CRIMINAL LAW: Boxing Contest -- Dorothy
Under Sec 727.5 boxing is illegal if a prize is received when an admission fee is charged.
(Bump to Denman, St Rep, 1-11-61) # 61-1-3

January 11, 1961

William F. Denman
State Representative
Polk County
L O C A L

Dear Mr. Denman:

This is in response to your letter of January 5, 1961, in which you set forth the following:

> "By this letter I am requesting an opinion from your office as to the legality of the Golden Gloves (amateur) Boxing Tournaments held annually in Des Moines and other cities throughout Iowa.***
>
> Golden Glove Tournaments in the past have charged an admission fee and generally speaking have given awards to the winners in the finals -- these awards, however, are only incidental to the tournament itself. The major goal of these tournaments has been to promote sportsmanship and physical education among the youths of Iowa."

The particular Code Section involved in this question is Section 727.5 (Iowa Code, 1958) which provides:

> "Boxing contest--sparring exhibition. Whoever engages in any boxing contest or sparring exhibition with or without gloves for a prize, reward, or anything of value, at which an admission fee is charged or received, either directly or indirectly and whoever knowingly aids, abets, or assists in any such boxing contest or sparring exhibition, and any owner or lessee of any ground, lot, building, hall, or structure of any kind knowingly permitting the same to be used for such boxing contest or sparring exhibition shall be fined not exceeding three hundred dollars, or imprisoned in the county jail not exceeding ninety days."

Your attention is directed to an opinion of this office reported at 1928 Ops. Atty Gen., commenting on the above section at page 223:

> "It will be noted from reading the section above quoted that emphasis is placed upon the words 'for a prize, reward or anything of value at which an admission fee is charged or received either directly or indirectly.' We think the statute is clear and that if the contestants box for a prize, reward, or anything of value at which an admission fee is chargeddeither directly or indirectly that there would be a violation of the statute."

The statute in question has not been amended since the rendition of the above opinion. The opinion of this office remains that a boxing contest or sparring exhibition where an admission fee is charged or received, either directly or indirectly, and where a prize, reward or anything of value is given, is in violation of section 727.5 (Iowa Code, 1958). See also, 1922 Ops. Atty. Gen, page 367.

Respectfully submitted,

WILBUR N. BUMP
Solicitor General

WNB:gh

TAXATION: Moneys and Credits: Recipient for life of principal and interest payments of a real estate contract is owner of the contract for moneys and credits tax purposes. (Adams to Newell, Louisa Co Atty, 1-13-61) #61-1-6

429.1
428.4

January 13, 1961

Russell R. Newell
Louisa County Attorney
Columbus Junction, Iowa

Dear Mr. Newell:

This will acknowledge your letter of December 6, 1960, in which you ask the following question:

> "A decedent, whose estate is now being administered in this County, was, during her lifetime, the owner of a life interest in certain real estate, the vested remainder being owned by three others. About three years prior to decedent's death the decedent, the remaindermen and their spouses, entered into a long term contract for the sale of said real estate, the purchase price to be received in installments over a period of years and all unpaid balance bearing interest. The contract itself made no specific provision as to who should receive the principal and interest payments but there was an informal agreement among the parties that the life tenant should receive the principal installments and interest paid during her lifetime. Decedent was about 83 years of age when the contract was executed and did actually receive the principal installments and interest payments up to the time of her death. None of the parties reported this contract or any part thereof for the purpose of moneys and credits taxation.
>
> "Two questions now arise concerning this matter:
>
> "1. Should the ownership of the contract be apportioned between the life tenant and the remaindermen for the purpose of moneys and credits taxation?

"2. If so, how should apportionment be made?"

We are unable to find any authority in Iowa directly on this point.

Under Section 429.1, Code of Iowa (1958), the word "credit" is defined. In your factual situation, the credit is a "claim or demand due or to become due for money". The tax is levied on the credit by Section 429.2 and also 429.3. In order to determine who is responsible for the payment of this tax on the credit, we must go to Section 428.4, which deals with listing of property for taxation. The applicable language of 428.4 is "personal property shall be listed and assessed each year in the name of the owner on the first day of January". This places the obligation for the payment of the tax on the owner of the credit. So, of course, the problem here is to determine who is the owner of the credit for purposes of taxation.

It should be noted that the word "owner" is not an absolute term having one legal meaning only. For instance, one can be an owner in fee simple absolute, an owner of a life estate, an owner of an equitable interest and an owner of the remainder interest, among others. But,where one owns less than a fee simple absolute, the law has assigned various incidents which arise from that ownership.

In an analogous situation to the problem under discussion, and as an example of the above, the law has assigned to the "owner" of a life estate in real property, the duty to pay the annual taxes on that property. (Rich vs. Allen, 226 Ia. 1304, 286 N.W. 434; Reddish v. John, 190 Ia. 49, 179 N.W. 951; Harris v. Brown, 184 Ia. 1288, 169 N.W. 664.) So, even though the life tenant cannot be said to be the "owner" of the property in an absolute sense,(the remainderman is also an "owner") still, for purposes of the payment of the tax, the life tenant is held to the "owner".

We feel that the method of designating the "owner" in regard to real property would be followed in regard to personalty; so that, in this case, the now deceased life

beneficiary of the contract was the "owner" of the contract for purposes of the moneys and credits tax during her lifetime because she was the only one who had any right or claim for money due during her lifetime. We feel this is a just and equitable result since she enjoyed all the benefits of the contract.

This result appears to be the general rule as expressed in 33 Am. Jur. § 433, at page 956. There, the Annotator says:

> "§ 433. Generally. — It is a well-settled general principle, confirmed by practically all the authorities, although exceptions may exist under special factual situations and although there is not unanimity in respect of the extent of the duty as affected by the amount of income derived from property, that as between a life tenant or life beneficiary and a remainderman or other owner of a future interest, the life tenant or beneficiary, since he enjoys the rents and profits of land or the income of personalty has the duty to pay or to have paid from income otherwise accruing to him such current taxes as are assessed against the property itself in such a manner that a failure to pay them will affect not only the present interest, but future interests because of liens or possibility of sale by the taxing authority, and, as a corollary, as between the parties, a remainderman or other owner of a future interest, in the absence of some agreement, controlling equity, or controlling expressed or impliable intent of the creator of interests in the property, is under no duty or obligation to pay or to have paid from his property or corpus such taxes. * * *."

Since the answer to your first question is that the moneys and credits taxed is assessed to the life tenant, it is unnecessary to answer your second question.

Respectfully,

William E. Adams
Assistant Attorney General

WEA/bjf

MOTOR VEHICLE: Delinquent registration, penalty on:

(Section 321.134, Code 1958). Unless payable in two equal semi-annual installments the penalty is computed on the basis of the annual registration fee as provided in this section. (Pesch to Carlson, Dept of Public Safety, 1-17-61) #61-1-7

January 17, 1961

Department of Public Safety
State of Iowa
State Office Building
L O C A L

Attn: J. F. Carlson, Director
Motor Vehicle Registration
Division

COPY

Dear Mr. Carlson:

With regard to your letter reading as follows:

"A question has risen pertaining to computing a penalty on a delinquent commercial vehicle license as provided for in Section 321.134 of the 1958 Iowa Code.

"An Iowa operator of a truck tractor was apprehended in October of 1960 operating on a delinquent 1959 commercial license plate. The overall gross weight of his truck tractor and semi trailer, and load hauled thereon, required a twenty (20) ton truck tractor classification for which the annual fee is $435.00.

"Does the penalty apply on the full annual fee, or on the basis of the first and second installment as they become delinquent?"

Section 321.134, Code 1958, reads:

"On February 1 of each year, a penalty of five percent of the annual registration fee shall be added to all fees not paid by that date, and five percent of the annual registration fee shall be added to such fees on the first of each month thereafter that the same remains unpaid, until paid, provided that said penalty in no case shall be less than one dollar, and provided that the owner of a vehicle who, before February 1 of any year, surrenders all registration plates for said vehicle to the county treasurer of the county in which said plates are of record, shall have the right to register said vehicle at any later date

period of said year by paying the full yearly registration fee without said penalty. Provided, however, that the annual registration fee for trucks, truck tractors, road tractors, trailers and semitrailers, as provided in sections 321.119 to 321.123, inclusive, when said annual registration fee is in excess of seventy dollars, may be payable in two equal semiannual installments.

"The penalties provided in the preceding paragraph shall be computed on the amount of the first installment only, and on August 1 of each year and on the first day of each month thereafter the same rate of penalty shall be added to the amount of the second installment, until the same is paid."

The computation on the basis of the first installment only would relate back only to those appearing after the word, "Provided" in line 16 of the statute quoted above. You have not made a distinction as to the manner in which the fee would have been paid by the Iowa operator about which you speak. However, since the said operator was apprehended in October, 1960, it would seem that no election could then be made to pay the fee in two equal semiannual installments inasmuch as the first semiannual period had expired. Therefore, on the facts stated in your letter, the penalty of five percent of the annual registration fee should be assessed as of February 1 and on the first of each month thereafter that the same remains unpaid, until paid.

Very truly yours,

CARL H. PESCH
Assistant Attorney General

CHP:mk

TAXATION: Income Tax: Salary paid by Iowa school district to exchange teacher from Germany under U. S. Information and Exchange Program not subject to Iowa Income Tax. Said salary, however, is subject to withholding under Iowa Public Employees Retirement System. (Gill to Harris, Green Co Atty,

422.7 1-17-61) H 61-1-9

January 17, 1961

David Harris
Greene County Attorney
Jefferson, Iowa

Dear Mr. Harris:

This will acknowledge your letter dated November 18, 1960, addressed to Norman A. Erbe, Attorney General of Iowa, in which you request the opinion of this department as to whether the salary paid by the Jefferson Community School District to an exchange teacher from Germany under the U. S. Information and Educational Exchange Program is subject to the Iowa income tax, and further whether his salary is subject to withholding under the Iowa Public Employees Retirement System.

Considering the tax question first, the following statute and treaty provisions are relevant:

> Income Tax Convention of the United States with Federal Republic of Germany, July 22, 1954.
>
> "Article I The taxes referred to in this convention are:
>
> "(a) In the case of the United States of America the Federal income taxes, including surtaxes and excess profits taxes;
>
> "(b) * * *

"Article II

"(1) As used in this convention:

"(a) The term 'United States' means the United States of America, and when used in a geographical sense means the States, the Territories of Alaska and Hawaii and the District of Columbia.

"Article XII

"A progessor or teacher, a resident of one of the contracting states, who temporarily visits the other contracting state for the purpose of teaching for a period not exceeding 2 years at a university, college, school or other educational institution in the other contracting state from tax on his remuneration for such teaching during that period."

Section 894 Internal Revenue Code (1954):

"Income of any kind, to the extent required by any treaty obligation of the United States shall not be included in gross income and shall be exempt from taxation under this subtitle."

Section 422.7, Code of Iowa (1958):

"422.7 'Net income' -- how computed. The term 'net income' means the adjusted gross income as computed for federal income tax purposes under the Internal Revenue Code of 1954, * * *."

It is a well established principal of constitutional law that treaties take precedent over conflicting state statutes, Nielson v. Johnson, Iowa 49 S. Ct. 223, 279 U.S. 47, 73 L. Ed. 607. We believe, however, that the U.S. - German Convention, parts of which are hereinabove set out, does not conflict with the state taxing statute, since the convention by its definitions exempts income only from the tax imposed by the contracting state, i.e., the United States of America. It does not purport to exempt income from state taxation.

The income tax levied by the State of Iowa is based on the federal adjusted gross income as provided by Section 422.7, Code, supra. Where income is not includible in adjusted gross income for federal tax purposes, it cannot be subjected to the Iowa tax.

We, therefore, conclude that in view of Section 894, I. R. C., supra, which excludes from gross income, such income as is exempted by treaty, the State of Iowa under existing statutes has no authority to tax such income.

We find no authority, however, which would exempt the exchange teacher's salary from the application of the Iowa Public Employees Retirement System. Section 97B.42, Code of Iowa (1958), makes it mandatory that public employees, including those employed by school districts, become members of the Iowa Public Employees Retirement System. It should be noted in this connection that Section 97B.53, Code of Iowa (1958), provides for withdrawal of accumulated contributions upon termination of employment.

Very truly yours,

Gary S. Gill
Special Assistant Attorney General

GSG/WWR/bjf

TAXATION: Military Service Exemption: One serving in the Coast Artillery in the Philippine Islands during the Nicaraguan Campaign is not eligible for the Military Service Exemption. (Adams to Erhardt, Wapello Co Atty, 1-17-61) # 61-1-10

427.3

January 17, 1961

Samuel O. Erhardt
Wapello County Attorney
Wapello County Court House
Ottumwa, Iowa

Dear Mr. Erhardt:

This will acknowledge your request for an opinion regarding Military Service Exemption, dated September 27, 1960. Your question is:

> "The claimant enlisted in February, 1926 with the sole aim and intent of participating in the Nicaraguan Campaign. He was assigned to the 59th Coast Artillery and in June of 1926 was shipped to the Philippines and did not return to the United States until shortly before his discharge in February of 1929."

The applicable Code provision is Section 427.3 (4), Code of Iowa (1958):

> "427.3 Military service -- exemptions. The following exemptions from taxation shall be allowed:
>
> " * * *.
>
> "4. The property, not to exceed five hundred dollars in taxable value of any honorably separated, retired, furloughed to a reserve, placed on inactive status, or discharged soldier, sailor, marine, or nurse of the second World War, army of occupation in Germany November 12, 1918 to July 11, 1923, American expeditionary forces in Siberia November 12, 1918 to April 30, 1920, second Nicaraguan campaign with the navy or marines in Nicaragua or on combatant ships 1926-1933, second Haitian suppressions of insurrections 1919-1920, navy and marine operations in China 1937-1939 and Yangtze service with navy and marines in Shanghai or in the Yangtze

> Valley 1926-1927 and 1930-1932 or of the Korean Conflict at any time between June 27, 1950 and July 27, 1953, both dates inclusive.
>
> "For the purposes of this section, the second World War shall be from December 7, 1941, to September 2, 1945, both dates inclusive."

The applicable phrase of this section is "second Nicaraguan Campaign with the navy or marines in Nicaragua or on combatant ships 1926-1933". This language is confusing when read in conjunction with the opening phrase because, deleting the unapplicable phrases, it reads :

> "4. The property, not to exceed five hundred dollars in taxable value of any honorably separated, retired, furloughed to a reserve, placed on inactive status, or discharged soldier, sailor, marine, or nurse of the * * * second Nicaraguan campaign with the navy or marines in Nicaragua or on combatant ships 1926-1933, * * * ."

As you can see, there is a conflict as to who is eligible. The opening phrase includes soldiers, sailors, marines and nurses; but the applicable phrase limits those who would qualify to those serving with the navy or marines or those on combatant ships. If the latter is controlling, then the claimant would not be eligible because he was in the Coast Artillery, a branch of the army. Nor does it appear that he served on a combatant ship.

This same inconsistency in phraseology is found in Iowa Code 427.3 (2), (1958):

> "427.3 Military service -- exemptions. The following exemptions from taxation shall be allowed:
>
> " * * * .
>
> "2. The property, not to exceed eighteen hundred dollars in taxable value, and poll tax of any honorably discharged soldier,

> sailor, marine or nurse of the war with Spain, Tyler Rangers, Colorado volunteers in the war of the rebellion, 1861 to 1865, Indian wars, Chinese relief expedition or the Philippine insurrection."

In Cress v. State Tax Commission, 244 Iowa 974, 58 N.W. 2d 831, the Iowa Supreme Court said at page 833 of the Northwest Reporter:

> "It may be noted in passing that the statute seems to create two classes of exemptions, or perhaps it should be said two categories which form the basis for exemptions: One, service in a certain conflict; and two, service in a certain unit. Thus, in section 427.3, we find listed the war with Spain, the Indian wars, and the Philippine insurrection, where the determining factor is the war itself. Also listed are the Chinese relief expedition, Tyler Rangers, and the Colorado volunteers in the war of the rebellion. Here the definitive basis is service in a particular unit or group of units. In the latter case, of course only service in the particular organization or expedition would qualify."

It appears to us that the Court in so saying, is holding that the introductory phrase regarding soldiers, sailors, marines and nurses, is not controlling where the phrase granting the exemption limits the exemption to a particular unit or units. The Court in this case also said:

> " * * * the taxpayer claiming an exemption is held to strict proof that he comes within the statute."

We feel that the Nicaraguan Campaign is in this "particular unit" rule and that in determining to whom the exemption applies, we should consider only the phrase:

> " * * * second Nicaraguan campaign with the navy or marines in Nicaragua or on combatant ships 1926-1933, * * *."

Therefore, since the claimant in your question served in the Philippines and not in the Nicaraguan Campaign, we do not feel he qualifies for the exemption.

Respectfully,

William E. Adams
Assistant Attorney General

WEA/bjf

TAXATION: Property: Exemption: Church owned farm, from which soil bank payments are received, is not exempt from property tax. (Adams to Martin, Keokuk Co. Atty, 1-17-61) # 61-1-11

January 17, 1961

427.1

Mr. J. Leo Martin
Keokuk County Attorney
P.O. Box 273
Sigourney, Iowa

Dear Mr. Martin:

This will acknowledge receipt of your letter of November 21, 1960, wherein the following question was submitted:

> "On July 26, 1957, one N. J. Peiffer died a resident of Keokuk County. In his Last Will and Testament, he left the Saints Peter and Paul Church of this County, eighty acres of land, providing that they could not sell or encumber the same prior to the year 2000. The Church acquired possession of this land March 1, 1958. Presently it is in the Soil Bank under the usual provisions. However, I am enclosing herewith a copy of the Conservation Reserve Contract in regard to the same for your convenience. The question has now arisen as to whether or not the income derived from this property is exempt to the Church under the provisions of Section 427.1(9)."

The statute involved is Section 427.1(9), Code of Iowa (1958), which reads as follows:

> "427.1 Exemptions. The following classes of property shall not be taxed:
>
> "* * *.
>
> "9. Property of religious, literary, and charitable societies. All grounds and buildings used by literary, scientific, charitable, benevolent, agricultural, and religious institutions and societies solely for their appropriate objects, not exceeding three hundred twenty acres in extent and not leased or otherwise used with a view to pecuniary profit. All deeds or leases by which such property is held shall be filed for record before the property herein described shall be omitted from the assessment."

Applicable also to the problem are 1923-24 A.G.O. 389; 1938 A.G.O. 176, plus numerous letter opinions from this office.

The only possible distinguishing feature between those two opinions above cited and this one is that the money coming to the church comes from soil bank payments rather than from private individuals leasing the land.

In this regard, the 1923-24 Opinion, supra, quotes Neugent v. Dilworth, 95 Iowa 49, at page 52 and again at page 53, as follows:

> "The plaintiff invests the money in an edifice and devotes it to religious purposes. That move has taken the money, or the property that stands for it, out of the list of assessable property, but it has made no change with the lots. That is the kind of devotion the law contemplates. It means that the property is to be used in the way of occupancy for the appropriate objects of the institution or church, and not as the means of securing funds for the erection of a church."

> "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 of the objects of the church, within the meaning of the law, is limited, and not general."

We feel that this language shows that this difference in the direct source of the money is immaterial.

As further substantiating this, we cite a letter opinion dated December 18, 1953, to the County Assessor of Woodbury County.

> "If a church purchases eighty (80) acres of land and farms it by volunteer labor furnished by the congregation, and the income will be devoted entirely to the use of the church, except for the amount required to pay the mortgage, will the property be exempt from taxation under the circumstances?

"You are advised that the statute provides that 'all grounds and buildings used by * * * *, religious institutions, * * * *, solely for their appropriate objects, * * * *, and not * * * otherwise used with a view to pecuniary profit' are exempt. The foregoing statute relates to the use of property for church purposes and in this case the property is not being so used but is used with a view to pecuniary profit--such use would not be used for church purposes. The Attorney General's office has heretofore held that under such circumstances the property would not be entitled to an exemption and the reasons are stated in 223 Iowa 341, at pages 344 and 346."

We feel that the above authorities are conclusive on the matter that the eighty-acre farm left to Saints Peter and Paul Church is not exempt under Section 427.1(9).

Respectfully,

William E. Adams
Assistant Attorney General

WEA:fs

COURTS: Marriages -- Under Section 559.10, judges of police courts cannot solemnize marriages. (Rehmann to Carroll, Union Co Atty 1-25-61) #61-1-13

January 25, 1961

Mr. E. L. Carroll
Union County Attorney
Creston, Iowa

Dear Mr. Carroll:

Reference is made to a letter referred to this office by Mr. Marshall F. Camp under the date of January 17, in which was stated the following:

> "Just at the end of 1960 while I was still County Attorney Elmer L. Hunt asked me to ask for an Opinion of the Attorney General as to whether the Judge of a Police Court could solemnize marriages....
>
> "The situation is this: Mr. Hunt was a Justice of the Peace in Creston up to January 1st. He was also a Police Court judge for Creston under an ordinance establishing a police court as provided in Section 367.1. He no longer is a Justice of the Peace, but he is the judge of the police court.
>
> "Section 595.10 in naming judges who may solemnize marriages fails to mention a judge of a police court."

In reply thereto we advise as follows:

Your attention is directed to section 559.10, Code 1958, which provides, to wit:

> "Who may solemnize. Marriages must be solemnized by:
>
> "1. A justice of the peace, or the mayor of the city or town wherein the marriage takes place.
>
> "2. Some judge of the supreme, district, superior, or municipal court of the state.
>
> "3. Some minister of the gospel, ordained or licensed according to the usages of his denomination."

The statute is specifically clear as to those persons who are entitled to solemnize marriages in this state. Under the doctrine of expressio unius est exclusio alterius, the statute specifically excludes a police court judge as contemplated in section 367.1, Code 1958.

We, therefore, are of the Opinion that a judge of the police court cannot solemnize marriages in this state.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:smw

SCHOOLS: Officers - A person elected to the county board of supervisors while being a member of a school board, does not create any incompatibility until a person is qualified under Section 63.1, which automatically creates a vacancy in the first office held by the person. (Rehmann to Barlow, Palo Alto Co Atty, 2-21-61)

February 21, 1961

Mr. Charles H. Barlow
Palo Alto County Attorney
Emmetsburg, Iowa

Dear Mr. Barlow:

Reference is made to your letter of February 1, in which you state the following:

> "A member of one of the local Palo Alto County School Boards was elected to the County board of Supervisors on November 8, 1960, to take office on the second secular day of January, 1962.
>
> "I would appreciate an opinion as to whether or not membership on a local School Board and on the County Board of Supervisors would be compatible offices. Also, I would like to know as to whether or not the fact that the person would not take office as County Supervisor until January of 1962, would present incompatibility at the present time."

In reply thereto, we advise as follows:

Enclosed please find a Thermo-Fax copy of a letter under the date of March 25, Rehmann to Poston, Wayne County Attorney, which holds that the Board of Directors of a school district and a member of the Board of Supervisors of a county are incompatible. The basic rule which sets out the test of incompatibility is found in State v. Anderson, 155 Iowa 271, at page 273.

With regard to when the incompatibility arises, your attention is again directed to the Anderson case in which the Court held as follows:

61-2-14

"It is a well-settled rule of common law that if a person, while occupying one office accepts another incompatible with the first, he ipso facto vacates the first office, 'and his title thereto is thereby terminated without any other act or proceeding.'"

The acceptance of office generally entails the qualification for such office which is prescribed in Chapter 63, Code 1958. 42 Am. Jur., PUBLIC OFFICERS, Section 78, page 940. Therefore, the person holding office as a member of a school board does not vacate that position until he qualifies as a member of the County Board of Supervisors in January, 1962.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:smw
Encl

TAXATION: Moneys and Credits: In a land contract, where $5,000.00 is paid in October of 1959, $5,000.00 in March of 1960, and $5,000.00 in March of 1961, with interest payable on the last $5,000.00 only, the $5,000.00 paid in March of 1960, is exempt by virtue of Section 429.4, Code of Iowa (1958).

(Gill to Strack, Grundy Co. Atty, 2-3-61)

February 3, 1961

T. C. Strack
Grundy County Attorney
Grundy Center, Iowa

Dear Mr. Strack:

This will acknowledge your request for an opinion dated October 10, 1960, in which you asked the following questions:

> "Customarily, in Grundy County, real estate contracts for the sale of farm real estate provide that the purchaser shall receive possession on March 1, and that interest on the unpaid balance due under the terms of the contract shall commence on March 1. Such contracts are frequently executed in the fall of the year so that on January 1 of the following year there is a debt due from the contract purchaser to the contract seller.
>
> "Assuming a real estate contract was executed on the 1st day of October, 1959, with a down payment on the date of execution of $5000.00 and a balance due thereafter of $10,000.00, such balance to be paid $5000.00 on the 1st day of March, 1960, and $5000.00 on the 1st day of March 1961. The purchaser under the contract is to take possession of the real estate on March 1, 1960, and interest on the unpaid balance is to commence on March 1, 1960, and be payable on March 1, 1961. Under the terms of such a contract, there would be no interest payable to the seller for the period from the 1st day of October, 1959, to the 1st day of March, 1960; but, under such a contract, there would be a valid debt existing on January 1, 1960. Under these assumed facts, would the debt created by the contract be tax exempt as a noninterest-bearing credit on January 1, 1960, under the provisions of the second paragraph of Section 429.4 of the 1958 Code?"

The applicable Code provisions are Sections 429.1 and 429.4, Code of Iowa (1958):

61-2-1

"429.1 'Credits' defined. The term 'credit', as used in this chapter, includes every claim or demand due or to become due for money, labor, or other valuable thing, every annuity or sum of money receivable at stated periods, and all money or property of any kind secured by deed, title bond, mortgage, or otherwise; but pensions of the United States or any of them, or salaries, or payments expected for services to be rendered, are not included in the above term."

"429.4 Deductions from moneys and credits. In making up the amount of moneys and credits, corporation shares or stocks which any person is required to list, to have listed or assessed, including actual value of building and loan shares, he will be entitled to deduct from the actual value thereof the gross amount of all debts in good faith owing by him, and in addition thereto an amount of five thousand dollars.

"All noninterest-bearing moneys and credits and accounts receivable shall be tax exempt, but the five thousand dollar exemption as set out in this section shall not apply in the event such noninterest-bearing moneys and credits and accounts receivable exempted herein shall exceed five thousand dollars and if less than five thousand dollars when added to such noninterest-bearing moneys and credits and accounts receivable."

It should first be noted that, what we feel was a very diligent search, has failed to produce any case in Iowa or elsewhere that is remotely on point. Nor did we find a statute even roughly comparable to the one we have in Iowa. Therefore, we must simply construe the statute involved using the general rules of statutory construction.

These are three rules which are necessary to this opinion:

1. "In the construction and interpretation of tax statutes, the primary consideration, as it is with respect to statutes generally, is to ascertain and give effect to the intention of the legislature. Tax statutes are to receive a reasonable construction with a view to carrying out their purpose and intent." 51 Am. Jur. 361.

2. "The intention of the legislature with respect to tax statutes must, as in the case of statutes generally, be ascertained from the language of the act." 51 Am. Jur. 361.

3. "In the application to the interpretation of tax statutes of the general principle that where there are two possible constructions of a statute, that one will be preferred which does not produce unfair, arbitrary, or oppressive results, it has been held that taxation is an intensely practical matter, and laws in respect of it should be construed and applied with a view of avoiding, so far as possible, unjust and oppressive consequences." 51 Am. Jur. 365.

Applying these rules and assuming the entire purchase price is not adjusted to include interest from October 1, 1959, we believe the following is a correct application of the statute to the facts of your problem.

The $5,000.00 paid in October, 1959, is money--the buyer having disposed of it, has no interest left in it for purposes of the moneys and credits tax. But, this $5,000.00 will be taxable to the seller, providing he still has it on January 1, 1960, and that it is bearing interest on that date and assuming that the $5,000.00 deduction allowed in Section 429.4 is not applicable. On January 1, 1960, the buyer will owe the seller $10,000.00, $5,000.00 payable on March 1, 1960, and $5,000.00 payable on March 1, 1961. In regard to the $5,000.00 payable on March 1, 1960, it is a debt of the buyer. Section 429.4 provides for a deduction of all debts from the amount of all credits for purposes of the moneys and credits tax without regard to whether or not such debts are interest bearing. Therefore, as to the buyer, this $5,000.00 is a deductible debt. As to the seller, this $5,000.00 is a credit as defined by Section 429.1. However, the second paragraph of Section 429.4, provides for a deduction of non-interest bearing credits from the tax imposed by Chapter 429, Code of Iowa (1958). This $5,000.00 does not draw interest, according to the problem you have presented, and so it would qualify as a non-interest bearing credit in the hands of the seller. It should be noted, however, that this deduction is limited by the first paragraph of Section 429.4.

Lastly, we consider the $5,000.00 payable on March 1, 1961. As to the buyer, it is a debt on January 1, 1960, and, therefore, deductible for purposes of taxation to him. To the seller, this $5,000.00 is an interest bearing credit and, therefore, is taxable to him as a credit.

Very truly yours,

Gary S. Gill
Special Assistant Attorney General

GSG/WEA/bjf

CONSERVATION: County Conservation Boards -- Section 111A.4(3), Code 1958, requires only final plans, and not preliminary and intermediate plans, be submitted to the State Conservation Commission for approval. (Craig to Dietz, St Rep, 2-8-61)

February 8, 1961

Honorable Riley Dietz
Representative, Scott County
House of Representatives
L O C A L

Dear Mr. Dietz:

This will acknowledge receipt of your recent opinion request, in which you ask whether section 111A.4(3), 1958 Code of Iowa, requires county conservation boards to obtain the approval of the State Conservation Commission in order to authorize preliminary, intermediate, and final general development plans. Specifically, you inquire whether the State Conservation Commission must approve individual contracts and plans or give step-by-step approval to each phase of an operation.

