in individual cases.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:bl

TAXATION: Sales Tax; Sales in Interstate Commerce: -

1. When goods are delivered to a common carrier, which is also the purchaser, the sale is subject to sales tax.

2. Whether a sale is in interstate commerce depends on whether it is the seller's obligation to deliver the goods out-of-state to the buyer.

(Gill v. O'Connor, Ia. Tax Comm., Sept. 9, 1960)

422.42
422.43

60-111=1

September 9, 1960

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 a letter from D. E. Cunningham, Director of the Sales and Use Tax Division of the State Tax Commission, under date of July 18, 1960, wherein the following problems were submitted:

"Our audit program has developed two or three closely related matters within the past two months which need clarification for the sake of uniform administration by our office and field representatives.

"The first refers to transactions by an Iowa retailer with the Chicago, Burlington and Quincy Railroad of Aurora, Illinois where the Burlington vendor delivers the sold merchandise to the carrier customer in Iowa and it is subsequently transported by the purchaser to Aurora, Illinois for alleged use in that State. From the evidence in our possession, the Iowa seller is not required to deliver this merchandise to Illinois but instead the Iowa delivery to the carrier is evidently had for the purpose of convenience and expediency. The question is therefore, whether this is a sale in Iowa or in interstate commerce?

"We have another question wherein the same railroad out of Aurora, Illinois purchases merchandise from the Burlington vendor, but delivery of the sold merchandise is made to the Burlington Truck Lines, Incorporated at Burlington, Iowa. This Burlington Truck Line is wholly owned by the Chicago, Burlington and Quincy Railroad but it is an entirely different corporation under separate management, with its headquarters at Galesburg, Illinois. The Illinois purchaser contends that this transaction qualifies for greater recognition from Iowa sales tax than the one wherein the railroad line itself accepts the merchandise in Iowa.

60-11-1

"There are a number of other instances which basically revert to the two cited above but there seems to be no point in duplicating the facts as only the identity of the foreign customers and Iowa sellers are affected. These problems do create a substantial revenue or exemption condition and that is why we desire guidance."

In response to the foregoing inquiries, the following statutes and regulations are found to be applicable:

Section 422.43, Code of Iowa (1958), reads in part as follows:

"422.43 Tax imposed. There is hereby imposed, beginning the first day of April, 1937, a tax of two percent upon the gross receipts from all sales of tangible personal property, consisting of goods, wares, or merchandise, except as otherwise provided in this division, sold at retail in the state to consumers or users; * * *."

Section 422.42, Code of Iowa (1958), reads in part as follows:

"422.42 Definitions. The following words, terms, and phrases, when used in this division, have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

"* * *.

"2. 'Sales' means any transfer, exchange, or barter, conditional or otherwise, in any manner or by any means whatsoever, for a consideration.

"3. 'Retail sale' or 'sale at retail' means the sale to a consumer or to any person for any purpose, other than for processing or for resale of tangible personal property * * *."

Section 422.45, Subsection 1, Code of Iowa (1958), reads as follows:

"422.45 Exemptions. There are hereby specifically exempted from the provisions of this division and from the computation of the amount of tax imposed by it, the following:

"1. The gross receipts from sales of tangible personal property which this state is prohibited from taxing under the constitution or laws of the United States or under the constitution of this state."

Rule No. 55, 1958 I.D.R. at page 461, reads in part as follows:

"Rule No. 55. Sales in interstate commerce—goods shipped from this state. When tangible personal property is sold within the state and the seller is obligated to deliver it to a point outside the state or to deliver it to a carrier or to the mails for transportation to a point without the state, the retail sales tax does not apply, provided the property is not returned to a point within this state. The most acceptable proof of transportation outside the state will be:

"(a) A waybill or bill of lading made out to the seller's order calling for delivery; or

"(b) An insurance or registry receipt issued by the United States Postal Department, or a Post Office Department's receipt; or

"(c) A trip sheet signed by the seller's delivery agent and showing the signature and address of the person outside the state who received the delivered goods.

"However, where tangible personal property is sold and delivered in this state to the buyer or his agent other than a common carrier, the sales tax applies, notwithstanding the fact that the buyer may subsequently transport the property out of the state."

From an examination of the above cited statutes and regulation, it becomes apparent that, in answering these questions, there must be a determination made as to when the sale is completed by delivery or change of possession to the buyer. If delivery is made outside the State of Iowa, the sale is exempt, because the goods were not "sold at retail in the state". The Tax Commission by promulgating Rule No. 55 has, in effect, said, if it is the seller's obligation to deliver the goods to the purchaser in some other state, it is a sale in interstate commerce and exempt. The aforementioned rule states expressly that delivery to a common carrier to be carried out-of-state is an interstate sale.

The first question asks: what is the sales tax consequences when the seller delivers to a common carrier that is also the purchaser? In any other case, Rule No. 55 requires that if goods are delivered to the purchaser in this state the sales tax must be collected. An excellent discussion of this very problem is found in a recent case, decided by the Illinois Supreme Court; that is, Pressed Steel Car Co., Inc. v. Lyons, et al., 7 Ill. 2d 95; 129 N.E.2d 765; 3 STC 549 (1955). The plaintiff argued that the purchasing railroads did not obtain possession of the materials until delivered out-of-state, because the purchasing railroads were acting as a common carrier, when they picked the goods up in Illinois. The foregoing contention was met in the following manner by the Court:

> "Inherent in this contention is an assertion that the purchasing railroad has a dual personality when it carries goods consigned to itself so that its role as carrier is divorced from its role as purchaser. Because the commerce clause is concerned with substance rather than form, we turn at once to a consideration of the realities of the relationship between the seller and the purchasing railroads. That the railroad is technically obligated by its contract with the seller to deliver the goods purchased to the destination named in the bill of lading is conceded. But the circumstance that the carrier is also the consignee makes it difficult to see that any significant consequences would follow if the railroad should find it more convenient to transport the goods to a point other than the destination named in the bill of lading, whether within our outside of Illinois. There would be no problem in reaching agreement between carrier and consignee as to the substituted destination. And it is difficult to conceive of any realistic consideration which could prompt an objection by the seller. The bill of lading is not used here as a security device. The fact that Pressed Steel holds title to the goods and therefore bears certain minimal risks of loss in transit is not significant because once a carrier deviates from its contract of carriage without the consent of the consignor, the risk of loss shifts to the carrier until the deviation has been ended (Dunseth v. Wade, 2 Scam. 285; Merchants' Dispatch Transportation

Co. v. Kahn, 76 Ill. 520; Benoit v. Central Vermont Railway, 73 Atl. 2d 321, 116 Vt. 266; 33 A. L. R. 2d 139), or ratified by acceptance of payment from the purchaser. (Griggs v. Stoker Service Co., 50 S. E. 2d 914, 229 N. C. 572.) In the absence of diversion, Pressed Steel bears only the risk of loss or damage caused by such uncommon occurrences as an act of God or the public enemy."

The Illinois Court was also faced with the argument that the ICC had recognized this dual personality of railroads; but the Court, although stating they thought the ICC rulings irrelevant, mentioned a number of the Commission's rulings that indicated a contrary decision.

The Court, in holding that Pressed Steel was liable for the tax, turned to the United States Supreme Court's decision in Department of Treasury v. Wood Preserving Corp., 313 U. S. 62, for support. The following quotation is from the Court's opinion and, though extensive, this writer feels it answers your question without need of further explanation:

"The United States Supreme Court in the Wood Preserving Corporation case had this to say which is pertinent to the contention that a bill of lading requiring delivery to an out-of-State destination indicated that a railroad was a carrier but not a purchaser: 'These were local transactions,--sales and deliveries of particular ties by respondent to the Railroad Company in Indiana. The transactions were none the less intrastate activities because the ties thus sold and delivered were forthwith loaded on the railroad cars to go to Ohio for treatment. Respondent did not pay freight for that transportation and the circumstance that the billing was in its name as consignor is not of consequence in the light of the facts showing the completed delivery to the Railroad Company in Indiana. See Superior Oil Co. v. Mississippi, 280 U. S. 390.'

"[Reasoning of Court]

"The California courts have also had a series of railroad supplier cases under the California retail sales tax act. (Standard Oil Co. v. Johnson, 92 Pac. 2d 470, 132 Pac. 2d 910, 135 Pac. 2d 638, and 147 Pac. 2d 577.) The first three of these

decisions were by the District Court of Appeals. In the decision in 92 Pac. 2d 470, the court had held that sales similar to those in In re Globe Varnish Co., were interstate sales. However, in two later opinions (132 Pac. 2d 910, and 135 Pac. 2d 638) the court repudiated its earlier decision on the basis of the subsequent holding of the United States Supreme Court in the Wood Preserving Corporation case, saying: 'The mere use of a standard bill of lading and a designation of respondent as consignor should not be allowed to change what is essentially an intrastate transaction into an interstate transaction.' (135 Pac. 2d at 642.) The final California decision, (147 Pac. 2d 577), involved primarily an interpretation of the California statute and the regulations issued under it. In the course of its decision, however, the Supreme Court distinguished the Wood Preserving Company case upon the ground that there the seller did not pay the freight charges and the shipments were f. o. b. an Indiana point, while in the case before it the freight charges were prepaid by the seller and the shipments were f. o. b. an out-of-State destination. The parties to this case have felt that these variables do not affect the intrastate character of the transaction, and we agree. The Wood Preserving decision has been cited with approval by the United States Supreme Court many times (e. g., International Harvester Co. v. Dept. of Treasury, 322 U. S. 340, 344 et seq.; Parke, Davis & Co. v. Cook, 323 U. S. 681, 682; Richfield Oil Corp. v. State Board, 329 U. S. 69, 74.) and would seem to rest on a broader ground than is attributed to it by the California Supreme Court. As was stated in the International Harvester Co. case (322 U. S. at 345): '[In Wood Preserving] * * * both the agreement to sell and the delivery took place in Indiana. These events would be adequate to sustain a sales tax by Indiana.'

"Our analysis of the relationship between the seller and the purchasers in this case leads us to believe that the present transaction is intrastate and is subject to the tax. Unless the State is required by the commerce clause of the Federal constitution to recognize a rather fictional split personality on the part of the purchasing railroads, the only significant difference between the circumstances in this case and those involved in our earlier decisions with respect to railroad suppliers lies in the fact that by handling the transaction as it was handled here, the seller bears the risks of loss occasioned by an act of God or the public enemy. This difference is not sufficient, in our opinion, to compel the State to distinguish between railroads which purchase and receive delivery within the State intending to take the goods purchased to another State, and other purchasers who do the same thing. (Cf. International Harvester Co. v. Dept. of Treasury, 322 U. S. 340.) The primary activities which gave rise to the tax

were intrastate. The peripheral circumstances which have added an interstate flavor do not, in our judgment, make them interstate.

"The possibility that multiple taxation may result from the imposition of a use tax or some other tax by the State of destination appears to us to be no greater here than in the Wood Preserving Co. and International Harvester cases, in both of which the argument here made was pressed upon the Supreme Court but was rejected."

In regard to your second question, a determination must be made in the first instance whether the Burlington Truck Lines was acting as an agent of the C. B. & Q. Railroad or as a common carrier when it picked up the subject of the sale at Burlington. If the result of this determination is that it was performing in the capacity of a common carrier, there would be no sales tax due; unless, the Commission is ready to withdraw Rule No. 55 in part. As previously stated, if the seller is obligated to deliver to the buyer outside of the state, the sale cannot be taxed. Therefore, it appears that the Commission, by the aforementioned rule, has said that, if goods are delivered to a common carrier consigned to an out-of-state buyer, it is to be considered the seller's obligation in every case of this kind. Certainly, the Commission may look at every transaction as to the intent of the parties, the contract and other circumstances to determine the sales tax consequences. Nevertheless, the burden would be on the Commission to show it was the buyer's duty to transport it out of the state if there were no express provisions in the contract. A showing by the seller that he was the consignor and had chosen the common carrier would indicate it was the seller's duty to transport the goods to a given destination, and in most cases there would be little evidence to show a contrary intent. For these reasons, Rule No. 55, as it

relates to common carriers, provides for a practical efficient administration of the Sales Tax Law. Therefore, you are advised that there are three possible courses of action by the Commission in respect to the second situation outlined in your letter.

1. That the Burlington Truck Lines may have been acting as an agent of the C. B. & Q. Railroad rather than as an independent common carrier; or

2. If the trucking company was acting as a common carrier, follow Rule No. 55, which would make the sale exempt; or

3. Look to the circumstances of the cases to ascertain whether it was the seller's obligation to deliver the goods out-of-state to the buyer.

Very truly yours,

Gary S. Gill
Special Assistant Attorney General

GSG:fs

TAXATION: Mobile Home Fees; Nonresident Servicemen: --

1. The monthly fees provided for in Chapter 135D of the Code of Iowa (1958) must be classified as a tax; and

2. A person on active duty with the Armed Forces cannot be taxed on his property except by the state of his residence at the time of call to active duty under Federal law. (Gill to O'Connor, Ch Tax Comm. 10-5-60) 60-11-2

October 5, 1960

135
135D.9
135D.21

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 a letter from Ballard B. Tipton, Director, Property Tax Division, Iowa State Tax Commission, wherein the following problems were submitted:

> "The Property Tax Division respectfully requests an official opinion on the following questions pertaining to mobile home fees.
>
> "Section 135D, Code of Iowa 1958, provides for occupants of mobile homes to pay a monthly fee, and it is further provided in 135D.21 that all mobile homes for which a monthly fee is collected under the provisions of Chapter 135D shall not be assessed for property tax, but such exemption shall not apply to the property contained in any mobile home. There appear to be a number of mobile trailer homes located within the state of Iowa that are occupied as a home by members of the U. S. Armed Forces and their family. For example, there are a number of servicemen living in mobile trailer homes located in and outside the city of Council Bluffs, Iowa. These servicemen are stationed at Offutt Air Base in the vicinity of Omaha, Nebraska. There is the question as to whether those occupants of mobile homes located in Iowa who are members of the U. S. Armed Forces are required to pay the monthly mobile home fees provided for in said Section 135D.9. If it be held that such military personnel are required to pay such mobile home fees, and in the case they fail or neglect to pay such monthly fees, does the assessor of the city or county in which the mobile home is located have the authority and duty to in such case assess the mobile home or trailer as personal property? Are such members of the U. S. Armed Forces residing in the state of Iowa, who are either stationed within this state or outside this state, exempted from paying personal property tax in Iowa while members of the U. S. Armed Forces? Is the monthly mobile home fee provided for in Section 135D.9 to be classified as a tax? In

60-11-2

considering the above and foregoing questions, it perhaps is necessary to keep in mind that under the provisions of Section 135D.10 50 percent of each monthly fee collected by the county treasurer shall be paid to the local public school district wherein the mobile home is located; 25 percent shall be paid to the municipal corporation wherein the mobile home is located, and 25 percent shall be retained for the general fund by the county treasurer. If there is no municipality, 50 percent shall be retained by the county treasurer for the general fund. There appears to be some Federal law providing for the reimbursement of the tuition to any school district where 3 percent of the students enrolled are from parents in the military service or certain civilian government employees. In some cases military personnel are urging that their mobile home is located in an Iowa school district where such district is being reimbursed by the Federal government for tuition of the children in school of such military personnel, and that, therefore, they should not have to pay the Iowa monthly mobile home fee, part of which goes to the local public school district wherein the mobile home is located. In the case of a member of the U. S. Armed Forces whose wife is living in a trailer or mobile home located within the state of Iowa, is there an exemption to be granted them from paying the monthly fee on their mobile home, taking into consideration that the husband is not residing in the mobile home and is stationed full time at a military base?"