You enclose a copy of a letter opinion written July 22, 1960, from James Gritton to Martin Leir, Soott County Attorney. In that opinion, Mr. Gritton states that the authorization by a county conservation board for preparation of plans for the construction of a lake and park is not within the purview of section 111A.4(3). Mr. Gritton further states that plans and reports should be submitted to the State Conservation Commission only when prepared in final form and adopted by the county conservation board.

On the basis of the opinion above referred to, it is my opinion that section 111A.4(3), 1958 Code of Iowa, does not require county conservation boards to obtain the approval of the State Conservation Commission for individual contracts or for preliminary or intermediate plans, but does require that final plans be submitted for such approval.

Very truly yours,

FRANK CRAIG
Assistant Attorney General

FC:bl

61-2-2

State OFFICERS AND DEPARTMENTS, Materials and Supplies, Under Sections 73.1 and 73.7 all purchases should be Iowa products "without additional cost" and all thing being equal the lowest bid should be accepted. (Bump to Knowles, St Rep 2-14-61)

Honorable Paul Knowles
House of Representatives
L O C A L

Dear Mr. Knowles:

This is in response to your letter of February 3, 1961 in which you set forth the following:

> "I would like an opinion as to how much latitude state departments have in awarding contracts for materials and supplies to Iowa manufacturers and producers. I understand that the policy has been to grant the contract to the lowest bidder regardless of how close an Iowa producer might be, and regardless of the loss to the state and its political subdivisions of the tax money that would be generated had the contract been awarded to Iowa producers.
>
> I respectfully request your opinion on the things that can be considered in granting the contract between a resident and a non-resident producer.
>
> I would further like your opinion as to whether any conditions of delivery or repurchase of scrap can be considered, and finally, as to what soncideration should be given to taxes generated by the placing of business in Iowa and in determining if there is a "loss" to the state in accepting a higher bid from an Iowa producer."

The substance of your inquiry seems to be (1) whether an Iowa producer can be favored over an out of state producer if the latter's bid is lower and, if so, (2) what factors can be considered to justify favoring the Iowa producer.

Initially, I would direct your attention to Chapter 73 (Iowa Code, 1958) which sets forth certain instances in which Iowa products, provisions and coal must be preferred over the same items from other jurisdictions. Section 73.1 provides:

> "Preference authorized--conditions. Every commission, board, committee, officer or other governing body of the state, or any . . . purchasing agent . . . for such. . . governing

61-2-5

> body shall use only those products and provisions grown and coal produced within the state of Iowa, when they are found in marketable quantities in the state and are of a quality reasonably suited to the purpose intended, and can be secured without additional cost over foreign products or products of other states."

The answer to your question might appear easily stated by referring to the words, "without additional cost," set forth in the above section. In other words, did the legislature intend that the "lowest bid" should be accepted in all instances. We think that this was not the intention nor has it been the interpretation that has been applied. Specifically, we refer to §73.7 (Iowa Code, 1958), pertaining to purchases of coal in excess of $300.00, where it is provided:

> "73.7. . . unless the purchasing body shall determine that the general good of the state, including the best interests of the taxpayer and the employment of labor. . . the contract shall be let to the lower responsible bidder. . ."

Thus it appears evident that had the legislature intended to circumscribe the discretionary power of purchasing officers in the general preference requirement (s73.1 supra) it would have required awarding the contract to the "lowest responsible bidder" in all events. See generally: 27 ALR2d 319.

It is not questioned that a qualitative judgment of the product is to be made by the purchasing agent, nor is the low bidder, even though a reliable concern, exclusively favored. 1934 Ops. Atty Gen. p. 371. It has also been opined, in reference to coal purchases, that where quality is the same the contract must be awarded to the lowest bidder. 1934 Ops. Atty. Gen. p. 318. (This opinion was written prior to the enactment of the quoted portion of §73.7 set forth above.)

The ultimate question for determination is what discretion, if any, is vested in purchasing agents to favor a higher Iowa bidder where there is no discernable difference in quality over the items offered by a foreign supplier.

Where there is a general statute and a special statute affecting the same subject, the special statute is considered an exception to the general statute and its provisions govern in case of conflict. Iowa Mutual Tornado Ins. Ass'n. v. Fischer, 245 Iowa 951, 65 NW2d 162 (1954). Thus, it must be determined in each instance whether a specific statute governs purchases for the governmental agency involved.

As an example, reference is directed to §397.18 (Iowa Code, 1958) (Public utility plants) where it is provided:

> ". . . the governing body. . . shall have the power to adopt such . . . propositions, or bids. . . as they shall deem to be in the best interest of the municipality."

In commenting on this section in Interstate Power Co. v. McGregor, 230 Iowa 42, 296 NW 770, the Iowa Court stated at page 51:

> "By this provision, the legislature has vested a judicial discretion in the governing officers of the municipality. The amount of the bid is, of course, a matter for careful and weighty consideration, but other considerations may tip the balance in favor of a higher bid."

Further reference is made to §218.52 (Iowa code, 1958) (Government of Institutions) where it is provided:

> "Supplies--competition. The board shall, in the purchase of supplies, afford all reasonable opportunity for competition, and shall give preference to local dealers and Iowa producers when such can be done without loss to the state."

Quite obviously the words, "without loss to the state," convey a broader meaning than the "actual dollar gain or loss" on any given transaction. In this respect the board of control is required to make a judicial determination of what is a "loss to the state."

It would be within the discretion of the board of control to consider the tax loss to the state if a foreign firm were favored over a slightly higher bid of an Iowa firm in the purchase of supplies. Similarly, more favorable delivery terms offered by a higher bidder, if considered important by the purchaser, are a proper subject for consideration by the purchaser. Also, if the higher bidder were to offer a better repurchase price of scrap than a lower bidder had offere, this would be an element to consider in awarding the contract.

It is implicit, however, that there can be no arbitrary classification by which one class of bidder is to receive no consideration so long as a satisfactory bidder can be found in the first class. Miller v. City of Des Moines, 143 Iowa 409. (1909).

No exact listing can be made of the elements to be considered in awarding bids. When discretion is to be exercised in circumstances such as these, the discretion is particularly broad and will not be interfered with by the courts if exercised on a rational basis, without fraud or palpable abuse. 43 Am. Jur., Public Works, §41.

Under the general preference section, (§73.1, supra) with the exception of coal, (§73.7, supra), all purchasing agencies must prefer Iowa products and provisions when they can be secured "without additional cost." All things being equal, the lowest bid should be accepted. 1934 Ops. Atty. Gen. p. 371. When the purchasing function is further clarified by statute, as for coal (§73.7, supra); or for municipal public utility plants (§397.18, supra), or for government institutions (§218.52, supra) the more explicit directions must be followed. In these latter cases a judicial and discretionary determination must be made but not entirely on the basis of the lowest bid. The standard has been established by the legislature and it is within this standard that the various agencies must prescribe the policy.

Respectfully submitted,

W. N. BUMP

WNB:gh

STATE OFFICERS AND DEPARTMENTS: Awarding contracts -- All purchasing agencies must prefer Iowa products and provisions when they can be secured without additional cost except where more explicit directions are set forth which require a judicial and discretionary determination to be made by the agencies. A qualitative judgment of the product or provision is to be made in all cases. (Bump to Knowles, St. Rep., 2/15/61) #61-4-29

February 15, 1961

Honorable Paul Knowles
House of Representatives
L O C A L

Dear Mr. Knowles:

This is in response to your letter of February 3, 1961 in which you set forth the following:

> "I would like an opinion as to how much latitude state departments have in awarding contracts for materials and supplies to Iowa manufacturers and producers. I understand that the policy has been to grant the contract to the lowest bidder regardless of how close an Iowa producer might be, and regardless of the loss to the state and its political subdivisions of the tax money that would be generated had the contract been awarded to Iowa producers.
>
> "I respectfully request your opinion on the things that can be considered in granting the contract between a resident and a non-resident producer.
>
> "I would further like your opinion as to whether any conditions of delivery or repurchase of scrap can be considered, and finally, as to what consideration should be given to taxes generated by the placing of business in Iowa and in determining if there is a 'loss' to the state in accepting a higher bid from an Iowa producer."

The substance of your inquiry seems to be (1) whether an Iowa producer can be favored over an out-of-state producer if the latter's bid if lower and, if so, (2) what factors can be considered to justify favoring the Iowa producer.

61-4-29

Initially, I would direct your attention to Chapter 73 (Iowa Code, 1958) which sets forth certain instances in which Iowa products, provisions and coal must be preferred over the same items from other jurisdictions. Section 73.1 provides:

> "Preference authorized -- conditions. Every commission, board, committee, officer or other governing body of the state, or any . . . purchasing agent . . . for such . . . governing body shall use only those products and provisions grown and coal produced within the state of Iowa, when they are found in marketable quantities in the state and are of a quality reasonably suited to the purpose intended, and can be secured without additional cost over foreign products or products of other states."

The answer to your question might appear easily stated by referring to the words, "without additional cost," set forth in the above section. In other words, did the legislature intend that the "lowest bid" should be accepted in all instances. We think that this was not the intention nor has it been the interpretation that has been applied. Specifically, we refer to section 73.7 (Iowa Code, 1958), pertaining to purchases of coal in excess of $300, where it is provided:

> "73.7 . . . unless the purchasing body shall determine that the general good of the state, including the best interests of the taxpayer and the employment of labor . . . the contract shall be let to the lower responsible bidder . . ."

Thus it appears evident that, had the legislature intended to circumscribe the discretionary power of purchasing officers in the general preference requirement (section 73.1, supra), it would have required awarding the contract to the "lowest responsible bidder" in all events. See generally: 27 A.L.R. 2d 319.

It is not questioned that a qualitative judgment of the product is to be made by the purchasing agent, nor is the low bidder, even though a realiable concern, exclusively favored. 1934 Ops. Atty. Gen. p. 371. It has also been opined, in reference to coal purchases, that where quality is the same the contract must be awarded to the lowest bidder. 1934 Ops. Atty. Gen. p. 318. (This opinion was written prior to the enactment of the quoted portion of section 73.7 set forth above.)

The ultimate question for determination is what discretion, if any, is vested in purchasing agents to favor a higher Iowa bidder where there is no discernable difference in quality over the items offered by a foreign supplier.

Where there is a general statute and a special statute affecting the same subject, the special statute is considered an exception to the general statute and its provisions govern in case of conflict. Iowa Mutual Tornado Ins. Ass'n. v. Fischer, 245 Iowa 951, 65 N.W. 2d 162 (1954). Thus, it must be determined in each instance whether a specific statute governs purchases for the governmental agency involved.

As an example, reference is directed to section 397.18, Iowa Code, 1958 (Public utility plants), where it is provided:

> " . . . the governing body . . . shall have the power to adopt such . . . propositions, or bids . . . as they shall deem to be in the best interest of the municipality."

In commenting on this section, in Interstate Power Co. v. McGregor, 230 Iowa 42, 296 N.W. 770, the Iowa Court stated, at page 51:

> "By this provision, the legislature has vested a judicial discretion in the governing officers of the municipality. The amount of the bid is, of course, a matter for careful and weighty consideration, but other considerations may tip the balance in favor of a higher bid."

Further reference is made to section 218.52 (Iowa Code, 1958) (Government of Institutions), where it is provided:

> "Supplies -- competition. The board shall, in the purchase of supplies, afford all reasonable opportunity for competition, and shall give preference to local dealers and Iowa producers when such can be done without loss to the state."

Quite obviously the words, "without loss to the state," convey a broader meaning than the "actual dollar gain or loss" on any given transaction. In this respect, the board of control is required to make a judicial determination of what is a "loss to the state."

It would be within the discretion of the board of control to consider the tax loss to the state if a foreign firm were favored over a slightly higher bid of an Iowa firm in the purchase of supplies. Similarly, more favorable delivery terms offered by a higher bidder, if considered important by the purchaser, are a proper subject for consideration by the purchaser. Also, if the higher bidder were to offer a better repurchase price of scrap than a lower bidder had offered, this would be an element to consider in awarding the contract.

It is implicit, however, that there can be no arbitrary classification by which one class of bidder is to receive no consideration so long as a satisfactory bidder can be found in the first class. Miller v. City of Des Moines, 143 Iowa 409. (1909).

No exact listing can be made of the elements to be considered in awarding bids. When discretion is to be exercised in circumstances such as these, the discretion is particularly broad and will not be interfered with by the courts if exercised on a rational basis, without fraud or palpable abuse. 43 Am. Jur., Public Works, section 41.

Under the general preference section, section 73.1, supra, with the exception of coal (section 73.7, supra), all purchasing agencies must prefer Iowa products and provisions when they can be secured "without additional cost." All things being equal, the lowest bid should be accepted. 1934 Ops. Atty. Gen. p. 371. When the purchasing function is further clarified by statute, as for coal (section 73.7, supra), or for municipal public utility plants (section 397.18, supra), or for government institutions (section 218.52, supra), the more explicit directions must be followed. In these latter cases, a judicial and discretionary determination must be made, but not entirely on the basis of the lowest bid. The standard has been established by the legislature and it is within this standard that the various agencies must prescribe the policy.

Respectfully submitted,

W. N. BUMP

WNB:gh

MOTOR VEHICLES: Auxiliary truck wheels -- trailers -- Auxiliary truck wheels pinned to straight truck need not be registered as a trailer, but must be considered in computing truck registration fee. (1958 Code of Iowa, sections 321.119, 321.123, 321.1(9), 321.1(24).) (Craig to Cady, Franklin Co Atty, 2-21-61)

February 21, 1961

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

Dear Mr. Cady:

This will acknowledge receipt of your recent opinion request, in which you state:

"I am requesting an official opinion from your office concerning Section 321.123 of the 1958 Code of Iowa relating to the licensing of trailers.

"There is an individual who has a dual two wheel temporary trailer which he rolls under the rear of a truck where it is chained and pinned and the function of the trailer is to support the rear end of the truck and give additional support to the load hauled thereon. The trailer is completely separate from the truck and its only connection with the truck is the fact that it is pinned thereto.

"The question which I have is whether or not this is a trailer under the provisions of 321.123 of the 1958 Code of Iowa so that the owner has to pay the trailer rate or does this come under Section 321.119 requiring him to pay the truck registration fee, since the excess over the nine tons is carried on the trailer?

"First of all, the trailer is designed and particularly adapted for the purpose of carrying part of the load of a truck and is not designed to carry loads in itself. The trailer is used only part of the time and it is pinned to the truck part of the time, and the rest of the time the truck is used as a straight truck.

"The trailer unit does have brakes."

61-2-8

Section 321.119, 1958 Code of Iowa, sets out the registration fees for trucks with pneumatic tires. Section 321.123, 1958 Code of Iowa, sets out the registration fees for trailers. Neither section defines the type of vehicle to which it pertains.

Section 321.1(9), 1958 Code of Iowa, defines the term "trailer" for the purposes of Chapter 321, thus:

> "'Trailer' means every vehicle without motive power designed for carrying persons or property and for being drawn by a motor vehicle and so constructed that no part of its weight rests upon the towing vehicle."

The piece of equipment you describe is designed and adapted for carrying part of the load of a truck, and is not designed to carry persons or property itself. This piece of equipment is pinned to the truck, not drawn by it, and all of its weight presumably is upon the truck. It is therefore my opinion that the piece of equipment you describe is not a trailer, and thus is not covered by Section 321.123, 1958 Code of Iowa.

The truck registration fee set out in section 321.119, 1958 Code of Iowa, is based upon gross weight; Section 321.1(24), 1958 Code of Iowa, defines gross weight thus:

> "'Gross weight' shall mean the empty weight of a vehicle plus the maximum load to be carried thereon."

The weight of any equipment that is an integral part of a truck is considered in computing the gross weight. Crown Concrete Company v. Conkling, 247 Iowa 609, 75 N.W. 2d 351.

In 1952 Opinions of the Attorney General 34, it is stated that equipment used with a truck for the transportation of property is considered part of the truck. In 1950 Opinions of the Attorney General 25, it is stated that any piece of equipment fastened to and used with a truck for the transportation of property is considered part of the truck, and is included in computing the license fee for the truck.

Therefore, based on the above authority, it is my opinion that auxiliary truck wheels pinned to a straight truck should be included in computing the truck's registration fee.

Very truly yours,

FRANK CRAIG
Assistant Attorney General

FC:sw

MOTOR VEHICLES: State parks -- (1) Conservation Commission has not promulgated traffic regulations for State Parks, (2) Assessment of points under Chapter 222, Acts of 58th G.A., within discretion of Department of Public Safety, (3) Jurisdiction of Conservation Commission over public highways through State Parks not exclusive. (1958 Code of Iowa, Sections 80.9(2)(b), 306.1, 306.2, 306.3, Chapters 17A, 321, Chapter 222 of the Acts of the 58th General Assembly, and 1958 Iowa Departmental Rules, July 1959 Supplement, 17.)
(Craig to Charlton, Delaware Co Atty, 2-21-61)

February 21, 1961

Mr. Wm. Stuart Charlton
Delaware County Attorney
Manchester, Iowa

Dear Mr. Charlton:

This will acknowledge receipt of your opinion request in which you state:

> "Could you advise this office of any traffic regulations promulgated and presently effective in State Parks pursuant to Iowa Code Section 111.35 by the State Conservation Commission other than the speed limit as set out in 111.36?
>
> "Please further advise as to whether violations of such regulations or 111.36 would constitute driving offenses upon which the Department of Public Safety could assess points.
>
> "A reference to authorities with copies of same regarding the former and an informal opinion as to latter at your early convenience would be appreciated. Do you not also feel that the jurisdiction given to the Conservation Commission is probably not exclusive and charges for violation of state statutes could be upheld?"

Your letter presents two questions:

1. Has the State Conservation Commission promulgated traffic regulations for State Parks, pursuant to Section 111.35, 1958 Code of Iowa?

2. Would a violation of the type of traffic regulations referred to in question one, if there are in fact any such regulations, or a violation of Section 111.36, 1958 Code of Iowa,

61-2-9

constitute an offense for which the Department of Public Safety could assess points?

Under the provisions of Chapter 17A, 1958 Code of Iowa, rules and regulations of general application, promulgated by state administrative agencies, are to be printed in the Iowa Departmental Rules. I have examined 1958 I.D.R., and the semi-annual supplements thereto, through and including July, 1960, and do not find therein any traffic rules or regulations for roads in State Parks. Therefore, I conclude that the answer to question number one is in the negative.

Chapter 222, Acts of the 58th General Assembly, provides that the Commissioner of Public Safety may promulgate a point system to determine when to suspend the license of an operator or chauffeur. Chapter 222 authorizes the Commissioner to change the point system, as experience makes necessary or desirable. The point system rules and regulations promulgated by the Commissioner, which are found at 1958 I.D.R., July 1959 Supplement, 17, state that the system shall be used as a guide. Thus, the decision as to whether to employ a point system, and how it is to be used, is placed in the hands of the Commissioner. It is therefore my opinion, in answer to question number two, that the decision as to whether points should be assessed for traffic convictions in such cases must be made by the Commissioner.

Your letter also asks if this office does not feel that the jurisdiction of the Conservation Commission is not exclusive over the roads in State Parks. Since you do not request an opinion on this point, no opinion is given. However, I believe Sections 80.9(2)(b), 306.1, 306.2, 306.3, 1958 Code of Iowa, are pertinent in this regard.

Very truly yours,

FRANK CRAIG
Assistant Attorney General

FC:sw

CITIES AND TOWNS

Park Board -- The Park Board of the City of Clinton, Iowa, has the power to exchange certain real estate which it owns, for certain property which the Clinton Community School District owns, and such exchange is not within the provisions of Section 278.1(2), Code of 1958.

February 21, 1961

Hon. David O. Shaff

Senate Chamber

Statehouse

L O C A L

My dear Senator:

Yours of the 7th inst. addressed to the Attorney General has been handed to me for answer. You state:

> "A number of years ago, the Park Board of the City of Clinton acquired certain real estate by outright conveyance, there being no reservations in the title. For the purpose of acquiring a site for the construction of a new school building, the Clinton Community School District would like to exchange some property which it already owns, for the Park Board site. Keeping in mind the provisions of Code Sections 297.1, 363.4, 409.46 and 409.47, will you please furnish an opinion as to the applicability of such code sections and particularly as to the necessity of complying with the provisions of Code sections 409.46 and 409.47. Since those code sections refer to towns and not cities and towns, we assume that such code sections do not apply to the proposed exchange and that the exchange may be made under the provisions of Chapter 370 of the code."

In reply thereto I would advise that upon review of the statutes designated by you, I am of the opinion that the Park Board of the City of Clinton has the power to make the proposed exchange.

However, insofar as the School District is concerned, I would refer you to Section 278.1(2), which provides as

61-2-10

follows:

> "278.1 Enumeration. The voters at the regular election shall have power to:
> 1. * * *
> 2. 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, provided, however, that nothing herein shall be construed to prevent the sale or lease of real or other property by the board of directors without an election to the extent authorized in section 297.22.
> * * *"

Whether an exchange is within the term "disposition" as used in the foregoing statute, has not been the subject of a formal opinion, but informally it has been our view that "exchange" is not included in the term, and therefore would not require submission of an exchange transaction to the voters.

Very truly,

OSCAR STRAUSS

First Assistant Attorney General

OS:mmh4

SCHOOLS :

State Board Expenses -- A member of the State Board of Public Instruction who is a resident of Des Moines, is entitled to payment of expenses incurred in Des Moines as elsewhere. (Strauss to Johnston, Supt. Pub. Inst. 2-21-

Sec 257.6

February 21, 1961

STATE DEPARTMENT OF PUBLIC INSTRUCTION

State Office Building

Des Moines 19, Iowa

L O C A L

Paul F. Johnston, Superintendent

Dear Mr. Johnston:

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

> "We have been advised by the State Comptroller's Office that expenses incurred by our State Board member who is a resident of Des Moines cannot be paid because of the general rule that expenses for state employees cannot be reimbursed in their city of residence.
>
> "Chapter 257, Section 6, Code of Iowa, in relation to per diem of members states: 'The members of the state board shall be allowed a per diem of fifteen dollars and their necessary travel and expense while engaged in their official duties.'
>
> "We see no reference in the statute that would indicate that actual expenses incurred in the City of Des Moines by the resident Board member should be excluded.
>
> "We have a State Board meeting once a month in which it is necessary for the resident Board member to many times take a taxi to and from the meeting, and usually the Thursday meeting starts late in the afternoon and goes over the dinner hour which requires her to buy her evening meal.
>
> "It is our contention that she is not a regular employ of the State but is an elected Board member and does not incur expense in the City of Des Moines while on official business of the State Board. We are requesting

61-2-11.

> an official opinion on whether or not she is entitled to be reimbursed for her actual and necessary expenses brought on because of official business of the State Board regardless of where those expenses are incurred within the State.
>
> "We will appreciate your early response to this inquiry."

In reply thereto I advise that the members of the State Board of Public Instruction are not within the rule of the comptroller with respect to incurring, and the payment of, expenses in Des Moines. The statute to which you refer and exhibited does not so provide, and incorporation by interpretation of the rule would constitute legislation reserved to the Legislature. See the case of Hindman v. Reaser, 246 Iowa 1375, where, quoting from 82 C.J.S., Statutes, section 312, it is stated:

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

Thus, a member of the Board of Education resident of Des Moines, is entitled to payment of her expenses incurred in Des Moines as elsewhere.

Very truly,

OSCAR STRAUSS

First Assistant Attorney General

OS:mmh4

MOTOR VEHICLES: Operator's License -- Two color System - Commissioner of Public Safety may, by administrative order, adopt a system whereby operator's and chauffeur's licenses issued to persons under 21 years of age are a different color than those issued to persons over 21 years of age if Commissioner believes such program requisite or necessary to enforce laws Department of Public Safety enforces. (321.8, 321.189). (Craig to Pesch, Comm. Pub Saf, 2-21-61)

February 21, 1961

Mr. Carl H. Pesch
Commissioner, Department of Public Safety
L O C A L

Dear Mr. Pesch:

This will acknowledge receipt of your recent opinion request, in which you state:

> "This office has been approached regarding the possibility of issuing different color operators and chauffeurs licenses as follows: For those licenses of persons under the age of 21 years, a different colored license would be issued from those licenses of persons over 21 years of age.
>
> "It has been suggested that this Department adopt this two color program and put the same in effect by administrative act. My questions are these:
>
> "1. May this be done by administrative act, and
>
> "2. Does Section 321.8 and Section 321.189 above referred to permit this procedure?"

The Department of Public Safety is, of course, an administrative agency. See 33 Iowa Law Review 291, 300. Administrative agencies have only such power and authority as is clearly granted by statute or necessarily implied from powers granted by statute. Federal Trade Commission v. Raladon Co., 283 U.S. 643; City of Los Angeles v. Industrial Accident Commission of State of California, 8 Cal. App. 2d 580, 47 P. 2d 1096; Roxborough v. Michigan Unemployment Compensation Commission, 309 Mich. 505, 15 N.W. 2d 724. Therefore, in answer to your first question, it is my opinion that whether or not you can by administrative act adopt a two color program for operator's and chauffeur's licenses hinges on whether or not you

61-2-15

are given, either by a specific statute or by the necessary implication of a specific statute, the power to do so.

In answer to question two, the two sections of the 1958 Iowa Code here applicable, Sections 321.8 and 321.189, do not specifically authorize the issuance of different colored licensees. Section 321.189 requires each operator's or chauffeur's license to bear a distinguishing number assigned to the licensee, and also the licensee's full name, date of birth, occupation, sex, address, description and usual signature. No provision is made as to color. Section 321.8 requires the Commissioner of Public Safety to ". . . prescribe and provide suitable forms . . ." which are ". . . requisite or deemed necessary to carry out the provisions of this chapter and any other laws, the enforcement and administration of which are vested in the department. . ." It also makes no reference to the color of such forms.

It is a general rule that in carrying out their duties, as specified or necessarily implied by statute, administrative agencies have a certain amount of discretion, within certain limits, in the methods they employ to effectuate a statute. McLeland v. Marshall County, 199 Iowa 1232, 1238, 201 N.W. 401. As the United States Supreme Court has stated, administrative agencies have the ". . . power to fill up the details . . ." United States v. Grimaud, 220 U.S. 506, 31 S. Ct. 480, 483, 55 L. Ed. 563, 568..

In 1940 Opinions of the Attorney General 160, it is stated that the duty of the Commissioner of Public Safety to prescribe forms includes determining the kind of forms to be used. The opinion cites what is now Section 321.8, 1958 Code of Iowa, and states, at page 161:

> "The statute contemplates that registration cards must be prescribed and provided in suitable form and requires of the commissioner of motor vehicles the preparation of such form. It is, therefore, mandatory upon the commissioner to so act in accordance with the statute and with him rests the responsibility and the discretion in regard to such forms."

Thus, the Commissioner is given a certain amount of discretion in regard to determining the type of forms to use. This discretion is ministerial, of course, and must be within the limits of the statute. Schneberger v. Welfare Board, 228 Iowa 399, 291 N.W. 859. There are no statutory provisions, either

prohibiting or requiring, a two color system for operator's and chauffeur's licenses. There are, however, statutory provisions requiring the Commissioner to prescribe forms necessary to carry out the provisions of Chapter 321 and any other laws the Department of Public Safety enforces.

Therefore, on the basis of the above authority, it is my opinion that Section 321.8, 1958 Code of Iowa, authorizes the Commissioner of Public Safety to adopt, by administrative act, a two color license program, as set out above, if the Commissioner believes such two color license program is "requisite or deemed necessary" to carry out the provisions of Chapter 321 or "any other laws, the enforcement and administration of which" are vested in the Department of Public Safety.

Very truly yours,

FRANK CRAIG
Assistant Attorney General

FC:sw

TAXATION: Tax Sales; Delinquent Special Assessments: Sales of property for delinquent special assessment taxes are handled by County Treasurer and private buyers, and certifying body for the tax may bid but county not required to bid. (Sections 391.64, 65 and 66 and Section 446.19, Code of Iowa (1958)). (Gill to Bedell, Dickinson Co Atty, 2-21-61)

February 21, 1961

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

Dear Mr. Bedell:

This will acknowledge receipt of your letter of January 7, 1961, in which you submitted the following questions:

> "I have been asked by our County Treasurer to obtain your official opinion as to the methods and processes to be used in connection with delinquent special assessment taxes made for street improvements and sewers which have been certified by a city to the county tax collecting bodies. There seems to be some conflict in opinion between the various representatives of the State Auditor's office and the normal procedure followed by different County Treasurers in this respect. I would like to have your answer in regard to the following questions:
>
> 1. Should a tract of real estate be advertised and sold by the County Treasurer where there are only delinquent special assessment taxes and there are no delinquent general real estate taxes?
>
> 2. If real estate should be advertised and sold by the Treasurer on a delinquent special assessment only, does the right of the public to bid on tax sale apply to this particular property or is the certifying body the only authorized bidder?
>
> 3. If real estate should be advertised and sold for delinquent special assessment taxes and there is no public bidder, is the County obligated to bid on this property the same as for delinquent general taxes?
>
> 4. When there are both delinquent general real estate taxes and special assessment taxes, does the fact that special assessment taxes are involved change the method of sale or the right of persons to bid in any respect?"

61-2-13

The applicable statutes are:

"391.64 Tax sale. Property against which a special assessment has been levied for street improvements or sewers may be sold for any sum of principal or interest due and delinquent at any regular or adjourned tax sale, in the same manner, with the same forfeitures, penalties, and right of redemption, and certificates and deeds on such sales shall be made in the same manner and with like effect, as in case of sales for the nonpayment of ordinary taxes."

"391.65 Right of purchaser. The purchaser at such sale shall take the property charged with the lien of the remaining unpaid installments and interest."

"391.66 City as purchaser. At any such sale, where bonds have been issued in anticipation of such special taxes and interest, the city may be a purchaser, and be entitled to all the rights of purchasers at tax sales."

Also applicable is 1936 A.G.O. 260.

Your first question is answered by Section 391.64 of the 1958 Code of Iowa which states that sales made for delinquent special assessment taxes shall be made at any regular or adjourned tax sale. Therefore, the answer to question one is yes, since the County Treasurer conducts regular and adjourned tax sales.

The answer to your second question is found in Sections 391.65 and 391.66. They provide that <u>both</u> private parties and the municipal certifying body may bid.

In regard to your third question, 1936 A.G.O. 260 says that the county is <u>not</u> required to bid on property sold for delinquent special assessment taxes, so the answer to question three is no.

We would answer the fourth question in the negative, subject to the

following notation: The county is required to bid only the amount of the delinquent general tax.

Very truly yours,

Gary S. Gill
Special Assistant Attorney General

GSG:WEA:fs

CONSTITUTIONAL LAW: Conservation -- Deer hunting - House File 266 is Constitutional. (Craig to Graham, St Rep, 2-21-61)

February 21, 1961

Honorable J. W. Graham
Representative, Ida County
House of Representatives
L O C A L

Dear Mr. Graham:

This will acknowledge receipt of your recent opinion request, in which you state:

> "I am enclosing a copy of House File 266 and would appreciate the Attorney General's opinion as to the constitutionality of this bill. It would be greatly appreciated if this opinion could be forthcoming in the not too distant future."

House File 266 is entitled, "An Act to prohibit all other hunting during shotgun deer season and to provide for the free licensing of owners and tenants of land to hunt deer on such land."

This opinion is restricted to the Constitutional issues of House File 266. No opinion is requested or given on other considerations which may concern it.

It has been held by the United States Supreme Court that the title to wild game, and the power to regulate its taking, inheres in the governments of the several states. The regulation of hunting is an exercise of the soveriegnity of a state. Greer v. Connecticut, 161 U.S. 519.

The hunting of game is not a right; it is a privilege granted by a state, under the conditions the state imposes. Hanley v. Smith, 101 Ohio St. Rep. 13, 126 N.E. 2d 879. A state statute regulating hunting and the carrying of firearms on an individual's own property is Constitutional. State v. Gilletto, 98 Conn. 702, 120 A. 567.

61-2-7

The Iowa Constitution does not expressly state that individuals have a right to bear arms. The Second Amendment to the United States Constitution, which does so provide, states:

> "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

The Second Amendment does not apply to individual states. It restricts the power of the national government, and is thus not applicable here. United States v. Crinkshank, 92 U.S. 542; Presser v. Illinois, 116 U.S. 252; Miller v. Texas, 153 U.S. 535.

Therefore, on the basis of the above authority, it is my opinion that House File 266 is Constitutional.

Very truly yours,

FRANK CRAIG
Assistant Attorney General

FC:sw

SCHOOLS: Boundary change -- No boundary change can be effected unless a petition is signed by the requisite number of voters in the included portion under Section 275.12, and if the portion to be included in the boundary change is uninhabited, then such boundary change cannot be accomplished in the absence of specific statutory authority to the contrary. (Rehmann to Riley, St Rep, 2-23-61)

February 23, 1961

Honorable Tom Riley
Representative, Linn County
House of Representatives
L O C A L

Dear Mr. Riley:

This is to acknowledge receipt of your letter of February 22, in which you made the following inquiry:

> "There is a city-owned park which is uninhabited and which is located in Marion Rural Community School District. The Cedar Rapids Community School District desires to use this land to build a junior high school to serve the people in the Cedar Rapids Community School District. I am advised that the Board of Marion Rural Community School District insists that the transfer of the said city park not be made from its district to the Cedar Rapids district unless the issue be submitted to the voters of both districts. Would you advise whether the present laws pertaining to school districts prescribe any method by which this property can be transferred on approval of voters of both districts? And, if the laws do not provide for an election on this matter, would you advise as to whether it would be necessary for a special bill to pass in order for the transfer to be accomplished?"

In reply thereto, we advise as follows:

Your attention is directed to Section 274.4, Code 1958, which states in pertinent part as follows:

61-2-17

> "Record of reorganization filed. When an election on the proposition of organizing, reorganizing, enlarging, or changing the boundaries of any school corporation carries by the required statutory margin . . ."

An examination of the school law pertaining to boundary changes discloses that the only method by which a boundary can be changed is in accordance with the provisions of Chapter 275, Code 1958. The Supreme Court held, in the case of Jackson v. Smith, 246 Iowa 427, 68 N.W. 2d 82, that the procedures of Chapter 274 when they became effective on April 30, 1953, is the only method which can be followed for reorganization, consolidation, merger, or boundary changes under the laws of Iowa.

Your attention if further directed to Section 275.12, which provides in pertinent part as follows:

> "A petition . . . shall be filed with the superintendent of schools in the county in which the greatest number of electors reside. Such petition shall be signed by the voters in such existing school district affected or portion thereof equal to at least twenty per cent of the number of eligible voters or four hundred voters, which ever is the smaller number. School districts affected or portioned thereof shall be defined to mean that area to be included in the plan of the proposed new school district. . . ."

Enclosed please find Thermo-Fax copy of a letter opinion, Abels to Harbor, under the date of March 20, 1958, which holds that the residents of the portion of the included area may sign a reorganization petition. Under the wording of the statute and the interpretation placed upon the statute by this office, it is apparent from the facts, as set out in your letter, that there are no voters in the affected portion to sign a petition for reorganization as set out in Section 275.12, Code 1958, which is a condition precedent to any school reorganization.

Therefore, a petition for reorganization could never originate to create a boundary change as set out in your letter.

We are of the opinion that under the present laws pertaining to the prescribed method by which boundary changes may be accomplished there could be no election upon the boundary change because there could be no petition for reorganization for the reason that there are no voters in the effected area who could sign the petition giving rise to the subject matter for reorganization. Thus, in order to accomplish the boundary change as contemplated, it will be necessary for legislation to be enacted.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:smw
Encl

INSTITUTIONS: Board of Control -- The Board of Control is authorized under Chapter 159, 58th G. A., to accept Federal grant for research purposes for named applicants and to cause the grant to be disbursed in accordance with terms of this grant and kept in custody of a finance officer who need not be associated with or employed by the Board. (Bump to Brown February 24, 1961

Bd of Control, 2-24-61)

2/8.12

Board of Control of State Institutions
Attention: M. J. Brown
Administrative Assistant
L O C A L

Dear Mr. Brown:

This is in response to your letter of January 23, 1961 in which you set forth the following:

> "We would like to have an Attorney General's ruling on the possibility of receiving Federal Research Project Funds from such agencies as the Institute of Mental Health and our manner of handling such funds.
>
> "Is it possible for us to accept such research grants and handle these funds in a special depository, drawing payments therefrom, for proper use as specified in the grant?
>
> "Is it necessary that the financial officer in charge of such funds be associated with or presently employed by the Board of Control of State Institutions?"

As you are aware, the Federal regulations governing these grants must be complied with in all respects pertaining to application, use and custody of the funds and no comment is here made on those problems. Since this is a program that has previously been in effect, I assume that you are familiar with all of these regulations.

Additional facts necessary to render an opinion on this matter have been orally supplied by Mr. Lowell W. Sebenke, Chief of Psychological Services. If I understand correctly, the Board of Control is to be merely a sponsoring agency for the project, or a conduit for the federal funds, which ultimately

61-2-18

are to go to different individuals at separate state institutions conducting various research projects, the thought being that a centrally located disbursing agent would be able to receive and disburse the federal funds more expeditiously.

The question then arises as to whether it is within the power of the Board of Control to accept a federal grant for research purposes specified in the grant to be allocated, in turn, to institution employees named in the grant. It appears without question that the Board may accept such funds under Chapter 159, 58th General Assembly, which provides:

> "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."

With respect to the second question raised, whether the financial officer in charge of these funds must be associated with or presently employed by the Board of Control, you are advised that there is no requirement for such relationship. You will note that section 218.8 requires that the business manager of each institution shall have "complete charge and supervision over . . . financial affairs relating to such institution . . . " This section is not applicable to the question since the federal funds are not allocated to the institution as such, but to a named individual at that institution through the sponsorship of the governing agency, the Board of Control. It is within the power of the Board of Control to designate a financial officer not associated with or employed by it to carry out the terms of the federal grant.

Thus, under the provisions of Chapter 159, supra, the Board of Control can accept a federal grant and cause it to be kept in the custody of and disbursed by a financial officer in accordance with the terms of the federal grant, even though such designated officer is not associated with or employed by the Board. In the custodial aspect of the federal funds, however, it is advised that the Board give consideration to requiring a surety bond in accordance with section 218.12, under the discretionary power to the Board therein specified.

Respectfully submitted,

WILBUR N. BUMP
Solicitor General

WNB:bl

COUNTIES AND COUNTY OFFICERS: Incompatibility -- A trustee of a municipal library organized under Chapter 378 may not be trustee of a county library organized under Chapter 358B, Code 1958. (Rehmann to Grafton, St Lib., 3-10-61)

March 10, 1961

Miss Ernestine Grafton, Director
State Traveling Library
L O C A L

Dear Miss Grafton:

Reference is made to your letter of January 17, 1961 in which you state the following:

> "We have had an inquiry from the Dubuque County Library asking if it is legal for the same person to serve on both the Dyersville Library Board and the Dubuque County Library Board of Trustees. I would appreciate an opinion from you on this question.
>
> "There has been considerable correspondence about the Dyersville and Dubuque County library situation in recent years and I believe your files will acquaint you with the situation. However, if there are any questions you would like to ask us we will be glad to discuss the matter with you."

In reply thereto, we advise as follows:

In order to determine whether or not a person may serve on the county library board as well as on a city or town library board, the question arises as to compatibility of office. The Iowa Supreme Court, in the case of State v. Anderson, 155 Iowa 271, 273, 136 N.W. 128, said:

> "The question must be determined largely from a consideration of the duties of each, having, in doing so, a due regard for the public interest. It is generally said that

61-3-8

> incompatibility does not depend upon the incidents of the office, as upon the physical inability to engage in the duties of both at the same time. * * * The test of incompatibility is whether there is an inconsistency in the functions of the two, as where one is subordinate to the other, 'and subject to some degree to its revisory power', or where the duties of the two offices 'are inherently inconsistent and repugnant.'"

Your attention is directed to section 358B.9(4), Code 1958, which provides in pertinent part:

> "Library service shall be accomplished by one or more of the following methods in whole or in part:
>
> "1. * * *
>
> "4. By contracting for library service with the trustees of a free public library of any city or town."

You will note, by the wording of this statute, that the board has the power to contract with any other free public library for services, or in the exchange of services. It is conceivable that the trustee could be put into a position where, in so contracting between a free city library and the county library, he would in effect be working to the detriment of one or the other. The city library, in accepting the services of the county library, would thus be subordinating itself to the county library.

We are of the opinion that a trustee of a municipal library organized under Chapter 378 cannot be a trustee of a county library organized under Chapter 358B, Code 1958.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:bl

County and County Officers — Thos. Rowland

Erection and repair -- The installation of an elevator in a pre-existing shaft does not constitute building, erection, or repair as provided by section 332.7, Code 1958. Such installation constitutes equipment, and ~~XMEXMXMXE~~ letting of a contract therefor by public bidding is not a statutory requirement. (Strauss to O'Connor Chickasaw Co Atty 3-7-61)

March 7, 1961

Mr. James D. O'Connor
Chickasaw County Attorney
New Hampton, Iowa

Dear Mr. O'Connor:

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

"I should like your opinion on the following question: Is the installation of an elevator car and the equipment necessary to use the same in a pre-existing elevator shaft in the Chickasaw County Courthouse an "erection' or a 'repair' as contemplated by section 332.7, Code of Iowa, 1958, which requires invitations to bid, by advertisement for three weeks in all official newspapers of the county as a prerequisite to a valid contract where a building is being erected or repaired?

"The Chickasaw County Courthouse was erected in 1929-1930. At that time, an elevator shaft was built in, but due to lack of funds the elevator car was not installed. The shaft is bare except for a small amount of steel framework around the doors on all three levels. The Board of Supervisors will be contracting for the elevator car and for all materials needed for installation and operation except for the already installed steel framework about the doors.

"It is my opinion that Section 332.7 does not apply here. The statute is expressly limited to building, erection or repair. Black's Law Dictionary, Fourth Edition defines erection as: raising up; building; a completed building; to build; construct; set up. Repair on the other hand means: to mend, remedy, restore, renovate, to restore to a sound or good state after decay, injury, dilapidation, or partial destruction.

61-3-2

"Section 332.2 sets out the general power of the Board of Supervisors. Subsection 15 gives them the power to build, equip, and keep in repair the necessary building for the use of the county and of the courts. Note that Section 332.7 does not mention contracts to equip county buildings.

"It is my thinking that the installation of an elevator in a pre-existing shaft is patently not the erection of a building. Since repair implies restoration is a prior condition then by definition the said installation is not a repair. I feel the installation of an elevator is an act of equipping the building and is not contemplated by section 332.7."

In reply thereto I would advise you in my opinion the installation of an elevator, under the circumstances described, does not constitute building, erection or repair as provided by section 332.7, Code 1958. Such installation constitutes equipment and letting of a contract therefor by public bidding is not a statutory requirement.

Very truly,

OSCAR STRAUSS

First Assistant Attorney General

OS:mmh4

COUNTY & COUNTY OFFICERS

~~COUNTIES:~~ Medical examiner -- duties -- Where death of an inmate occurs in the Iowa State Penitentiary, regardless of cause, such death must be reported to the county medical examiner under the provisions ofChapter 258, Acts of the 58th General Assembly. (Bianco to Tucker, Dep. Lee Co Atty March 8, 1961 3-8-61)

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

Dear Mr. Tucker:

Reference is made to your favor of January 11, 1961, presently at hand, requesting opinion, which reads:

"My question concerns the new law passed by the 58th General Assembly, Chapter 258, relating to County Medical Examiners; their duties as specified in Section 1, paragraphs 4, and 5. Paragraph 4 of Section 1 states:

"On or after the second secular day of January 1961 the death of any person shall be reported to the County Medical Examiner by the physician in attendance, by any law enforcement officer having knowledge of such death, by the embalmer, or by any other person present, if the deceased shall have died; a) from violence, b) suddenly, when in apparent health, c) when unattended by a physician during the period of thirty-six (36) hours immediately preceeding his death, d) as a result of or following an abortion, e) while in custody of the law, f) in an accident in a gypsum or coal mine, g) in a suspicious, unusual or unnatural manner, h) from a disease which might constitute a threat to public health.

"Paragraph 5:

"Upon receipt of such notice the County Medical Examiner shall take charge of the dead body, make inquiries regarding the cause and manner of death, reduce his findings to writing on forms provided by the Commissioner of Public Health for such purpose.

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and deliver the original of such form to the County Attorney, retaining one copy for his own use, and forwarding another copy to the Criminal Investigation Division of the State Department of Public Safety.

"We have in Lee County the Iowa State Penitentiary which maintains its own hospital facilities and its own physician. This physician is not in constant attendance but is on call and makes regular visits. When deaths occur at the Iowa State Penitentiary by natural causes is the County Medical Examiner bound by paragraph 4, subsection (e), and paragraph 5 of this new act to make a separate inquiry regarding the cause and manner of death and submit the forms to the County Attorney as is provided in paragraph 5? This would seem to be a duplication of work in view of the fact that the penitentiary does have a physician."

In reply thereto, we advise:

We note the following mandatory language in paragraph 4, which states: " * * * the death of any person shall be reported to the county medical examiner * * * ", and in paragraph 5, the language, " * * * the county medical examiner shall take charge of the dead body * * * ".

We are immediately concerned with the deaths (by natural causes) classified in the law as occurring, "While in custody of the law". We believe there can be no question but that one imprisoned in the state penttentiary is in custody of the law. (See cases cited in Words & Phrases, Vol. 10, pp. 721, 722 & pocket part.)

One of the principal duties of the medical examiner, spelled out in the law, is to: "make inquiries regarding the cause and manner of death, reduce his findings to writing on forms, (etc.) * * * ". Therefore, this is precisely one of the functions within the duties of the medical examiner, to determine whether or not the death in question was the result of natural causes or otherwise.

The fact that there may be a physician present does not alter the specific provisions of the law in question, where the deceased is in custody of the law, i.e., in prison.

Where a statute is plain and unambiguous, there is no room for construction.

Under this general rule of construction, the statute being mandatory, it is our considered opinion that, in the event of any deaths occurring in the Iowa State Penitentiary, such deaths must be reported to the county medical examiner.

Yours truly,

FRANK D. BIANCO
Assistant Attorney General

FDB:bl
cc: John E. Bennett, Warden
Dr. Frank Maynard, County Medical Examiner
Loren Chancellor, Vital Statistics Division

County & County Officers

COUNTIES: Mentally ill -- claims -- The provisions of section 249.20, Code 1958, cannot be resorted to force assignment of a tax sale certificate to Board of Supervisors under lien provisions of Chapter 230. An ordinary action at law may be brought against a guardian of a mentally ill patient of a state institution to enforce collection of county claims for support under Chapter 230 or an equitable action to foreclose the statutory lien granted counties under said statutes. March 8, 1961

(Bianco to Maddocks, Wright Co Att'y, 3-8-61)

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

Dear Mr. Maddocks:

Your letter of February 2, 1961, requesting opinion, states:

> "Wright County has a widowed person in a State Mental Health Institution for which the expenses incurred have been charged to Wright County. The person has real estate and the proper lien has been filed against same. However, the property was recently sold at a tax sale and a certificate issued to a citizen from another County. It is not anticipated that this person will ever recover and her guardian refuses to redeem.
>
> "1. May the Board of Supervisors force an assignment of the certificate by paying the outstanding taxes in order to protect this lien?
>
> "2. Would Iowa Code Section 249.20 (1958) under the title of Social Welfare and Rehabilitation be applicable?
>
> "3. In the event that questions 1 and 2 are in the negative, what method might be performed in order to obtain title to the property or by some other manner protect the lien of the County."

In reply thereto, we advise as follows:

The answer to questions one and two are in the negative for the following reasons. The pertinent statutes relating to

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these questions are sections 230.15, 230.25, 230.26 and 230.27, as amended, reading as follows:

"230.15 Personal liability. Mentally ill persons and persons legally liable for their support shall remain liable for the support of such mentally ill. Persons legally liable for the support of a mentally ill or mentally retarded person shall include the spouse, father, mother, and adult children of such mentally ill or mentally retarded person, and any person, firm, or corporation bound by contract hereafter made for support. The county auditor, subject to the direction of the board of supervisors, shall enforce the obligation herein created as to all sums advanced by the county."

"230.25 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. Such lien shall be effective against the real estate owned by the husband or wife of such person only in the event that the name of the husband or the wife of such person is indexed by the auditor. No lien imposed by this statute against any real estate of a husband or wife of such person prior to the effective date of this Act shall be effective against the property of such husband or wife unless prior to July 4, 1960, the name of such husband or wife of such person shall be indexed."

"230.26 Auditor to keep record. The auditor of each county shall keep an accurate account of the cost of the maintenance of any patient kept in any institution as provided for in this chapter and keep an index of the names of the persons committed from such county and the indexing and the record of the account of such patient in the office of the county auditor shall constitute notice of such lien. The name of the husband or the wife of such person designating such party as the spouse of the person committed shall also be indexed in the same manner as the names of the persons committed are indexed."

"230.27 Board and county attorney to collect. It shall be the duty of the board of supervisors to collect said claims and direct the county attorney to proceed with the collection of said claims as a part of the duties of his office."

The provision in section 249.20 with reference to the assignment of certificates of tax sales is not applicable to persons coming within the purview of Chapter 230. One deals specially with old age recipients, the other with persons who are mentally ill. Statutes creating liens must be strictly construed, and a lien created thereby is limited in operation and extent by the terms of the statute. (See Reports of Attorney General 1954, p. 105; 1950, p. 135 and authorities cited.)

In answer to your third question, we invite your attention to the provisions of section 230.27 which set out the duty of the Board of Supervisors to collect claims under Chapter 230 against persons legally liable, including the mentally ill person, and the duties of the county attorney at the direction of the Board.

Assuming that the property in question is not the homestead of the recipient and is not occupied by any minor children of the recipient (section 230.28), it would appear that either of two actions might be maintained to force collection of money now accrued for support furnished.

One: an ordinary action at law against guardian and, after judgment, a general execution against the property in question, subject of course to the tax sale.

Two: an action in equity to foreclose the statutory lien (section 230.25), resulting also in judgment and special execution to enforce the same.

In this connection, see Reports of Attorney General 1954, p. 107; Thode, Guardian v. Spofford, et al, 65 Iowa 294; Clay Co. v. Myers, 159 Iowa 745; Gressly v. Hamilton Co., 136 Iowa 722, 114 N.W. 191; Plymouth Co. v. Koehler, Guardian, 221 Iowa 1022, l.c. 1027.

Sincerely yours,

FRANK D. BIANCO
Assistant Attorney General

FDB:bl

MOTOR VEHICLES: Speed Limits: Section 321.286 applies to mail carrying postoffice units if such units have a gross weight of over five thousand pounds. described in request

(Craig to Cady, Franklin Co Atty, 3-8-61)

March 8, 1961

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

Dear Mr. Cady:

This will acknowledge your recent opinion request, in which you stated:

> "Some time ago I wrote to your office requesting an Attorney General's ruling as to whether or not one of these large mobile mail truck units which carries first class mail is a freight carrying vehicle under Section 321.286 or whether it would come under the bus speed limits as fixed by Section 321.287. Section 321.286 fixes the speed limit at 50 miles per hour. Your office denied the request, since there was a case pending in court.
>
> "We have other situations here involving similar circumstances, and the Patrol and my office are interested in knowing whether or not the opinion of your office is that the said vehicle comes under the restrictions of Section 321.286 or Section 321.287. These are cases in which no action is pending."

The facts regarding such mobile ~~truck~~ units were more fully set out in your original request, where you stated:

> "I would like an opinion from you as to whether or not the highway postoffice vehicles qualify as trucks or busses insofar as the speed limit is concerned.
>
> "The vehicles are made by a bus company and are a bus in every respect except that the back end is changed into a postoffice."

61-3-5

"These so-called highway postoffices do not carry either freight or passengers but do carry a small crew of men who sort mail while enroute and they have a certain time schedule on which they must operate to make connections with trains at different points."

Your specific request is thus whether the post office vehicle you describe is a truck or a bus, for the purposes of the speed limits established by Sections 321.286 and 321.287, 1958 Code of Iowa. It should be noted that although the catchwords preceding Section 321.286 denominate the provisions of that section as "Truck speed limits," and the catchwords preceding 321.287 denominate those provisions "Bus speed limits," the bodies of the respective statutes state more definitively the type of vehicle to which the limits apply. The catchwords are supplied by the Code Editor, (Section 14.12(4), 1958 Code of Iowa), and are not part of the statute. State v. Chenoweth, 226 Iowa 217, 220, 284 N.W. 110. The speed limits so established apply, of course, only to the type of vehicles that come within the defined limitations of the statute. See Hawkins v. Burton, 225 Iowa 707, 281 N.W. 342.

Section 321.287, 1958 Code of Iowa, was repealed and replaced by Chapter 229, Acts of the 58th General Assembly, which provides:

"Section 1. Section three hundred twenty-one point two hundred eighty-seven (321.287), Code 1958, is repealed and the following enacted in lieu thereof:

"'No passenger-carrying vehicle used as a common carrier, except school busses, shall be driven upon the highways at a greater rate of speed than sixty (60) miles per hour at any time. No school bus shall be operated in violation of section three hundred twenty-one point three hundred seventy-seven (321.377).'"

It is evident, from the language of Chapter 229, the speed limit therein imposed applies only to passenger-carrying motor vehicles used as a common carrier. It has been held many times that a common carrier of passengers is one who undertakes for hire to carry all persons who apply for passage. Mitchell v. New York Life Insurance Co., 75 F. 2d 107, Thompson & Houston Electric Co. v. Simon, 20 Or. 60, 25 P. 147; McGregor v. Gill, 144 Tenn. 521, 86 S.W. 318. State ex rel. Beard v. Thompson, 217 Iowa 994, 252 N.W. 256, indicates that a vehicle which carries only mail on a regular basis is not a common carrier. Therefore, it is my opinion that the mail carrying vehicle you

describe does not come with the definition of the type of vehicle covered by Chapter 229, Acts of the 58th General Assembly, and the speed limit established by Chapter 229 is not applicable to such a vehicle.

Section 321.286, 1958 Code of Iowa, the other speed limit section to which you refer, provides:

> "Truck speed limits. It shall be unlawful for the driver of a freight-carrying vehicle, with a gross weight of over five thousand pounds, to drive the same at a speed exceeding the following:
>
> "1. Fifty miles per hour for any freight-carrying vehicle which is equipped with pneumatic tires.
>
> "2. Twenty miles per hour for any freight-carrying vehicle equipped with solid rubber tires, if the weight of the vehicle and load is less than six tons, and twelve miles per hour for any freight-carrying vehicle equipped with solid rubber tires, if the weight of the vehicle and load is more than six tons."

I assume that the vehicles you describe are equipped with pneumatic tires. If they are so equipped, the limits imposed by Section 321.286 apply if the vehicle is a (1), freight-carrying vehicle and (2), has a gross weight of over five thousand pounds.

At 1926 Opinions of the Attorney General 314, it was held that carrying newspapers made a vehicle a freight carrier. At page 315, it was stated:

> "The term 'freight' in its common and accepted usage in this part of the country, may be said to be that with which anything is fraught or laden for transportation, and in this sense the term embraces every article of personal property which is capable of transportation, whether live stock, merchandise, whether bulky or compact, and whether transported by measurement, weight or otherwise. Interstate Commerce Commission v. Southern Pacific Company, 132 Federal, 829, 838; The Nassau, 188 Federal, 46, 48; Noyes v. Canfield, 27 Vt., 79, 85."

This definition, which is generally accepted by the Courts, Pennsylvania Railway Co. v. Sly, 65 Pa. 205, 211, appears to define "freight" in terms that include mail.

The provisions of Chapter 321, 1958 Code of Iowa, apply to the drivers of vehicles owned by the United States Government. Section 321.230, 1958 Code of Iowa.

Therefore, based on the above authority, it is my opinion that the speed limits established by Section 321.286 apply to the vehicle you describe, if the vehicle has a gross weight of over five thousand pounds.

Very truly yours,

FRANK CRAIG
Assistant Attorney General

FC:sw

CITIES AND TOWNS: Licensing and Regulation of Mobile Home Parks -- Municipal Corporations have no licensing power under Chapter 135D, Iowa Code (1958), but may regulate the operation of mobile home parks within the scope of their police power. (Eregen to Freed, St Rep, 3-9-61)

March 9, 1961

Honorable Willard M. Freed
Representative, Webster County
House of Representatives
L O C A L

Dear Mr. Freed:

We have your letter of January 25, 1961, in which you pose the following questions:

"1. Can a municipality by ordinance assume responsibility for investigation and enforcement of the terms of Chapter 135D and impose a license fee for such, without the delegation of responsibility as provided for in section 135D.20?

"2. Can any governmental sub-division impose a tax or license fee upon the operation of a mobile home park other than those provided for in section 135D.5, 135D.9, 135D.10 and chapter 321 as expressed in section 135D.19?

"3. Section 135D.3 provides that an application for an annual license be submitted to the municipal Board of Health when the proposed park is located within a municipality;

"A. Is it within the scope of authority of a municipality to disapprove such application?

"B. In the event that the municipality disapproves such application, may they forward it back to the applicant or must they forward it to the State Board of Health?

61-3-6

"C. Must a municipal board of health give reason for its disapproval in writing?

"D. In the event that the State Board of Health finds that the reasons given are not sufficient to refuse to issue a license, may it proceed to issue the license?

"4. In the event that a person would sell his homestead and subsequently use the proceeds of the sale of his homestead to purchase a trailer house, would the homestead exemption apply to the proceeds used for the purchase of this trailer house, and would this trailer house be exempt from execution under the Homestead Law?"

In response to your first inquiry, your attention is directed to the following Iowa Code sections:

"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 depattment of health such delegation can best effectuate the policies of this chapter....

"135D.5. The application for the first annual primary license....shall be accompanied by an approved permit from the municipality wherein the park is to be located, or a statement that the municipality does not require an approved permit...."

While it is evident from the quoted sections that municipal corporations are free to exercise inspection and regulatory functions under Chapter 135D when these functions are delegated to them by the State Department of Health and under their police power, all licensing power contemplated in Chapter 135D is in our opinion vested in the State Department of Health.

It is generally held that municipal corporations possess only such powers as are expressly conferred upon them by the legislature and those necessarily or fairly implied in or incident to the powers expressly conferred and those necessarily essential to the purposes of such corporations as established by statute. See, for example, Gritton v. City of Des Moines,

247 Iowa 326, 73 N.W. 2d 813 (1955); City of Mason City v. Zerbie, 250 Iowa 102, 93 N.W. 2d 94 (1958); Sioner-McCray System v. City of Des Moines, 247 Iowa 1313, 78 N.W. 2d 843 (1956); City of Des Moines v. District Court of Polk County, 241 Iowa 256, 41 N.W. 2d 36 (1950). Thus, unless the licensing power is expressly vested in municipal corporations by virtue of Chapter 135D or implied by some other statute, such power cannot be exercised by a municipality.

Nothing in Chapter 135D expressly authorizes the delegation of licensing power to municipal corporations, and Section 135D.2 expressly provides:

> "Primary and annual license fees. The application for the first annual primary license shall be submitted with all plans and specifications enumerated in section 135D.4, and payment of twenty-five dollars for each mobile home park with facilities for twenty or fewer mobile homes, or fifty dollars for each mobile home park with facilities for more than twenty mobile homes, and shall be accompanied by an approved permit from the municipality whereon the park is to be located, or a statement that the municipality does not require an approved permit. In the event a mobile park has facilities for three or less mobile homes, the annual license fee shall not exceed ten dollars. . . .
>
> "When the application is received by the state department of health, it shall promptly cause the mobile home park and appurtenances thereto to be inspected. When such inspection and report has been made and the state department of health finds that all requirements of this chapter and such conditions of health and safety as the state department of health may require have been met by the applicant, the state department for health shall forthwith issue such annual primary license in the name of the state." (Italics supplied).