The applicable provisions of Section 135D.9, Code of Iowa (1958), are set forth below for your information:

"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, two dollars per month or major fraction thereof; for trailers from thirty to thirty-five feet in length, two and one-half dollars per month or major fraction thereof; and for all trailers over thirty-five feet in length, three 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 the event that an occupied mobile home is not harbored in a mobile home park the owner of said mobile home shall pay a monthly fee in the amount and in the manner as has heretofore been provided in this section. 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."

Chapter 135D of the Iowa Code is concerned primarily with the licensing and regulation of mobile home parks by the State Department of Health. On first blush, it would appear the aforementioned law was enacted under the police powers of the state. On the other hand, certain provisions bear further examination, specifically:

"135D.10 Responsibility for monthly fee--distribution. The monthly fee for each occupied mobile home situated upon a licensed mobile home park shall be paid by the licensee thereof, or by the owner where the mobile home is not situated in a mobile home park, to the county treasurer of the county wherein such licensed mobile home park or mobile home is situated, on or before the tenth day of each and every month following thereafter. Such monthly fee is hereby allocated and required to be paid by the county treasurer as follows:

"For each monthly fee collected by the county treasurer, fifty percent shall be paid to the local public school district wherein said licensed mobile home park or mobile home is located; twenty-five percent shall be paid to the municipal corporation wherein said licensed mobile home park or mobile home is located, and twenty-five percent shall be retained for the general fund by the county treasurer. If there is no municipality, fifty percent shall be retained by the county treasurer for the general fund."

This leaves one with an impression that it may be a revenue measure in part. It is well established that the Legislature may exercise both the police and taxing power in one Act. See Solberg v. Davenport, 211 Iowa 612; 232 N.W. 477 (1930), and cases cited therein for this proposition.

Thus, a determination must be made as to whether the fee in question is a license or a tax. Certain distinctions between the two are drawn in the Solberg case, supra, to wit:

"It is the general rule that, where the charge for the license is imposed in the exercise of the police power, the amount which may be exacted may include and must be limited and measured by the necessary or probable expense of issuing the license, and such inspection, regulation, and supervision as may be provided for in the act and may be lawful and necessary. (Citations).

"* * *.

"Where the amount imposed is substantially in excess of and out of proportion to the expense incurred, it is generally regarded as a revenue measure. (Citations). This is particularly so where no provision for inspection or regulation is made by the act. (Citations). It is also a well settled rule that the terminology used in the act is in no way controlling in determining this question as to whether it is a license or a tax. (Citations)."

One of the many cases cited in the Solberg case is that of Vernor v. Secretary of State, 179 Mich. 157; 146 N.W. 338 (1914). The issue before the Michigan Supreme Court was the constitutionality of the motor vehicles licensing and registration act. The Court in answering the problem had to decide whether the registration fee was only a license or a tax. In holding that the fee was a tax, the Court made an interesting observation:

"The act we are considering provides for no policing or police regulation. The expense of operating the department, including the furnishing of the lists of owners to the county clerks, will be so inconsiderable, compared with the amount collected, that we must take judicial notice that the great amount of surplus (probably more than half a million dollars) renders the imposition of the license fee or tax so wholly and palpably unreasonable as to invalidate the law as a license measure, and to stamp upon it the intention of imposing a tax instead of a license. The clear purpose of the Legislature in exacting so large an amount from the owners of automobiles was to produce a fund for highway purposes under the guise of regulation, which makes it a tax measure which clearly is not covered by the title of the act. The obvious purpose of the amendment in the act of 1913, increasing the fees according to horse power, was to increase that fund. There can be no more labor or expense in registering a

> vehicle of high horse power than in registering one of low power, and the only reasonable purpose in the graduated fee is the increased revenue. This graduated fee according to horse power must be held to be a mere guise or subterfuge to obtain the increased revenue."

Also, the distribution of moneys received by the state or political subdivision through the operation of this law, while an element to be considered, is not determinative, 33 Am. Jur. 340, Licenses § 19.

Therefore, the rules stated heretofore must be applied to Sections 135D.9 and 135D.10 to ascertain whether the fee exacted is a license or a tax.

1. Is the fee limited to the necessary expense of inspection, regulation and supervision? The answer here would have to be no, since there is not any provision for inspection or supervision of mobile homes located outside of a licensed park; nevertheless, a mobile home owner would pay at least twenty-four dollars per year. Further, the reasons set forth in the Varner case, supra, are applicable here, in that, if this is a regulatory enactment, why the need for "graduated" fees?

2. Does the distribution of the fees affect the character of the statute? Here the reply must be yes. Although not determinative, when considered with #1 above, Section 135D.10 points in the direction of taxation. The breakdown by the statute of the fees gives fifty per cent to the schools and the rest goes to the general fund of either a municipality or the county. In other words, it takes on the appearance of a revenue measure.

3. Although again not determinative, this monthly fee is in lieu of all property taxes on the mobile home.

4. Lastly, your attention is directed to the last sentence of Section 135D.9, supra, wherein the licensee is required to keep his books open for inspection by the county assessor. The local assessor has no regulatory power and has no connection whatsoever with the State Department of Health. The assessor's duties are to assess and value property within his taxing district for the purpose of taxation.

In view of the foregoing reasons, it appears to be inescapable that this portion of Chapter 135D, at least, is a revenue measure.

If it is to be considered a tax, does it affect the right of the state to require a monthly fee from soldiers that are nonresidents on active duty.

Your attention is invited to the Soldiers' and Sailors' Relief Act of 1940, 50 U.S.C.A. App. § 574, which is set forth below for your information:

> "(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. * * *."

This provision of the Soldiers' and Sailors' Relief Act is still in full force and effect due to the fact that it was incorporated by reference into the Universal Military Training and Service Act passed in 1948 by Congress, and by amendment has been extended to July 1, 1963. (See 50 U.S.C.A. App. §§ 464 and 467.)

The constitutionality of § 574, supra, has been upheld by the United States Supreme Court 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). An Air Force officer was assessed on personal property kept in his apartment in Denver, Colorado. His home state was Louisiana. Justice Reed, writing for the majority, said:

> "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."

Therefore, it is submitted that this is a property tax and cannot be collected from a nonresident on active duty with the Armed Forces.

The last question presented by Mr. Tipton's letter was:

> "In the case of a member of the U. S. Armed Forces whose wife

is living in a trailer or mobile home located within the state of Iowa, is there an exemption to be granted them from paying the monthly fee on their mobile home, taking into consideration that the husband is not residing in the mobile home and is stationed full time at a military base?"

If the inquiry is referring to Iowa residents on duty with the Armed Forces, the reply would be in the negative, since this is personal property of a resident not exempted by the aforementioned Act of Congress. If the reference is to a nonresident soldier, then an investigation must be made to see whether the mobile home is located in Iowa as a result of military orders; if it is, then it is exempt.

In conclusion, you are advised that (1) the monthly fees provided for in Chapter 135D of the Code of Iowa (1958) must be classified as a tax; and (2) a person on active duty with the Armed Forces cannot be taxed on his property except by the state of his residence at the time of call to active duty under Federal law.

Very truly yours,

Gary S. Gill
Special Assistant Attorney General

GSG:fs

DRAINAGE DISTRICT; ~~COUNTY~~ WORKMEN'S COMPENSATION; INSURANCE

1. Drainage district workers engaged in major repairs and improvemen are employees of the drainage district and not the county.
2. Drainage district employees are not excluded from the provisions the workmen's compensation law, but are not county employees and thus not within the liability insurance coverage purchased by the county.
3. Under Chapter 517A, 1958 Code of Iowa, districts of political subdivisions are authorized to purchase liability, personal injury and property damage insurance. A drainage district may purchase workmen's compensation insurance.

October 6, 1960

(Faulkner to Oeth, Dubuque County, 10-660)
60-11-3

Dubuque County Attorney
701 Bank & Insurance Building
Dubuque, Iowa

Attention: William W. Thinnes

Dear Sir:

In your letter of August 5, 1960, the following questions were submitted:

"1. Are Drainage District workers employees of the county in which the drainage district is located?

"2. Are Drainage District employees covered by and included in workman's compensation and public liability insurance purchased by the county?

"3. Is it necessary that a Drainage District purchase public liability and workman's compensation insurance?"

This was followed by another letter on August 23, 1960, in which the following was reported:

"A. In regard to Question 1.: The workers are engaged in major repairs and improvements.

"B. In regard to Question 2.: The workers are not employees of a private independent contractor. They are hired by the drainage district.

"C. In regard to Question 3.: All the work performed, both major and minor repairs and improvements is done by the men hired by the drainage district. On occasion regular county employees will lend assistance."

In answer to question 1, you are referred to Chapter 455, 1958 Code of Iowa. Section 455.135(2), 1958 Code of Iowa specifically

60-11-3

Dubuque County Attorney
Attention: William W. Thinnes

provides the following:

> "In the case of minor repairs, or in the eradication of brush and weeds along the open ditches, not in excess of five hundred dollars where the board finds that the same will result in a saving to the district it may cause the same to be done by secondary road equipment, or weed fund equipment, and labor of the county and then reimburse the secondary road maintenance fund or the weed fund from the drainage district fund thus benefited." (Emphasis supplied)

It is further pointed out that Section 455.135(1) provides that the control and management of the drainage district is vested in the board of supervisors or board of trustees. Either of the said management authorities may, as provided, order repairs or improvements made.

Section 455.136, 1958 Code of Iowa, provides:

> "The costs of the repair or improvements provided for in section 455.135 shall be paid for out of the funds of the levee or drainage district. If the funds on hand are not sufficient to pay such expenses, the board within two years shall levy an assessment sufficient to pay the outstanding indebtedness and leave the balance which the board determines is desirable as a sinking fund to pay maintenance and repair expenses.
>
> "If the board deems that the costs of the repairs or improvements will create assessments against the lands in the district greater than should be borne in one year, it may levy the same at one time and provide for the payment of said costs and assessments in the manner provided in sections 455.64 to 455.68, inclusive; provided that assessments may be collected in less than ten installments, as the board may determine." (Emphasis supplied)

The fund mentioned in the above section is, of course, created by assessment of the property benefited in the drainage district as provided in Section 455.61, 1958 Code of Iowa. Since the cost of

Dubuque County Attorney
Attention: William W. Thinnes

repair or improvements must be paid out of the levee or drainage district funds, drainage district workers hired to accomplish such repair or improvements would be paid from the drainage district fund.

A drainage district is a separately created statutory being apart from the county even though the county board of supervisors may be the management authority of a drainage district, and when managed by the board of supervisors the said board is not acting for the county but in a representative capacity. Mitchell County v. Odden, 219 Iowa 793, 259 N.W. 774. The degree of county participation as to either labor or equipment is limited to that stated in Section 455.135(2) above set out.

Under the canons of construction, statutorily created bodies are limited to those powers expressly granted, and such additional implied powers necessary to carry out those expressed. Mitchell County v. Odden, 219 Iowa 793, 259 N.W. 774.

It is, therefore, the opinion of this office that drainage district workers are employees of the drainage district and not the county when such workers are engaged in major repairs and improvements.

With regard to question 2, please be advised that drainage district workers, not being county employees, are not within the compulsory workmen's compensation provision codified in Section 85.2, 1958 Code of Iowa. However, drainage district employees would appear not to be excluded from the workmen's compensation law under Section 85.1, 1958 Code of Iowa, unless their employment is of a casual nature. The question then becomes whether a drainage district is an "employer" within the definition stated in Section 85.61, 1958 Code of Iowa:

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

****

Dubuque County Attorney
Attention: William W. Thinnes

According to State v. Olson, 249 Iowa 536, 86 N.W. 2d 214, and cases cited therein, a drainage district is not a corporation and it cannot sue or be sued.

In a 1952 Attorney General opinion, at page 53, a county board of education was held not an "employer" within the terms of the workmen's compensation law. In addition, a civil township was held not an "employer" within the workmen's compensation law in Hop v. Brink, 205 Iowa 74, 217 N.W. 551. In that case a civil township was said to be not an incorporated body but an involuntary political or civil division of the county. It was further stated that a civil township could not be classed as a municipal corporation.

Therefore, it is concluded that a drainage district is not an "employer" within the workmen's compensation law. For that reason drainage district employees are not covered under the workmen's compensation law and thus not covered by compensation liability insurance under Chapter 87, 1958 Code of Iowa.

It is further the opinion of this office, as to the second part of question 2, that drainage district employees, not being county employees, are not within the liability insurance coverage purchased by the county.

In answer to your third question, please be advised that it is not the province of this office to determine whether it is necessary that a drainage district purchase public liability and workmen's compensation insurance. Your attention is directed to Section 517A.1, 1958 Code of Iowa, wherein authority is granted for all "districts" of all political subdivisions of the state, not otherwise authorized, to purchase liability, personal injury and property damage insurance. A drainage district may not, in view of the answer to question 2, purchase workmen's compensation insurance.

Very truly yours,

HVP:mj

COUNTY AND COUNTY OFFICERS, Hospital

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

#60-11-4

347.7

OCTOBER 31, 1960

Mr. Richard D. Morr
Lucas County Attorney
West side of Square
Chariton, Iowa

Dear Mr. Morr:

This will acknowledge receipt of yours of the 13th inst. in which you submitted the following:

"Lucas County established a County Public Hospital under Chapter 347 of the 1958 Code. The hosptal building is in the final stages of construction and equiping and is expected to be in operation within several months. At the time the hospital bonds were sold, the County Treasurer segregated the proceeds in a 'Hospital Construction Fund' and these funds have been disbursed for construction costs.

"All revenues from taxation under Section 347.7 of the 1958 Code, which includes a mill for 'erection and equipment' and a mill for 'improvement, maintenance, and replacements', have been segregated in a 'County Public Hospital Fund.' The Board of Trustees has disbursed from the 'County Public Hospital Fund' to meet unanticipated expenses arising in the constructing, equipping and opening of the hospital. The fund will have a balance adequate to meet the payment of bonds currently due.

"In a recent annual audit of the County Treasurer's office, the Auditor suggested that the Treasurer's office must maintain a separate account or fund for the proceeds of the levy for 'erection and equipment' (servide on bonds), and 'improvement, maintenance and replacements,' and that authority (approved transfer) from the State Comptroller must be obtained before funds can be disbursed or used for a purpose other than that for which it was levied. All revenue from the levy for 'improvements, maintenance and replacements' has been used for 'erecting and equipping' of the hospital building. It is our position that Section 347.7 of the 1958 Code of Iowa provides for this.

60-11-4

"Our question then is: Can the Hospital Board unite into one fund the proceeds from the levy for 'erection and equipment' and 'improvements, maintenance and replacements' and disburse from the said united fund any surplus that is unappropriated for the purpose for which it was levied, constructing and equipping the hospital?

"As above stated, the statute involved clearly seems to indicate that the procedure followed by the Lucas County Hospital Board in disbursing the unappropriated amounts is correct and in accord with the statute."

In reply thereto I advise that the foregoing procedured has had the previous consideration of this department as evidenced by opinion of this department appearing in the Report for 1944, at page 140, copy of which opinion is hereto attached.

With respect to this situation, the foregoing opinion states:

"It seems clear to us upon well-founded principles, that:

"First: A diversion of the tax money acquired either for the erection and equipment of the hospital, or for its improvement, maintenance and replacement to a self erected construction fund is illegal.