Can such a delegation be reasonably implied? Although certain powers can be delegated to municipal corporations under Section 135D.20, these powers don't include the power to license; rather, under this section only the duties of inspection and regulation may be delegated. Under present Iowa law, the power to regulate does not imply or include the power to license.

City of Mason City v. Zerble, supra; Bear v. City of Cedar Rapids, 147 Iowa 341, 126 N.W. 324, (1910), either expressly or as an incident thereto, Town of Akron v. McElligott, 166 Iowa 297, 147 N.W. 773 (1914). Therefore, your first inquiry must, in our opinion, be answered in the negative. In the absence of a delegation under Section 135D. 20, a municipality has no powers under the act. Even if such a delegation is made, a municipality then has only the powers of inspection and regulation. The licensing power remains vested in the State Department of Health.

This is not to say, however, that a municipal corporation may not regulate mobile homes and mobile home parks within the sphere of its police power, and in so doing, impose reasonable inspection requirements and standards upon them. In this regard, see Iowa Departmental Rules, Health Department, Section I (2), (3), which provides as follows:

> "Minimum Requirements. It is hereby declared by the Iowa State Department of Health that these rules and regulations are to be the minimum requirements for the safeguarding of the public health within this state. Health officials have no discretionary powers to lessen these requirements but may increase them to fit attendant circumstances.
>
> "Power to Make Additional Rules. Local boards of health are authorized and empowered by law to make such additions, provided they are not in conflict with these rules and regulations and are not contrary to the best public health practice."

In our opinion, the same considerations apply to all governmental subdivisions for the same reasons and therefore, no governmental subdivision can impose a tax or license fee upon the operation of a mobile home park other than those set out in Chapter 135D.

In regard to your inquiries as to the power of a municipality to disapprove an application for an annual license, your attention is directed to Code of Iowa, Section 135D.8, which provides:

> "Denial of permit or license. If the application for a permit to construct or make alterations upon a mobile home park and the appurtenances thereto, or a primary license to operate the same, is denied by the state

> "department of health, it shall so state in writing, giving the reasons for denying the application. If the objection can be corrected, the applicant may amend his application and resubmit it for approval, and if denied the applicant may within thirty days thereafter appeal from the decision of the state board of health to the district court of the county in which said mobile home park is located, and the case shall be tried in equity."(Italics supplied.)

The intent of this section is clearly to vest in the board of health the sole power to grant or deny applications for licenses and permits. I.D.R., Health - Mobile Home Parks, 3.3 (1958), which provides:

> "Each application for a license, or application for renewal of license, relating to a mobile home park located within a municipality shall contain a certification of the Local Board of Health (Mayor, Council, and Health Physician), that the park complies with municipal ordinances, codes and the local regulatory measures, applicable thereto and not in conflict with the statute and these rules and regulations before being submitted to the Department."

does not, in our opinion, change the result. Iowa Code Section 135D.3 requires that an application for a license to operate a mobile home park within a municipality must be filed with the local board of health who shall forward the case to the State Department of Health. In our opinion, this section merely serves to apprise the municipality that such an application is being made, and also forms a basis for the certification required by the above-quoted rule. Since no statute confers upon a municipality the power to disapprove such application, and such power cannot be inferred under any reasonable construction of Chapter 135D, the conclusion is inescapable that the certification of the municipality serves merely an advisory purpose. The power to disapprove applications rests solely in the State Board of Health. Once again, however, this does not preclude a municipality from regulating the operation of mobile home parks within the scope of its police power and enjoining the operation of those enterprises which fail to comply with its regulations.

Very truly yours,

JOHN M. CREGER
Assistant Attorney General

JMC:sb

SCHOOLS: Reorganization -- A consolidated school district not maintaining a high school organized prior to May 10, 1957, which still maintains a school, is eligible to vote under section 275.20, Code 1958.

(Rehmann to Snyder, Buena Vista Co Atty, 3-10-61)

March 10, 1961.

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

Dear Mr. Snyder:

Reference is made to your letter of February 6 in which you made the following inquiry:

"A petition has been filed for reorganization of the Newell-Providence Community School District contemplating the addition of about five sections of land from the existing Providence Consolidated School District area to the Newell-Providence area.

"The Newell-Providence District was organized in the last school year, as a result of which approximately thirteen sections of the then existing Providence Consolidated School District were incorporated into the Newell-Providence District. Last year Providence Consolidated operated a high school but has not operated one during the current school year, but Providence is still operating a six-grade school in the Providence District. Providence has operated a school continuously since long prior to May 10, 1957.

"Opinion is requested as to whether the electors in the entire Providence Consolidated School District will be entitled to vote in the pending election in which the Newell-Providence District would propose to add approximately five sections of the Providence area to its existing territory. The question appears to turn on the definition of whether Providence Consolidated School District is a rural independent school district of eight sections or more . . . 'under provisions of Section 275.20(A). The case of Branderhorst vs. County Board of Education, 99 N.W. 2d 433 touches on this subject, but appears not to have been decided directly on this issue.

61-3-7

"Opinion is also requested as to whether or not areas of land which are in contact only at a point, such as at an intersection, are contiguous. The case of State vs. Brown, 91 N.W. 2d 571 makes it appear that one must be able to travel from one part to another without leaving the territory. It is obvious that one could not travel through an infinitesimal point."

In reply thereto, we advise as follows:

Section 275.20, Code 1958 provides in pertinent part as follows:

"The voters shall vote separately in each existing school district affected or portion thereof upon the proposition to create such new school corporation. School districts affected or portion thereof shall be defined to mean that area included within the boundaries of the proposed new school corporation, except that where a portion of an existing school district operating a high school, or a rural independent school district of eight sections or more operating a school formed prior to May 10, 1957, is included within the boundaries of the proposed new school corporation, that affected school district shall be defined as that existing district within and without the proposed new school corporation, and in such districts the entire district shall vote. * * *"

An examination of the statute discloses that the entire school district will vote on the proposition if one of two conditions exist:

1. If the school district is operating a high school,

which, in accordance with the facts raised in your case, is not applicable, or

2. If the school district involved is a rural independent school district of eight sections or more operating a school formed prior to May 10, 1957,

in which case the entire school district votes upon the proposition.

Based upon the facts, it appears that a school has been in operation prior to May 10, 1957; however, interpretation must be

placed upon whether or not the school district under consideration is a rural independent school district within the meaning of the statute. Your attention is directed to the case of Des Moines Ind. Comm. Sch. Dist. v. Armstrong, 250 Iowa 634, 95 N.W. 2d 515, at 519, in which the court said:

> "Section 274.6 has a long legislative history. Commencing at least as early as the Code of 1873 until 1924 school corporations were divided into two classes, those composed of subdistricts -- called school townships -- and independent or rural independent districts. Section 1, chapter 16, Acts 40th Extra General Assembly, in 1924 (section 4124, Code, 1924), added consolidated districts to school corporations other than school townships. Thus the law stood until the 56th General Assembly in 1955 by section 1, chapter 136, added community school districts to this second group."

In view of the foregoing authority, and for the purpose of the election as provided under section 275.20, Code 1958, it would appear that the school district under consideration is a rural independent school district within the meaning of the statute. Therefore, the whole district is entitled to vote on the forthcoming school reorganization.

In regard to the second proposition raised by your letter, your attention is directed to section 275.11, Code 1958, which provides as follows:

> "Proposals involving two or more districts. Subject to the approval of the county board of education contiguous territory located in two or more school districts may be united into a single district in the manner provided in sections 275.12 to 275.23 hereof."

Although the legislature has not defined the word "contiguous" within the meaning of this section, the Supreme Court on various occasions has had an opportunity to determine whether or not a proposed school district was contiguous within the meaning of the statutes. The first such case is Smith v. Blairsburg Ind. Sch. Dist., 179 Iowa 500, 159 N.W. 1027, which established the basic fundamental determination of territory considered to be contiguous. Subsequent to that case, there were several other cases of importance, one of which is State ex rel Little v. Evans, 244 Iowa 1356, 60 N.W. 2d 521, wherein the court held that, until all the school districts involved do not have a common boundary between

one another, they were touching or to touch a common district or districts wherein there was a solid mass, and therefore were contiguous within the meaning of the statute.

In a later pronouncement, namely State ex rel Warrington v. Comm. Sch. Dist. of St. Ansgar, 247 Iowa 1167, 78 N.W. 2d 86 at 91, the Court held that the sector cut off by a rejecting connecting district or part thereof was not contiguous, and said with reference to the word contiguous, by relating back to the Smith case, supra, as follows:

> "On various occasions in the past we have discussed the applicable meaning of the word 'contiguous' as it relates to school legislation. Smith v. Blairsburg Independent School Dist., 179 Iowa 500, 506, 159 N.W. 1027, 1028. We said there:
>
> "'All essential is that the boundaries of the proposed district be indicated, and that the territory therein be contiguous. According to Webster's Dictionary, "contiguous" means: "In actual contact; touching; also near, though not in contact; neighboring; joining." And the Century Dictionary defines the word as: "Touching; meeting or joining at the surface or border; hence, close together; neighboring, bordering or joining; adjacent; as to two certain objects; houses or estates." The evident design of the Legislature was that the 16 or more sections composing the consolidated district should together constitute an undivided or solid body of land.' (Emphasis supplied.)
>
> "We held there if the territory included constituted 'one body of land' the contiguous requirement of the legislation was met. (authorities cited); and 1925-26 Attorney General's Opinions, page 70, where it was held only contiguous territory could form a school corporation.
>
> "Certainly back of such requirement is the history and logic of school reorganization. Consolidation from its beginning involved lands with a 'common boundary' * * * and 'contiguous territory located in three or more school districts' * * *. The expressed policy of reorganization as set forth in Code section 275.1 is 'to encourage the reorganization of school districts into such units as are necessary, economical and efficient * * * .' (Emphasis supplied.)"

In a subsequent case involving the same school district, namely State ex rel Brown v. Comm. Sch. Dist. of St. Ansgar, 249 Iowa 1228, 91 N.W. 2d 571, at 575, the Court said:

> " * * * There we pointed out that the territory must be 'one body of land', that it must be in 'actual contact', or touching, to be within the meaning of contiguous territory under the statute. * * * The requirement that all parts of the Community School District of St. Ansgar, as organized, did connect and adjoin, and that one could travel from one part to the other without leaving this territory, was sufficient." (Emphasis supplied.)

This case held that the area involved was contiguous even though it surrounded an entire school district, and that this alone did not create any illegality in the absence of any statutory authority to the contrary.

From the above authority, it would appear that contiguous, within the meaning of section 275.11, describes a mass involving several school districts or portions thereof, the areas of which must have a boundary or boundaries in common with other school districts or portions of areas involved therewith, so that a person could travel from one part of the district to another without leaving the territory of the school district.

Therefore, areas that touch at a common point and which have no common boundaries are not contiguous within the meaning of section 275.11, Code 1958.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:bl

COURTS: Justice of the peace -- fees -- Under section 601.131, Code 1958, to retain criminal fees, the proceedings must be held in the township where the justice of the peace is elected.
(Rehmann to Bainter, Henry Co Atty, 3-14-61)

March 14, 1961

Staff

Mr. Harlan W. Bainter
Henry County Attorney
118½ South Main
Mt. Pleasant, Iowa

Dear Mr. Bainter:

This is to acknowledge receipt of your letter of February 27, in which you made the following inquiry:

"We have a Justice of Peace in our county who has served competently for quite a number of years. Up through 1959, he resided in Mt. Pleasant Corporation and was elected from this township as a Justice of Peace. In the year 1959, he built a home and moved to Tippecanoe Township, his business still remaining in Mt. Pleasant Corporation. In the last election, he lived in Tippecanoe Township, was on the ballot in Tippecanoe Township, and was elected Justice of Peace in Tippecanoe Township. He still continues to hold office at his place of business in Mt. Pleasant Corporation. I might add, that until a week ago, he was the only Justice of Peace in the entire county. We have recently, at my insistence, appointed a Justice of Peace from Mt. Pleasant Corporation, and I am insisting he handle all matters going over to District Court in order to protect District Court prosecutions until this matter is resolved.

"I feel that I need some specific direction from your office with regard to a current construction of the Rogers case and Section 601.131 of the 1958 Code of Iowa. I am advised that 601.131 is intended to prevent a Justice of Peace from collecting the $1200.00 minimum in two different townships. In our county, a Justice of Peace does not even make half of $1200.00 in one township in any given year.

61-3-9

"I am wondering if you would give me a current construction of the two matters cited in your opinion in relation to the fact situation as set out in my letter."

In reply thereto, we advise as follows:

The problem presented in your letter appears to include two questions:

1. Whether or not a justice of the peace elected in one township could hold court in another township in which his place of business is located, and

2. If court were held in a township other than that for which he was elected, whether or not he would be entitled to collect fees in criminal cases.

The jurisdiction of justices of the peace, when not restricted, is coextensive with their respective counties. (Section 601.1, Code 1958). Actions in all cases may be brought in the township where the defendant or one of several defendants resides or, when actual service is made upon a defendant within the county, then in the township wherein the service is made. (Sections 601.3 and 601.4, Code 1958). The justice of the peace acquires jurisdiction upon service of the defendant within his township, either because he resides there or because service is personally made upon him within the township, even though the offense is committed elsewhere.

However, section 601.14, Code 1958, provides:

"If there is no justice in the proper township qualified or able to act, the action may be commenced in any adjoining township in the same county. If there be no such justice in an adjoining township, it may be commenced before the justice in the same county nearest to the township in which the defendant resides."

Thus a justice of the peace can acquire jurisdiction in some instances even though service was not made upon the defendant within the township from which he was elected.

The Supreme Court, in commenting upon the above-mentioned statute, in the case of Coulter Bros. v. Riegel, 204 Iowa 1032, at 1036, 216 N.W. 715, said:

"It is thus seen that the statute creates four possible venues: First, the township where either the plaintiff, the defendant, or any one of the several defendants resides. Second, any other township of the same county, provided that actual service is had on one or more of the defendants in such township. Third, an adjoining township to the proper township, when there is no qualified or acting justice in the proper township, regardless of notice on the defendant in such township. Fourth, any township of the same county where a justice is found, when there is no qualified or acting justice in the adjoining township, without respect to the service of notice in the township where such action is commenced."

Section 762.1, Code 1958, provides:

"Justices of the peace have jurisdiction of, and must hear, try, and determine all public offenses, less than felony, committed within their respective counties, in which the punishment prescribed by law does not exceed a fine of one hundred dollars or imprisonment thirty days."

This section makes it mandatory for the justice of the peace to hear nonindictable offenses within his township when jurisdiction is conferred upon him as set out above. However, this office has held, in Opinions of the Attorney General 1925-26, page 205, that a justice of the peace elected in one township may hold court in criminal matters in another township within the same county, where his jurisdiction is coextensive within the limits of the county. In the case of Rogers v. Loop, 51 Iowa 41, 50 N.W. 224, the Court held that stipulation of the parties that court would be held outside the township for which the justice of the peace was elected did not oust the justice of the peace from his jurisdiction. Thus the validity of any decisions rendered by the justice of the peace outside the township for which he was elected would not be affected for the reason of lack of jurisdiction.

The fact that a justice of the peace may hold court outside the township for which he is elected has no relationship to the method of compensation to the justice of the peace as provided in section 601.131, Code 1958. The manner of compensation of a justice of the peace is determined upon the population of the township from which he was elected. While

statutory provisions allow exceptions to hold court outside the township for which he was elected, section 601.131(2)(c), Code 1958, provides:

> "2. Justices of the peace and constables in townships having a population of under ten thousand shall pay into the county treasury all criminal fees collected in each year in excess of the following sums: * * *
>
> "c. In addition they shall pay into the county treasury all criminal fees collected in proceedings in townships other than that in which they were elected."

The statute is clear and unambiguous. To be able to retain criminal fees, the proceeding must be held in the township where the justice of the peace is elected. Because there is statutory authority allowing the justice of the peace to hold proceedings outside his township does not make an exception to this restriction.

Thus, the answer to your first question is in the affirmative and the second in the negative.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:bl

STATE OFFICERS & DEPARTMENT Mrs. Richard-
Redistricting -- Precedent for appropriate legislation reflecting the change in the number of congressional districts from eight to seven is contained in Chapter 76, Laws of the 49th G.A., redistricting the state from nine to eight congressional districts.
(Strauss to Vance, St Sen, 3-14-61)

March 14, 1961

Hon. Clifford M. Vance

Senate Chamber

B U I L D I N G

My dear Senator:

Reference is herein made to the question of appropriate legislation reflecting the change in the number of congressional districts from eight to seven.

I would advise that there is precedent for such procedure, in the reduction of congressional districts from nine to eight. Chapter 35.1, Code of 1939, organized the congressional districts of the state to the number of nine. Chapter 76, Laws of the 49th General Assembly, approved April 15, 1941, reflecting a redistricting of the state into eight congressional districts, recites the following:

> "Section 1. Section five hundred twenty-six and one-tenth (526.1), Code 1939, is hereby repealed and the following enacted in lieu thereof:
> The State of Iowa is hereby organized and divided into eight (8) congressional districts," (then follows the specific composition of the eight districts:

Sec. 2 thereof provided the following:

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> "This act shall be effective as to the nomination and election of representatives in congress for this state in 1942 and succeeding years. Nothing herein contained shall affect the law concerning the filling of vacancies, should any occur in the seventy-seventh (77th) congress."

Sec. 3 thereof provided the following:

> "Nothing herein contained shall affect the terms of office of officials now holding certificates of election from the various congressional districts of Iowa."

See generally with respect to legislation directed to reapportioning congressional districts, Smiley v. Holm, Secretary of State, 285 U.S. 355, 52 Supreme Court Reporter, page 397.

Very truly,

OSCAR STRAUSS

First Assistant Attorney General

OS:mmh4

SCHOOLS: Schoolhouses -- Under section 278.1(7), Code 1958, the taxes derived under said section can be used for the remodeling of an existing schoolhouse.
(Rehmann to Perkins, Polk Co Atty, 3-17-61)

March 17, 1961

Mr. Harry Perkins
Polk County Attorney
Polk County Courthouse
Des Moines, Iowa

Dear Mr. Perkins:

This is to acknowledge receipt of your letter of February 23, in which you state the following:

"Section 278.1, Code of Iowa, 1958, in part provides:

"'The voters at the regular election shall have power to:

"'(7) Vote a school house tax not exceeding 2½ mills on the dollar in any one year for the purchase of grounds, construction of school houses, the payment of debts contracted for the erection of school houses, not including interest on bonds, procuring libraries for and opening roads to school houses.'

"The electors of the Des Moines Independent Community School District, acting under the above statute, have voted and there has been levied such a school house tax, and there is now in the school house fund of said district approximately the sum of $315,000.00 raised by said 2½ mill tax.

"The Des Moines Independent Community School District now proposes to remodel Moulton School (formerly known as North High School) at a cost of approximately $300,000.00.

"Remodeling will consist of removal of an old portion of the building no longer suitable for

61-3-12

school purposes, construction of connecting corridors, removal of old partitions, replacement of partitions to provide class rooms of suitable size, construction of one new entrance, remodeling to furnish an administrative unit, and construction of stair enclosure and other remodeling to meet the requirements of the State Fire Marshal.

"The legal question upon which your opinion is requested may be stated as follows:

"'Is the language of Section 278.1 sub-paragraph 7 of the Code of Iowa, 1958, under which the tax was levied for "the purchase of grounds and construction of school houses" broad enough to permit the use of such tax funds for remodeling Moulton School as above outlined?'"

In reply thereto, we advise as follows:

An examination of the statutes relating to school matters fails to disclose any definition by the legislature of "construction of school houses", as found in section 278.1(7), Code 1958. The Supreme Court has not defined the word, "construction" as found in the above-mentioned section. However, they have defined the word "repair" and the word, "reconstruct" in one case.

In the case of Fuche v. City of Cedar Rapids, 158 Iowa 392, 139 N.W. 903, at 904, the Court said:

"To 'repair' presupposes the existence of the thing to be repaired; thus we say the thing needs repairing; the thing is out of repair; and so, when we speak of repairs, we assume that the thing to be repaired is in existence, and the word 'repair' contemplates an existing structure or thing which has become imperfect by reason of the action of the elements, or otherwise; and, when we repair, we restore to a sound or good state, after decay, waste, injury, or partial destruction, the existing structure or thing which needs to be restored to its original condition, or, in other words, we supply, in the original existing structure, that which is lost or destroyed, and thereby restore it to the condition in which it originally existed, as near as may be.

"Reconstruction presupposes the nonexistence of the thing to be reconstructed, as an entity; that the thing, before existing, has lost its entity; and 'reconstruction is defined as follows: 'To

construct again; to rebuild; to restore again as an entity the thing which was lost or destroyed' -- and it is apparent that the Legislature meant by the word 'reconstruct' to rebuild (that is, to construct again the thing which, as an entity, has been lost or destroyed); and the fact that in reconstruction some of the material or parts which entered into the composition of the original entity are used does not deprive it of its designation of a reconstructed thing. To illustrate: If a house is completely torn down, and its entity as a house destroyed, the fact that no material was used in rebuilding, except what had formerly been in the building, as originally constructed, would not justify one in saying, wishing to speak correctly, that the house was repaired, but rather that it was rebuilt, or reconstructed."

The term "remodel" has been defined by Webster's New International Dictionary, 2d Ed., Unabridged, as follows:

"To build anew, to reconstruct."

Thus, remodeling or major structural changes appear to contemplate something more than mere repairs, but actual construction, rebuilding, and reshaping of a building. Enclosed please find thermofax copy of an opinion under the date of June 4, 1952, Strauss to Miner, Henry County Attorney, wherein we held that "erection" referred to in section 297.7 indicates remodeling or major alteration of existing buildings because "construction" is within the meaning of "erection".

It is our opinion that, based upon the facts as presented in your letter, the remodeling contemplated by the school district comes within the meaning of the words, "construction of schoolhouses", as found in section 278.1(7), Code 1958.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:bl

HEALTH: Optometry -- partnership of persons unlicensed as optometrists -- Under the provisions of sections 154.1, 154.2 and 154.3, a partnership composed of persons unlicensed as optometrists cannot carry on a partnership optometric practice.

(Bianco to Zimmerer, Comm Pub Health) 3-17-61

March 17, 1961

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

Dear Dr. Zimmerer:

We have your inquiry of February 28, 1961, for an opinion as to whether the heirs or beneficiaries of a deceased registered optometrist, who are not licensed optometrists, can, as partners, continue the operation of the partnership optometric practice of which the deceased was a member.

In reply thereto, we advise:

Section 154.1, Code 1958, as amended, defines "persons" deemed to be engaged in the practice of optometry in the following language:

> "'Optometry' defined. For the purpose of this title the following classes of persons shall be deemed to be engaged in the practice of optometry:
>
> "1. Persons employing any means other than the use of drugs, medicine or surgery for the measurement of the visual power and visual efficiency of the human eye; the prescribing and adapting of lenses, prisms and contact lenses, and the using or employing of visual training or ocular exercise, for the aid, relief or correction of vision.
>
> "2. Persons who allow the public to use any mechanical device for such purpose.
>
> "3. Persons who publicly profess to be optometrists and to assume the duties incident to said profession."

The question then is: Is a partnership such a person or entity as can engage in the practice of the profession of optometry in the State of Iowa?

61-3-13

Section 147.1 of the Code includes "optometry" in its definition of a profession.

The general definition of "partnership" given in 68 C.J.S. 398, section 1, reads:

> "A partnership is a contract of two or more competent persons, to place their money, effects, labor, and skill in lawful commerce or business, and to divide the profit and bear the loss, in certain proportions."

A "partner" is defined, 68 C.J.S. 404, thus:

> "A partner is one of two or more associated as joint principals in carrying on any business with a view to joint profit."

In the case of State v. Kindy Optical Co., 216 Iowa 1157, 248 N.W. 332, it was held that a corporation cannot legally practice optometry.

Likewise, a partnership as a person or entity, or a partner thereof, cannot qualify for a license to practice optometry within the definitions of a person deemed to be engaged in the practice or profession of optometry.

As was said in the case of State Board v. Savelle, 90 Colo. 177, 8 P. 2d 693, 697, cited in the Kindy case, supra, " * * * the relation of the dental practitioner to his patients and patrons must be personal." And this would be true insofar as the relationships of optometrists and their patients or patrons were concerned.

We find in the Kindy case, at page 1163, this further statement by the court:

> "We might suggest that there is no difference, under our Code, in the law applicable to the practice of dentistry and optometry, and that the general rules laid down by the court are alike applicable to these as well as all other of the learned professions." (Emphasis ours.)

Therefore, under the above authorities, it is our opinion that a partnership composed of persons who are not licensed

optometrists cannot carry on the operation of a partnership optometric practice, within the provisions of Chapter 154 of the Code, as amended, and particularly sections 154.1, 154.2 and 154.3 thereof.

Respectfully submitted,

FRANK D. BIANCO
Assistant Attorney General

FDB:bl

TAXATION: Moneys and Credits: A valid debt owed to the Commodity Credit Loan Corporation evidenced by a chattel mortgage and note is a deductible debt for purposes of Moneys and Credits Tax (Sections 429.4, 429.5 and 429.6 (Code of Iowa (1958)).

(Gill to Cady, Franklin Co Atty, 3-21-61)

March 21, 1961

G. A. Cady
Franklin County Attorney
Hampton, Iowa

Dear Mr. Cady:

Your request for an Attorney General's Opinion of February 3, 1961, has been referred to me for answer. Your question is stated as follows:

> "I hereby request an official opinion from your office concerning Chapter 429 of the 1958 Code of Iowa, and specifically Section 429.5 thereof, relating to good faith debt requirements.
>
> "The Franklin County Assessor is confronted with a situation wherein it is imperative he know whether or not money owed to the Commodity Credit Corporation on a corn loan is to be considered a deductible good faith debt in arriving at net moneys and credits as provided in Section 429.5 of the 1958 Code of Iowa."

The applicable Code sections are 429.4, 429.5 and 429.6:

> "429.4 Deductions from moneys and credits. In making up the amount of moneys and credits, corporation shares or stocks which any person is required to list, to have listed or assessed, including actual value of building and loan shares, he will be entitled to deduct from the actual value thereof the gross amount of all debts in good faith owing by him, and in addition thereto an amount of five thousand dollars.
>
> "All noninterest-bearing moneys and credits and accounts receivable shall be tax exempt, but the five thousand dollar exemption as set out in this section shall not apply in the event such noninterest-bearing moneys and credits and accounts receivable exempted herein shall exceed five thousand dollars then only so much thereof as shall amount to five thousand dollars when added to such noninterest-bearing moneys and credits and accounts receivable."

61-3-15

"429.5 Good-faith debt required. No acknowledgment of indebtedness not founded on actual consideration, and no such acknowledgment made for the purpose of being so deducted, shall be considered a debt within the intent of section 429.4."

"429.6 Details of debt. No person shall be entitled to any deduction from the amount of moneys and credits assessed unless he shall, upon demand, specifically state the nature of such indebtedness and the person to whom he is indebted and any other information the assessor may require."

After an examination of the chattel mortage and note relating to the Commodity Credit Corporation loan, we are of the opinion that they create a valid secured debt on the part of the mortgagor.

It has been previously held that a mortgage indebtedness is a valid deduction under Chapter 429. (1940 A.G.O. 27)

We, therefore, believe that the answer to your question is yes, a valid debt to the Commodity Credit Loan Corporation is a deductible debt for purposes of Moneys and Credits.

Very truly yours,

Gary S. Gill
Special Assistant Attorney General

GSG/WEA/bjf

STATE OFFICERS AND DEPARTMENTS
Endowment Funds

1. Net income of real estate held as an endowment fund used for university purposes does not constitute "pecuniary profit".

2. House File 404 as filed February 20, 1961, would apply to real estate now held by educational institutions as well as to any that is acquired subsequent to its enactment. Exemption from taxation now enjoyed is subject to revocation by the legislature at any time.

(Struwss to Denman, St Rep, March 30, 1961 3-30-61)

March 30, 1961

Honorable William F. Denman

State Representative

Statehouse

L O C A L

Dear Mr. Denman:

This will acknowledge receipt of yours of the 27th inst. in which you submit the following:

> "I would appreciate your opinion in regard to the above named House File (404) in regard to the following:
>
> 1. Does the net income from the operation of real estate held in a university endowment fund and wholly used for university purposes without benefit to a third party, constitute a 'pecuniary profit'?
>
> 2. Is it the intent of this bill to apply to real estate presently held by educational institutions or is it to apply only to real estate acquired subsequent to this bill becoming law?
>
> "I would appreciate an immediate reply."

In reply thereto I advise:

1. In answer to your question #1, I am of the opinion that the net income of real estate held as an endowment fund only used for university purposes does not constitute "pecuniary profit". This conclusion is based upon an opinion

61-3-16

of this department appearing in the attorney general's report for 1928, at page 79, where in interpreting the following exemption statute, being Chapter 61, Acts of the 34th General Assembly:

> "Real estate to the extent of not to exceed one hundred sixty acres in any civil township, owned by any educational institution of this state, as a part of its endowment fund, shall not be taxed."

it was stated:

> "We are therefore of the opinion that the property owned by Coe College in the City of Cedar Rapids is exempt from taxation, providing same does not exceed one hundred sixty acres in any civil township. The fact that such property is rented will make no difference in the application of the rule. The property that is exempt is not limited to non-income property. In fact such property would not be of much value as an endowment unless rents or profits could be derived therefrom."