"Second: The fund arising out of bequests and gifts cannot be used for any other purpose than that stated in the statute, to-wit: The retirement of bonds issued for the purchase of property sold under the statute 5359, sub-section 11, or for further permanent improvement as the Board may determine, and a diversion thereof for repairs and replacement of equipment or construction not permenent is illegal.

"Third: A transfer of any of the maintenance fund to a self erected construction fund for use in construction, either permanent or temporary, would likewise be an illegal diversion.

"Fourth: The County treasurer could not legally disburse money from this questioned construction fund.

"In view of the foregoing, we are of the opinion that the power exercised in establishing this fund is excessive, and without support in law."

See, in this connection, Art. VII, Sec. 7, of the Constitution of the State, which provides the following:

> "Tax imposed distinctly stated. Sec. 7. 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."

and the interpretation thereof by the case of Taft Company, et al., v. Alber, County Auditor, 185 Iowa 1069, 171 N.W. 719.

Very truly yours,

OSCAR STRAUSS

First Assistant Attorney General

OS:mmh4
Enc: 1
CC to State Comptroller
Attention Mr. Murphy

State Auditor
Attention Mr. Holloway

CONSERVATION:

County Conservation Boards -- Discussion relative to the control and jurisdiction of the Board of Supervisors over the County Conservation Board. (Grifton v Leir, Scott Co Atty, 11-3-60)

#60-11-5

111A.2

November 3, 1960

Mr. Martin D. Leir
Scott County Attorney
Third Floor Courthouse
Davenport, Iowa

Dear Mr. Leir:

This is to acknowledge receipt of your letter of October 11, 1960, which reads as follows:

"The question has arisen as to what control and jurisdiction the Board of Supervisors of Scott County may exercise over the Scott County Conservation Board.

"In checking the law I have come to the following conclusions of law:

"1. The Scott County Conservation Board exists under and was authorized by Chapter 111A of the Code of Iowa (1958). This chapter affords little comfort in attempting to determine what control the Board of Supervisors may have over the Conservation Board.

"2. Section 111A.2 authorized the Board of Supervisors to make appointments to the Conservation Board but does not provide a procedure for removal other than upon a change of residence.

"3. Section 111A.3 requires the Board of Supervisors to provide suitable offices for the Conservation Board and further provides that the Conservation Board must annually make a full and complete report to the Supervisors.

"4. The balance of this chapter indicates that jurisdiction and control over the County Conservation Board, if any, is vested in the State Conservation Commission.

"5. It appears that once the Conservation Board is established, the Supervisors have discretion in the levying of taxes for the expenses of the Conservation Board, but little or no other control.

60-11-5

"6. Chapter 111A has not been judicially interpreted so that there are many areas of this chapter still subject to judicial construction.

"7. I can find no authorization for the Supervisors to control the discretionary acts of the Conservation Board. The only possibility would be an inference which might arise from the fact that, under Section 111A.3, the Conservation Board must report to the Supervisors and such report 'may include such recommendations as may be deemed advisable' - - - and this possibility could be construed to mean that the Supervisors could exercise control over the acts of the Conservation Board.

"8. I personally feel, however, that the arm of the judicial construction is not long enough to reach out and make such a finding. Therefore, it is my conclusion that the intention of this chapter is to establish a separate and distinct Conservation Board that is an independent group, with sole and complete authority (subject to State Approval) in the areas prescribed in Chapter 111A of the Code of Iowa (1958).

"Would you be kind enough to review the foregoing and let me have the benefit of your suggestions and conclusions in the matter."

In reply thereto I wish to state that I am in substantial agreement with your analysis of the problem of the control and jurisdiction which the Board of Supervisors may exercise over the County Conservation Board.

In connection with division two of your letter, I wish to recall your attention to Chapter 66, and to section 332.3(9), Code of 1958.

I am of the opinion that the Board of Supervisors has only control of the levying of taxes as pointed out in paragraph five of your letter.

I appreciate the inclusion of your analysis and conclusions relative to the problem in your letter of request.

Yours truly,

JAMES H. GRITTON
Assistant Attorney General

JHG:MMH4

ELECTIONS:

Canvassing Board --

A canvassing board does not have the authority to break the seal of the ballot envelope in its search for a missing pollbook in order to complete its canvass. (STRAUSS to Cash, Monroe Co Atty, 11-21-60) #60-11-6

November 21, 1960

50.17

Mr. W. K. Cash
Monroe County Attorney
Peoples National Bank Building
Albia, Iowa

Dear Mr. Cash:

Your letter of November 15, 1960, is as follows:

> "In conducting the canvass of the general election, the Board of Supervisors, in attempting to canvass the returns of Albia Third Ward -- a double board -- found that the counting board's poll book was not in the return envelope, but that the receiving board's poll book containing only a portion of the total ballots tallied was in the return envelope.
>
> "The counting board's poll book was not found in any of the election materials and supplies returned to the auditor and it is believed that the missing poll book is sealed in the ballot envelope along with the ballots cast in this ward.
>
> "The problem presented is two-fold --
>
> "1. Does the canvassing board have any authority to break the seal of the ballot envelope to obtain the missing poll book, in order to complete the canvass?
>
> "2. If they do not have such authority, must they then complete the canvass on the basis of the poll book that is available?"

Insofar as your first question is concerned, the Supreme Court said, in the case of Davis vs Wilson, et al., 229 Iowa 100, 104:

> "The determinative factor in an election for public office, whether it be a primary or a general election, is the vote of the electors. It is true that the canvass by the state board of canvassers of the abstracts of the election returns filed by the county auditors is one of the statutory steps in an election for public office, but it cannot ordinarily alter the record made by the voters. Its duty is the ministerial or administrative one of ascertaining and verifying that record and declaring the result as it was shown upon the face of the abstracted returns.

60-11-6

State ex rel. Rice v. County Judge, 7 Iowa 186, 198;
Jones v. Fisher, 156 Iowa 582, 586, 137 N.W. 940, 941;
9 C. J., page 1275;
20 C. J. 199, section 251.

In 20 C. J. 200, section 255, it is stated:

'Where there is no question as to the genuineness of the returns or that all of the returns are before them, the powers and duties of canvassers are limited to the mechanical or mathematical function of ascertaining and declaring the apparent result of the election by adding or compiling the votes cast for each condidate as shown on the face of the returns before them, and then declaring or certifying the result so ascertained.'"

It is conceded that all returns are not before the canvassing board, and it being a duty of the board to canvass all of the returns (29 C.J.S. 343), the rule is that it is the continuing duty of the election officers to make a proper return of the result of the election, and where they neglect or refuse to perform their duty, they may be compelled to do so by an appropriate judicial remedy. (29 C.J.S. 334)

While exact authority is lacking, a somewhat similar situation was before this office in 1952. In the Opinions of the Attorney General for that year, at page 157, 159, this office stated as follows:

"Authority for such procedure is found in the case of Rummel v. Dealy, 112 Iowa 503, where it appeared that at the General Election of 1898 the judges of election in certain townships failed and neglected to properly certify and authenticate the election returns of said townships and that in consequence thereof the board of supervisors, when canvassing said returns in said county, refused to canvass the returns from said townships. It also appeared that while the board of supervisors were in session, the judges of election appeared and asked the said board that they be permitted to correct any errors submitted by them in authentication of returns, which request the board refused and refused to consider the vote shown by the return. Mandamus was sought to compel the board of supervisors to permit the authentication of the returns by the judges of election, and recanvass the votes cast and make return accordingly. Mandamus issued requiring the Board to reconvene and canvass the election returns. In so ordering, the Court observed:

> 'It is made to appear that the judges of election failed to properly and fully certify to the returns of said election, and that, immediately upon discovering the mistake so made by them, they offered to certify in due form said returns, and the board of supervisors refused them the right so to do. We are not referred to any like case, but we think, under the facts as found by the court, the correction should have been permitted. Technicalities in such proceedings should not be permitted to defeat the expressed will of the voters.
>
> 'These returns were at all times in the custody of proper parties, and there was no question of the identity of the judges of election; and the offer to correct the error was while the board was in session, in the act of canvassing the votes of the county. It is not so easy to see, or even imagine, prejudicial consequences to result from the right so to do. It was not proposed to alter or change the returns as to the votes, but only to do an omitted act, required by law, as to certification, so that the returns might be canvassed by the board of supervisors. In the absence of any positive legal objection to such a proceeding, we think public policy in the securing of correct results from the voters, requires the more liberal rule by which such results are obtainable. Some reliance is placed on State v. Hardin County Judge, 13 Iowa 139. We are not holding that it was the duty of the board to canvass the returns without the certification, but only that their certification should have been permitted under the circumstances of the case, and when certified, they should have been counted. This being a legal duty of the board, it was competent for the court to order it done. That the board may be compelled to recanvass and correct a mistake was held in Price v. Hamel, 1 Iowa 473, and has been held in other cases.'

"Application of the rule there laid down, it appearing to the canvassing board that the election officials had failed in their duty to make a return of the whole number of ballots cast for each officer, such election board should be reconvened and return made in accordance with the requirements of section 50.16, Code of Iowa, 1950, and like request of the judges."

Further, in 168 A.L.R. 864, it is stated:

> "Thus, where the official tally sheet correctly indicated the vote for the office of county clerk, but when the four certificates required by the statute came to be made out by the precinct officials, two of them showed the vote as indicated by the tally sheet, but by a mistake of the copyist, the vote between the rival candidates for the office of county attorney was copied on the other two certificates, and one of the erroneous certificates was returned with the

> stub book and ballots to be used in the official count by the election commissioners, it was held, in McEuen v. Carey (1906) 123 Ky. 536, 96 SW 850, that the precinct officials properly changed the certificate by making it reflect the actual vote, and that while consent had been obtained from the contestee of the office of county clerk for such change, this consent was not necessary, the court saying that it was the duty of the officers to return a true statement of the vote as shown bn the tally sheet, and that until this was done they had not performed their whole duty in the premises, and had they refused to make the correction, they could have been compelled so to do by a writ of mandamus."

Applying the rule stated above, it appearing to the canvassing board that the election officials had failed in their duty to return the pollbook as provided by section 50.47, Code 1958, such election board should be reconvened and if possible, return made in adcordance with section 50.17, supra, even if this means the opening and resealing of the ballot envelope.

I am therefore of the opinion that the canvassing board does not have the authority to break the seal of the ballot envelope to obtain the missing pollbook in order to complete the canvass.

The answer to your second question may properly await the reconvening of the election board as suggested herein.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh4

CRIMINAL LAW: Justice of the Peace: In a prosecution for a non-indictable misdemeanor under Chapter 762 7(1) the State may not move for a change of venue except when the justice is related to the defendant or a witness therefore, 7(2) the State has no right to a jury trial, 7(3) the state ~~may~~ maynot take an appeal from a judgment in favor of defendant.

(Neely to Brown, Mitchell Co Atty, 11-7-60)

November 7, 1960

#60-11-7

Mr. Loren N. Brown
Mitchell County Attorney
Osage, Iowa

Dear Sir:

This is to acknowledge receipt of your recent letter wherein you make the following request:

> "We have a problem which has become very acute in this area in recent weeks regarding the rights of the State of Iowa in Justice of the Peace Court. Since the trial and disposition of non-indictable misdemeanors can affect the law enforcement program in general to a considerable degree, I would like the opinion of your office on the following three questions:
>
> "1. Does the State of Iowa have the right to a change of place of trial in Justice of the Peace Court, as the Defendant has, when a non-indictable misdemeanor charge has been filed, or would that right be strictly limited to special situations where the Justice of the Peace is personally related to the Defendant, etc?
>
> "2. Does the State of Iowa have the right to a jury trial where a non-indictable misdemeanor has been charged and filed in Justice of the Peace Court?
>
> "3. Does the State of Iowa have the right of appeal from a decision of a Justice of the Peace Court where a non-indictable misdemeanor has been charged, and the Defendant found not guilty either by a jury or by the Justice of the Peace acting without a jury?"

In answer to question No. 1 we must first examine State ex rel, Fletcher v. District Court, 213 Iowa 822, 238 N.W. 290, wherein the Court said, at page 828 of the Iowa Report:

60-11-7

> "It is obvious that the venue of criminal cases was, in England and is in Iowa, a matter of statutory regulation, * * * *"

As the right to a change of venue is clearly statutory, we must ascertain if the legislature provided that the State may move for a change of venue. Section 762.13, 1958 Code of Iowa provides:

> "Change of venue--grounds. Before any testimony is heard, a change of place of trial may be applied for by an affidavit filed, stating that the justice is prejudiced against the defendant, or is of near relation to the prosecutor upon the charge or the party injured or interested, or is a material witness for either party, or that the defendant cannot obtain justice before him, as the affiant verily believes."

The General Assembly has provided that the defendant may move for a change of venue in a justice of the peace court in a prosecution under Chapter 762. It is well established that where a statute is clear, plain, and unambiguous there is no room for construction. It is also a well established principle that penal statutes must be strictly construed and doubts, if any, resolved in favor of the defendant. (See Masteller v. Board of Control of State Inst., 100 N.W. 2d 111.)

Also in point is the familiar rule of statutory construction that the express mention of one thing implies the exclusion of others. (Expressio unis est exclusio alterius). Thus the legislative intent is expressed by omission as well as by inclusion. (State v. Flack, 101 N.W. 2d 535). The legislature has provided that the state may move for a change of venue in the district court, section 778.1, Code of Iowa.

Applying these rules of construction it is quite clear that the state may not move for a change of venue in a prosecution for a non-indictable misdemeanor, except when the justice is related to the defendant, or is a witness therefore.

In answer to question No. 2, we must apply the same rules of statutory construction and, as the legislature has not so provided, it is clear that the state has no right to a jury trial where a non-indictable misdemeanor has been charged and filed in a justice of the peace court.

The answer to question No. 3 is found in State v. Ford, 161 Iowa 323, 142 N.W. 984, wherein the Court said at page 325 of the Iowa Report:

"An appeal by the state from a judgment in favor of a defendant in a criminal case entered in the district court is authorized by section 5448 of the Code but merely for the exposition of the law with reference to the error complained of. Section 5463, Code. In trials before a justice of peace, the right of appeal is expressly conferred on the defendant both by the statute and the Constitution (section 11, art. I, Constitution; section 5612, Code), and an appeal from the judgment of the district court by the state to the Supreme Court is expressly authorized by section 5620 of the Code. No appeal, however, is authorized from a judgment in favor of the defendant in the justice court or police court.

"Nor do we think that jurisdiction is conferred on the district court. Section 6 of article 5 of the Constitution declares that, 'The district court shall be a court of law and equity, which shall be distinct and separate jurisdictions, and have jurisdiction in civil and criminal matters arising in their respective districts, in such manner as shall be prescribed by law.' No statute has undertaken to confer jurisdiction of appeals by the state from judgments for the defendants in either the police or justice court. It is well settled in this state that, in the absence of a statute authorizing an appeal by the state, an appellate court cannot acquire jurisdiction to review the proceedings below. State v. Johnson, 2 Iowa 549; State v. Van Horton, 26 Iowa 402; State v. Tait, 22 Iowa 140. And it is adjudicated elsewhere, by the overwhelming weight of authority, that the state may not sue out a writ of error or take an appeal from a judgment in favor of the defendant in a criminal case, whether rendered upon a verdict of acquittal or upon a question of law determined by the court, unless authorized by statute." (Emphasis supplied).

Therefore, it is the opinion of this writer that all three questions would be answered in the negative.

Yours very truly,

MARION R. NEELY
Assistant Attorney General

MRN:kvr

MOTOR VEHICLES: School Bus Stops -- Four Lane Highways -- Motor vehicles on four lane highways must comply with section 321.372(3) even when operating on a separate roadway. (Craig to Samore, Woodbury Co AH 11-8-60)

#60-11-8

November 8, 1960

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

Dear Mr. Samore:

This will acknowledge receipt of your opinion request, in which you state:

"Your opinion is respectfully requested as to the interpretation of Section 321.372(3) of the 1958 Code of Iowa under the following factual situation:

"This concerns a four lane highway consisting of two separate road beds, each road bed containing two lanes for vehicles being driven in the same direction; however, the two road beds are divided by an area on which there can be no travel. The other road bed contains two lanes for vehicles going in the same direction but in the opposite direction of the other road bed.

"A school bus is being operated on one of these road beds and stops to receive and discharge pupils, and at said time the stop warning signals are flashing. However, another vehicle being operated in the opposite direction on the other road bed approaches the general area where the bus is stopped.

"Your opinion is respectfully requested as to wherein the driver of such vehicle on the separate and distinct road bed is required to stop and remain stopped until the stoparm is retracted."

60-11-8

The section of the 1958 Code to which you refer, section 321.372(3), provides:

"Discharging pupils -- regulations. * * *

"3. The driver of any vehicle when meeting a school bus on which the stop warning signal lights are flashing shall reduce the speed of said vehicle to not more than twenty miles per hour, and shall bring said vehicle to a complete stop when school bus stops and stop signal arm is extended and said vehicle shall remain stopped until stoparm is retracted after which driver may proceed with due caution.

"The driver of any vehicle overtaking a school bus shall not pass a school bus when flashing stop warning signal lights are flashing and shall bring said vehicle to a complete stop not closer than fifteen feet of the school bus when it is stopped and stoparm is extended, and shall remain stopped until the stoparm is retracted and school bus resumes motion, or until signalled by the driver to proceed.

"This section shall not apply to 'business' and 'residence' districts but shall apply in suburban districts of cities and towns."

Several other states also have statutory provisions requiring motor vehicles to come to a complete stop when meeting a school bus that is receiving or discharging passengers. Most of these statutes provide that vehicles do not have to stop when traveling on a separate roadway and there is a median between the roadways which pedestrians are not permitted to cross, i.e., Arizona Revised Statutes Annotated, § 28-857; Burns Annotated Indiana Statutes, 47-2132; Arkansas Statutes Annotated, § 75.658.1; Illinois Statutes Annotated, ch. 95½, § 196; New Mexico Statutes Annotated, § 64-18-46; and Wyoming Statutes, § 31-150.

The Iowa statute, however, does not make any such exemption. The entire roadway and both road beds are part of the highway, as defined by section 321.1(48), 1958 Code of Iowa.

In People v. Berghauser, 7 Misc. 2d 178, 166 N.Y.S. 2d 161, a New York Court suggested statutes requiring vehicles to stop when meeting a school bus receiving or

discharging passengers should be construed strictly. At page 162 of 166 N.Y.S. 2d, the Court stated:

> "Children are notoriously careless and irresponsible and need protection when traveling in groups to and from school. When getting in and out of a school bus it is impossible to know where children will dart or chase each other. The Legislature recognized this by enacting the section in question. This law was not enacted to inconvenience drivers of automobiles, but rather for the protection of children. It is, therefore, of the utmost importance to determine whether or not under these or similar circumstances there is a violation of this section."

The New York Statute under consideration, Vehicle and Traffic Law 81, subdivision 24, is almost identical to the Iowa law. The Court held that a motor vehicle approaching from a right angle a school bus stopped near an intersection was "meeting" the school bus, and required to come to a complete stop.

The Iowa statute does not make an exemption in the situation you describe. It cannot be assumed that the Legislature intended such an exemption; exemptions cannot be read into a statute. Young v. O'Keefe, 246 Iowa 1182, 69 N.W. 2d 534. There appears to be good reason for strictly construing such a statute. Therefore, it is my opinion that the driver of a vehicle on a fourlane highway, with separate roadbeds, is required to stop and remain stopped when meeting a school bus receiving or discharging passengers, as provided by section 321.372(3), 1958 Code of Iowa, even though the driver is on a separate roadbed.

Very truly yours,

FRANK CRAIG
Assistant Attorney General

FC:bl

ELECTIONS:

Contests -- Ballot marking --

1. The legislature not having provided otherwise, the only statutory court to determine an election contest is one on which the chairman of the board of supervisors presides, whether he be an interested party or not.

2. a. A check mark placed in the circle with crosses in the square beneath the circle, would not vitiate the validity of the vote, and the crosses should be counted.

November 18, 1960

b. The use of a ball point pen in marking the ballot is permitted and the ballot is valid.

c. The filling in of the circle, making a solid, colored circle thereof, deprives the voter of his statutory right to vote by and through the blank circle. The ballot should not be counted.

(Strauss to Draheim, Wright Co Atty 11-19-60)

Mr. A. F. Draheim, Jr.
Wright County Attorney
Clarion, Iowa

#60-11-9

62.13

605.17

Dear Mr. Draheim, Jr.:

This will acknowledge receipt of your letter of November 15, 1960, which reads as follows:

> "As a result of the recent general election, a candidate for Supervisor of one of the districts, desires to contest the election as provided by Iowa Code Chapter 62 (1958). This chapter states in part that one of the members that shall comprise the Contest Court shall be the present Chairman of the Board of Supervisors, and in this particular matter the Chairman of the Board of Supervisors is the incumbent in the contest.
>
> "It is my opinion that in such a case a Chairman of the Board of Supervisors should be disqualified from presiding in the contest. The procedure for conducting the contest as provided in Section 62.13 of said chapter states that the proceedings, power and control shall be similar to those of the District Court, and Iowa Code Section 605.17 states that a judge shall be disqualified from acting as such in any case wherein he is a party or interested in the proceedings.
>
> "At your earliest convenience please forward an opinion as to the following matters:
>
> 1. Would the Chairman of the Board of Supervisors be disqualified to act h the above stated case with reference to the Code Sections cited or any others that may be pertinent to the problem?
> 2. With reference to Iowa Code Sections 49.92, 49.94 and 49.97, would the following situations be considered spoiled ballots as defined by 49.100?:
>   a. A check mark rather than a cross placed in the circle at the top of the ticket, with crosses in the squares beneath the circle.

60-11-9

b. The use of a ball point pen to mark the ballot.
c. Where the circle was completely filled in, making a solid, colored circle, with no other marking in the circle.

"It is my opinion that example "a" above would not constitute a defective ballot, and that the judges should count only the crosses as they appear in the squares beneath the circle.

"With reference to item "b", a ball point pen or any other color marking is permitted and the ballot valid. See Dolen v. Cooke, 212 Ia., 771, 237 NW 496.

"As to item "C" it appears that the mark was not intended to be an identification mark as provided by Section 49.98."

I advise as follows:

1. Insofar as your Question No. 1, it appears that the statutory provision making the chairman of the board of supervisors the presiding officer of the contest court, imposes an additional duty upon that member of the board, a duty that, absent statutory authority therefor, may not be delegated, nor may a substitute to perform the duty be designated. No such authority appears to exist. In that situation, thus while public policy would require an official interested in the subject matter before the contest court to disqualify himself from acting thereon, such disqualification would reduce the contest court to two members. A contest court of two members is unauthorized. Thus, while a contest hearing is authorized, no body exists to hear and decide the contest. As a result of the foregoing statutory situation, if the chairman of the board does disqualify himself, no court exists to determine the contest; if he does not disqualify himself, then the contest court would consist of three members of which the chairman as an interested party, would be one. The legislature not having provided otherwise,

the only statutory court is one on which the chairman of the board presides, whether he be an interested party or not.

2. In answer to your Question No. 2, I advise as follows:

2a. A check mark placed in the circle with crosses in the square beneath the circle, would not vitiate the validity of the vote, and the crosses should be counted.

2b. The use of a ball point pen in marking the ballot is permitted, and the ballot is valid.

2c. I am of the opinion that the filling in of the circle, making a solid, color/ed circle thereof, deprives the voter of his statutory right to vote by and through the blank circle. The ballot should not be counted.

Very truly yours,

OSCAR STRAUSS

First Assistant Attorney General

OS:mmh4

STATE OFFICERS AND DEPARTMENTS:

Interstate Coop Commission --

A member of the Board of Control ceases to be an administrative officer when he resigns therefrom, and therefore is no longer eligible to be a member of the Iowa Interstate Cooperation Commission. (Strauss to Ringgenberg, Leg Res Bur. 11-23-60)

November 23, 1960

60-11-10

IOWA LEGISLATIVE RESEARCH BUREAU
Statehouse
Des Moines 19, Iowa

Attention Clayton Ringgenberg, Director

Dear Mr. Ringgenberg:

This will acknowledge receipt of your letter of November 22, 1960, in which you state:

> "As Secretary of the Iowa Interstate Cooperation Commission, I have been asked to request your opinion on the following questions:
>
> 1. Mr. John R. Hansen was a member of the Board of Control when he was appointed to this Commission. Since then he has resigned as a member of the Board of Control. Is he still considered to be a member of the Interstate Cooperation Commission?
>
> 2. If he is still a member of the Commission, can he be reimbursed for his travel expenses from funds which have been made available to the Commission by the Budget and Financial Control Committee?"

In answer to your Question #1 I would advise that the foregoing designated commission created by Chapter 83, Acts of the 58th General Assembly, by the terms thereof consists of thirteen (13) members, among whom are three (3) administrative officers to be appointed by the governor.

According to authority, the word "consist" as so used means to be "composed of" or "made up of." As applied to Mr. Hansen's

60-11-10

relationship as between his official status and membership on the Commission, it would appear that upon his resignation, he ceased to be an administrative officer. As a result thereof, if his membership on the Commission continued, the Commission would no longer consist of three (3) administrative officers. It would consist of one civilian and two officers. The statute may not be so interpreted. When Mr. Hansen ceased to be an administrative officer, he ceased to be a member of the Iowa Interstate Cooperation Commission.

In view of the foregoing conclusion, answer to your Question #2 is not required.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh4

SCHOOLS: Schoolhouse sites -- A school board cannot purchase with undesignated surplus in the schoolhouse fund a school site in excess of 30 acres, as provided in section 297.3.

(Rehmann to Anderson, Howard Co. Atty., 11-28-60)

November 28, 1960

60-11-11

Mr. C. J. Anderson
Howard County Attorney
Cresco, Iowa

Dear Mr. Anderson:

This is to acknowledge receipt of your letter of November 25, in which you state the following:

"The local community school district proposes to purchase school building and play ground sites as provided by Section 297.3, Code of Iowa, 1958. The district can purchase at an advantageous and reasonable price the total of 60 acres, 30 acres of which would be utilized as a present site for a school play ground area, and an adjacent 30 acres would be used for the future site.

"The school district has funds available in their schoolhouse fund for the purpose of the purchasing of sites. The sources of the funds in this schoolhouse fund are as follows: A portion thereof is from a tax levy for a schoolhouse and schoolhouse site purposes; A portion is from insurance funds derived from fire damage to a schoolhouse; And a portion represents a transfer from general funds surplus to the schoolhouse fund.

"It is not possible for the district to procure a 30 acre tract as such in that the owner will sell only a total of 60 acres.

"Based upon the above facts, these questions present themselves:

60-11-11

"1. Must the provisions of Section 297.3 be construed as limiting a purchase to 30 acres plus 2 blocks, or can that Section be construed as permitting the purchase, for example, of a total of 60 acres, it being contemplated that 30 acres would be utilized for one site and the actual present construction of school facilities, and the other 30 acres would be utilized for a future site with the contemplation of a future building program?

"2. Assuming the proper purchase of this property, whether it be 30 acres or 60 acres, can present existing funds be utilized for the purpose of purchasing school sites and does the Board have authority upon their own motion to make the purchase and to use the existing funds for that purpose, or must there be a vote of the electors authorizing the Board to make the proposed purchase and authorizing the Board to utilize the existing schoolhouse funds for the proposed purpose?"

Your attention is directed to section 297.3, Code 1958, which provides as follows:

"Thirty-acre limitation. Any school corporation including a city, town, or village, may take and hold an area equal to two blocks exclusive of the street or highway, for a schoolhouse site, and not exceeding thirty acres for school playground, stadium, or field house, or other purposes for each such site." (Emphasis supplied)

It appears from the specific wording of the chapter that a school district may purchase two blocks exclusive of streets and highways; however, the total amount of land for each school site shall not exceed 30 acres. This legal limit is placed upon the school district, and any land in excess of the limit would void the title derived by the school district. Smith v. Maresh, 226 Iowa 552, 284 N.W. 390.

With respect to the problem presented in your letter, the school board has no authority to purchase land in excess of 30 acres for a school site. If they are unable to enter into a satisfactory agreement with the owner of said land, and the board, in their judgment, feel that condemnation proceedings are necessary, then the authority vested in them by section 297.6 gives the school board the power to condemn the necessary 30 acres of land.

With respect to your second question, your attention is directed to section 278.1(7), which provides as follows:

"Enumeration. The voters at the regular election shall have power to:

"1. * * *

"7. Vote a schoolhouse tax, not exceeding two and one-half mills on the dollar in any one year, for the purchase of grounds, construction of schoolhouses, the payment of debts contracted for the erection of schoolhouses, not including interest on bonds, procuring libraries for and opening roads to schoolhouses."

The funds on hand specifically derived by virtue of this levy can be expended for the purchase of a school site, once sufficient funds are available for that purpose. Campbell v. Bd. of Dir., 241 Iowa 230, 39 N.W. 2d 628. However, if amounts are needed in excess of that which has been accumulated by virtue of the vote under section 278.1(7), then it is necessary to submit to the vote of the electors at a regular or special election the question whether or not such undesignated proceeds which are accumulated in your schoolhouse surplus should be devoted to the purchasing of a school site. Opinions of the Attorney General 1928, page 210.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:bl

443.12

TAXATION: Property Tax: Moneys and Credits-- Interest on omitted and withheld moneys and credits commences on 1st of April for first installment and 1st of October for second installment. (Adams to O'Connor, St Tax Comm 9-2-60)

#60-12-1

September 2, 1960

John J. O'Connor
Chairman
State Tax Commission
Local

Dear Mr. O'Connor:

This will acknowledge receipt of your request, dated August 12, 1960, for an opinion regarding the collection of interest on omitted moneys and credits.

The facts are these: Taxpayer "A" reported to his local assessor in 1958 that he had no moneys and credits subject to that tax for 1958. However, he actually did have $100,000 in taxable moneys and credits. The State Tax Commission brought this latter fact to the attention of the local assessor in 1960, and directed him to proceed to collect the taxes and interest due on this omitted or withheld property.

Your question is: Does the interest penalty of 6%, prescribed by Iowa Code Sections 443.12 and 445.39, commence on April 1, 1959, for the entire $100,000 or does the interest penalty of 6% commence on April 1, 1959, as to only one-half of the omitted or withheld property, or $50,000, with the interest penalty of 6% on the remaining one-half, or $50,000, to commence on October 1, 1959?

The applicable statutes of the 1958 Code are:

60-12-1

"445.37 When delinquent. In all cases where the half of any taxes has not been paid before the first day of April succeeding the levy, the amount thereof shall become delinquent from the first day of April after due; and in case the second installment is not paid before the first day of October succeeding its maturity, it shall become delinquent from the first day of October after due."