Support is further found in the case of Webster City v. Wright County, 144 Iowa 502, 504, where a library having an endowment of $125,000, and an annual income of more than $4,000, was held to be an educational institution and exempt from taxation under the following statute:

> "All grounds and buildings used for public libraries including libraries owned and kept up by private individuals, associations or corporations for public use, and not for private profits, and for literary, scientific, charitable, benevolent, agricultural and religious institutions and societies, devoted solely to the appropriate objects of these institutions, not exceeding one hundred and sixty acres in extent, and not leased or otherwise used with a view to pecuniary profit, * * * "

2. In answer to your question #2: I would advise that it is the intent of this bill as a matter of law to apply it to real estate now held by educational institutions as well as to any that is acquired subsequent to this enactment. This

view is based upon the rule that this exemption which these properties may now enjoy, is subject to revocation by the legislature at any time. The rule is stated in the case of Shiner v. Jacobs, 62 Iowa 393, as follows:

> "The exemption provided for was an act of general legislation. It was applicable to all the prairie lands in the state. Every owner of lands was thereby invited to devote a part of his land to the culture of forest trees. The law was not in the nature of a contract between the state and such land owners as availed themselves of its provisions. It appears to be well settled that, where an exemption from taxation is provided for by the general laws of the state, any subsequent legislature is not thereby deprived of the power to alter the law and remove the exemption.
>
> People v. Roper, 35 N.Y., 629;
> East Saginaw Manf. Co. v. The City of East Saginaw, 19 Mich., 259;
> Same case, 13 Wallace, 373;
> Rector, etc., of Christ's Church v. The County of Phila., 24 Howard, 300;
> Hagar v. The Supervisors of Yolo Co., 47 Cal., 222."

and 84 C. J. S., Section 239, title TAXATION, states the rule as follows:

> "REVOCABILITY
>
> Except where an exemption is a valid contract, it may be repealed or revoked.
>
> "By virtue of the control of the state over the whole subject of taxation, as discussed supra, section 4, it is always competent for the legislature, except where restricted by the contractual nature of the grant, to repeal an entire or partial exemption from taxation, and impose taxes on the property in question; and, therefore, if such a grant was not in the nature of a contract, but was a mere gratuity, or concession for which no price was paid or service rendered, it is at all times revocable at the pleasure of the legislature; and the grant of an exemption as a gratuity is none the less a gratuity because made on a condition which has been complied with. Revocation of an exemption, in order to be effective, must be based on an existing power in the governmental agency assuming to exercise it. The presumption is against irrevocability of an exemption and, if the

language of the grant is susceptible of a different construction it will not be construed as contemplating an absolute and irrevocable exemption.

Very truly,

OSCAR STRAUSS

First Assistant Attorney General

OS:mmh4

TAXATION (Transfer Tax): -- On the authority of the Internal Revenue Ruling #45-349 appearing in the Internal Revenue Cumulative Bulletins, Rulings 1957 - Nos. 1-616, and Prentice-Hall on Federal Taxes, permanent volume, paragraph 190,053, entitled Stock Transfers, the State is immune from federal transfer tax on the sale of certain securities. (Strauss to Abrahamson, St Treas, 3-30-61)

March 30, 1961

No citizens

Mr. M. L. Abrahamson
Treasurer of State
L O C A L

Mr. Charles R. Dayton
Deputy Treasurer

Dear Mr. Dayton:

Reference is herein made to your request for opinion as to the liability of the State of Iowa to pay a federal transfer tax upon the sale of certain securities -- part of the Iowa Public Employees' Retirement Fund. On the authority of the Internal Revenue Ruling, #45-349, appearing in Internal Revenue Cumulative Bulletins, Rulings 1957 - Nos. 1-616, the headnote of which ruling states:

> "Sales or transfers of corporate securities to or by a State, or a political subdivision thereof, are subject to the documentary stamp tax. If the State or political subdivision thereof is acting in a governmental capacity in the sale or transfer, it is immune from the tax but the nonexempt party to the transaction is liable for the tax."

and Prentice-Hall on Federal Taxes, Permanent Volume, Paragraph 190,053, entitled Stock Transfers, which states:

> (190,289-A) Sales or transfers of stock to or by a State or its political subdivision. -- The tax applies to sales or transfers of corporate securities to or by a State, or a political subdivision thereof. If the State or political subdivision is acting in a governmental capacity in the sale or transfer, it is immune from the tax but the nonexempt party to the transaction is liable for the tax. * * * Sec. 4321 imposes a tax

61-3-17

on each sale or transfer of shares or certificates of stock, or of rights to subscribe for or to receive such shares or certificates issued by a corporation. Sec. 4331 imposes a tax on each sale or transfer of any certificates of indebtedness, issued by a corporation. Sec. 4383 (Now 4384) provides, in part, that the documentery stamp tax shall be paid by any person who makes, signs, issues, or sells any of the documents and instruments subject to the tax, or for whose use or benefit the same are made, signed, issued, or sold. Thus, the tax shall be paid by any of the parties to a taxable transaction, or by any person for whose use or benefit the transaction is made. * * * However, If a State or political subdivision thereof acquires or disposes of corporate securities while acting in its truly governmental capacity, it is considered immune from the tax. Accordingly, in such cases, it is held that the State or political subdivision thereof is not liable for the transfer taxes imposed under Sec. 4321 and 4331, but the other or non-exempt party to the transaction is liable for the tax under the dual liability provisions of Sec. 4383 (now Sec. 4384). Rev. Rul. 57-349, IRB 1957-30."

the State is immune from the federal transfer tax.

Very truly,

OSCAR STRAUSS

First Assistant Attorney General

OS:mmh4

County and County Officers
Board of Education --

1. A County Board of Education would have no authority to levy a tax for educational purposes without a legislative enabling act.
2. If an enabling act is adopted, unless it so required, there would be no necessity of submitting the proposition of levying a tax to the voters of the county. March 30, 1961

(Strauss to Roggensack, Clayton Co Atty, 3-30-61)

CH'73

Mr. H. K. Roggensack
Clayton County Attorney
Elkader, Iowa

Dear Rogge:

This will acknowledge receipt of yours of the 16th inst. in which you submitted the following:

> "The County Board of Education of Clayton County, Iowa, are hoping to have an enabling act passed which would authorize them to make a county wide levy on all of the property in Clayton County, Iowa, for school purposes. They would then in turn seek to bring about equalization of our schools by granting aid from this fund to all of the schools of Clayton County on an average daily attendance basis. This would be helpful to the schools along the river, which have poor taxing districts and lots of students. They may not even need an enabling act for there is no limit as to how much the county board can tax.
>
> "They are wondering:
> 1. Can they tax for educational purposes as outlined in this letter without an enabling act.
> 2. If they can, or if an enabling act is passed, must they still submit the proposition to the voters of Clayton County, Iowa.
>
> "I would be pleased to have your reaction to this, and any suggestions you wish to make.
>
> "With best personal regards."

In reply thereto I would advise you as follows:

1. In answer to your question 1, I am of the opinion that your county board of education would have no authority to levy a tax for educational purposes without a legislative

61-3-19

enabling act.

2. In answer to your question 2, I would say that if an enabling act is adopted, there would be no necessity of submitting the proposition of levying to the voters of Clayton County unless the enabling act so required.

I know the Attorney General extends personal regards with mine.

Very truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh4

TAXATION : Mr. Kirkham
Charitable Institutions --

1. A civil township is merely a legal subdivision of the county for governmental purposes.
2. Code section 427.1(11) applies not only to farm land but also to city property.
3. Charitable institutions have to pay taxes on all of its property over and above its exemption of 320 acres in a single civil township whether leased for pecuniary profit or not.

(Strauss to Hougen, St Rep, 3-31-61)

March 31, 1961

Honorable Chester O. Hougen
House of Representatives
Statehouse
L O C A L

Dear Mr. Hougen:

This will acknowledge receipt of yours of the 22nd inst. in which you submitted the following:

"The Ways and Means Committee in the House has requested that I obtain an attorney general's opinion with respect to House File 404 attached, and with specific references to sections 427.9 and 427.11.

(1) What is the meaning of the words 'civil township' in section 427.11?

(2) Does section 427.11 apply only to farm land, or is city property included in any respect?

(3) Under section 427.9, do charitable institutions referred to therein have to pay taxes on all property which is leased for pecuniary profit, and if so, what is the meaning of the words 'not exceeding 320 acres in extent'?

"The purpose of the Ways and Means Committee is to tax all property owned by educational or charitable institutions which is profit earning.

"A reply at your earliest convenience will be sincerely appreciated."

In reply thereto I would advise as follows:

1. In answer to your question 1: The meaning of the words: 'civil township' as used in section 427.1(11), Code

61-3-20

1958, is defined in the case of In Re Appeal of Trustees, 185 Iowa 434, 170 N.W. 813, at page 437 as follows:

> "A civil township is merely a legal subdivision of the county for governmental purposes. Township of West Bend v. Munch, 52 Iowa 132. The several counties are divided into civil townships by the respective boards of supervisors, and incorporated towns and cities are either coterminous with the civil townships including them or are contained therein."

2. In answer to your question 2: Section 427.1(11), Code 1958, applies not only to farm land but also to city property. That question is answered in the case of In Re Appeal of Trustees, supra, as follows:

> "Under the first amendment to Section 1304 of the Code, there can be no doubt that 'real estate' included urban property, as well as farm lands. Either, if held by an educational institution as part of its endowment, was exempt from taxation. Although the amendment was repealed, there is no reason for saying that the words 'real estate' were employed in any other sense in the substitute enacted by the thirty-fourth general assembly. The limitation was of the area which should be exempt, and not of the kind of realty, whether urban or rural, platted or unplatted. Only the limited area in a single civil township was made exempt."

3. In answer to your question 3: I quote to you the provisions of Section 427.1(9), Code 1958:

> "9. Property of religious, literary, and charitable societies. All grounds and buildings used by literary, scientific, charitable, benevolent, agricultural, and religious institutions and societies solely for their appropriate objects, not exceeding three hundred twenty acres in extent and not leased or otherwise used with a view to pecuniary profit. All deeds or leases by which such property is held shall be filed for record before the property herin described shall be omitted from the assessment."

I am of the opinion that under the terms of the foregoing statute, property not exceeding three hundred twenty acres

is exempt from taxation provided that it is not leased or otherwise used with a view to pecuniary profit. All other property embraced within the terms of the foregoing statute is subject to taxation, whether leased for pecuniary profit or not. I am also of the opinion that the meaning of the words: "not exceeding three hundred twenty acres in extent" as used in the foregoing numbered statute describes the limited area in a single civil township that may be exempt. Comparable language of limitation as used in section 427.1(11), Code 1958, was held to a like meaning.

Very truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh4

HEALTH: Board of Nurse Examiners -- licenses -- educational standards -- practical nurses -- It is a question of fact, and within the discretionary power of the board of nurse examiners to determine and approve any course of study in question, as to whether or not such course of study meets the standards prescribed in the statute, section 153.3(4), relating to licensure of practical nurses.

(Bianco to Sage, Bd of Nurse Ex, 3-31-61)

March 31, 1961

Miss Vera M. Sage, R.N.
Executive Secretary
Iowa Board of Nurse Examiners
State Office Building
L O C A L

Dear Miss Sage:

I have your favor of recent date requesting opinion of this office as follows:

> "The Code of Iowa, Chapter 152 Practice of Nursing. Section 152.3 item 4 Licenses -- sets forth this requirement for practical nurse licensure. 'Have completed a course of study through the tenth grade in public schools or its equivalent in parochial or secular schools'.
>
> "May we have your opinion about the following?
>
> "Would an acceptable score on the General Educational Development Test plus a Certificate of Equivalence of high school graduation from a University Extension Division meet this requirement?
>
> "A letter from the University of Nebraska, University Extension Division has prompted our request for an opinion. (Copy of letter enclosed.)"

In reply thereto, we would advise:

It appears that your question presents a question of policy as towhat educational standards meet the tests enunciated in the law, rather than a legal problem.

61-3-21

The statutory requirement, section 153.3(4), Code 1958, is stated thus:

> "Have completed a course of study through the tenth grade in public schools or its equivalent in parochial or secular schools, * * *" (emphasis ours)

The state board of public instruction has established minimum standards for courses of study through the twelfth grade in public schools. (See Iowa Departmental Rules 1958 and January 1961 Supplement, pp. 24 through 29 and amendments thereto.)

The University of Nebraska, University Extension Division, (a secular school), has evolved a system of educational development in which they evaluate the intellectual capabilities of a student by giving the students what is denominated "General Educational Development Tests". Based on the results of these tests, a course of instruction is then prescribed by which said student may earn a "Certificate of Equivalence" of high school graduation. We would assume then that this would be equivalent to a course of study through the twelfth grade under the standards of the state board of public instruction for public schools.

Therefore we advise that it is a question of fact, and within the discretionary power of the board of nurse examiners to determine and approve any course of study in question, as to whether or not such course of study meets the standards prescribed in the statute, section 153.3(4), relating to licensure of practical nurses.

Yours truly,

FRANK D. BIANCO
Assistant Attorney General

FDB:bl

HEALTH: Welfare -- restricted hospitals -- nursing or custodial homes -- children's boarding homes -- licenses -- Whether or not an applicant can qualify for a license for a "restricted hospital" is a question of fact to be determined by the Commissioner of Health, under the standards established by the Department of Health, under the provisions of the statutes, sections 135B.4, 135B.5, and 135B.7. The same is true as to nursing homes and custodial homes under sections 135C.1 and 135C.2. Under Chapter 237, governing children's boarding homes, being in part number 98 with Chapter 135C, the Department of Social Welfare may also license as a children's boarding home institutions which have been licensed as nursing or custodial homes, where the patients include children under the age of 14 years. (Beatrice Zimmerer) March 31, 1961

3-31-61

Mr. L. L. Caffrey, Chairman
State Board of Social Welfare
and
Edmund G. Zimmerer, M.D., M.P.H.
Commissioner of Public Health
L O C A L

Re: Tommie Dale Memorial Home

Gentlemen:

Reference is made to request for opinion of this office on the following questions:

> "We would like an opinion from the Attorney General's office relative to the following questions which have been raised by both the Department of Health and the Department of Social Welfare.
>
> "1. Is there any age limitation with respect to those persons who may properly be included in the definition for a nursing home or custodial home as defined by Chapter 135 C, Code of Iowa?
>
> "2. Is it possible to restrict, by departmental rules and regulations, the housing of adults and persons under the age of 14 years in the same 'nursing home' or custodial home?
>
> "3. Does an operator providing 'nursing home' or custodial home care for children and youth under the age of 14 years have to obtain both a nursing home license, as provided in Chapter 135 C, and a children's boarding home license as provided in Chapter 237?"

The matter of the licensure of the above-named home has been the subject of investigation since the fall of 1959. No building had been constructed at that time, and the type of operation was rather nebulous, except that it was to be a home for untrainable children.

61-3-23

The Department of Social Welfare and the State Department of Health have both been consulted from time to time as to which department should license the operation.

We now understand that the building has been completed and there is on file an application with the State Department of Health for a "restricted hospital license", as made by the owner. This application has been submitted under the provisions of Chapter 135B of the Code, as amended by Chapter 135, Laws of the 58th General Assembly. The applicable provisions of the law governing the issuance of such a license provide:

"135B.1 Definitions. As used in this chapter:

"1. 'Hospital' means a place which is devoted primarily to the maintenance and operation of facilities for the diagnosis, treatment or care over a period exceeding twenty-four hours of two or more nonrelated individuals suffering from illness, injury, or deformity, or a place which is devoted primarily to the rendering over a period exceeding twenty-four hours of obstetrical or other medical or nursing care for two or more nonrelated individuals, or any institution, place, building or agency in which any accommodation is primarily maintained, furnished or offered for the care over a period exceeding twenty-four hours of two or more nonrelated aged or infirm persons requiring or receiving chronic or convalescent care; and shall include sanatoriums or other related institutions within the meaning of this chapter. Provided, however, nothing in this chapter shall apply to hotels or other similar places that furnish only food and lodging, or either, to their guests. 'Hospital' shall include, in any event, any facilities wholly or partially constructed or to be constructed with federal financial assistance, pursuant to Public Law 725, 79th Congress, approved August 13, 1946. * * * "

"135B.2 Purpose. The purpose of this chapter is to provide for the development, establishment and enforcement of basic standards (1) for the care and treatment of individuals in hospitals and (2) for the construction, maintenance and operation of such hospitals, which, in the light of existing knowledge, will promote safe and adequate treatment of such individuals in hospitals, in the interest of the health, welfare and safety of the public."

"135B.4 Application for license. Licenses shall be obtained from the state department of health. * * * "

"135B.5 Issuance and renewal of license. Upon receipt of an application for license and the license fee, the state department of health shall issue a license if the applicant and hospital facilities comply with the provisions of this chapter and the regulations of the said department. Each such license, unless sooner suspended or revoked, shall be renewable annually upon payment of ten dollars and upon filing by the licensee, and approval by the department, or an annual report upon such uniform dates and containing such information in such form as the state department of health, with the advice of the hospital licensing board, shall prescribe by regulation. Licenses issued hereunder shall be either general or restricted in form. Where the facilities of an applicant for hospital license are suitable or adequate for only certain types of hospital care or treatment, the specific types of care or treatment for which such hospital is properly equipped shall be set forth on the face of the license and the lawful operation of the hospital shall be thereby restricted to the types of care and treatment so specified. Each license shall be issued only for the premises and persons or governmental units named in the application and shall not be transferable or assignable except with the written approval of the state department of health. Licenses shall be posted in a conspicuous place on the licensed premises as prescribed by regulation of the said department."

Pursuant to the provisions of section 135B.7, the department has promulgated rules, regulations and standards with respect to the different types of hospitals to be licensed as may be designed to further the accomplishment of the purposes of the chapter. (See Iowa Departmental Rules, 1958, page 123 et seq., as amended.)

We have been advised that the group of untrainable children for whom medical care will be furnished comprise a group ranging from infants to children ten years of age, and that the home will provide a variety of treatments for untrainable children which will include heat therapy, hydrotherapy, massage and sun baths. In addition, provisions will be made for administering oxygen when necessary, as well as intravenous feedings and subcutaneous feedings. All of the children will be strictly bed patients and wheel chair patients.

The supervisory staff will consist of three registered nurses, ten practical nurses, and one dietitian. The immediate supervision will be under the direction of the owner, Mr. J. L. Torgerson, and one of the registered nurses.

The application for the restricted hospital license contains the statement that two doctors will be associated and on call, one in charge of laboratory and one in charge of X-ray.

In the application on the question: Is the hospital accredited by A.M.A. Registry?, the answer was: "No accreditation has been requested by the applicant."

The law provides, in section 135B.5: "Upon receipt of an application for license and the license fee, the state department of health shall issue a license if the applicant and hospital facilities comply with the provisions of this chapter and the regulations of the said department." (Emphasis ours) The law further provides the state department of health may require affirmative evidence of ability to comply with such reasonable standards, rules and regulations as may be lawfully prescribed hereunder. Said standards, rules and regulations have been prescribed. (See Iowa Departmental Rules, 1958)

We call your attention to this significant act of the legislature, in adopting the amendment (Chapter 135, Laws of the 58th G. A.), wherein three types of homes were stricken from the definition of hospitals as contained in section 135B.1, 1.3., "rest homes, nursing homes, boarding homes".

The matter to be determined, therefore, is whether the applicant's institution falls within the classification of a general or restricted hospital; or a "rest home", "nursing home", or "boarding home", which are no longer defined as hospitals.

Therefore, whether or not the applicant institution, wherein the application states as to classification of institution, "restricted hospital for mentally and physically retarded children" meets the standards of such a hospital for the treatment of such patients, as opposed to the care by nursing of such patients, is a question of fact, solely within the discretionary powers of the Commissioner acting as head of the state department of health, which is charged with the duty of issuing such licenses.

In the alternative, this institution may qualify and be licensed as a nursing home or custodial home. The applicable

statute is Chapter 135C, Code of 1958. Nursing homes and custodial homes are defined thus:

"135C.1 Definitions. As used in this chapter:

"1. 'Nursing home' means any institution, place, building or agency which is devoted primarily tothe maintenance and operation of facilities for the housing, for a period exceeding twenty-four hours, and for providing skilled nursing care and related medical services for, two or more nonrelated individuals who are not acutely ill and not in need of hospital care, but who, by reason of age, illness, disease, injury, convalescence or physical or mental infirmity need such care. Nursing home does not include hospitals or custodial homes.

"2. 'Custodial home' means any institution, place, building or agency which is devoted primarily to the maintenance and operation of facilities for the housing, for a period exceeding twenty-four hours, and for care in excess of food, shelter, laundry or services incident thereto for, two or more nonrelated individuals who are not in need of nursing care or related medical services but who, by reason of age, illness, disease, injury, convalescence or physical or mental infirmity are unable to care for themselves. Custodial home does not mean hospitals or nursing homes."

There is a distinction in the type of care each may supply. Nursing homes may provide "skilled nursing care and related medical services for * * * who are not acutely ill and not in need of hospital care, but who, by reason of * * * physical or mental infirmity need such care."

Likewise, custodial homes may provide "for care in excess of food, shelter, laundry or servlces incident thereto * * * who are not in need of nursing care or related medical services but who, by reason of * * * physical or mental infirmity are unable to care for themselves.

The patients for which care is contemplated in the institution in question are a group ranging from infants to children ten years of age. The above provision of the law does not specify age as a criteria for admission. Although it speaks of persons "by reason of age", it includes other categories, inter alia, persons of "physical or mental infirmity". Age is not a limiting factor to one afflicted with physical or mental infirmities.

Therefore, in answer to question one, it is our opinion that there is no age limitation with respect to those persons who may properly be included in the definition for care in a nursing home or custodial home.

In answer to question two, it is our opinion that there is no statutory authority granted whereby, by departmental rules and regulations, the housing of adults and persons under the age of 14 years in the same nursing home or custodial home may be restricted.

Whether said institution shall be licensed as a nursing home or custodial home is also a factual question to be determined by the Commissioner of Health.

To answer your third query, we must advert to the provisions of Chapter 237 of the Code, wherein we find the following:

> "237.2 'Children's boarding home' defined. Any person who receives for care and treatment or has in his custody at any one time more than two children under the age of fourteen years unattended by parent or guardian, for the purpose of providing them with food, care, and lodging, except children related to him by blood or marriage, and except children received by him with the intent of adopting them into his own family, shall be deemed to maintain a children's boarding home. This definition shall not include any person who, without compensation, is caring for children for a temporary period."

> "237.3 Power to license. The state board of social welfare is hereby empowered to grant a license for one year for the conduct of any children's boarding home that is for the public good, that has adequate equipment for the work which it undertakes, and that is conducted by a reputable and responsible person."

> "237.4 Conditions to granting. No such license shall be issued unless the premises are in a fit sanitary condition, and the application for such license shall have been approved by the state department of health."

The primary objective of the institution in question, as we understand the facts, is to provide nursing or medical care for children ranging in age from infants to ten years of age. We note it is provided that the department of health shall approve the application for license of a children's boarding home, and that no license shall be issued unless the premises are in a fit sanitary condition, the inference being that

the department of health must pass upon this question. The statutes governing nursing and custodial homes and children's boarding homes are interrelated.

We believe that the rule of construction of pari materia applies here.

Statutes in "pari materia", which are statutes relating to same subject matter, must be construed together. (See Lucchesi v. State Board of Equalization, 31 P.2d 800, 802, 137 Cal. App. 478.)

Therefore, in answer to your third question, the said institution may also be licensed as a children's boarding home under Chapter 237 of the Code.

Respectfully submitted,

FRANK D. BIANCO
Assistant Attorney General

FDB:bl

TAXATION: Real, Personal, Moneys & Credits, and Business Corporation Taxes: Where public library is sole beneficiary of a trust, all property of the trust and all income of the trust are exempt from taxation. Iowa Code Sections 427.1(11), 427.1 (8), 427.1 (10) and 422.34 (2). (Gill to Erhardt, Wapello Co. Atty, 3-31-61)

Samuel O. Erhardt
Wapello County Attorney
Wapello County Court House
Ottumwa, Iowa

Dear Mr. Erhardt:

This will acknowledge receipt of your request for an Attorney General's Opinion dated February 27, 1961, wherein you present the following question:

"Where a trust has as its only beneficiary a municipal owned public library, is the trust liable for personal or real property taxes and business tax on corporations?"

The applicable Code sections are 427.1 (8), 427.1 (10) and 427.1 (11), Code of Iowa (1958):

"427.1 Exemptions. The following classes of property shall not be taxed:

" * * *.

"8. Libraries and art galleries. All grounds and buildings used for public libraries, public art galleries, and libraries and art galleries owned and kept by private individuals, associations, or corporations, for public use and not for private profit.

" * * *.

"10. Personal property of institutions and students. Moneys and credits belonging exclusively to the institutions named in subsections 7, 8, and 9 and devoted solely to sustaining them, but not exceeding in amount or income the amount prescribed by their charters or articles of incorporation; and the books, papers, pictures, works of art, apparatus, and other personal property belonging to such institutions and used solely for the purposes contemplated in said subsections and the like property of students in such institutions used for their education.

61-3-24

"11. Property of educational institutions. Real estate owned by any educational institution of this state as a part of its endownment fund, to the extent of one hundred sixty acres in any civil township. Every educational institution claiming an exemption under the provisions of this subsection shall file with the assessor not later than February 1 of the year for which such exemption is requested, a statement upon forms to be prescribed by the state tax commission, describing and locating the property upon which such exemption is claimed."

Iowa Code Section 427.1 (11) is applicable because of the case of Webster City v. Wright County (1909), 144 Iowa 502; 123 N.W. 193; 24 L.R.A., N.S. 1205; held that libraries are educational institutions.

It is axiomatic that the beneficial interest determines the taxability or non-taxability of a trust. (Ellsworth College v. Emmett County, 156 Ia. 52, 135 N.W. 594).

Therefore, in regard to real property, the library may own up to 160 acres in any single township and it will be exempt from real property taxes without regard as to whether or not a profit is made from this real property. (Appeal of Trustee of Iowa College, 185 Ia. 434; 170 N.W. 813).

Iowa Code Section 427.1 (10), exempts personal property, including moneys and credits, of libraries from taxation, provided the property is used "solely for the purpose contemplated in said subsection (here, 427.1 (8))."

In regard to the business corporation tax, Section 422.34 (2) would exempt this trust from that tax since, as set out above, a library is an educational institution.

Very truly yours,

bjf

DRAINAGE DISTRICTS
Recovery of Damages -- The governing body of Drainage District No. 7 in Des Moines County, Iowa, does not have authority to invest funds received from the United States Government, representing damages to the drainage district due to the operation of Mississippi River Navigation Pools, in certificates of deposit of approved banks and lending institutions.

(Strauss to Ford, Des Moines Co Atty, 3-17-61)

March 17, 1961

Mr. T. K. Ford

Des Moines County Attorney

Burlington, Iowa

Dear Mr. Ford:

Reference is herein made to yours of the 3rd inst. in which you submitted the following:

"Drainage District Number 7 in Des Moines County has received $452,419.00 from the United States Government which represents damages to the Drainage District due to the operation of Mississippi River Navigation Pools. This sum was received under circumstances encompassed within Section 455.162 of the 1958 Code of Iowa and breaks down as follows:

1.	Cost of pumping increased seepage	$ 9,150.00
2.	United States share of annual depreciation	1,296.00
3.	Total annual cost	10,446.00
4.	Total annual cost capitalized at 2 3/4%	379,855.00
5.	Lump sum share of depreciation	14,794.00
6.	Remedial work (additional facilities) plumbing, etc.	57,770.00

"Pursuant to the provisions of paragraph two of section 455.162, the governing body of the district made application to the District Court and received authority to invest $379,855.00 in United States Treasury Bonds. The governing body desires to invest $10,000.00 each in six approved Des Moines County banks and lending institutions in certificates of deposits for six months. The $60,000.00 involved will not and cannot be used until October of 1961.

61-3-11

"The drainage district takes the position that this $60,000.00 which is presently in the custody of the Des Moines County Treasurer is not "public funds" within the meaning of Section 452.10 of the 1958 Code of Iowa and they further argue that these funds, having been received from the United States Government, are not "in his hands" within the meaning of Section 452.10 and they therefore assert their authority to invest in these certificates of deposit.

"We have examined Sections 452.10, 455.9, 455.61, 455.162 and all other related sections and chapters.

"We are unable to find any law that appears to be even reasonably conclusive on the questions imposed here and therefore ask your opinion as to whether these funds are governed and controlled by the provisions of 452.10, and in the event that you answer it in the negative whether the drainage district governing body has authority to invest these funds in certificates of deposit of approved banks and lending institutions.

"Since these funds will be used around October 1st, it is quite important that we have an early answer or there will not be time for profitable investment of said funds."

In reply thereto I advise as follows:

Section 455.162, Code 1958, among other things, provides the following:

"* * *
"If a lump sum settlement is made between the United States and the district to provide an annual payment of income therefrom, the county treasurer of the county in which the greater portion of the district is situated shall be custodian of such principal fund. The governing body of the district shall apply to the district court for authority to invest said fund as provided by section 682.23, in addition to the investments therein approved the court may authorize investment of said fund in interest bearing bonds or warrants of said district. The income from said fund shall be disbursed by direction of the governing body of the district."

This is the authority in the district to invest the fund referred to in the section, and investments therein specified exclude the power in the district to invest otherwise than as therein specified.

This is within the rule of expressio unius est exclusio alterius that only those powers are granted which are expressly or by necessary implication conferred with the effect usually to accomplish a rather strict interpretation of the powers otherwise. Under this rule the district is limited in investing the foregoing money in the manner prescribed in the statute. This does not include investment in bank certificates of deposit. See Sutherland Statutory Construction, 3rd Edition, Volume 3, page 268, et seq.