"445.39 Interest as penalty. If the first installment of taxes shall not be paid by April 1, said installment shall become due and draw interest, as a penalty, of three-fourths of one percent per month until paid, from the first day of April following the levy; and if the last half shall not be paid by October 1 following such levy, then a like interest shall be charged from the date such last half became delinquent."

"443.12 Corrections by treasurer. When property subject to taxation is withheld, overlooked, or from any other cause is not listed and assessed, the county treasurer shall, when apprised thereof, at any time within five years from the date at which such assessment should have been made, demand of the person, firm, corporation, or other party by whom the same should have been listed, or to whom it should have been assessed, or of the administrator thereof, the amount the property should have been taxed in each year the same was so withheld or overlooked and not listed and assessed, together with six percent interest thereon from the time the taxes would have become due and payable had such property been listed and assessed."

Also bearing on the problem is Iowa Code Section 7214, Code of 1924:

"7214. Interest as penalty. If the first installment of taxes shall not be paid by April first, the whole shall become due and draw interest as a penalty of one per cent month until paid, from the first of March following the levy; and if the first half shall be paid when due, and the last half shall not be paid by October first following such levy, then a like interest shall be charged from the date such last half became delinquent."

In addition, 1906 A. G. O. 337 and 1925-26 A. G. O. 115 are on point.

First, it should be noted that Iowa Code Section 443.12 is the code section applicable to the facts of your inquiry. It applies to withheld property and refers to

445.37 by stating that where the property is omitted or withheld, "the county treasurer * * * shall demand * * * the amount the property should have been taxed in each year the same was so withheld * * * together with 6% interest thereon from the time the taxes would have become due and payable had such property been listed and assessed." This latter phrase is the key phrase, as we must go to Iowa Code Sections 445.37 and 445.39 since these sections govern the interest payments on property not omitted or withheld but properly reported.

In 1906 A. G. O. 337, it was stated, "In case the first installment remains unpaid April 1st, the entire tax will be considered as delinquent from March first; and in a like manner if the second installment is not paid before October first, it is considered delinquent from September first." This meant that, applied to the instant facts, if the taxpayer failed to pay the taxes due on the $100,000, by April 1st, interest would be computed for the "entire tax" ($100,000) beginning March 1st. But if he had made the payment on one-half, or $50,000, before April 1st, but failed to make his second installment payment of tax by October 1st, on this second one-half, or $50,000, interest would commence to run from September 1st.

1925-26 A. G. O. 115 is in accord stating, "And if the first half of the tax due are not paid prior to the first day of April, then the taxes are delinquent and it is the duty of the county treasurer to proceed to collect the same by distress, or sale, * * *."

It should be noted that both of these opinions were written in respect to Section 7214, Code of 1924, and that section said that if the first installment was not paid, the whole amount became due and interest was to be paid on the whole amount.

Section 7214 was modified in the 1927 Code to the present form of Section 445.39. The only difference in 7214 of the 1927 Code and 445.39 of the 1958 Code is the change in the amount of interest from 1% in 1927 to three-fourths of 1% interest now. This modification clearly changes the law as stated in the 1906 A. G. O. and 1925-26 A. G. O., supra, as will be shown a bit later.

Iowa Code Section 443.12 simply states that the omitted property will be taxed with 6% interest from the time the tax would have become due had the property not been omitted and instead, properly listed and assessed. Had the moneys and credits in the instant case been properly reported and assessed, the due date of the tax on them would be governed by section 445.37. Applied to this case, the due date for the first half of the tax on the $100,000 was March 1, 1959, and the delinquent date on the first half of the tax on the $100,000 was April 1, 1959. The due date on the second half of the tax on the $100,000 was September 1, 1959, and the delinquent date for this second half was October 1, 1959.

When the interest on the delinquent taxes commences in governed by 445.39. Note that while prior to the 1927 Code, change of this section, it stated that the "whole shall become due and draw interest * * * ", when the first installment was delinquent, this Code section now says that "said installment shall become due and draw interest * * * ". Also note that before 1927, Section 7214 made no provision for the payment of interest on the second installment unless the first installment had been paid. This was, of course, because interest on the second installment became due concurrent with interest on the first installment if the first installment was not paid. 1958 Code Section 445.39 segregates the installments and the interest to be paid on them when they are delinquent. Thus, the installments are treated individually,

and, therefore, failure to pay the first installment April 1st, does not automatically make the second installment also delinquent and due on April 1st. Only the first installment becomes delinquent on April 1st, and the second installment becomes delinquent on October 1st, but not before, regardless of what happens to the first installment.

Applying the above to your question, the answer is that the interest penalty of 6% commences on April 1, 1959, as to one-half of the omitted moneys and credits, or $50,000, and on October 1, 1959, as to the remaining one-half, or $50,000, of the omitted moneys and credits.

Very truly yours,

William E. Adams
Assistant Attorney General

WEA/bjf

TAXATION: Sales Tax: Whether sales tax on labor cost of reducing carcass of meat to various cuts of meat is subject to sales tax, depends on the facts of particular transaction. (Adams to Rigler, St Senator, 9-12-60)

422.12
#60-12-2

September 12, 1960

422.42

Robert R. Rigler
State Senator
Forty-Fourth District
New Hampton, Iowa

Dear Mr. Rigler:

This will acknowledge receipt of your letter to Norman A. Erbe, Attorney General of Iowa, dated August 8, 1960, wherein you present the following question:

> "It has been brought to my attention that the Iowa State Tax Commission recently informed operators of cold storage locker service plants in the state that it intends to insist that the state sales tax be paid on the processing service when an individual buys a quantity of meat from the locker operator, then orders the operator to process the meat to the buyer's specifications.
>
> "My understanding is that until now this has been considered as exempt from the sales tax. It would seem to me that it should be exempt. However, I would sincerely appreciate an opinion from your office as to whether the sales tax is applicable in the instance I cited."

60-12-2

First, it should be noted that there are three possible factual situations in your problem:

1. Where the side of beef is advertised and sold at a price per pound processed into pieces.

2. Where the side of beef is sold as is and removed from the seller's premises uncut.

3. Where the side of meat is sold at a price per pound and an additional charge per pound is made for processing it into pieces.

It is the latter situation to which this opinion is addressed as there are no problems concerning the first two factual situations.

The applicable Code sections are as follows:

"422.42 Definitions. The following words, terms, and phrases, when used in this division, have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

" * * *.

"2. 'Sales' means any transfer, exchange, or barter, conditional or otherwise, in any manner or by any means whatsoever, for a consideration.

"3. 'Retail sale' or 'sale at retail' means the sale to a consumer or to any person for any purpose, other than for processing or for resale of tangible personal property * * *.

"4. 'Business' includes any activity engaged in by any person or caused to be engaged in by him with the object of gain, benefit, or advantage, either direct or indirect.

"5. 'Retailer' includes every person engaged in the business of selling tangible goods, wares, or merchandise at retail, * * *."

"422.43 Tax imposed. There is hereby imposed, beginning the first day of April, 1937, a tax of two percent upon the gross receipts from all sales of tangible personal property, consisting of goods, wares, or merchandise, except as otherwise provided in this division, sold at retail in the state to consumers or users; * * *."

We find no cases directly on point either in Iowa or in any other state, however, there are analogous situations which are helpful. Rule 58 of Retail Sales & Use Tax Regulations reads:

"Rule No. 58. TANGIBLE PERSONAL PROPERTY MADE TO ORDER.-- Where retailers, such as dry goods merchants or tailors, contract to fabricate items of tangible personal property, such as carpeting, curtains, drapes, tents, awnings, clothing, auto tops and the like, from materials in stock, which have been selected by customers, the total receipts from the sale of such articles must be included in the gross receipts upon which the sales tax is computed. Such retailers may not deduct labor or service charges of fabrication or production notwithstanding that such charges may be separately billed to customers apart from charges for materials.

"These cases should be distinguished from instances where repairmen perform labor or services in repairing or altering items of tangible personal property belonging to their customers, in which event the labor or service charges do not come within the provisions of either the sales or use tax law. To illustrate the tax status of the service charge, assume that a customer purchased a dress or article of ladies wearing apparel, and the title had passed to the customer, any subsequent charges made and segregated for alteration would be exempt from sales tax."

Although Iowa has no decisions on this regulation, Michigan and Ohio Do.

In the Vogue Shoppe, Inc. v. Dept. of Revenue, State Board of Tax Appeals, Docket #263, May 27, 1952, it was held that an interior decorating company cannot segregate sales of material for drapes, slipcovers, etc., and the cost of fabricating this material into drapes, etc. Tax was charged on the whole price.

In Smith-Bridgeman & Co. v. Dept. of Revenue Michigan BTA, Docket #314, 12-29-56, tax was charged on both materials and labor involved in the making of custom drapes, even though two separate departments of the store were involved, each with separate books.

In Baker & Stauffer v. Bower, Ohio BTA, #29873, 3-31-56, it was held that while hauling charges, if separatly billed, were not taxable, that in the fabrication of drapes and slipcovers, whether labor and material charges were separated or not, the tax was applicable to both charges together.

We feel the crux of the problem is what does the buyer buy? Does he buy one-fourth or one-half of beef or does he buy its components, i. e., eight steaks, twenty pounds of hamburger, four pounds of beef loin, etc.? If it is the latter which is purchased, whether packaged or not, we fail to see how the transaction is different from purchasing one piece of round steak at the corner market or super market. No one has yet argued that the market sale of one piece of round steak is not subject to sales tax as to the labor required to separate that one piece from the rest of the side of beef and for good reason. The tax is on the gross receipts of the retailer (see 422.43, supra). In this situation, the gross receipts of the one piece of round steak is almost invariably the same as its price. What goes to make up the price? Included will be many items of labor. For example, the labor cost of placing the hay and corn in a place for the cow

to eat it, the labor cost of moving the cow to the packer, the labor cost of killing it, the labor cost of moving the carcass from place to place for cooling and aging, etc. And lastly, the labor cost of cutting the one piece of beef from the carcass and packaging it. In the case of the one piece of round steak, there is nothing to separate the latter labor cost from the prior labor costs and all of the labor costs go into the making of the price, which is almost always the gross receipts. Therefore, sales tax is charged upon the purchase price including the last element of the labor charge, i. e., separating the one piece of beef from the carcass and packaging it.

Extending this, one could go to the ordinary market and purchase several pieces of meat. Still he would be required to pay sales tax on the total price paid, including all labor charges which are elements of the price. This would be so even though he purchased in this manner, the precise number and kind of pieces of meat which, together equaled a side of beef. How can one distinguish between this situation and the one you cite where a person goes to a locker to purchase a side of beef with the idea in mind to have it cut in pieces and packaged. The elements of the price included the cost of cutting the side into pieces and packaging them. Or, to put it another way, the customer was not interested in buying merely a side of beef, he wanted so many steaks, rounds, etc., and it is these pieces in which he is interested. If the customer actually wants a side of beef only, then the tax would not attach. But, also, the labor to cut and package it would not be performed.

So, in the final analysis, the answer to your question relies on facts of each individual case. If the customer wants a side of beef and purchases it, then no sales tax would be collectible on the process of cutting it into pieces. One can imagine very few instances of this type of transaction in the locker business which sells to a retail

trade. Evidence of wanting a side only would no doubt take into consideration the time lapse between the purchase of the side of beef and the process of cutting it up into usable pieces. How long the lapse would need to be in order not to show intent to purchase pieces rather than a whole side of beef, we cannot say. But, we would guess that it would be measured in months rather than days or weeks.

In the ordinary instance, however, we believe the customer purchases pieces of meat which can be conveniently used by the family rather than the side of beef. Therefore, the tax will ordinarily be imposed on the cost of the pieces, including the cost of the final processing step, i. e., cutting and packaging.

Very truly yours,

Wm. E. Adams
Assistant Attorney General

WEA/bjf

LABOR: Employment agencies -- license -- (1) Sale of license hypothetical question, (2) Commission has no authority to interfere with employment agency franchise agreements, (3) franchise agreement does not constitute a partnership, (4) names of all partners must appear on application for employment agency license, (4) fee of 2% of total annual gross earnings for employment at less than $250 a month violates 94.6(6) wage assignments for future earnings unenforceable. November 28, 1960 (Craig to Lowe, Labor Comm, 11-28-60)

#60-12-3

Mr. Don Lowe
Commissioner
Bureau of Labor
L O C A L

Dear Mr. Lowe:

This will acknowledge receipt of your recent opinion request, in which you state:

"Enclosed is a Franchise Agreement, along with Application for an Employment Agency License by Dennis L. Pokormy. Mr. Synhorst and I discussed at some length as to whether or not it was lawful for an individual to sell a license or a franchise agreement for which the State issues a license. We are also wondering whether or not under the terms of this agreement the licensor is not, in effect, a partner, and if so, should his name appear on the Application and License?

"We would like a formal opinion on the foregoing and it will be necessary for us to have such opinion before December 15th, in accord with Section 95.3 which limits our time to either issuance or refusal of issuance.

"We would also like a formal opinion on the Fee Schedule presented with this Application, particularly to that section which states "(A) All positions paying less than $250.00 per month: Two per cent (2%) of the annual (twelve 4-1/3 weeks) gross earnings."

"Will you please advise whether we have authority to ask for a change in their contract given to the applicant, particularly, the paragraph which states "As security for my above promise to make payment

60-12-3

upon procurement of employment, I hereby assign and transfer to NATIONAL PERSONNEL SERVICE OF CEDAR RAPIDS all my right, title, and interest in and to my wages, due or to become due from the said employer, and a receipt to the employer by this assignee shall be a full and sufficient receipt to said employer for any sums so paid".

"It has been customary for those persons operating under a license and doing business as National Personnel Service to make their charge immediately upon procurement of employment."

Your letter poses six questions:

1. Is it lawful to sell a license issued by the state?

2. Is it lawful to sell a franchise agreement to conduct a business for which the state issues a license?

3. Under the terms of the agreement you attached to your letter, are the licensor and licensee partners?

4. If there is a partnership in an employment agency business, must the names of all the partners appear on the application for license?

5. Is the fee schedule set out in your letter within the provisions of the Iowa law?

6. May you require the deletion of the assignment of wages paragraph in the application?

In answer to the first question, the issue of whether or not it is lawful to sell a license issued by the state does not pertain to this situation; this situation does not involve the sale of a license. The question is thus hypothetical and this department must decline to answer it.

In answer to question number two, the Iowa Supreme Court stated, regarding license statutes, in Central States Theatre Corporation v. Sar, 245 Iowa 1254, 66 N.W. 2d 450, at page 1259:

"'But, as we have said above, a regulatory statute enacted in the exercise of the police power must be reasonable. Its real purpose must be to protect the public health, morals or general welfare, and it must be reasonably required and suited to attain that purpose. It cannot masquerade

> as an exercise of the police power and arbitrarily invade personal rights or private property. It cannot disregard the constitutional guaranties.'"

And, at page 1260:

> "'Nor can the police power be exerted arbitrarily to interfere with private business, or to prohibit lawful occupations, or to impose unreasonable or unnecessary restrictions upon them under the guise of the protection of the public.'"

The only power of the commission is to issue or refuse to issue a license to conduct an employment agency. Section 95.3, 1958 Code of Iowa, provides:

> "Issuance or refusal. The commission shall fully investigate all applicants for the license required by section 95.1, and shall not issue any license earlier than one week after the application therefor is filed, provided, however, that the commission shall either grant or refuse such license within thirty days from the date of the filing of the application. All licenses issued under the provisions of this chapter shall expire on June 30 next succeeding their issuance."

There is no statutory authority to regulate the sale of franchise agreements. Therefore, it is my opinion that the commission's authority to license employment agencies does not give it the power to interfere, one way or another, in private contracts between individuals engaged in the business of operating such agencies.

In answer to question number three, the franchise agreement you attach specifically provides that there is no intent to create a partnership. One of the primary requirements for the creation of a partnership is the intent to create a partnership. Kinney v. Bank of Plymouth, 213 Iowa 267, 236 N.W. 31; Moorshead v. United Railway Co., 203 Mo. 121, 96 S. W. 261; Edmonston v. Holder, 203 Oklahoma 189, 218 P. 2d 905. Another essential requirement to a partnership is an agreement to share lossee. Berry Seed Company v. Hutchings, 247 Iowa 417, 74 N.W. 2d 233; In re Hewitt's Estate, 245 Iowa 369, 62 N.W. 2d 198. There is no agreement to share losses in the attached agreement. Therefore, it is my opinion that the agreement does not create a partnership.

In answer to question number four, section 95.2, 1958 Code of Iowa, provides:

> "Application. Application for such license shall be made in writing to the commission provided in section 95.1. It shall contain the name of the applicant, and if applicant be a firm, the names of the members, and if it be a corporation, the names of the officers thereof; and the name, number and address of the building and place where the employment agency is to be conducted. It shall be accompanied by the affidavits of at least two reputable citizens of the state in no way connected with applicant, certifying to the good moral character and reliability of the applicant, or, if a firm or corporation, of each of the members or officers thereof, and that the applicant is a citizen of the United States, if a natural person; also a surety company bond in the sum of two thousand dollars to be approved by the labor commissioner and conditioned to pay any damages that may accrue to any person or persons because of any wrongful act, or violation of law, on the part of applicant in the conduct of said business. There shall also be filed with the application a schedule of fees to be charged for services rendered to patrons, which schedule shall not be changed during the term of license without consent being first given by the commission.
>
> "Any person, firm, or corporation applying for a license, as provided in this chapter, to operate an employment agency for furnishing or procuring of employment shall furnish the commission with its contract form, which form shall distinctly provide that no fee or other thing of value in excess of one dollar shall be collected in advance of the procuring of employment and no license shall be issued unless such contract form contains such provision. Thereafter, any person, firm, or corporation to whom a license has been issued that violates this provision of its contract shall have his license canceled."

If a "firm" applies for a license, the names of all the members must appear on the application. It has been held many times that a partnership is a "firm". Gustafson v. Taber, 125 Montana 225, 234 P. 2d 474, 475; State v. Phelps, 171 Wisconsin 13, 176 N.W. 217; Thomas-Bonner Company v. Hooven, Owens & Rentschler Company, 284 Federal 377, 380.

Therefore, it is my opinion that, if a partnership operates an employment agency business, the names of all the partners must appear on the application for license.

In answer to question number five, section 94.6, 1958 Code of Iowa, provides:

> "Limitation of fee. No such person, firm, or corporation shall charge a fee for the furnishing or procurement of any situation or employment paying less than two hundred fifty dollars per month which shall exceed twenty-five percent of the wages paid for the first month of any such employment or situation furnished or procured, but in no event shall the charge for the furnishing or procurement of any situation or employment be in excess of five percent of the annual gross earnings. The provisions of this section shall not apply to the furnishing or procurement of vaudeville acts, circus acts, theatrical, stage or platform attractions or amusement enterprises."

In an opinion to your office, dated June 2, 1959, from Mr. Carl Pesch of our staff, it was stated that the provisions of section 94.6 must be strictly followed. Section 94.6 provides that the fee for procuring any ". . . situation or employment paying less than two hundred fifty dollars per month" shall not exceed twenty-five percent of the wages paid the first month. It is quite possible that two percent of the employee's annual gross earnings could exceed twenty-five percent of the first month's wages, particularly if the employee receives a raise in wages or works additional hours. Such a fee would clearly violate section 94.6. Therefore, it is my opinion that a fee schedule calling for two percent (2%) of the annual gross earnings for positions paying less than $250.00 per month violates the provisions of section 94.6, 1958 Code of Iowa.

In answer to question number six, the assignment of wages in the attached contract is unenforceable. Coyle v. Des Moines Gately's, 230 Iowa 511, 298 N.W. 797, held invalid an assignment of wages, and stated, at page 514 of 230 Iowa:

> " . . . the great weight of authority holds that assignment of future personal earnings, wholly in expectancy, and to accrue from employment not yet entered into or contracted for, are invalid."

This is, of course, a situation where the future earnings are from an employment not entered into or contracted for. Since the clause is invalid and unenforceable, it is my opinion that you have the authority to have it deleted from the application.

Very truly yours,

FRANK CRAIG
Assistant Attorney General

FC:bl

WELFARE: Legal settlement -- The court, when committing a child to the permanent care and custody of a child agency under section 338.26, establishes the legal settlement of that child in the county of original jurisdiction. (Rehmann To O'Connell, Buchanan Co Atty, 11-30-60)

60-12-4

November 30, 1960

Mr. William J. O'Connell
Buchanan County Attorney
Security Bank Building
Independence, Iowa

Dear Mr. O'Connell:

This will acknowledge receipt of your letter of November 26, in which you state:

"In 1954 Mr. & Mrs. Clair Wyninger were living in Buchanan County with their family of minor children. The children were not properly cared for by the parents.

"On September 13, 1954 a complaint was filed in District Court charging that the minor children were dependent and neglected and without proper parents' care or guardianship, contrary to Section 232.2 1954 Iowa Code.

"On September 29, 1954 the court entered an order finding the minors dependent and neglected and committing the children to Catholic Charities in Dubuque. Costs of the care and keep of the children was assumed by Buchanan County.

"On October 14, 1955 the District Court in Buchanan County, upon application, notice and hearing, ordered that the children be permanently committed to Catholic Charities of Dubuque with Catholic Charities to have the duty to seek adoptive homes if possible. The Court in this order specifically stated that it had jurisdiction of the persons and subject matter to which the order pertained. At

60-12-4

the time of entry of this order it appeared of record that the father of these children had left the state and that his whereabouts were unknown. The mother of these children was then residing in Buchanan County.

"Over a year ago the mother of these children left Buchanan County and is now employed and residing in Linn County. The father's whereabouts is still unknown.

"QUESTIONS:

"1. What is the county of legal settlement of the children?

"2. Does Buchanan County have the obligation to continue payment of the monthly allowance provided by Section 240.5, 1958 Iowa Code?"

In reply thereto, we advise as follows:

An adoption of a child must be in the county of legal settlement of the child. Milligan v. McLaughlin, 94 Neb. 171, 142 N.W. 675. Jensen v. Sorensen, 211 Iowa 354, 233 N.W. 717. Thus the court placing a child in a children's home for the purpose of adoption must keep jurisdiction of the child because the court severs the normal parent-child relationship. If the child is committed to an adoption agency outside the county, the court still has jurisdiction of the child because of its legal settlement.

Therefore, in answer to your first question, Buchanan County is the county of legal settlement of the children.

The severance of the legal relationship between parent and child has no bearing upon the commitment made by virtue of section 240.5, Code 1958. As pointed out above, the children's legal settlement is still in Buchanan County and they were committed to the children's home by order of the court.

Therefore, in answer to your second question, Buchanan County is still obligated to pay the expenses of the children in the receiving institution until they attain the age of 18 years or are legally adopted.

Very truly yours,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:bl

SCHOOLS: High school district -- The record action of the board of directors of a school district does not change the status of a school district to a non-high school district until the end of the current fiscal year. (Rehmann to Brown, Mitchell Co Atty, 11-30-60)

60-12-5 November 30, 1960

279.10

Mr. Loren N. Brown
Mitchell County Attorney
Osage, Iowa

Dear Mr. Brown:

This is to acknowledge receipt of your letter of November 23, 1960, in which you made the following inquiry:

"Section 275.40 'Alternate merger procedure' states ' -- a school district not operating a high school that is contiguous to a high school district may merge with said high school district in the following manner: ----'

"School District A currently is operating a high school. However, the board of directors of said District A by record action this November discontinues its high school facilities effective at the close of the current academic year. If the current academic year closes on May 26, may said District A on May 27 legally begin a procedure to bring about before July 1 following a merger with high school District B?

"If the answer to the preceding question is in the affirmative, would it also be legal for District A, on any date following the date of its record action to discontinue its high school facilities, to begin a procedure to bring about a merger before July 1 following with high school District B?"

In reply thereto, we advise as follows:

60-12-5

Section 279.10, Code 1958, specifically provides that the school year shall commence on July 1 and continue through June 30 of the following year. The status of a school district does not change prior to the effective date of the forthcoming school year. The fact that this school district by record action plans to discontinue its high school does not change its status during the current fiscal year as a high school district.

Therefore, in answer to your question, Chapter 192, Acts of the 58th General Assembly, referred to in your letter as section 275.40, is not available as a method of reorganization to the two existing districts. If it is their desire to reorganize, to be effective July 1, 1961, the ordinary procedure as set out in section 275.12 et seq., Code 1958, is available to them as the proper method to accomplish this aim.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:bl
cc: Dept. of Public Instruction

Beer :- Cities & Towns -- ordinances in conflict with state law. Municipalities cannot pass an ordinance changing the minimum requirement of 500 sq. ft. of floor space under Sec. 124.39, Code 1958. (Blanco to Buchheit, Fayette Co Atty, 12-1-60)

60-12-6

December 1, 1960

124.39

Mr. Mark D. Buchheit
Fayette County Attorney
West Union, Iowa

Dear Mr. Buchheit:

I have your favor of recent date in which you request an opinion of this office on the following question:

> "According to Section 124.39 of the 1958 Code of Iowa no dancing shall be permitted in connection with the operation of a beer business under any class "B" license except that cities and towns may, by ordinance, and County Boards of Supervisors may by resolution authorize and license dancing in connection with the operation of a beer business under a class "B" license providing the floor space used for dancing purposes therein contained at least 500 square feet all of which shall be at the same general floor level as the place where the beer is dispensed. The question arises as to whether or not a city has the right to pass an ordinance changing the minimum requirement of 500 square feet of floor space as set out in said Code Section."

In reply thereto we would advise as follows:

Section 124.34 Code of 1958 provides in part;

> "Cities and towns are hereby empowered to adopt ordinances for the enforcement of this chapter * * * and are empowered to adopt ordinances, not in conflict with the provisions of this chapter, governing any other activities or matters which may affect the sale and distribution of beer under Class 'B' permits and the welfare and morals of the community * * *."

60-12-6

The power to pass ordinances is subject to the statutory limitation that such must not be inconsistent with the laws of the state and may not contravene the policy of the state as expressed in its legislation, (Section 366.1 Code of Iowa) Town of Randolph v. Gee, 199 Iowa 181, 201 N.W. 567, and the general test is whether the ordinance prohibits an act which the statute permits or permits an act which the statute prohibits, Towns v. City of Sioux City, 214 Iowa 76, 241 N.W. 658.

The provision of the statute above quoted has expressly denied to municipalities the right to enact ordinances inconsistent with these provisions, except in certain enumerated respects.

Under the statute, Class "B" permittees may be authorized and licensed to dancing in their establishments provided a minimum floor space of "at least 500 sq. ft." is made available as prescribed by the statute.

An ordinance which in effect alters this requirement would not only contravene a declared policy of the state, as found in this statute, but is in direct conflict with, and in violation of, the express provisions of the statute.

Therefore, in answer to your question it is our opinion that a municipality cannot pass an ordinance changing the minimum requirement of 500 sq. ft. of floor space as set out in the said Code section.

Respectfully submitted,

FRANK D. BIANCO
Assistant Attorney General

FDB:kvr

HEALTH: Public Health Nurse -- Under the provisions of Chapter 143 and Sec. 152.1, Code of 1958, a registered nurse who has been employed as a public health nurse may be considered as such.
(Bianco to Brown, Mitchell Co Atty, 12-2-60)

60-12-7

December 2, 1960

Mr. Loren N. Brown
Mitchell County Attorney
Osage, Iowa

Dear Mr. Brown:

We have your favor of November 25, 1960 requesting opinion, reading as follows:

> "A registered nurse is employed by a county board of education, on the recommendation of the county superintendent of schools, to supervise the health services of the county school system, and for no other purposes, and to thereby provide for the general promotion of health of the pupils enrolled in the schools of the county school system. Is this registered nurse, under the laws of Iowa, considered to be a public health nurse?"

Section 143.1 Code of Iowa provides for the employment of public health nurses. It does not define a public health nurse as such.

In section 152.1 we find the practice of nursing defined as follows:

> "For the purpose of this title any person shall be deemed to be engaged in the practice of nursing as a registered nurse who performs any professional services requiring the application of principles of biological, physical or social sciences and nursing skills in the observation of symptoms, reactions and the accurate recording of facts and carrying out of treatments and medication prescribed by licensed physicians in the care of the sick, in the prevention of disease or in the conservation of health."

60-12-7

We have been advised by authoritative sources of the State Department of Health, that public health nursing is a specialized field, in which registered nurses may acquire specialized techniques in that field. That since this type of nursing encompasses the prevention of disease or the conservation of health, one of the requirements to qualify for a position as a public health nurse is to hold a registered nurses certificate.

Public health nurses are registered nurses, who have secured additional training in the field of public health nursing.

In view of the foregoing provisions of the Iowa law, for all practical purposes, it is our opinion that a registered nurse who has been employed as a public health nurse, may be considered to be a public health nurse.

Respectfully submitted.

FRANK D. BIANCO
Assistant Attorney General

FDB:kvr

COUNTIES AND COUNTY OFFICERS:

City solicitors -- Since there are no statutory prohibitions, the only reason the position of assistant county attorney and city solicitor can not be occupied by the same person would be incompatibity arising out of the duties to be performed.

Mr. Richards

(Strauss to Tucker, Dep Lee Co Atty, 12-5-60)

60-12-8

December 5, 1960

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

Dear Mr. Tucker:

This will acknowledge receipt of your letter of December 3, 1960, in which you state:

> "I am the Deputy County Attorney of Lee County, appointed by the Board of Supervisors, without compensation. The town of West Point, Iowa, a small community within the county, has approached me in regard to my filling the position as their city attorney. This also is an appointive office.
>
> "The question which naturally arose in our minds, and to which we have been unable to find cases or prior Attorney General's opinions, is whether or not these two positions are incompatable and whether or not there is any conflict of interests.
>
> "May we have an informal opinion on this point."

In reply thereto I refer you to the opinion of this department issued November 20, 1953, to William M. Tucker, Assistant County Attorney of Iowa City, Iowa, addressed to the same question submitted by you. Copy of this opinion is hereto attached and by this reference made a part hereof.

Yours truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh4
Enc:

60-12-8

LABOR: Railroad Station -- A railroad station is a "workshop", as defined in section 88.3, 1958 Code of Iowa. (Craig to Stanley, St Rep, 12-6-60)

#60-12-9

December 6, 1960

12-9-60

Representative David M. Stanley
102 Middle Road
Muscatine, Iowa

Dear Mr. Stanley:

This will acknowledge receipt of your opinion request of November 28, in which you state:

"This letter is a request for your legal opinion on the question whether Section 88.3 of the Code of Iowa applies to the Linwood Station of the Chicago, Rock Island & Pacific Railroad Company. This question is submitted pursuant to Section 13.2 of the Code of Iowa. In my opinion, this question involves the public health and safety, and corrective legislation will be necessary if Section 88.3 does not apply.