Yours very truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh4

HEALTH: County hospitals -- use of radiology by chiropractors -- Under the provisions of sections 151.1, 135B.20(2) and 135B.22, a chiropractor cannot use the facilities of a county hospital to treat patients by the use of radiology, except under the direction and supervision of a doctor as defined in section 135B.20(2). (Bicanco to Morr, Lucas Co Atty 3-17-61)

March 17, 1961

1 file

Mr. Richard D. Morr
Lucas County Attorney
Chariton, Iowa

Dear Mr. Morr:

Your letter of February 11, 1961 has been referred to the writer for reply, and states the following:

"The Lucas County Hospital Board has requested that I obtain an opinion from your office relative to the use of the County Hospital's radiology facilities by chiropractors practicing in the hospital. It would seem that there is no question but that a Lucas County chiropractor could hospitalize and treat a Lucas County resident at the County Hospital, if the local Board saw fit to allow the chiropractor to admit his patients to the hospital. Opinions of Attorney General 1938, p. 321.

"The question: Does Chapter 135B of the 1958 Code of Iowa prohibit duly licensed chiropractors allowed to practice in the County Hospital by the Hospital Board from utilizing radiology facilities of the hospital in treating their patients?

"Section 135B.20(2) defines 'doctor' as 'any person licensed to practice medicine and surgery or osteopathy or osteopathy and surgery in this state.' Section 135B.22 provides that radiology services ' * * * must be performed by or under the direction and supervision of a doctor * * * .' It would seem from the above that a chiropractor could not avail himself and his patient of radiology facilities of the hospital, even though the scope of his profession would lawfully include the use of radiology in his treatment of patients.

"It would seem that Chapter 135B was enacted as a limitation on hospitals, rather than on the medical

61-4-1

profession itself. It also follows that since chiropractors are allowed to practice in the County Hospital, it would seem that they should be permitted to utilize all the hospital facilities, the use of which is compatible with and within the scope of their practice.

"The problem here arises primarily in the definition of 'doctor' in Section 135B.20(2). Section 147.74 of the 1958 Code of Iowa provides that a chiropractor may use the prefix 'doctor' in holding himself out professionally to the public. There is little question but what chiropractors are commonly referred to as 'doctors' by the general public. The definition of 'doctor' in Section 135B.20(2) in its narrowest construction would prevent also an oral surgeon from utilizing radiology facilities of the hospital, in that even though Section 135B.31 makes reference to the practice of oral surgery and provides that that 'practice' shall not be effected or limited by the Chapter - the oral surgeon would still be prohibited from utilizing radiology facilities of the hospital without having a doctor direct and supervise the service. It would seem from this then that the legislature did not intend to exclude either the practitioner of chiropractic or oral surgery from utilizing County Hospital Radiology facilities by the enactment of the Chapter involved, nor did it intend to further narrow the scope of their profession if they were treating their patient in a County Hospital.

"X-Ray facilities are the phase of radiology concerned with herein."

In reply thereto, we advise as follows:

Your question involves the scope and the limits of the practice of chiropractic. The Code defines "chiropractic" as follows:

"151.1 'Chiropractic' defined. For the purpose of this title the following classes of persons shall be deemed to be engaged in the practice of chiropractic:

"1. Persons publicly professing to be chiropractors or publicly professing to assume the duties incident to the practice of chiropractic.

"2. Persons who treat human ailments by the adjustment by hand of the articulations of the spine or by other incidental adjustments."

It is a restricted form of the practice of medicine. In the case of Lowman v. Kuecher, 246 Iowa 1227, 71 N.W. 2d 586, 52 A.L.R. 2d 1380, it is said:

"There can be no question but that the practice of chiropractic is the practice of medicine, although in a restricted form. This court so stated in State v. Boston, 226 Iowa 429, 437, 278 N.W. 291, where we said, 'The practice of medicine and surgery is the practice of the healing art, and, unless some restriction be placed thereon by the legislature, the whole field of medicine and surgery is open to the practitioner. On the other hand, the practice of chiropractic, although recognized as a branch of the healing art, is throughout held and considered to be only one form of the practice, within well-defined limits, of the science of healing.' See also 70 C.J.S., Physicians & Surgeons, § 15b; Commonwealth v. New England College of Chiropractic, 221 Mass. 190, 180 N.E. 895."

It has long been established, by our courts, what the limits and scope of the practice of chiropractic are, and that such limits and scope do not include the treatment of patients by means of "electric or other machines"; "physiotherapy, electrotherapy, colonic irrigation, ultraviolet rays, traction tables, vitalizors, and the like", and also construed as prohibiting chiropractors from prescribing diet in the treatment of the sick. (See State v. Otterholt, 234 Iowa 1286, 15 N.W. 2d 529; State v. Boston, supra; State v. Zechman, 157 Iowa 158, 138 N.W. 387; State v. Frutiger, 167 Iowa 550, 149 N.W. 634; and State v. Corwin, 151 Iowa 420; 131 N.W. 659.)

The law clearly defines the person, "doctor", (section 135B.20(2)), who is authorized to perform the "medical services" (section 135B.22) characterized therein, including radiology.

Therefore, in view of the holdings of the above authorities and the specific provisions of the statutes, it is our considered opinion that the limits and scope of the profession of chiropractic do not lawfully include the use of radiology in the treatment of patients, except under the direction and supervision of a doctor, as defined in section 135B.20(2), Code 1958.

Very truly yours,

FRANK D. BIANCO
Assistant Attorney General

FDB:bl

CONSERVATION [redacted] County Conservation Board -- Particular option to purchase [redacted] property not contractually binding upon County Conservation [redacted] Board unless they choose to exercise the option. (Section 111A.4(3)). (Craig to Sindlinger Ass't Black Hawk Co Atty, 4-4-61)

April 4, 1961

Mr. William W. Sindlinger
Assistant Black Hawk County Attorney
Cedar Falls Trust and Savings Bank Building
Cedar Falls, Iowa

Dear Mr. Sindlinger:

This will acknowledge receipt of your recent opinion request, in which you state:

"Enclosed please find a copy of an option for the purchase of certain real estate located in Black Hawk County, Iowa, by the Black Hawk County Conservation Board. As you are aware, the County Conservation Board functions under the provisions of Chapter 111A and before any real estate can be purchased by a County Conservation Board, the State Conservation Commission must approve such purchase (111A.4(3)).

"Our practice has been to acquire an option on the realestate which the local Board desired to purchase, submit the same to the State Conservation Commission, and, if approved, to exercise the option. Such procedure was followed in the immediate case except that the State Conservation Commission refused to approve the option and we have therefore not exercised the same.

"Of course we realize that the present County Conservation Board cannot enter into contracts for the purchase of land which will obligate future Boards. We therefore come to the point of my inquiry: Does the enclosed option create a contractual obligation upon the part of the Conservation Board to purchase all of the land therein described, or is it simply an option to purchase the several parcels of land therein described upon the terms and conditions set forth?"

61-4-3

A county board cannot, as a general rule, enter into contracts that will bind future boards. Palo Alto County v. Ulrich, 199 Iowa 1, 201 N.W. 132; State v. Plainer, 43 Iowa 140.

An option to purchase real property is not, however, a binding contract until the option is exercised. In Rumpton v. Dobson, 156 Iowa 315, 136 N.W. 682, at page 321 of 156 Iowa, the Supreme Court stated:

> "An 'option' is not an actual or existing contract, but merely a right reserved in a subsisting agreement. It is a continuing offer of a contract, and if the offeree decides to exercise his right to demand the conveyance or other act contemplated, he must signify that fact to the offerer. Rivers v. Sugar Co., 52 La. Ann. 762, 27 South. 118; Sixer v. Clark, 116 Wis. 534 (93 N.W. 539). An option is not a sale. It is not even an agreement for a sale. At best it is but a right of election in the party securing the same to exercise a privilege, and only when that privilege has been exercised by acceptance does it become a contract to sell. Hopwood v. McCausland, 120 Iowa, 218. 'An option is nothing more than a continuing offer to sell; but until it is accepted it does not become a contract of sale; for it lacks the element of an agreement between the minds of the parties. It is only when there has been an acceptance of a proposal to sell that the vendee becomes in any sense the equitable owner of the subject-matter of the option.' Milwaukee Mechanics' Ins. Co. v. R. S. Shea & Son, 123 Fed. 9, 11 (60 C. C. A. 103)."

To the same effect, see Myers v. Stone & Son, 128 Iowa 10, 102 N.W. 507.

The instrument you attach does not bind the Black Hawk County Conservation Board. It merely grants them the ". . . exclusive option, right and privilege to purchase . . ." certain parcels of real property, at a stated price, within a certain period of time.

Therefore, on the basis of the above authority, it is my opinion that the instrument you enclosed does not create a contractual obligation but is an option to purchase, which is not binding

upon the Conservation Board if it chooses not to purchase the property.

Very truly yours,

FRANK CRAIG
Assistant Attorney General

FC:sb

AGRICULTURE: Mink Ranches. Persons engaged in the production of domesticated fur-bearing animals can be "farmers" for the purpose of county zoning, if their operation is sufficiently extensive. Wright to Sersland, Sp Rep

4-4-61

1592

April 4, 1961

Hon. H. E. Sersland
House of Representatives
B U I L D I N G

Dear Sir:

This will acknowledge receipt of your letter of March 17, 1961, wherein you state:

> "I hereby request an opinion as to the status of the fur farmers and what their status will be in regard to county zoning. Will they be farmers or otherwise?"

It is the opinion of this office that persons engaged in the production of domesticated fur-bearing animals are employed in an agricultural pursuit and can, therefore, be classified as "farmers" if their operation is sufficiently extensive. This will depend upon the factual situation in each case.

An Attorney General's opinion of September 6, 1956, held that the employees of mink ranchers are not exempt under Section 321.1(43), 1954 Code of Iowa, from the requirement of a chauffeur's license since mink ranchers are not "farmers" within the meaning of Section 321.1(43).

The 1956 opinion was issued before the amendment of Section 159.2, 1958 Code of Iowa, by the 58th General Assembly which added, as an object of the Department of Agriculture, the encouragement, promotion, and advancement of the interests of agriculture including the production of domesticated fur-bearing animals. By thus making such production an agricultural pursuit, the General Assembly recognized that the raising of these animals is as much a part of agriculture as is "livestock industry", "dairying", and "poultry raising" which are other pursuits listed in Section 159.2.

Since the legislature has seen fit to include the production of domesticated fur-bearing animals within the jurisdiction of the Department of Agriculture, the producers may be treated as "farmers" for county zoning purposes.

Very truly yours,

GEORGE E. WRIGHT
Assistant Attorney General

GEW/d

61-4-4

CONSERVATION: County Conservation Boards -- Condemnation of land by county for conservation purposes under House File 153 would require approval of County Conservation Board, State Conservation Commission and County Board of Supervisors. (Greger to Rapson, St Rep, 4-4-61)

April 4, 1961

471.4

The Honorable George P. Rapson
House of Representatives
L O C A L

Dear Mr. Rapson:

We are in receipt of your letter of March 29, 1961, in which you request the opinion of this office in regard to the following:

> "Would the passage of this bill (House File 153) mean that the condemnation of land for conservation purposes would have to be approved by the Board of Supervisors, the County Conservation Board, and the State Conservation Commission?
>
> "Apparently there is some question as to whether the approval would have to be obtained from the Board of Supervisors."

In our opinion, your inquiry must be answered in the affirmative. House File 153 would amend Iowa Code Section 471.4 to read as follows:

> "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 creation of courthouses or jails and the construction, improvement or maintenance of highways, and for the carrying out of plans for the acquisition of land advanced by a county conservation board, and approved by the state conservation commission as provided in Section 111A.4."

Section 111A.4 vests the county conservation board with power

> "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."

61-4-5

Although the county conservation board has these powers, Section 111A.6 clearly provides that all projects will be financed with funds raised by the board of supervisors. That section provides:

> "111A.6 Funds -- tax levy -- gifts. Upon the adoption of any county of the provisions of this chapter, the county board of supervisors of such county may by resolution appropriate an amount of money from the general fund of the county for the payment of expenses incurred by the county conservation board in carrying out its powers and duties, and it may levy or cause to be levied an annual tax, in addition to all other taxes, of not less than one-fourth mill or more than one mill on the dollar of the assessed valuation of all real and personal property subject to taxation within such county, which tax shall be collected by the county treasurer as other taxes are collected, and shall be paid into a separate and distinct fund to be known as the county conservation fund, . . ."

Note that Section 111A.6 is permissive rather than mandatory; that is, the board of supervisors may appropriate money for the conservation board, and may levy a tax. Nothing requires it to make such an appropriation or levy. And further:

> ". . . The county conservation board shall have no power or authority to contract any debt or obligation in any year in excess of the moneys in the hands of the county treasurer immediately available for such purposes."

Thus, funds available to the county conservation board are limited to those funds made available by the board of supervisors in its discretion. (But see: Staff to Thomas E. Tucker, Deputy, Lee County Attorney, March 21, 1961: revenue collected in addition to amount budgeted may not be used in budget year.) For this reason, the proposed amendment, which vests counties with the power of eminent domain for conservation purposes, would require the approval of the board of supervisors as a condition to condemnation of land.

Very truly yours,

JOHN M. CREGER
Assistant Attorney General

JMC:sb

Constitutional Law : Amendment -- House Joint Resolution 22 providing for annual sessions of the General Assembly, does not deprive the General Assembly in its biennial session from exercising all of its constitutional powers, including those conferred by H.J.R. 22. (Strauss to Smith St Rep 4-4-61)

Const Art III Sec 2

April 4, 1961

Representative Roy J. Smith

House of Representatives, Seat 75

Statehouse

B U I L D I N G

Dear Mr. Smith:

RE: HOUSE JOINT RESOLUTION 22

"A Joint Resolution proposing an amendment to the constitution of the state of Iowa relating to the sessions of the General Assembly, and to repeal section two (2), article three (III), of the constitution of the state of Iowa and proposing a substitute therefor.

"Be It Resolved by the General Assembly of the State of Iowa:

"Section 1. Section two (2), article three (III), of the constitution of the state of Iowa, is repealed and the following adopted in lieu thereof:

"The General Assembly shall meet in session on the second Monday in January of each year. In the interim the General Assembly may be convened by the governor by proclamation. The session in even-numbered years shall not exceed seventy-five (75) days. In even-numbered years the session shall be devoted to consideration of the budget, the production, distribution and appropriation of revenue, review and revision of the tax structure, legislation designed to meet emergencies, and such other legislation involving subject matters authorized for consideration by the General Assembly under rules adopted by a majority of not less than two-thirds of its elected members of each house or auth rized by law."

61-41-6

"Sec. 2. The foregoing proposed amendment to the constitution of the state of Iowa is hereby referred to the General Assembly to be chosen at the next general election, and the secretary of state is directed to cause the same to be published, as provided by law, for three (3) months previous to the time of making such choice."

Reference is herein made to your oral request for opinion as to whether the provisions of proposed House Joint Resolution 22, concerning annual sessions of the General Assembly, and prescribing the powers of the assembly in even-numbered years, is a restriction to the extent thereof upon the General Assembly in odd-numbered years.

I would advise that in my opinion the specifications of what may be considered in the annual sessions in even-numbered years is not a bar to the consideration of the same matters in a session of the General Assembly in odd-numbered years. Section 30 of Article III of the constitution providing as follows:

" Local or special laws -- general and uniform -- boundaries of counties. SEC. 30. The General Assembly shall not pass local or special laws in the following cases:
For the assessment and collection of taxes for State, County, or road purposes;
For laying out, opening, and working roads or highways;
For changing the names of persons;
For the incorporation of cities and towns;
For vacating roads, town plats, streets, alleys, or public squares;
For locating or changing county seats.
In all the cases above enumerated, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State; and no law changing the boundary lines of any county shall have effect until upon being submitted to the people of the counties affected by the change, at a general election, it shall be approved by a majority of the votes in each county, cast for and against it."

is unchanged and expresses the general powers of the General Assembly sitting in odd-numbered years. This would include the powers of legislation conferred upon the General Assembly in the even-numbered years under House Joint Resolution 22.

Very truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh4

INSTITUTIONS: Employees -- military service -- employees of state institutions are entitled to pay for first thirty days of military service, whether they enlist or are inducted or are called into temporary federal or state service. (Creger to Bd of Control 4-5-61)

April 5, 1961

29.28

Board of Control of
State Institutions
L O C A L

Gentlemen:

We are in receipt of your letter of March 20, 1961, in which you make the following inquiry:

> "We are encountering a problem in the payment of salary to employees called into temporary and active State service while members of the Iowa National Guard and inductees into the Federal military service, and would like to know if they are entitled up to 30 days' salary in either case, to protect our institutional business managers when these occasions arise."

Your attention is directed to Iowa Code section 29.28, which provides as follows:

> "All officers and employees of the state, or a subdivision thereof, or a municipality therein, who are members of the national guard, organized reserves or any component part of the military, naval, or air forces or nurse corps of this state or of the United States, shall, when ordered by proper authority to active state or federal service, be entitled to a leave of absence from such civil employment for the period of such active state or federal service, without loss of status or efficiency rating, and without loss of pay during the first thirty days of such leave of absence. The proper appointing authority may make a temporary appointment to fill any vacancy created by such leave of absence."

61-4-8

You will note that, by the terms of this section, leave of absence shall be granted to those persons who enter either state or federal service and that their service shall be without loss of pay during the first thirty days of such leave of absence. This is true again whether or not the service entered is federal or state in nature. In our opinion, the same consideration applies whether or not the individual inducted is a member of the Iowa National Guard or an ordinary inductee into the federal military service.

It also applies whether such person is inducted involuntarily or enlists. In this connection, your attention is directed to 1942 Opinions of the Attorney General, page 130, holding that a person who enlists in the armed forces of the United States or a reserve officer who applies for active service before he is ordered to report is nevertheless "ordered by proper authority to active service".

Very truly yours,

JOHN M. CREGER
Assistant Attorney General

JMC:bl

ELECTIONS: Voting machines -- Under section 49.99, Code 1958, a voter can write in the name of a candidate in order to cast his vote for him, even though such candidates name is printed on the ballot in such a position as to make it impossible to vote mechanically for him because of a prior vote, when he is given the opportunity to cast his ballot for two. (Rehmann to Schroeder, Jackson Co Atty, 4-7-61)

April 7, 1961

Mr. Asher E. Schroeder
Jackson County Attorney
Maquoketa, Iowa

Dear Mr. Schroeder:

This is to acknowledge receipt of your letter of February 1, in which you state:

> "I have enclosed a sample of the ballot used. You will note, that the names of two persons appear on the ballot as candidates for the office of Justice of the Peace, both names are in column 31. One in the list of Democratic candidates, and the other on the line reserved for independent candidates. You will also note, that beneath the title of the office appears the caption, vote for two. We have voting machines in Jackson County, and of course it is impossible to vote for both of the persons named in column 31.
>
> "When the voting was finally tabulated, Mr. Norpel had received in excess of 400 votes. Mr. Gallagher over 300 votes. In column 32, a Mr. Ernst had received 22 write-in votes: and yet another individual had received 2 write-in votes. The precinct judges reported the results as showing Norpel and Gallagher as having the two highest total votes and therefore the apparent winners.
>
> "Mr. Norpel has qualified for the office, and it would seem as though there is no question as to his election, however, I question the election of Mr. Gallagher, since it would appear as though he had been defeated by Mr. Norpel. Mr. Gallagher has not yet qualified for office, though it has been indicated that he intends to do so.

61-4-10

"The question then, is whether or not the write-in candidate would be the other Justice of the Peace elected in Bellevue Township; or would Mr. Gallagher be the other Justice of the Peace, by virtue of having polled the second highest number of votes?"

In reply thereto, we advise as follows:

Voting machines are set up for the convenience of the voters, and the mechanical impossibility of being able to vote for two candidates whose names appear in a vertical column has no bearing upon the election. Ginsberg v. Heffernan, 60 N.Y.S. 2d 875.

Where a voter has the right to designate two candidates for an office, and because of the way the voting machine is set up he can only vote mechanically for one, this does not prevent him from writing in the name of another candidate, including one whose name already appears on the ballot. In re Election of assessor in Gearhart Twp., 192 Pa. 446, 43 A. 972.

The leading case in Iowa concerning the subject is Whittam v. Zahorik, 91 Iowa 23, 59 N.W. 57. In this case, there were six candidates in two parties, running for three offices of justice of the peace. The ballots were so marked that it was difficult to determine whether the persons were voting for all the candidates in one party or voting for some of the candidates to the exclusion of other candidates within the party. The court said, at page 30 of the Iowa reports:

" * * * There is no sufficient ground for saying that one person is a candidate against another because their names are printed in the same order, and opposite each other, on the ballot. When there is more than one candidate on each ticket for an office, each voter decides for himself whom he will regard as opposing candidates. * * * "

The court went on to hold that one candidate did not defeat another candidate for the office. Only those candidates who received the highest number of votes were elected to fill the positions of justices of the peace.

Thus, in answer to the question propounded in your letter, the person receiving the second highest number of votes is duly elected to the office of justice of the peace.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:bl

CITIES AND TOWNS, Change of name. Under Sec 362.40, The change in name has no effect upon the official records of a town (Bump to Roggensack, Clayton Co Atty, 4-11-61)

April 11, 1961

Mr. H. K. Roggensack
Clayton County Attorney
Elkader, Iowa

Dear Mr. Roggensack:

This is in response to your letter of April 7, 1961, in which you request an opinion of this office on the following question:

> "The Town of Guttenberg is having a special election in order to change the name of the Town from "Guttenberg to Gutenberg." Will you please give us an official opinion as to what effect, if any, this change will have on titles, plats, maps and all other official records."

As you are aware, the statutory procedure for changing the corporate name of a town is set forth in sections 362.38-362.41 inclusive, Iowa Code, 1958. Assuming that this procedure is followed and that the change is approved, the change in name does not affect the municipality's identity, rights, or debts. 62 C.J.S., Mun. Corps., 835.

The change in name must be made a matter of public record in §362.40 which provides:

> "Record filed. If a majority of the votes cast is in favor of the proposed change, the clerk of the city of town shall enter upon the records thereof the result of such election, and set forth in such record the new name adopted, as well as the original name thereof, and shall cause to be filed for record a certified copy of the entry so made in the office of the recorder of the county or counties in which such city or town is situated, and in the office of the secretary of state."

61-4-11

The validity of titles, plats, maps and all other official records remains unchanged after the name change. In Village of Northbrook v. Sterba, 149 N.E. 258, 318 Ill. 360 (1925), the Court said at page 261 of the Northeastern report:

> "The fact that the village of Northbrook formerly had another name can have no effect upon the validity of an ordinance establishing the village datum which was in existence prior to the change of name. The identity of the village remains unchanged. Provision is made by statute for changing the name of a city, incorporated town or village, and the rights and privileges of any such municipality exist the same after as before the change of name."

The reasoning set forth is applicable in the change herein proposed.

Sincerely yours,

WNBump/sb
CC to Senator Elvers

BEER AND CIGARETTES: Institutions -- Institutions may not legally furnish or sell cigarettes to inmates of the State Training School for Boys under the age of 18. (Iowa Code section 98.2) (Creger to Dunn, Hardin Co Atty, 4-19-61)

April 19, 1961

Mr. William N. Dunn
Hardin County Attorney
Eldora, Iowa

Dear Mr. Dunn:

We are in receipt of your letter of April 15, 1961, in which you state:

> "The Iowa State Training School for Boys at Eldora, Iowa proposes to give and later sell, cigarettes to boys committed to the school between the ages of 15 and 18 years. This action is governed by Chapter 98.2 of the 1958 Code of Iowa as amended by Chapter 119 of the Acts of the 58th General Assembly.
>
> "I would appreciate your opinion as to whether or not this proposed action would be in violation of Chapter 98.2 as amended."

Iowa Code section 98.2 provides as follows:

> "No person shall furnish to any minor under eighteen years of age by gift, sale, or otherwise, any cigarette or cigarette paper, or any paper or other substance made or prepared for the purpose of use in making of cigarettes. No person shall directly or indirectly by himself or agent sell, barter, or give to any minor under eighteen years of age any tobacco in any other form whatever except upon the written order of his parent or guardian or the person in whose custody he is."

In our opinion, this section by its terms prohibits the furnishing of cigarettes to any person under the age of eighteen, whether or not that person is an inmate of

61-4-14

the State Training School for Boys, and whether or not consent to said furnishing is obtained from the parents of the inmates in question.

Very truly yours,

JOHN M. CREGER
Assistant Attorney General

JMC:bl

STATE OFFICERS AND DEPARTMENTS: Employee pension plans -- Board of trustees of Public Safety Peace Officers' Retirement, Accident and Disability System have no power to administer proposed pension plan for fish-and-game conservation officers.

Gegger to Jarvis, St Rep, 4-19-61

97A.5(1)

April 19, 1961

Honorable Fred M. Jarvis
State Representative, Buena Vista County
House of Representatives
L O C A L

Dear Sir:

We are in receipt of your letter of March 17, 1961, in which you state:

> "In consideration of House File No. 488, the question comes up as to whether we could provide a pension fund for the fish and game conservation officers, similar to the one now in effect for the members of the Highway Patrol, and have the same administered by the board of trustees that administer the plan and fund for the patrol members.
>
> "This is asked because we have had objections to setting up a new board of trustees to administer this plan for the conservation members. These objectors feel that we are establishing too many separate boards, and that we should have the same board of trustees administer any plan set up in the proposed bill that now administers the highway patrol plan.
>
> "As one of the authors of the bill, and feeling that we should set up a plan such as set out in the bill, I would appreciate it if you would advise me whether we could utilize the present highway patrol board of pension trustees or some other like board or commission."

Your attention is directed to Iowa Code section 97A.5(1), which establishes a board of trustees to administer the public safety peace officers' retirement, accident and disability system. This section provides:

61-4-15

"The general administration and the responsibility for the proper operation of the system and for making effective the provisions of this chapter are hereby vested in a board of trustees to administer the system. Such board of trustees shall be constituted as follows: The commissioner of public safety, who shall be chairman of said board, the state treasurer, and a member of the system, to be chosen by the members thereof for a term of two years."

You will note that this section vests in the board of trustees no power or authority to undertake the administration of all pension funds generally. It authorizes the board only to carry into effect the provisions of Chapter 97A and to administer this one particular pension and retirement system.

In addition, restriction of the membership of the board of trustees to the Treasurer, Commissioner of Public Safety and a member of the retirement system itself reflects the intent of the legislature that this board was intended to administer the retirement system established by Chapter 97A.

Further, we find no statutory provision vesting in any state agency the general authority to administer various pension funds for state employees.

We must therefore answer your inquiry in the negative.

Very truly yours,

JOHN M. CREGER
Assistant Attorney General

JMC:bl

CONSERVATION: Outboard Motors - Boat is equipped with motor when motor is mounted on boat ready for use. Iowa Code Section 106.16 (Cregen to Mitchell, Conserv. Comm, 4-20-61)

April 20, 1961

Mr. Raymond R. Mitchell
Superintendent of Parks
State Conservation Commission
Local

Dear Mr. Mitchell:

We have your letter of April 6, 1961, requesting an opinion of this office interpreting Iowa Code Section 106.16 which fixes a maximum on the horse power of outboard motors permissible upon any artificial lake of one hundred acres of more.

Your request raises the question of when a boat is "equipped" with an outboard motor in excess of six horse power.

Iowa Code Section 106.16 provides:

> "No motorboat in class I, II, or III and no boats in classes IV and V, shall be permitted on any artificial lake under the jurisdiction of the commission. Provided, however, that boats in classes IV and V, when equipped with an outboard motor not to exceed six horsepower, shall be permitted upon any artificial lake of one hundred acres or more in size."

In our opinion, a boat is "equipped" with an outboard motor when such a motor is mounted on the transom of the boat. It has been held that "to equip" means the installation of an item of equipment in such a manner and in such a place that it is ready for use. See Palbamius v. Strauss 100 Oregon 497, 198 Pac. 253. Thus a boat is equipped with a motor in excess of the allowable six horse power when that motor is mounted thereon ready for use, whether or not the boat is actually operated under the power of the motor in question.

Very truly yours,

JOHN M. CREGER
Assistant Attorney General

JMC:jt

61-4-16

COUNTIES AND COUNTY OFFICERS: Medical examiners -- Under Chapter 258, county medical examiners may not charge a docketing fee. Rehmann to Perkins, Polk Co Atty, 4-24-61

April 24, 1961

Mr. Harry Perkins
Polk County Attorney
406 Courthouse
Des Moines, Iowa

Dear Mr. Perkins:

This is to acknowledge receipt of your letter of April 4, in which you state the following:

> "The question whether or not they are entitled to a docketing fee has been raised at some of the meetings of the County officers and employees, or meetings of the county medical examiners. At some of the meetings the officers apparently stated at said meeting that they are making a charge for docketing each case processed by them.
>
> "We would, therefore, appreciate receiving your opinion as to whether a medical officer is authorized to charge a docketing fee.
>
> "Subparagraph 2 of paragraph 5 of section 1 reads as follows:
>
> "'For each such preliminary investigation including the making of the required reports the County medical examiner is to receive a fee of $15.00 plus his actual expenses, to be paid by the county for which he is appointed.'
>
> "The question raised, therefore, is: Does the clause (plus his actual expenses) authorize the medical examiner to charge such a fee?"

In reply thereto, we advise as follows:

Chapter 258, Section 1(6), Acts of the 58th General Assembly provides:

61-4-19

"6. If, in the opinion of the county medical examiner, an autopsy examination is advisable and in the public interest, such autopsy shall be performed. The autopsy may be made by the county medical examiner or by such competent pathologist as he may designate.

"A full record and report of the facts developed by the autopsy and findings of the person making such autopsy shall be made promptly and filed with the county medical examiner and in the office of the county attorney. Pertinent information embodied therein shall be furnished forthwith to the appropriate state department or agency by the county medical examiner."

Subparagraphs 5 and 6 of the above-mentioned act set out the specific duties of the county medical examiner, consisting primarily of investigative work, with respect to the causes of death, within the county when certain conditions exist. The county coroner, on the other hand, was required to keep a docket of such cases reported by him, and acted with quasi judicial authority.

The county medical examiner is no longer required to keep a docket of such cases, but only a record of his findings which must be kept on file with the county attorney. In addition, your attention is directed to Section 16 of the heretofore-mentioned chapter of the Acts of the 58th General Assembly, which repeals Section 340.19, Code 1958, relating to docketing fees by the county coroner.