"This question is discussed in an opinion by Mr. Frank Craig, Assistant Attorney General, to Mr. Don Lowe, dated July 14, 1960. However, that opinion does not deal with the specific question raised herein.

"One of my constituents works at the Linwood Station, and I have made some investigation of the situation which exists at this station. This is a freight station which handles a large volume of incoming and outgoing freight and railway express shipments. Two permanent employees, an agent-telegrapher and a clerk, work at this station. In addition to these employees at the station, there are usually a number of other railroad employees working in the immediate vicinity of the station on switching crews, section crews, etc.

"This station apparently handles a much larger volume of freight than the typical Iowa small town

60-12-9

station. One of the employees at the station tells me that the annual volume of freight through this station is about $2,000,000.00, and that more than 12,000 cars per year are handled at this station. This station is located in a major industrial area west of Davenport.

"The work done by the two permanent employees at this station includes checking cars in the yards, helping truck drivers load and unload their freight, and helping customers who come to pick up their shipments. Thus, their work includes a good deal of hard physical work in addition to clerical work,

"The Chicago, Rock Island & Pacific Railroad Company has refused to provide 'adequate washing facilities' and 'a sufficient supply of water suitable for drinking purposes' at this station.

"My specific question is: Is the Linwood Station of the Chicago, Rock Island & Pacific Railroad Company a 'mercantile establishment' or a 'workshop' for the purposes of Section 88.3 of the Code of Iowa, thus requiring the employer to provide 'adequate washing facilities' and 'a sufficient supply of water suitable for drinking purposes' as required by this Section?

"It would appear that this station is either a 'mercantile establishment' or a 'workshop' within the meaning of Section 88.3. It seems doubtful that the legislature would have intended to protect employees in an ordinary retail store and deny protection to men working in a situation such as this railroad station, where the work is heavier and the working conditions make washing facilities and drinking water more necessary than in the average retail store.

"Mr. Craig's opinion of July 14, 1960, deals primarily with an opinion by Judge D. D. Needham of the Polk County District Court, Equity No. 64095. A copy of this opinion has been furnished to me, and I agree with Mr. Craig's opinion that the decision does not specifically cover the Linwood Station situation. However, I believe the following statement on page 5 of Judge Needham's opinion is significant:

> 'Finally we find that we should construe health and sanitary measures broadly and liberally and we find such measures in Chapter

> 88 and, in addition, find therein that it is the duty of the Commissioner of Labor to enforce such provisions.'
>
> "I note also that the decree states that 'The several provisions of Chapters 88 and 91 ...' are applicable to the operation of railroads engaged in interstate business in Iowa. It may also be significant that paragraph 11 of the Findings of Fact refers to 'washing facilities', and on page 4 of the opinion there is a specific reference to Section 88.3 and its requirement of adequate washing facilities."

The opinion by Judge D. D. Needham of the Polk County District Court, to which your letter refers, which opinion was handed down January 28, 1959, Polk County Equity No. 64905, held that a shop maintained by a railroad for the manufacture or the repair of engines and other rolling stock is a "workshop" within the meaning of sections 88.11 through 88.13, 1958 Code of Iowa. An earlier Attorney General's Opinion, reported at 1956 Opinions of the Attorney General 157, held the same.

Your question is whether a railroad station is a "mercantile establishment" or "workshop" for the purposes of section 88.3, 1958 Code of Iowa. I find no Iowa Supreme Court cases which construe section 88.3 or which define the terms "mercantile establishment" or "workshop" as used therein. However, authorities from other jurisdictions agree that a "mercantile establishment" is a place devoted to the purchase and sale of articles of merchandise. Sherrouse Realty v. Marine, 46 So. 2d 156; Hotchkiss v. District of Columbia, 44 App. D.C. 73; Veazey Drug Co. v. Bruza, 169 Okl. 418, 37 P. 2d 294. Apparently no articles are purchased or sold at the Linwood Station, and it therefore is not a "mercantile establishment".

A "workshop" has been defined as a place where any work is carried on. Board of Education of High School District No. 502 v. Industrial Commission, 301 Ill. 611, 134 N.E. 70; Fritz v. Christian Reformed City Mission Board, 281 Mich. 582, 275 N.W. 499. The only reported case I find specifically involving a railroad depot or station is Richmond & Danville Railroad Company v. The Commissioners of Alamance County, 76 N.C. 212. There the railroad had an agreement that land used for "workshop purposes" was to be exempt from real estate taxes until dividends to the Company stockholders reached 6 percent per annum. Alamance County attempted to tax certain

property before that rate of return had been reached. The Court held the railroad property was exempt from the tax, and stated, at page 214, 215 of 76 N.C.:

> "The term 'workshop' in reference to a great road like this, embraces foundaries, engine houses, depots, machine shops, necessary offices and all the usual appliances for the manufacture and repair of engines, cars and other stock required for the operation of the road." (Emphasis added.)

This language was quoted in a later case which arose between the same parties, Richmond & Danville Railroad Company v. The Commissioners of Alamance County, 84 N.C. 504, at 506.

Upon the basis of the above-cited authority, it is my opinion that the Linwood Station is a "workshop", as contemplated by section 88.3, 1958 Code of Iowa.

Very truly yours,

FRANK CRAIG
Assistant Attorney General

FC:bl

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

December 6, 1960

60-12-10

Mr. H. K. Roggensack
Clayton County Attorney
Elkader, Iowa

111A.7

Dear Roggie:

This will acknowledge receipt of your letter of November 23, 1960, in which you state:

> "Will you please give me an opinion as to whether or not the County Attorney is obligated as a part of the duties of his office to prepare easements, examine abstracts of title, and other legal services for the county conservation commission."

In reply thereto I call your attention to the provisions of section 111A.7, Code 1958, to the effect that:

> " * * * 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 foregoing would appear to impose upon you as county attorney, the performance of such duties to the county conservation commission as shall not interfere with the statutory duties imposed upon you by chapter 336, Code 1958. Thus, while there is an obligation to perform the duties mentioned in your letter, such obligation is yours to perform as the performance of your specific statutory duties will permit.

Yours very truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh4

60-12-10

ELECTIONS:

Invalid ballots -- In voting, use of a check mark (√) instead of a cross (X) (authorized by section 49.92, Code 1958) invalidates the ballot. (Strauss to Jensen, Taylor Co Atty, 12-6-60)

#60-12-11

December 6, 1960

Mr. A. Elton Jensen
Taylor County Attorney
Bedford, Iowa

Dear Mr. Jensen:

This will acknowledge receipt of your letter of December 5, 1960, which states the following:

"We have a contest of an election coming up on December 13, 1960, there being 9 votes difference between the candidates for the office of county recorder.

"From the contest statement it appears that ballots marked with a check (√) instead of a cross (X) will be in issue.

"I am acquainted with the provisions of 1928AG774 to the effect that it is held that 'where any mark other than the one authorized by Sections 809-16 inclusive (now including section 49.92 of the Code), is used on a ballot, the question as to whether or not said ballot should or should not be rejected is determined by deciding whether or not the mark was intended as an identification mark. If it was, the ballot should be rejected, if not it should be counted.'

"I am also acquainted with a 1931 Supreme Court decision, Joe W. Donlan vs. E. R. Cook, 212 Iowa 771 in which it is held that 'Employing a check mark in marking a ballot instead of a cross invalidates it'.

"I would like to be advised if it is now the opinion of your office that a check mark invalidates the ballot even though it appears that no effort was made to identify the ballot."

In reply to the foregoing I would advise that the rule stated in Donlan v. Cooke, 212 Iowa 771, as follows:

60-12-11

> "Three ballots were marked with a check mark instead of a cross. These ballots can not be counted."

is controlling upon this department and to which it is now committed.

Very truly yours,

OSCAR STRAUSS

First Assistant Attorney General

OS:mmh4

SCHOOLS: Compatibility of office -- A member of the state legislature cannot at the same time be a member of a county board of education. The two offices are incompatible. (Strauss to McDonald, Dallas Co Atty, 12-7-60)

60-12-12

December 7, 1960

Mr. John C. McDonald

Dallas County Attorney

Dallas Center, Iowa

Dear Mr. McDonald:

This will acknowledge receipt of your letter of December 6, 1960, which states the following:

> "Recently a member of the Dallas County Board of Education was elected to the legislature as a State Representative from Dallas County.
>
> "My question is whether or not any incompatibility exists in the nature and duties of the two offices which would render it improper for him to retain both offices."

In reply to the foregoing, I would advise you that it is the view of the department that the foregoing-designated offices are incompatible. See the case of Weza v. Auditor General, et al., 297 Mich. 686, 298 N.W. 368.

Yours truly,

OSCAR STRAUSS

First Assistant Attorney General

OS?mmh4

60-12-12

CITIES AND TOWNS:

SEWAGE DISPOSAL -- Chapters 392 and 393, Code 1958, are separate and distinct operational provisions for sewerage, and sewage disposal, and are not alternative. Sewer rentals are restricted by Chapter 393, and may not be used for operation under Chapter 392. (Strauss to Akers, Auditor, 12-13-60)

60-12-13

December 13, 1960

ch 392 393

Hon. Chet B. Akers

Auditor of State

B U I L D I N G

Attention Mr. C. W. Ward

Dear Ward:

Reference is herein made to yours of the 5th inst. with accompanying opinion of R. M. McMullin, City Corporate Counsel of the City of West Des Moines, addressed to the use of rentals in payment of sewerage service as provided in Chapter 393, Code 1958.

In reply thereto I would advise that in my view, Chapters 392 and 393, Code 1958, are separate and distinct operational provisions for sewerage, and sewage disposal. They are not alternative operations. Chapter 392 is restricted to such operations between cities and towns adjacent and existing along the same river. This is a special statute designed to fit a situation within its terms. Chapter 393, on the other hand, upon which the opinion is based, concerns the installation of such facilities in cities and towns, and is general in its terms.

60-12-13

It appears that the sewerage problems as between the City of Des Moines and the City of West Des Moines, were resolved under the provisions of Chapter 392, and not Chapter 393, and such resolution was confirmed by the supreme court in the case of the City of Des Moines v. the City of West Des Moines, 239 Iowa 1, 30 N.W.2d 500. The rental provisions of Chapter 393 are not thus available to the City of West Des Moines.

The difference between Chapter 392 and Chapter 393 is pointed up specifically by section 393.8, which segregates such rentals in a separate fund to be devoted to the payment of "the cost of financing the operation, maintenance," etc. of a utility, as defined in section 393.1. The rental provision, therefore, is by its terms restricted to Chapter 393, and may not be used for operations under Chapter 392. See also City of Des Moines v. City of West Des Moines, 244 Iowa 310, 56 NW 2d 904.

Very truly,

OSCAR STRAUSS

First Assistant Attorney General

OS:mmh4

COURTS (Salary) -- The compensation of a district court judge appointed by the governor June 3, 1959, elected November 8, 1960, for the short term from November 8, 1960 to January 1, 1961, and for the full term beginning January 1, 1961, should be computed at the rate of $10,000 per year until January 1, 1961, at which time, under section 42 of chapter 1, Acts of the 58th General Assembly, it should be increased to $12,500 per year. (Strauss to Sarsfield, comp. 12-14-60

December 14,1960

605.1
#60-12-14

Mr. Glenn D. Sarsfield
State Comptroller
B U I L D I N G

Attention Mr. Harold Croft

Dear Mr. Croft:

This has reference to the letter of Judge Jackson, dated December 8, 1960, with reference to his compensation from November 8, 1960 to January 1, 1961, in which he states his belief that he is entitled to compensation at the rate of $12,500 a year, the increase becoming effective upon his election November 8, 1960.

With reference thereto I am of the opinion that on the basis of the following legislative history and judicial pronouncement:

1.

Chapter 1, section 42, Acts of the 58th General Assembly, contains the following:

> " * * * Section six hundred five point one (605.1), Code-1958, is amended by strking from lines two (2) and three (3) the words 'ten thousand dollars per year' and 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.'."

This Act was approved May 14, 1959.

60-12-14

2.

Chapter 354, Acts of the 58th General Assembly, created the eighth Judge and was approved March 27, 1959. It was published in two papers, one on March 31, 1959, one on April 3, 1959, and was in effect April 4, 1959.

3.

Judge Jackson was appointed judge June 3, 1959.

4.

The case of Schaffner v. Shaw, 191 Iowa 1047, 180 N.W. 853, at page 1051, states:

> 'Thus an existing office without an incumbent is vacant; and by the great weight of authority there is no difference, insofar as the right to appoint is concerned, whether the vacancy is occasioned by death or resignation of the incumbent, or the office has been created, and no incumbent has been appointed or elected to the office.' (Emphasis ours.)

there was a term of office existing at the time of the passage of chapter 1, section 42, Acts of the 58th General Assembly, and therefore the compensation of Judge Jackson should be computed at the rate of $10,000 per year until the term beginning January 1, 1961. The November election merely filled a vacancy for the unexpired term existing at that time and expiring December 31, 1960.

Very truly,

OSCAR STRAUSS

First Assistant Attorney General

OS:mmh4

COUNTY AND COUNTY OFFICERS Domestic Animal Fund -- The owner of animals that are killed by his dog and another dog, cannot qualify for recovery under section 352.1, Code 1958. (Strauss to Hindt, Lyon Co. Atty, 12-19-60)

December 19, 1960

#60-12-17

Mr. Harvey W. Hindt

Lyon County Attorney

Rock Rapids, Iowa

Dear Mr. Hindt:

This will acknowledge receipt of your letter of December 9, 1960, in which you state the following:

> "A question has arisen in regards to interpretation of the provisions of section 352.1 of the 1958 Code of Iowa, and I would like to have an opinion thereon. Two dogs killed several pigs owned by a local farmer. A timely claim was filed with the County Auditor. One of the dogs was owned by the person whose pigs were killed, the other dog was not owned by said person.
>
> "The questions I have are: First, Does the County have to pay any of this claim? and Second, Can the County pay any of this claim?
>
> "We are presuming that both of the dogs are equally involved in the killing of these domestic animals. It is the contention of the individual who has suffered this loss and his insurer that we should pay 1/2 of the value of the stock that was lost. I would appreciate your consideration of this matter."

In reply thereto I would advise as follows:

Recovery from the county because of the foregoing, is predicated upon section 352.1, Code 1958, which provides as follows:

> "352.1 Claims. Any person damaged by the killing or injury of any domestic animal or fowl by wolves, or by dogs

60-12-17

> not owned by said person, may, within ten days from the time he or his agent has knowledge of such killing or injury, file with the county auditor of the county in which such killing or injury occurred a claim for such damage."

It appears from the foregoing that the killing involved two dogs, one of which was owned by the claimant.

In the case of Hodges v. Tama County, 91 Iowa 578, 581, it is said:

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

Thus, the damage not having been caused by dogs not owned by the claimant, the claimant has failed to bring himself within the provisions of the foregoing statute and therefore any liability should be denied, and the answers to your questions are in the negative.