Thus, in answer to your question, the county medical examiner is not required to keep a docket of the cases processed by him. In the absence of specific provision for a docketing fee, he is not authorized to charge such fee as an actual expense incurred by him.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:sb

COUNTIES AND COUNTY OFFICERS: Medical examiner -- Under Chapter 258, Acts of the 58th G. A., the county board of supervisors may appoint such deputy medical examiners as are necessary to assist him in the performance of his duties. He shall promptly notify the chairman of the board of supervisors, who shall designate some other qualified person to serve in his place when he is unable to perform his duties.

(Rehmann to Nelson, Story Co Atty April 24, 1961 4-24-61)

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

Attention: George R. Larson, Assistant County Attorney

Dear Mr. Nelson:

This is to acknowledge receipt of your letter of March 24, in which you state the following:

"The local board of supervisors has asked me to request a clarification of the above mentioned statute (Chapter 339, 1958 Code of Iowa, as amended) by way of formal opinion from you.

"Apparently, the local board has duly appointed a medical examiner and two deputies pursuant to said statute. The medical examiner, but not his deputies, is a member of the staff of a large medical clinic at Ames, Iowa, and it appears that he, without authority from the supervisors, has caused a schedule to be prepared of staff members of said clinic and that in accordance with said schedule, each staff member performs the duties of medical examiner during the period of time set opposite his name. Such substitute, although he performs all of the duties of medical examiner, including the filing of the medical examiner's report signed by such substitute, is not a duly appointed deputy. It also appears that such substitute signs and files with the county auditor a claim for medical examiner fees.

"These, then, being the facts, the local board wishes to know:

"(1) If such a procedure were to continue, would the local board have authority under Section

61-4-26

399.8 of said Chapter to appoint the entire personnel of a medical clinic as deputy medical examiners? If so, would each have to take an oath of office in view of Article XI, Section 5 of the Constitution of the State of Iowa and would each have to give a bond pursuant to Section 341.4 of the 1958 Code of Iowa, even in view of Section 341.1 of the 1958 Code of Iowa being amended by the Fifty-eighth General Assembly by deleting therefrom the word 'coroner'?

"(2) Would the local board have authority under the existing conditions, to approve payment of claims for medical examiner fees when such claims have been signed by one of said medical clinic's staff members, not a duly appointed medical examiner or deputy?

"(3) Does the second paragraph of Section 339.2 of the 1958 Code of Iowa, as amended by Acts 1959 (58 G. A.), Chapter 258, mean that a medical examiner, 'unable to serve in any particular case or for any period of time,' will be temporarily or permanently replaced by some other qualified person?"

In reply thereto, we advise as follows:

Your attention is directed to Chapter 258, Section 1, Acts of the 58th General Assembly, which provides in pertinent part, to wit:

"8. Each county board of supervisors is hereby authorized to provide or arrange, and pay for, such laboratory facilities, such deputy medical examiner or examiners and such other professional, technical, and clerical assistance as may be recommended and required by the county medical examiner in the performance of the duties imposed by this chapter."

You will note that Chapter 339, Code 1958, has been repealed effective January 1 of this year, and therefore there can be no amendment to said chapter. However, under subparagraph 3 of the above-quoted section, the county medical examiner is required to take an oath of office and to enter into a bond with the county auditor in an amount to be figured by the board of supervisors.

Pursuant to subparagraph 8, the county board of supervisors is authorized to arrange for such deputy medical examiners as are required to assist the county medical examiner

in the performance of his duties. By virtue of section 341.4, Code 1958, if such deputy is appointed, the same requirements made of the medical examiner have to be imposed upon each deputy so appointed.

Therefore, in answer to your first question, the county board of supervisors could appoint such persons they feel necessary to assist the county medical examiner in the performance of his office. Whether or not it would require the entire staff of a particular medical clinic to perform such duties would be a question of fact, the determination of which would lie solely with the county board of supervisors.

Chapter 258, section 1(2), provides, to wit:

> "Each county medical examiner shall be licensed in Iowa as a doctor of medicine and surgery, or licensed in Iowa as an osteopathic physician or osteopathic physician and surgeon as defined by law. He shall be appointed by the board of supervisors from lists of two or more names submitted by the component medical society and the osteopathic society of the county in which he is resident. If no list of names is submitted by either society, the board of supervisors shall appoint a county medical examiner from the licensed doctors of medicine, or licensed osteopathic physicians or osteopathic physicians and surgeons of the county. If no qualified appointee can be found in the county, the board of supervisors shall appoint the medical examiner from another county."

You will note that only those persons appointed and properly qualified may serve as medical examiners within the county and, if there be no person who is properly qualified to act as medical examiner within the county, then the county may appoint the medical examiner from another county. The county medical examiner is expected to be available at all times; however, if he cannot do so, he is charged with a duty to promptly notify the board of supervisors, who shall designate a person to serve in his place.

Thus, the answers to your second and third questions must, by virtue of the foregoing authority, be that only those persons authorized to act as county medical examiners can make the preliminary investigations and the required reports.

If for any reason the county medical examiner is unable to perform his duties, as required of him under Chapter 258,

Acts of the 58th G. A., said medical examiner may be excused, provided he notifies the county board of supervisors of his inability to act. Whether such inability is of a temporary or permanent nature can only be determined from the facts as they are presented to the county board of supervisors.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:bl

TAXATION: Moneys and Credits - Exemption: A foreign corporation engaged in printing and publishing newspapers is a manufacturer within the provisions of section 427.1 (20), Code of Iowa (1958). Where such corporation obtains 74% of its total operating income from sources within Iowa and has four of its six operating plants within the State of Iowa, its "principal factories" are in Iowa. (Sections 427.1 (20), 428.20 and 429.2, Code of Iowa (1958).) (Murray to Leir, Scott Co Atty, 4-26-61)

April 26, 1961

Martin D. Leir
Scott County Attorney
3rd Floor, Court House
Davenport, Iowa

Dear Mr. Leir:

This will acknowledge your letter of February 24, 1961, in which you request the opinion of this department concerning the liability of Lee Enterprises, Incorporated stock as to moneys and credits tax.

For purposes of this opinion, we assume the facts as stated in a letter dated February 23, 1961, from Lane & Waterman, attorneys for Lee Enterprises, Incorporated, addressed to Mr. John M. Strelow, City Assessor of Davenport, Iowa, which provides that Lee Enterprises, Incorporated is a Delaware corporation, whose main operating office is located at 211 Brady Street, Davenport, Iowa. The corporation is the owner, printer and publisher of the following newspapers:

The Morning Democrat	Davenport, Iowa
The Daily Times	Davenport, Iowa
The Globe Gazette	Mason City, Iowa
The Muscatine Journal	Muscatine, Iowa
The Ottumwa Courier	Ottumwa, Iowa
The LaCrosse Tribune	LaCrosse, Wisconsin
The Kewanee Star	Kewanee, Illinois

The company owns printing plants in Davenport, Mason City, Muscatine, and Ottumwa, Iowa and at LaCrosse, Wisconsin and Kewanee, Illinois. The largest

61-4-23

plant is located in Davenport, and four of the six plants are located in Iowa. Of its gross operating income, 74% is derived from Iowa sources, 20% from Wisconsin and 6% from Illinois.

In addition, Lee Enterprises, Inc., owns 50% of the total outstanding capital stock of Madison Newspapers, Inc., a Wisconsin corporation, which publishes the Capital Times and Wisconsin State Journal, both of Madison Wisconsin, and also owns 49.75% of the outstanding capital stock of the Journal Star Printing Company, a Nebraska corporation which owns and publishes the Journal and Star Newspapers of Lincoln, Nebraska.

The relevant statutory provisions are sections 429.2, 427.1 (20) and 428.20, Code of Iowa (1958), which are here set forth:

> "429.2 Moneys--credits--annuities--bank notes--stock. Moneys, credits, and corporation shares or stocks, except as otherwise provided, cash, circulating notes of national banking associations, and United States legal tender notes, and other notes, and certificates of the United States payable on demand, and circulating or intended to circulate as currency, notes, including those secured by mortgage, accounts, contracts for cash or labor, bills of exchange, judgments, choses in action, liens of any kind, securities, debentures, bonds other than those of the United States, annuities, and corporation shares or stocks not otherwise taxed in kind, shall be assessed and, excepting shares of stock of national, state, and savings banks, and loan and trust companies, and moneyed capital as hereinafter defined, shall be taxed upon the uniform basis throughout the state of five mills on the dollar of actual valuation, same to be assessed and collected where the owner resides."
>
> "427.1 Exemptions. The following classes of property shall not be taxed:
>
> " * * * .
>
> "20. The shares of capital stock of telegraph and telephone companies, freight line and equipment companies, transmission line

companies as defined in section 437.1, express companies, corporations engaged in merchandising as defined in section 428.16, domestic corporations engaged in manufacturing as defined in section 428.20, and manufacturing companies organized under the laws of other states having their main operating offices and principal factories in the state of Iowa, and corporations not organized for pecuniary profit."

"428.20 'Manufacturer' defined--duty to list. Any person, firm, or corporation who purchases, receives, or holds personal property of any description for the purpose of adding to the value thereof by any process of manufacturing, refining, purifying, combining of different materials, or by the packing of meats, with a view to selling the same for gain or profit, shall be deemed a manufacturer for the purposes of this title, and shall list such property for taxation."

If the stock of Lee Enterprises, Incorporated is to be exempt, from the imposition of the moneys and credits tax, such exemption must be found in that portion of section 427.1 (20), supra, which provides the exempt status for "manufacturing companies organized under the laws of other states having their main operating offices, and principal factories in the state of Iowa."

This office has held in 1909 A. G. O. 328, that one engaged in the business of printing and publishing newspapers was a manufacturer within the provisions of section [redacted]9 Iowa Code 1897, presently section 428.20, supra. In that opinion, we stated:

"/O/ur statute says that any person, firm or corporation that combines different materials with a view to making gain or profit and selling the same is a manufacturer for the purpose of taxation. Now it will be conceded, I think, that it would be impossible to get out a newspaper without doing just exactly what the statute includes in this definition. For instance, you take one of our large newspaper plants here in this city: it takes paper of various kinds, ink, paste, metal, glue, truth and fiction and combines them, works them into the finished product of newspapers, magazines, books, maps, calendars and numerous other manufactured articles. ***.

"I therefore conclude:

"First. That a corporation organized under the laws of the state of Iowa for the purpose of the publication of a newspaper should be classed for the purpose of taxation as a manufacturer."

This leaves for determination the question of whether the corporation under consideration has its main operating offices and principal factories in Iowa. Under the facts as hereinabove stated, the main operating offices of the corporation are in Davenport, Iowa. This is, of course, a conclusion which should be verified by the local assessor, in conducting his investigation to determine whether the facts are as stated in the letter submitted by the taxpayer's representatives.

Section 427.1 (20), supra, was ameded in 1951 by Chapter 168, Acts of the 54th G. A., which extended the exemption from moneys and credits taxation to foreign manufacturing corporation having their main operating factories and principal factories in Iowa. The legislature in so amending the statute recognized the fact that a foreign manufacturing corporation may have factories in Iowa and also outside this state. It provided that so long as the principal factories are within the state, and the other requirements were met, the stock of foreign manufacturing corporation should be treated no different than that of a domestic manufacturing corporation, for purposes of the moneys and credits tax.

Under the facts as submitted, it appears that of the six newspaper plants owned by Lee Enterprises, the four plants located in Iowa produce 74% of its total operating income. We believe that this factor is sufficient to establish that the principal factories of the corporation are within the State of Iowa.

It appears further that Lee Enterprises, Incorporated, owns substantial stock in other newspaper corporations. Whether this factor is such as to change the nature of

the corporation from a manufacturer to a holding company, we are, under the facts presented, unable to say. This issue would have to be resolved by taking the income derived from these sources and comparing it with the corporations total income. Where it is of such a magnitude as to constitute the principal or main business of the corporation, we do not believe that it could qualify as a manufacturing corporation. Where, on the other hand, its principal income is derived from its manufacturing activities, we believe that it does so qualify. This issue cannot be determined by this office under the facts presented.

Very truly yours,

George W. Murray
Special Assistant Attorney General

GWM/WWR/bjf

AGRICULTURE: Veterinary Medicine -- Paragraph "e" of Section 1, of Chapter 143, Acts of the 58th G.A., provides that when the supervisor of the Iowa veterinary medicine diagnostic laboratory determines that an outbreak of hog cholera requires the use of virulent blood or virus, then the Department of Agriculture is required, under the terms of said paragraph "e" to forthwith approve the sale of virulent blood or virus to those persons entitled to use said virulent blood or virus, including those persons who are holders of valid unrevoked written permits to administer the same. April 27, 1961

(Strauss to Paul, St Rep, 4-27-1961)

Honorable George L. Paul
State Representative, Poweshiek County
House of Representatives
B U I L D I N G

Dear Mr. Paul:

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

> "It has come to my attention that the provisions of Chapter 143, Section 1, Sub-section E of the Laws of the 58th General Assembly are either misunderstood or misinterpreted by the enforcement agencies therein named.
>
> "It has come to my attention particularly in my own county that when cholera has been diagnosed by the diagnostic laboratory located at Iowa State University it has been difficult for the local veterinarian to obtain virulent blood or virus as set forth in this sub-section.
>
> "Therefore I should appreciate it very much if you will give me an Attorney General's opinion clarifying the procedure and the responsibility of the enforcement agencies to act in this respect."

In reply thereto I would advise that the statute in question is quite plain in its terms, and the duties of the several agencies designated to administer the Act, equally plain. Thus, when the supervisor of the Iowa veterinary medicine diagnostic laboratory determines that an outbreak of hog cholera requires the use of virulent blood or virus (which appears to be the situation described in your letter) then the Department of Agriculture is required, under the terms

61-4-27

of the Act, to "forthwith approve the sale of virulent blood or virus to those persons entitled to use said virulent blood or virus, including those persons who are holders of valid unrevoked written permits to administer the same."

Very truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh4

DRAINAGE DISTRICTS: Improvement - Trustees of drainage district may improve drainage outlet and right of way acquired by it in the state of Missouri under Iowa Code Section 455.17.

(Creger to McGrath, Van Buren Co. Atty, 4-27-61)

April 27, 1961

Mr. James W. McGrath
Van Buren County Attorney
Keosauqua, Iowa

Dear Mr. McGrath:

We are in receipt of your letter of April 3, 1961, in which you request the opinion of this office in regard to the right of the board of trustees of a drainage district to repair or improve a drainage outlet and right of way acquired by the district in the state of Missouri under Section 455.157.

Your attention is directed to Iowa Code Section 455.157 which provides:

> "When a district is, or has been established in this state and no practicable outlet therefore can be obtained except through lands in an adjoining state, the board of supervisors of the county where said district is situated shall, as drainage commissioners, have power to purchase a right of way and to construct a ditch for such outlet in an adjoining state or to contribute to the construction of such ditch, in an adjoining state and to pay for the same out of the fund of such district."

Under Iowa Code Section 455.135 the county board of supervisors has a duty to keep drainage districts in repair, and it has been held that this imposes a duty on the board of supervisors to keep the drainage district in such condition that it will function properly and perform the service for which it was intended. See Wise v. Board of Supervisors, 242 Iowa 870, 48 N.W. 2d 247.

Iowa Code Section 455.135(1) provides: "... The board at any time on its own motion without notice may order done whatever is necessary to restore or retain a drainage or levy improvement in its original efficiency or capacity..."

Since the outlet and right of way acquired in Missouri under Iowa Code Section 455.157 is an essential part of the drainage system and must function in good order in order

61-4-28

to maintain the efficiency and capacity of the drainage improvement, the trustees are, in our opinion, authorized to use district funds for the purpose of repairing or improving, for drainage purposes, the right of way and outlet, that portion of the right of way and outlet which lies within the state of Missouri as well as that portion thereof which lies within the state of Iowa.

Very truly yours,

JOHN M. CREGER
Assistant Attorney General

JMC:jt

STATE OFFICERS AND DEPARTMENTS

Paving improvement appeals. The State Appeal Board is without jurisdiction to hear and determine an appeal from the action of a city council in ordering improvement by paving payable partially from special assessments and partially from the avails of a general obligation bond issue.

(Strauss to Elijah, St Sen, 5-10-61)

May 10, 1961

Honorable Earl Elijah
Senator, 23rd Senatorial District
Clarence, Iowa

Dear Senator:

This will acknowledge receipt of yours of May 8, 1961, in which you submitted the following:

> "It has been called to my attention by some residents of Mechanicsville that they are having some difficulty relative to a proposed paving project in their city.
>
> "It seems that the council has passed a resolution of necessity, engaged an engineering firm to make the necessary survey together with estimate of cost of the project.
>
> "The proposed contract was submitted for bids and ten contractors submitted bids. The contract was made with the Iowa Road Builders at a price some $11,000.00 below the engineers' estimate.
>
> "The contractor put up the necessary bonds and have moved their equipment in and are ready to proceed.
>
> "Some residents filed objections and are holding up the project. The objectors appealed to the State Appeal Board which ruled in favor of the objectors.
>
> "Since Mechanicsville is in my Senatorial District I would like to have your department give me a written opinion as to whether or not the appeal board has jurisdiction in this matter.
>
> "If you can cite court cases to substantiate your opinion it might prove helpful."

In reply thereto I would advise as follows:

61-5-5

The department is of the opinion that in the foregoing situation, the Appeal Board is without jurisdiction. There are two reasons for this conclusion, both supported by adjudicated cases:

1. Insofar as Chapter 23 is concerned, and the power of the Appeal Board under it, it is said in the case of Carlson v. City of Marshalltown, 212 Iowa 373, where a contract for public improvement was involved, the following:

> "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 economy in and fair prices for building or other construction work to be paid for 'out of the funds of the municipality.'
>
> * * * * *
>
> "These sections have reference to 'public contract,' 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."

2. Insofar as the cost of improvement is payable out of special assessments imposed upon the benefited property, supplemented by a general obligation bond issue, and the power of the Appeal Board over such a method of financing, in the case of Schumacher v. City of Clear Lake, 214 Iowa 34 where Chapter 23 and a contract for public improvement were concerned, and payment was made partially from assessments and partially from the general fund of the city, it was said:

> "The court is of the opinion that the contract in this case is entirely outside the purview and purpose of the budget law, which, so far as this case is concerned, 'is to secure economy in and fair prices for building or other construction work to be paid for "out of the funds of the municipality" ' and "is directed to the promotion of economy in the letting of public contracts.' See Carlson v. Marshalltown, 212 Iowa 373.
>
> "Chapter 308, Code, 1927, makes quite adequate provisions for the accomplishment of these purposes. The proposed resolution and the plat and schedule are required to state the kinds of material proposed to be used, method of construction, estimated cost for each different type of construction and kind of material to be used, and the amount to be assessed against each lot. Notice to the owners of the property subject to assessment is required, and they are permitted to make objections. The record is required to show whether the improvement is petitioned for or made on motion of the council (Section 5999). When the construction is ordered, the council is required to contract, and no work may be done until the contract or certified copy has been filed. (Section 6001, See amendment Forty-third G.A., Chapter 179, Section 2.) The contract is required to be let on competitive bidding. No appeal from the order of establishment is provided for, but appeal from the assessment is allowed. To superimpose the provisions of the budget law would be to hamper and obstruct the municipality and the property owners in their right to make public improvements and to introduce confusion, incongruity, and uncertainty into definitely prescribed procedure therefor.

Generally speaking, as concerns the making of public improvements by cities and towns, the following observation, made in the Schumacher case, is pertinent:

> "The city acts through its proper administrative and legislative body, the council. The council in so acting acts as the properly constituted legislative body of the city, not as the mere agent of the property owners. The council is a continuous body, and its power is a continuing power.
>
> State v. Mayor, 28 Atl., 381 (N.J.);
> In re Mayor, 193 N.Y. 503, 87 N.E. 759;
> Zeo v. Lester, 135 N.E. 458, 241 Mass. 340.

> "To uphold plaintiff's contention would be disastrous to municipalities and to those concerned in their operations as taxpayers, purchasers at tax sale, contractors, creditors, and otherwise."

It is to be observed further that the issuance of general obligation bonds is authorized either under the provisions of Section 408.17 or Section 396.22, both Code of 1958, and whether issued under one or the other, shall not be considered as indebtedness incurred for general or ordinary purposes.

Very truly,

OSCAR STRAUSS

First Assistant Attorney General

OS:mmh

BEER: Class B and C permits -- revocation -- The conviction of a minor for buying beer on the premises of a class B permit holder constitutes mandatory grounds for revocation of said permit under the provisions of section 124.20 of the Code.

(Bianco to Jenkins, Monroe Co Atty, 5-12-61)

May 12, 1961

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

Dear Mr. Jenkins:

We have your favor of May 11, 1961, reading as follows:

"A problem has arisen regarding the construction of Section 124.20 under the following factual situation. On the 1st day of May, 1961, a minor plead guilty to the charge of purchasing beer on the premises of a class 'B' beer permit holder, and was duly convicted and fined.

"My question, therefore, is this:

"Does the conviction of a minor for buying beer on the premises of a class 'B' permit holder constitute a mandatory ground for revocation of said permit under the provisions of Section 124.20?"

In reply thereto, we advise as follows:

The pertinent part of the statute involved in this problem reads:

" * * * A violation of the provisions of this paragraph by any holder of a class 'B' or class 'C' permit or any of his agents or employees in connection with the operation of a beer business under said class 'B' or class 'C' permit shall be a mandatory ground for revocation of said permit, in addition to other mandatory grounds provided in this chapter." (Emphasis ours)

61-5-6

The answer to your question, we believe, may be found in the case of Walker v. City of Clinton, 244 Iowa 1099, 59 N.W. 2d 785, and reaffirmed by the case of Michael v. Town of Logan, 247 Iowa 574, 73 N.W. 2d 714.

In the Walker case, we have the factual situation wherein two minors, aged 18 and 19 years respectively, on September 11, 1952, were apprehended by the Clinton police with beer in their possession. On September 12 next, they signed statements which said they had purchased beer at plaintiff's tavern, drinking several glasses each, and taking some away with them, and described the bartender who sold it to them. Each pleaded guilty on September 12 to a violation of the beer law by purchasing beer when a minor, and was sentenced.

Under the above facts, the city council summarily revoked the tavern operator's license, without notice or hearing.

The tavern operator brought an action of certiorari challenging the legality of the action of the council and alleging that it acted arbitrarily and without jurisdiction. The trial court sustained the writ.

The Supreme Court reversed the trial court, and in construing sections 124.20, 124.30 and 124.34, said:

> "Under either of these sections it (council) had a mandatory duty to revoke plaintiff's license if there was a sufficient showing of sale of beer to a minor, either by plaintiff or any employee."

The Court further went on to say, speaking of section 124.20:

> "It does not provide that the permit holder, or his agent or employee, must first be convicted of the criminal offense of such illegal sale before the permit may be cancelled."

Then, speaking with reference to section 124.30, the Court said:

> "It is again to be observed that revocation is required for some violations without first requiring a conviction."

As to what constitutes mandatory ground for revocation, we find the Court saying this:

> "They (city council) need have before them only something which fairly shows cause which, in their judgment, indicates a continuation of the license will be inimical to the purposes of chapter 124."

In view of the Walker case, it is our considered opinion that the conviction of the minors described in your letter would constitute a mandatory ground for revocation of a class "B" or "C" permit, under the provisions of section 124.20 of the Code.

Yours truly,

FRANK D. BIANCO
Assistant Attorney General

FDB:bl

STATE OFFICERS AND DEPARTMENTS: Liquor Control Commission -- Importation of bourbon, rum and brandy is authorized by Code section 123.27(2)(c)(3), provided that all regulatory provisions of the Iowa Liquor Control Act be first complied with.

(Greger to Dawson, Liq Comm, 5-17-61)

May 17, 1961

Pauline Dawson, Superintendent of Permits
Iowa Liquor Control Commission
East 7th and Court
L O C A L

Dear Madam:

We have your letter of May 1, 1961, in which you state:

"Under section 27, 2c-3 of the Liquor Control Act, we have issued a Manufacturer of Compounds permit to the Peter Pan Bakers, Inc. of Des Moines. They desire to import into our state, for use in making fruit cakes, bourbon, rum and brandy. A copy of permit issued to them is enclosed.

"We would like to know, since the basis of rum is molasses and that of bourbon is a grain, if permittee may legally import same into our state. Brandy being a vinous product we interpret the law to sanction importation of this liquor.

"We will appreciate hearing from you at your earliest convenience and thank you for your opinion."

Iowa Code section 123.27(2)(c) provides:

"c. Notwithstanding any of the provisions of this chapter, patent and proprietary medicines, tinctures, food products, extracts, toilet articles and perfumes, and other like commodities, none of which are susceptible of use as a beverage, but which require as one of their ingredients alcohol or vinous liquors, may be manufactured and sold within this state, provided a special permit so to do is first obtained, as in this subsection provided. * * * "

61-5-7

Subparagraph three (3) thereof provides, in part, as follows:

> " * * * Such special permit when so issued shall entitle the holder thereof to import into the state, or purchase from licensed distillers within the state or from the commission, alcohol or vinous liquors for use in manufacture, in accordance with the terms of said permit, and to sell the product of such manufacture, regardless of any of the other provisions of this chapter with respect to purchase and sale of alcohol or vinous liquors."

Section 123.27(3) provides:

> "Nothing in this chapter shall prohibit the legitimate sale of patent and proprietary medicines, tinctures, food products, extracts, toilet articles and perfumes, and other like commodities, none of which are generally classified or used as a beverage but which require as one of their ingredients alcoholic or vinous liquors, through the ordinary retail or wholesale channels."

You will note that, while sections 123.27(2)(c) and 123.27(2)(c)(3) appear to be limited to "alcohol or vinous liquors", section 123.27(3) applies to all "alcoholic or vinous liquors". If this language is given its literal effect, manufacturing processes authorized under section 123.27(2)(c) would be limited to those products which contain only "alcohol" as defined section 123.5(2), which provides:

> "'Alcohol' means the product of distillation of any fermented liquor, rectified either once or oftener, whatever may be the origin thereof, and includes synthetic ethyl alcohol.",

and to "vinous liquors", which term is not defined by the Liquor Control Act. From this, it would follow that pure alcohol and vinous liquors could be imported pursuant to section 123.27(2)(c)(3), while bourbon, rum, and the like could not be imported. The logical conclusion would be that, while under section 123.27(3) food products, extracts and the like containing all alcoholic liquors could be sold in the State, only alcohol and vinous liquors could be imported into the State and used in manufacturing processes within the State of Iowa. In our opinion, therefore, the intent of the legislature was that "alcohol or vinous liquors" should, for purposes of permits under Iowa Code section 123.27 (1958), be synonymous with alcoholic liquor as defined by Iowa Code section 123.5(5), which provides:

> "Alcoholic liquor' includes the three varieties of liquor above defined (alcohol, spirits, and wine), and every liquid or solid, patented or not, containing alcohol, spirits, or wine, and susceptible of being consumed by a human being, for beverage purposes. Any liquid or solid containing more than one of the three varieties above defined is considered as belonging to that variety which has the highest percentage of alcohol, according to the order in which they are above defined."

Therefore, the importation of bourbon, rum and brandy is, in our opinion, authorized by Iowa Code section 123.27(2)(c)(3), providing of course that all regulatory provisions of the Iowa Liquor Control Act be first complied with.

Very truly yours,

JOHN M. CREGER
Assistant Attorney General

JMC:bl

COUNTIES AND COUNTY OFFICERS: Funds of Conservation Boards -- Neither county conservation board nor county treasurer has power to invest funds in short term investments, but county treasurer may deposit money at interest so long as the money may be withdrawn on demand.

May 23, 1961

Creger to Leir, Scott Co Atty, 5-23-61

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

Dear Mr. Leir:

We are in receipt of your letter of March 24, 1961, in which you state:

> "Our Scott County Conservation Board has asked us to investigate the possibilities of investing surplus money that they have in their fund in short-term investments.
>
> "We would appreciate an Attorney General's opinion as to whether or not this would be proper."

In our opinion, your inquiry must be answered in the negative. Your attention is directed to Iowa Code Section 111A.6, which provides as follows:

> "Upon the adoption of any county of the provisions of this chapter, the county board of supervisors of such county may by resolution appropriate an amount of money from the general fund of the county for the payment of expenses incurred by the county conservation board . . . and it may levy . . . an annual tax . . . which tax shall be collected by the county treasurer . . . to be paid out upon the warrants drawn by the county auditor upon requisition of the county conservation board for the payment of expenses incurred in carrying out the powers and duties of such conservation board . . . . gifts, contributions and bequests of money and all ramp licenses, fees and charges and other revenue or money received or collected by the board shall be deposited in the county conservation fund . . . ." (Italics supplied.)

Thus, it appears that the county treasurer is the only person lawfully entitled to possession and control of the money in the county conservation fund, and the money can be drawn from this fund only upon requisition of the county conservation board

61-5-12

for the payment of expenses incurred by the board. The section further requires all other revenue of the board to be deposited in the county conservation fund and, therefore, all funds of the board must be used only for the payment of expenses incurred by the county conservation board in carrying out its powers and duties.

Iowa Code Section 334.1 provides:

> "The treasurer shall receive all monies payable to the county and disburse the same on warrants drawn and signed by the county auditor. . ."

In U.S. v. Brechtel, 90 F. 2d 516, 519(8th Cir. 1937), the Court, after setting out the above-quoted section, said:

> "The treasurer of _____ county, Iowa, is the only person under the law who has the possession and control of the money of said county."

Thus, it appears that while the county conservation board may requisition funds from the county conservation fund for payments of expenses incurred in carrying out its purposes, this fund is nevertheless a county fund within the jurisdiction of the county treasurer; and the county conservation board has no power to invest the monies in this fund in either short term or long term investments.