Very truly,

OSCAR STRAUSS

First Assistant Attorney General

OS:mmh4

TAXATION: Real Estate Taxes -- Tax Liens -

While the grantor in a deed dated November 28, 1960, vesting title in the United States of America, to real estate located in Iowa, may be responsible for the payment of the taxes for the year 1960, payable in 1961, there is no method in Iowa by which such taxes can be collected from said grantor. (Strauss to Samore, Woodbury Co Atty, 12-15-60) December 15, 1960

60-12-15

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

Dear Mr. Samore:

This will acknowledge receipt of your letter of December 2, 1960, in which you state the following:

> "Your opinion is respectfully requested upon the following circumstances:
>
> "On November 28, 1960, title was vested to real estate located in Sioux City, Iowa, in the United States of America; real estate taxes for the year 1959, payable in the year 1960, have been paid. Your opinion is respectfully requested as to whether or not the grantor is responsible for the real estate taxes for the year 1960, payable in 1961. The taxes for the year 1959, payable in 1960, was in the amount of $7,685.28. This represents a substantial tax assessment."

In reply thereto, I would advise that on the authority following, in my opinion, while the grantor above described may be responsible for the payment of the foregoing real estate taxes, there is no method in Iowa by which such taxes can be collected from said grantor.

In the case of In Re Estate of McMahon, 237 Iowa, 236, 21 NW 2d 581, it is stated on page 238:

> "I. It is stated in 51 Am. Jur. 831, section 945, that:
>
> 'A tax upon property, at least upon real property, is ordinarily considered to be a charge upon the property, and not a personal obligation of the person whose property is assessed for the tax, in the absence of a statutory declaration to that effect.'

60-12-15

"In 51 Am. Jur. 40, 41, section 8, it is also stated:

' * * * it is generally considered that taxes are not "debts," in the ordinary meaning of that word. A tax duly assessed or levied is not a debt within the meaning of the contract clause of the Federal Constitution; nor are taxes debts within the constitutional provision against imprisonment for debt. A tax is not a debt within the meaning of provisions allowing deductions in the determination of the amount of tax.
'A tax does not establish the relation of debtor and creditor between the taxpayer and the state or municipality; it does not bear interest when past due, unless the statute so provides; it is not liable to setoff; and it is not enforceable by a personal action against the taxpayer, absent statutory authority. A tax differs materially and essentially from a debt. The one is founded on contract; the other is not.' "

and on pages 239, 240:

"A further South Dakota authority which discloses that that State has a statutory provision for the collection of taxes is found in the case of Iowa Land Co. v. Douglas County, 8 S. D. 491, 504, 67 N. W. 52, 56, where it is stated:

'A tax is not a "debt," in the ordinary sense in which that term is used, but is a charge or burden imposed upon property for the benefit of the public. It is levied under the authority of the state, in the exercise of its sovereignty, for governmental purposes, or for some object connected therewith. * * * In this state the payment of taxes is enforced by distress and sale of the personal property, or sale of the real property, and no action in the courts is provided for or required. The proceeding is summary and statutory, and in no sense an action invoking the exercise of the judicial power of a court.'

"Under the authorities cited we can reach no other conclusion than that taxes are not debts such as were contemplated for payment in the first paragraph of the will of John Q. McMahon.

"(3) II. A proceeding for the collection of taxes is one in rem and under our Iowa authorities is an exclusive one. In Crawford County v. Laub, 110 Iowa 355, 357, 358, 81 N.W. 590, 591, which is a case involving a proceeding on a bond given by reason of the operation of a saloon under the mulct-tax law, we held such a tax was a debt because of the nature of the proceeding. However, in this cited case we said:

'It is sufficient here to say that, under the general law relating to the collection of taxes, upon sale of land a certificate of sale is executed by the treasurer to the purchaser, and, unless redemption is made in the meantime, on proper notice, a deed will be issued in three years. The remedy is thus provided in detail, and we think it is exclusive. * * * In providing a specific remedy for the enforcement of a tax lien, applicable to no other, the legislative intent that another may not be resorted to is manifest.' "

See also 84 C.J.S. page 35, and page 1376.

Very truly,

OSCAR STRAUSS

First Assistant Attorney General

OS:mmh4

TAXATION: Property Tax: Agricultural Produce Exemption: The owner of grain, harvested within the past year, must have been the owner of the growing crop to be exempt under Section 427.1(13) and, if not, must pay the grain handling tax imposed by Section 428.35, Code of Iowa (1958).
(Gill to O'Connor, St Tax Comm, 12-19-60)

December 19, 1960

#60-12-16

Mr. John J. O'Connor, Chairman
Iowa State Tax Commission
State Office Building
Des Moines, Iowa

Dear Mr. O'Connor:

This is to acknowledge receipt of a letter from Ballard B. Tipton, Director of the Property Tax Division, dated November 16, 1960, wherein the following problem was submitted:

"Some assessors in the state have posed the question as to whether in assessing hybrid seed corn dealers they should assess to the dealers hybrid seed corn grown in the year 1960, as personal property as of January 1, 1961, or whether they should assess such hybrid seed corn to them as grain handled.

"It appears that some of those dealers in contracting with farmers for production of hybrid seed corn provide in the contract that the farmer shall do all the work except detasseling, and the farmer receives cash for the corn delivered to the dealer. The farmer under some of the contracts does not furnish the seed and he is required to harvest the crop.

"Subsection 13 of Section 427.1, Code of Iowa 1958, provides that growing agricultural and horticultural crops and products, except commercial orchards and vineyards, and all horticultural and agricultural produce harvested by or for the person assessed within one year previous to the listing shall be exempted from taxation.

"Subsection 22 of Section 427.1 provides that grain handled, as defined under Section 428.35, shall not be taxed.

"It is provided in Section 428.4 that personal property shall be listed and assessed each year in the name of the owner thereof

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on the first day of January.

"Section 428.35 provides for an annual excise tax to be levied on grain handled in an amount equal to one-fourth mill per bushel.

"There is the further question as to whether hybrid seed corn grown under a contract between the dealer and farmer in the year 1960, and delivered to the dealer prior to January 1, 1961, and which is still in his hands as of that assessment date, would be exempt from being assessed to the dealer as personal property and would also be exempt from the 'grain handling' tax."

In response thereto, your attention is directed to Section 427.1(13), Code of Iowa (1958), which reads in part as follows:

"427.1 Exemptions. The following classes of property shall not be taxed:

"* * *,

"13. Agricultural produce. Growing agricultural and horticultural crops and products, except commercial orchards and vineyards, and all horticultural and agricultural produce harvested by or for the person assessed within one year previous to the listing, * * *."

Upon examination of the foregoing statute, it will be observed that the statute says "harvested for or by the person assessed". It would appear that before an individual could claim an exemption under this statute he must be the owner of the crop at the time it is growing. This statement is in accord with prior opinions on this subject. You are referred to the 1940 Report of the Attorney General at page 42 and the 1928 Report of the Attorney General at page 98.

The 1928 opinion, in part, reads:

> "However we believe the meaning of this section is plain. It is apparent that agricultural produce must have been harvested by or for the person assessed within one year previous to the listing to entitle the owner thereof to the exemption of such property from taxation. If such property is sold on or before the first day of January of the year in which the same is to be assessed, it must be assessed to the owner thereof, notwithstanding the fact that it was raised or grown within the year. Any other construction would do violence to the language used in the statute."

In view of the above language, it would appear that a determination must be made as to who is the owner of the growing crop. This can be ascertained only by an examination of the contract between the parties. From the facts stated in the request, one is unable to say which one of the parties is the owner. Therefore, depending upon the contract, if it is found that the corn dealer is the owner, then all corn harvested within the year would be exempt under Section 427.1(13). On the other hand, if the farmer owns the growing crop, then the corn dealer is subject to taxation under Section 428.35, since the dealer would be, in the terms of the statute, "receiving" grain at or in an "elevator, warehouse, mill, processing plant or other facility in this state . . . for storage, accumulation, sale, processing or for any purpose whatsoever".

In conclusion, the owner of grain, harvested within the past year, must have been the owner of the growing crop to be exempt under Section 427.1(13) and, if not, must pay the grain handling tax imposed by Section 428.35, Code of Iowa (1958).

Very truly yours,

Gary S. Gill
Special Assistant Attorney General

GSG:fs

COUNTIES AND COUNTY OFFICERS:
Incompatibility of office --
An inheritance tax appraiser cannot at the same time serve as deputy sheriff. (Strauss to Gray, Calhoun Co Atty, 12-19-60)

60-12-18

December 19, 1960

GRAY & GRAY, Lawyers
Rockwell City
Iowa

Attention Jack R. Gray, Calhoun County Attorney

Dear Sir:

This will acknowledge receipt of your letter of December 12, 1960, in which you state:

> "This is to advise you that one of the Inheritance Tax Appraisers of Calhoun County, Iowa, has been asked to serve as Deputy Sheriff for the next four years and, of course, he does not want to accept said position if his job as Inheritance Tax Appraiser is incompatible of holding the Deputy Sheriff job or if it is against any of the rules of the State Tax Commission. He has advised me that if it is incompatible he prefers to keep his appointment as one of the Inheritance Tax Appraisers of Calhoun County, Iowa.
>
> "Therefore, would you please let us know whether or not being Inheritance Tax Appraiser of Calhoun County and also being Deputy Sheriff of Calhoun County could be incompatible or be against any of the rules of the State Tax Commission."

In reply thereto I would advise you as follows:

1. A deputy sheriff, being a peace officer (see section 748.3, Code 1958), I am of the opinion that the performance of the duties of a peace officer as defined by chapter 748 as well as the performance of his duties as sheriff as prescribed in chapter 337, Code 1958, would preclude a deputy sheriff from occupying the office of inheritance tax appraiser.

60-12-18

2. It would seem that a public officer performing his duties at a stated salary would not be entitled to other compensation from the county unless expressly authorized by statute.

Very truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh4

COUNTY AND COUNTY OFFICERS

COUNTY MEDICAL EXAMINERS: Deputies -- bonds -- Deputy county medical examiners when appointed must be sworn in pursuant to Chapter 63 of the Code, and file bond pursuant to Chapter 64 of the Code. (Bianco to Schoeneman, Butler Co Atty, 12-20-60)

December 20, 1960

H 60-12-19

Mr. Robert F. Schoeneman
Butler County Attorney
Allison, Iowa

Attention: Paul C. Schaeffer, Chairman
Butler County Board of Supervisors

Dear Mr. Schoeneman:

We have Mr. Schaeffer's letter addressed to Doctor Zimmerer, Commissioner of Health, under date of December 12, 1960, which has been referred to the writer, reading as follows:

> "We are planning on appointing a Medical Examiner for Butler County next Monday, December 19, 1960, and we have a question we would like to ask.
>
> "We are going to appoint a County Medical Examiner, and are anticipating on appointing three Deputies in different parts of the County, and our question is must these Deputies be bonded and sworn in the same as any other Deputies employed by the County. Also our Board seems to think that a $1,000.00 bond is sufficient, if not would you please advise."

In reply thereto, please be advised that Chapter 258, Laws of the 58th General Assembly, with reference to the county medical examiner provides that he "...shall enter into bond with the county auditor in an amount to be fixed by the board of supervisors." Thus it can be seen it is within the discretion of the board to fix the amount of his bond.

As to deputies, said statute further provides: "Each county board of supervisors is hereby authorized to provide or arrange, ...such deputy medical examiner or examiners...as may be recommended and required by the county medical examiner in the performance of the duties imposed by this chapter."

Since these deputies are required to perform the duties of the county medical examiner, when called upon to do so, they are public officers, and are required to file bond under the provision of Section 64.2, Code of 1958 which states:

60-12-19

"All other public officers, except as otherwise specially provided, shall give bond with the conditions, in substance as follows: ...", (here follows the form of bond required). They must also be sworn in as required under Chapter 63 of the Code.

Respectfully submitted,

FRANK D. BIANCO
Assistant Attorney General

FDB:gh

COUNTIES AND COUNTY OFFICERS:

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

December 27, 1960

340.8

60-12-21

Mr. Richard W. Cooper
Buena Vista County Attorney
Porath Building
Storm Lake, Iowa

Dear Mr. Cooper:

This will acknowledge receipt of yours of the 21st inst.

In which you submitted the following:

"Re: Mr. Fred Jarvis
Claim for Additional Compensation
as Deputy Sheriff

"You may recall our recent telephone conversation relative to a claim filed by former Deputy Sheriff Fred Jarvis for eighty-five per cent of the Sheriff's residence allowance. The matter has been discussed with the Board of Supervisors, with myself and Mr. Jarvis being present, and they have directed me to secure an opinion from your office.

"The facts are as follows:

1. Mr. Jarvis took office as Deputy Sheriff on January 6, 1960. The following is a complete quotation of the minutes of the Board at a meeting held on January 6, 1960:

'Motion by Rehnstrom, second by Swenson, that the appointment of Fred M. Jarvis as first deputy in the office of County Sheriff be approved and that his salary be set at 85% of the officer's salary effective Jan. 6. Ayes all.'

2. Mr. Jarvis received his first pay check on the last day of January, 1960, and in the sum of $257.82 after deduction for withholding, Social Security, etc. The total base pay as entered in the Auditor's records was $315.21 per month and did not take into consideration 85 per cent of the Sheriff's residence allowance, but represented only 85 per cent of the Sheriff's statutory compensation without the allowance.

60-12-21

3. Mr. Jarvis continued as Deputy Sheriff until the last of November, 1960, receiving checks in the above stated amount each month and endorsing and cashing the same.

4. On November 29, 1960, he filed a claim with the Auditor as follows:

'Eighty-five percent of Sheriffs House rent for eleven months for the amount of Five Hundred and Fifty Dollars ($550.00) (1958 Code of Iowa Ch 340.7 Sub. 17) - $467.50.'

5. I believe it is a fair statement to say that it is conceded by the Board, and Mr. Jarvis, that neither was aware of the Attorney General's rulings which have included the sheriff's residence allowance as part of his salary and, therefore, could not have had any intent, on January 6, 1960, to include 85 per cent of this allowance in the deputy's total compensation.

6. Deputy sheriffs serving in the past have not received this percentage of the residence allowance.

"I do not believe that there is any question under the provisions of Section 340.8 of the 1958 Code of Iowa and subsequent opinions from your office but what the Board had adequate authority to set the compensation of the deputy at the full 85 per cent of the statutory salary of the sheriff plus the residence allowance. It would seem to me that we now have a question of what the Board can do at this point. Would the Board now have authority to allow Mr. Jarvis' claim, said claim having been filed before he left office as Deputy Sheriff? If not, would the Board now have authority to pass a supplementary resolution clarifying their resolution of January 6, 1960, and specifically including the 85 per cent of the residence allowance?

"Your opinion, and suggestions, as to the future handling of this claim will be sincerely appreciated.

"P.S. It might be of additional interest for you to know that the Board in approving the appointment of the new First Deputy Sheriff, effective December 1, 1960, authorized the full 85 per cent of the total Sheriff's salary and residence allowance."

In reply thereto I would advise you:

1. That Mr. Jarvis, as deputy sheriff, was entitled to 85% of his principal's salary, including residence allowance.

2. Your board of supervisors could legally supplement its former resolution so as to include the computation of 85% of a residence allowance as part of the principal's salary.

3. The fact that the deputy sheriff is no longer a public officer is not a waiver of his right to this additional compensation.

See Owens v. Floyd County, 96 G. Hpp. 25, 99 SE 2d 560 (1957)

Glavey v. US, 182 US 595, 21 s Ct. 841 45 L Ed. 1247 (1901)

City of Stuttgart v. Elms (1952) 249 SW 2d 829 220 Ark. 722

Bodenhofer v. Hogan, 142 Iowa 321, 120 N.W. 659.

Yours truly,

OSCAR STRAUSS

First Assistant Attorney General

OS:mmh4