Nor, in our opinion, does the county treasurer have the power to invest these funds in term investments. Your attention is directed to Iowa Code Section 452.4, which provides:

> "A county treasurer shall be liable to a like fine for loaning out . . . state, county or other funds in his hands."

In construing this section, the Attorney General of Iowa has ruled that county treasurers and boards of supervisors do not have authority to enter into agreements for any definite length of time with regard to deposit of funds and rate of interest. But, see the Attorney General's opinion, August 27, 1959, holding that a county treasurer may, subject to the statutory restrictions as to selection of depositories and rate of interest, so long as the absolute right of withdrawing the fund on demand is preserved in the terms of the deposit.

Very truly yours,

JOHN M. CREGER
Assistant Attorney General

JMC:sb

HIGHWAYS

SECONDARY ROADS -- Whether or not a road is a public highway is a question of fact to be determined for each particular road. In arriving at such a determination the following questions should be considered: Was the road established by statutory procedure or dedication and acceptance? Has the road been vacated or relocated by statutory procedure?

(Lyman to Heslinga Mahaska Co Atty 5-23-61
May 23d

Mr. Harold B. Heslinga
Mahaska County Attorney
118 North Market Street
Oskaloosa, Iowa

Dear Mr. Heslinga:

In re Responsibility for Maintenance of Certain Roads

You submitted the following question directed to you by the Mahaska County Board of Supervisors:

> **"There exists in Mahaska County several different situations pertaining to the secondary road system which we desire to be submitted to the Attorney General for clarification as to their legality and the responsibility of the Board of Supervisors and the County Engineer for their continued maintenance.**
>
> **"All of the situations concern existing traveled ways, some of which have been in existence for many years and others which are one, two, three, or so years old. They all serve one farm establishment and come to a dead end. Many of them are used by school buses, rural mail carriers, delivery and service men, and electric power and telephone transmission lines. All of them have had secondary road funds expended on them for one or more of the following: clearing and grubbing construction to grade, bridging, culverts, surfacing, maintenance and snow removal.**
>
> **"Case 1 - These roads originally were established as through roads, but a part of them have been closed in order to eliminate construction of a bridge or because of other undesirable physical properties, as well as their carrying very little traffic.**

61-5-13

"Case 2 - These roads have been constructed, surfaced, and maintained by the county but are not recorded on the road plat or in the road books in the office of the County Auditor. The land owner simply allowed the County to construct the road with the verbal understanding that maintenance would be done by the County.

"Case 3 - These roads are shown on the Road Plat in the road book as 'Consent" roads. The land owner petitioned the Board of Supervisors to establish a road to his farmstead and consented to a strip of land being used for that purpose.

"Case 4 - These roads are the same as CASE 3 above with the exception that the original surfacing or 1/2 the surfacing cost was paid for by the land owner.

"Case 5 - These roads were built on a new location to replace another established road which was subsequently vacated. The present road eliminates construction and maintenance problems encountered on the originally established roads, or serves as a more direct access to a through road.

"The land for some of the foregoing roads may have been removed from the taxable land area by recorded or unrecorded easements. Others have been constructed with no changes in the records of the assessor in taxable areaof land. Some of the roads were included in the county construction program in years past, having been placed on the program by trustees and/or board members.

". . . . Our question concerns the status of roads or traveled ways that have been accepted by the County in past years as part of the Secondary Road System in one way or another. They have been accepted and used by the school buses as public roads and they have been accepted and used by the U.S. Postal Department as public roads."

In order to answer the questions presented in your letter it is necessary to first examine some of the basic principles common to all five "cases" set forth in your letter.

Section 306.2(3) of the 1958 Code of Iowa, defines secondary roads as:

> ". . . all public highways, outside of cities and towns, except primary roads and state park and institutional roads."

The county board of supervisors is given jurisdiction over and responsibility for these secondary roads by Section 306.3(2) of the 1958 Code of Iowa, which provides:

> ". . . jurisdiction and control over the highways of the state are hereby vested in and imposed on . . . the county board of supervisors as to secondary roads within their respective counties . . ."

It is necessary to determine whether these roads referred to in the five "cases" are "public highways" as referred to in Section 306.2(3) of the 1958 Code of Iowa. A highway is defined in 25 AmJur 339, Highways § 2, as:

> ". . . a way open to the public at large, for travel or transportation, without distinction, discrimination or restriction, except such as is incident to regulations calculated to secure to the general public the largest practical benefit therefrom and enjoyment thereof. Its prime essentials are the right of common enjoyment on the one hand and the duty of public maintenance on the other. It is the right of travel by all the world, and not the exercise of the right, which constitutes a way a public highway, and the actual amount of travel upon it is not material. If it is open to all who desire to use it, it is a public highway although it may accomodate only a limited portion of the public or even a single family or although it accomodates some individuals more than others."

In these cases the method by which the roads were purported to be established may be of some importance. In 25 AmJur 344, Highways, § 9, is found:

> "Highways may be established by dedication, by prescription, or by the direct action of the public authorities. The owner of land cannot create a highway over it without the co-operation of the public. Giving a private way a name does not make it a public highway or thoroughfare."

It is established law in the state of Iowa that a highway cannot be established by dedication without an acceptance by the public. State v. Burmingham, 74 Iowa 407 (1888); Manderschid v. City of Dubuque, 29 Iowa 73 (1870); Bowersox v. The Board, 183 Iowa 645 (1918); Iowa Loan & Trust Company v. Board of Supervisors, 187 Iowa 160 (1919).

According to the terms in which your question is stated the landowners have consented to the use of the land as a roadway, and so the question of prescription can be ignored. The establishment of highways by the direct action of public authorities is now provided for in Chapter 306 of the 1958 Code of Iowa, namely Section 306.4. Prior to the 1951 amendments to Chapter 306, which were made by Chapter 103 of the Acts of the 54th General Assembly, the procedure for establishing highways was governed by Sections 306.3 through 306.61. Thus, in Iowa we have the statutory procedure for establishing highways, establishment by the prescriptive right of the public and the establishment by dedication with acceptance either by public authorities or by public user. In 25 AmJur 347, Highways, § 12, the "character of user" is stated that the use "must have been adverse, continuous, and exclusive".

Having discussed the above general principles, we can now turn to the particular questions posed in your letter. It will, of course, be necessary to make a determination of the facts regarding each road in each of the five "cases" and from those facts arrive at a conclusion as to whether or not the road is a public highway entitled to maintenance at public expense.

Case 1 - In the described situation there is apparently no question as to the fact that these roads are part of what was once an established highway. In 25 AmJur 409, Highways, § 3, it is stated that the "acient maxim 'once a highway, always a highway'" which has frequently been quoted by the courts is subject to many exceptions and qualifications. Insofar as the rights of the public are concerned the existence of a highway may be terminated by formal action by the public authorities having power and jurisdiction for such purpose. If in Case 1 the statutory procedure to abandon or vacate the road has not been utilized, the road remains a part of that highway system until vacated.

Case 2 - Again it will be necessary to make a determination of the facts in each road. There should be a determination of whether the statutory procedure for establishing a public highway has been followed. If the statutory procedure has not been followed, then no highway has been established unless there has been a dedication and acceptance. A mere dedication alone will not create a public highway. See 25 AmJur 344, Highways, § 9, supra. An acceptance is necessary to create a public highway. State v. Burmingham, supra; Manderschid v. City of Dubuque, supra; Bowersox v. The Board, supra; Iowa Loan & Trust Company v. Board of Supervisors, supra. It need not be a formal acceptance by official action. There is authority to the effect that expenditure of public funds on a road constitutes an acceptance, 25 AmJur 344, Highways, § 10. However, 19 AmJur 818, Estoppel, § 166, supports the position that a state or political subdivision cannot be estopped by the unauthorized acts or representations of its officers. Also, the state cannot be deprived of its property by the mistakes of officials. State v. Dakota County, Nebraska, 250 Iowa 318, 93 N.W.2d 595. In the event that it is determined that there has been no acceptance by public authorities, then there is the necessity of determining whether an acceptance has been made by public user. In these cases one farm establishment is served by each of the roads in question which are utilized by school buses, rural mail carriers, delivery and service men and electric and telephone transmission lines. If these vehicles and facilities use the road only for the purpose of servicing the one farm home on the land also occupied by the road, it would appear that they use the road for the convenience of or at the request of the owner of the underlying land and that their use is not adverse to his interest and thus does not have the adverse characteristic of user. If the facts were such as to lead to the conclusion in the last preceding sentence, then the road would be only a private road. In each case a determination would have to be made as

to whether or not there had been such acceptance as is needed to create a public road.

Case 3 - Prior to the extensive revision of Chapter 306 by Chapter 103 of the Acts of the 54th General Assembly, there was an abbreviated procedure for establishing public highways. This procedure was set out in Section 306.37 before that section was repealed and replaced by the General Assembly in 1951. Section 306.37 formerly entitled "Consent Highways" and before the 1951 amendments read:

> "Roads may be established without the appointment of a commissioner, if the written consent of all the owners of the land to be used for that purpose be first filed in the auditor's office; and the board, if satisfied that the proposed road is of sufficient public importance to be opened and worked by the public, shall make an order establishing the same. If a survey is necessary, the board, before ordering the same, may require the parties asking such establishment to pay or secure the payment of the expenses thereof."

It would be necessary in each case to determine whether or not this statutory procedure was complied with while the above statute was still in effect. In the event the procedure was not complied with, it would be necessary to determine whether there had been a dedication and acceptance similar to those indicated in Case 2.

Case 4 - These roads would appear to be cases where the improvement was made pursuant to Section 311.7 of the Iowa Code. In each case a determination would have to be made regarding whether or not the statutory procedure had been followed. In the event there is a determination that the statutory procedure was not followed, then a determination should be made as to whether or not there has been a dedication and acceptance similar to those indicated in Case 2.

Case 5 - Sections 306.4 through 306.12, inclusive, of the 1958 Code of Iowa, provide a procedure for altering highways. If the roads referred to in Case 5 were altered by this procedure or by the earlier applicable procedure provided in Chapter 306 before the 1951 amendments, then the highway is a public highway. A determination would need to be made in each case, and if it is determined that the statutory procedure was not followed, then it would be necessary to determine whether there had been a dedication and acceptance as

referred to in Case 2 above.

All of the above determinations of whether or not a particular road is a public highway are necessary to the decision of whether secondary road funds should be expended to maintain them since private roads are not entitled to maintenance by the public funds.

Very truly yours,

AGRICULTURE. Sale of Raw Milk Under Chapter 192, 1958 Code of Iowa, raw milk other than Grade "A" may be sold, but only by the producers and outside of a city or town.

(Wright to Spry, Sec Agri, 5-23-61)

May 23, 1961

Honorable Clyde Spry
Secretary of Agriculture
B U I L D I N G

Dear Mr. Spry:

In your letter of April 21, 1961, you request an opinion on the following question:

> "Section 192.10 of the 1958 Code of Iowa states:
> "No milk dealer, as defined in this chapter, shall sell or offer for sale at retail, in any city or town any milk or cream unless same has been fully pasteurized as defined in this chapter, except that Grade "A" raw milk need not be pasteurized".
> Section 192.10 subsection 3 states:
> "Nothing in this section shall be construed to mean compulsory grading of milk, such grades shall apply only to pasteurized and raw milk on which the grade is declared on the label".
> Can raw milk other than Grade "A" be sold as bottled milk at the retail level?"

It is the opinion of this office that raw milk, other than Grade "A", can be sold, but only by the producer and outside of a city or town.

Section 192.10 states, that no wholesaler or retailer of milk or cream, except the producer, shall offer or expose for sale any milk or cream unless the same shall have been pasteurized. Absent any contrary statement in the Code, this would imply that a milk producer, i.e., a farmer, may sell milk that has not been pasteurized.

Section 192.10 goes on to provide that no milk dealer, as defined in Chapter 192, shall "sell or offer for sale at retail, in any city or town, any milk or cream unless same has been fully pasteurized.... except that Grade "A" raw milk need not be pasteurized" Section 192.1 requires every person engaging in the sale of milk or cream at retail, in any city or town, to obtain a milk dealer's license from the Department of Agriculture.

61-5-14

It would appear from the above that anyone, even a producer, who sells milk at retail in a city or town is a milk dealer and can sell only pasteurized or Grade "A" raw milk. However, if a producer sells outside a city or town, there is nothing in the Code which prohibits him from selling raw milk which is not Grade "A".

Section 192.10(3) provides that the seller need not grade his milk. But if the seller were a "milk dealer" he could not sell raw milk in a city or town unless he graded it and that grade were Grade "A". A producer could sell his raw milk outside a city or town whether he graded it or not.

Very truly yours,

GEORGE E. WRIGHT
Assistant Attorney General

GEW/d

CONSERVATION: Soil conservation districts -- Chapters 467A and 467B, Code 1958, providing for maintenance programs for watershed districts, do not require that all portions of a watershed lying in more than one county be protected in accordance with the provisions of one uniform chapter.

(Creger to Greiner, Soil Cons Comm, 5-24-61)

May 24, 1961

Mr. William H. Greiner, Director
State Soil Conservation Committee
L O C A L

Dear Mr. Greiner:

We are in receipt of your letter of April 13, 1961, in which you state:

> "At the present time there are two sections under the Iowa Code that Soil Conservation districts can follow in regard to providing maintenance programs for watershed projects. One is the sub-district program under Chapter 467A and the other is the one-quarter mill levy under Chapter 467B, Code of Iowa.
>
> "The question raised is, when a watershed crosses county boundaries, could one county use the sub-district method and the other county use the one-quarter mill levy for providing maintenance money even though it is for the same watershed?"

In our opinion, your query must be answered in the affirmative. We find nothing in the Iowa Code requiring the administrative agency which is charged with the protection of a portion of a watershed lying within its particular county to transcend the boundary of its county in order to assert jurisdiction of the portion of the same watershed lying within an adjacent county.

The situation you pose is one in which two separate authorities cooperate in the maintenance and protection of one watershed, while exercising their individual jurisdiction over different parts thereof. Iowa Code section 467A.13 provides:

> "Purpose of subdistricts. Subdistricts of a soil conservation district may be formed as hereinafter

61-5-22

provided for the purpose of carrying out watershed protection and flood prevention programs within the subdistrict . . ."

Iowa Code section 467A.20 provides for a special annual tax to provide revenue necessary for protection of the watershed within the subdistrict. Iowa Code section 467B.1 provides:

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

and section 467B.9 authorizes an annual tax levy to finance Chapter 467B projects within the county.

Nothing in either chapter requires that all portions of one watershed be administered and protected in accordance with the provisions of one uniform chapter when the watershed itself lies in more than one county. Thus, each county has, in our opinion, the right to maintain its own portion of the watershed in the manner it prefers.

If the two adjacent counties can fulfill the policies of these sections, one using Chapter 467A program and one using Chapter 467B program, there is no objection to such an arrangement; the difficulties presented by such a situation, if any there be, are thus practical rather than legal.

Very truly yours,

JOHN M. CREGER
Assistant Attorney General

JMC:bl

STATE OFFICERS AND DEPARTMENTS: Taxation -- State Conservation Commission has no authority to pay special assessments. Iowa Code section 427.1 (1958).

Creger to Faber, Cons Comm, 5-24-61

May 24, 1961

Mr. Lester F. Faber
Assistant Director
State Conservation Commission
L O C A L

Dear Mr. Faber:

We are in receipt of your letter of April 10, 1961, in which you request the opinion of this office as to whether the State Conservation Commission may legally pay a special assessment levied against the State by Polk County, Iowa for a water line which runs adjacent to a state park.

You state that the county informs you that the Conservation Commission cannot hook up to the water main until such time as this assessment is paid.

Iowa Code section 427.1 provides:

> "Exemptions. The following classes of property shall not be taxed:
>
> "1. Federal and state property. The property of the United States and this state, . . . "

In Edwards & Walsh v. Jasper County, 117 Iowa 365 (1902), however, a distinction was made between general taxes and special assessments, holding that exemptions from general taxes do not relieve the owner of the property from special assessments. The reason for exempting property belonging to the State or to any of its instrumentalities, as counties and cities, from general taxes does not, as it appears to us, apply to special assessments. The Court said, at 117 Iowa, page 380:

> "While authority to levy such assessments is traceable to the taxing power, they are nevertheless

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> assessed on the theory that the property against which they are levied is benefited thereby to the extent of the levy, and the municipality acts as an agent, merely, in collecting the tax. The district improved is never co-extensive with the county or city, and it is not true that in paying the assessment the county must raise money to pay over to itself, and that no one would be benefited but the officers employed in the collection of the tax . . . True, the right to levy these assessments is referable to the power of taxation, but statutes exempting property from general taxation are almost universally held inapplicable to special assessments."

This case, however, stops short of holding that State property is subject to special assessment, and applies only to county and municipal property. The Court said, at 117 Iowa 382:

> "Property held by the United States or by the state itself cannot be made liable for two reasons: First, because it cannot be sold on execution, nor may any lien be created against it; and, second, because neither the state nor the United States can be sued, nor may judgments be enforced against either."

Thus, after this case, municipal and county property was not exempted from special assessment.

This is not to say, however, that the legislature could not, if it chose to do so, subject state property to special assessment. The State could, if it chose to do so, provide for the establishment of benefited water districts by county boards of supervisors. Iowa Code section 357.2 provides:

> "Territory included. The benefited water district may include part or all of any incorporated city or town, or cities and towns, together with or without surrounding territory including cemeteries and all publicly owned land. Said publicly owned property shall pay and bear its proportionate share of the cost and expense of said water system upon the same basis as privately owned property."

This section does not, in our opinion, subject state property to special assessment. Although, by its terms, it applies to all "publicly owned land", it contains no mechanics for enforcing the obligation against state property.

Under the reasoning of the Jasper County case, supra, state and federal property is exempt from special assessment because it cannot be sold in execution, nor may any lien be created against it, nor may the state or the United States be sued, nor judgments enforced against either. Thus, section 357.2 must, in our opinion, be construed to be limited to county property and the property of lesser political subdivisions, all of which is subject to execution, to lien and to judgment. We must, therefore, answer your inquiry in the negative.

Very truly yours,

JOHN M. CREGER
Assistant Attorney General

JMC:bl

STATE OFFICERS AND DEPARTMENTS
Liquor Samples - ownership

Ownership of samples of liquor delivered to the Iowa Liquor Control Commission or to the members thereof in their official capacity is in the State of Iowa.

(Strauss to Erbe, Gov., 5-24-61)

Original, undated, hand delivered by OS May 24, 1961

Honorable Norman A. Erbe
Governor of the State of Iowa
Statehouse
L O C A L

My dear Governor:

This will acknowledge receipt of yours of May 3, 1961, in which you submitted the following:

> "I have received a report from our present Iowa Liquor Control Commissioners stating that they considered the 'samples for analysis' as property of the distillers that shipped said samples to the Commission.
>
> "In each shipment, the addressee was the Iowa Liquor Commission to attention Commissioner C. J. Burris, Adcock or Smith. However, in the same report, they state that it is necessary to place State Liquor Seals on these 'samples.' Therefore, I hereby request an opinion from your office as to whether or not this liquor is state property upon being received and sealed by the Iowa Liquor Control Commission."

In reply thereto I would advise as follows:

The only statutory utterance fixing the place of samples in the operation of the Iowa Liquor Control Commission is found in section 123.39, Code 1958, providing as follows:

> "123.39 Gift of liquors prohibited. No manufacturer or wholesaler shall give away any alcoholic liquor of any kind or description at any time in connection with his business except for testing or sampling purposes only."

While the foregoing statute is general in its terms, it obviously is limited in its application to those manufacturers

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or wholesalers of liquors holding permits from the Iowa Liquor Control Commission as authorized by sections 123.36 and 123.37, Code 1958, which appear respectively as follows:

> "123.36. Manufacturer's license. Upon application in the prescribed form and accompanied by a fee of two hundred fifty dollars, the commission may in accordance with this chapter, and in accordance with the regulations, made thereunder, grant a license, good for a period of one year after date of issuance to a manufacturer which shall allow the manufacture, storage and wholesale disposition and sale of alcoholic liquors and wines to the commission and to customers outside of the state."

> "123.37 Wholesaler's license. Upon application in the prescribed form and accompanied by a fee of one hundred dollars and subject to the provisions of this chapter and the rules and regulations of the commission, the commission shall grant a license good for a period of one year after date of issuance, to a wholesaler, which shall allow the wholesaler to purchase alcoholic liquor from distillers either within or without the state for the purpose of selling to the commission and customers of such wholesaler engaged in the sale of alcoholic liquor and wines at retail outside of the state."

In connection with the foregoing permits, the Iowa Liquor Control Commission is authorized, under section 123.16, Code 1958, to do, among other things, the following:

> "123.16 Powers. The commission shall have the following functions, duties and powers:
>
> 1. To buy, import, and have in its possession for sale and sell liquors in the manner set forth in this chapter.
>
> * * * * "

It seems obvious that the public policy of the State, insofar as samples are concerned, expressed by the provisions of section 123.39, Code 1958, is equally applicable to such liquors as are authorized to be bought and imported and possessed by the commission under the provisions of Code section 123.16, hereinbefore quoted.

"Public policy" is defined in the case of State v. Gateway Mortuaries, 287 P. 156, 157, 87 Mont. 225, 68 A.L.R. 1512:

> "Legislature's utterance on particular subject within limits of its constitutional powers is 'public policy' of state."

Also In re Mahaffay's Estate, 254 P. 875, 877, 79 Mont. 10:

> "'Public policy' of state is determined by enactments of Legislature on subjects concerning which it has seen fit to speak."

Also in State ex rel. Holt v. District Court of First Judicial Dist. in and for Lewis and Clark County, 63 P.2d 1026, 1029, 103 Mont. 438:

> "To determine 'public policy' in the interpretation of statutes, courts are bound to follow legislative utterances, if within constitutional limits; and only in the absence of relevant legislative utterances may they look to judicial decisions."

For definitions generally, see the term "Public Policy," in WORDS AND PHRASES, Volume 35, page 274, and supplement thereto, page 83.

In that situation it is not to be ascribed to the legislature that samples of liquor as gifts are prohibited to manufacturers and wholesalers holding permits from the State, but excluding from the prohibition, those from whom purchases are made under other authority of the Iowa Liquor Control Commission.

In view of the foregoing, the title to the samples of liquor delivered to the Iowa Liquor Control Commission as gifts appears to be controlled by the following rules stated in 30 AMERICAN JURISPRUDENCE, Section 2, titled "Intoxicating Liquors":

> §2. Liquor as Property; Right of Ownership -- Intoxicating liquors have been considered immemorially and almost universally as property susceptible of private ownership, and, in the absence of statutory restrictions, as legitimate subjects of commerce -- domestic, interstate, and foreign. In other words, where no contrary rule is prescribed by legislative enactment, intoxicating liquors are held to be proper objects of barter, exchange, sale, or gift, as well as manufacture, possession, and transportation, like any other commodity in which a right of property exists."

It appears to be the rule in Iowa, in Monty v. Arneson, 25 Iowa Reports 386-387:

> "But, it is urged, the intoxicating liquor, being held with intent to violate the law, is not property. If that be so, what right had the sheriff to seize it on the execution, or the court to render a judgment for its value?
>
> "These very acts recognize the fact that it is property, for, if it were not, the sheriff could not take it, and the court could not assess its value, and render judgment therefor. But this court has held, that it is property, and an indictment will lie for larceny in feloniously taking it. State v. May, 20 Iowa, 305."

On page 389 it is further stated:

> "Intoxicating liquor is the subject of property; the commerce in it as an article of beverage is unlawful, but its character as property is not thereby destroyed.
>
> State v. May, 20 Iowa 305;
> Brown v. Perkins, 12 Gray 89;
> Preston v. Drew, 33 Maine 558.
>
> "In Ingalls v. Baker, 13 Allen 449, it is held that the owner of intoxicating liquor can maintain an action for its value against an officer seizing it upon an execution as the property of another. The facts of this case are quite similar to the one before us. In Nichols v. Valentine, 36 Main 322, it is ruled that such liquor cannot be taken upon execution. These cases were decided under statutes containing provisions similar to our own."

Obviously, under the Iowa Liquor Control Act, such liquor is property, and as thus defined, its transfer as property confers property rights gratuitously.

The ruling purpose of the word 'give' is to confer property rights gratuitously.

Noblett v. Smith, 128 S.E. 247, 251, 142 Va. 840.

And the primary meaning of the word 'give' is to transfer ownership or possession without compensation.

University of Vermont v. Wilbur's Estate, 163 A. 572, 575, 105 Vt. 147.

In this connection your attention is directed to the provisions of Regulation 22, Liquor Samples, subsection (2), of the Rules and Regulations of the Iowa Liquor Control Commission effective January 1, 1952, which provides:

> "(2) In June and December of each year the Commission shall order all samples remaining disposed of either by destruction or by transfer to hospitals or State institutions."

Based on the foregoing, I am of the opinion that the ownership of samples of liquor delivered to the Iowa Liquor Control Commission or to the members thereof in their official capacity is in the State of Iowa.

Very truly,

OSCAR STRAUSS

First Assistant Attorney General

OS:mmh4

STATE OFFICERS AND DEPARTMENTS: Board of Control -- Salarie of employees of Board of Control are reviewable annually. Iowa Code section 218.13 (1958), as amended by N.F. 644, 59th G. A.

Creger to Brown, Bd of Con., 5-26-61

May 26, 1961

Board of Control of State Institutions
State Office Building
L O C A L

Attention: M. J. Brown, Administrative Assistant

Gentlemen:

We are in receipt of your letter of May 10, 1961, in which you state:

> "Chapter 218.13, Code of Iowa, 1958, was amended by House File 644 of the 59th General Assembly to read as follows:
>
> "'The Board shall, annually, on each employee's anniversary date, review and fix the annual, monthly or semi-monthly salaries of said employees, except such salaries as are fixed by the General Assembly . . . '
>
> "Please give us an attorney general's opinion as to the application of such annual review.
>
> "1. Does it provide an annual review of said employee's salaries for increases or decreases only at that time on a fixed rate for the full year's period, or
>
> "2. Does it permit the fixing of a salary rate for an annual period even though the rate fixed for the first six month period differs from the rate fixed for the second six month period, all determined at the time of the annual review?"

This section, by its terms, provides only for an annual review of salaries and provides that annual, monthly, or semi-monthly salaries shall be fixed annually. In our opinion,

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the section quoted above does not permit the interpretation suggested by your second inquiry.

If the legislature had intended a semi-annual review of the salaries of employees of the Board of Control, the legislature would have expressly provided for such review. Your first inquiry is, therefore, answered in the affirmative.

Very truly yours,

JOHN M. CREGER
Assistant Attorney General

JMC:bl

STATE OFFICERS AND DEPARTMENTS: Board of Control -- Institutions -- Board of Control may determine a formula for certification to the comptroller of amounts due the state from counties having patients in state institutions chargeable thereto. Iowa Code section 230.20.

(Creger to Brown, Bd of Con, 5-26-61)

May 26, 1961

Board of Control of State Institutions
State Office Building
Des Moines, Iowa

Attention: M. J. Brown, Administrative Assistant

Gentlemen:

We are in receipt of your letter of May 10, 1961, in which you state:

> "Please give us an attorney general's opinion as to whether it is within the power and jurisdiction of the Board of Control of State Institutions under the statute to have the superintendents of our mental institutions certify to the comptroller the amount due the state from the several counties having patients chargeable thereto, on a basis of services rendered each patient instead of an average per patient cost.
>
> "1. Does Chapter 230.20, Code of Iowa, 1958, empower the Board of Control to determine a formula for certification of amounts due the state from the several counties by the superintendents on a services rendered basis, or
>
> "2. Must such certifications be made to the state comptroller on an 'average patient' cost basis?"

In our opinion, your first inquiry must be answered in the affirmative. Iowa Code section 230.20 (1958) provides:

> "Each superintendent of a state hospital where mentally ill patients are cared for shall certify to the state comptroller on the first days of January, April, July, and October, the amount not previously certified by him due the state from the several counties having patients chargeable thereto, and the comptroller shall thereupon charge the same to the county so owing . . . "

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This section contains no provisions establishing the certification formula, nor is such provision to be found elsewhere in the chapters of the Iowa Code dealing with institutions under the jurisdiction of the Board of Control of State Institutions.

Therefore, the Board of Control may, as one of its general administrative powers, establish a formula for certification of amounts due the State from the several counties on a service rendered basis, rather than on an average patient cost basis or upon any basis which the Board may deem reasonable and proper.

Very truly yours,

JOHN M. CREGER
Assistant Attorney General

JMC:bl

CITIES AND TOWNS : Public Utilities funds -- Proceeds from services rendered by the Atlantic Municipal Utilities, deposited under sec. 453.1, Code 1954, constitute a public fund, and when placed in a savings account, subject to withdrawal at any time, is a deposit and not a loan or investment and is subject to the provisions of the state sinking fund law.

Strauss to Dayton, Dep Treas., 6-5-61

June 5, 1961

Treasurer of State
Statehouse
L O C A L

Charles R. Dayton, Deputy Treasurer

Dear Mr. Dayton:

This will acknowledge receipt of your letter of May 22, 1961, as follows:

> "The Office of the Treasurer of State respectfully requests a ruling regarding a savings account in a bank which can be withdrawn any time but which draws interest after it is in that bank for a period of 90 days or longer, whether said savings account is covered under the State Sinking Fund for Public Deposits. More specifically, this refers to Atlantic Municipal Utilities, the proceeds of this savings account not coming from taxes but from services rendered for electricity in the town of Atlantic, Iowa.
>
> "This opinion has been asked for by Mr. O. A. Otto, President, The Whitney Loan and Trust Company Bank, Atlantic, Iowa."

In reply thereto I advise as follows:

(1) It appears from the foregoing that the money involved in the request consists of the proceeds for services rendered for electricity in the town of Atlantic, Iowa, from its municipal utility. As to such proceeds and its relation to the problem submitted, section 397.34, Code 1958, provides with respect to the powers of the trustees of public utilities plants, the following:

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> "397.34 Powers of trustees. The board of trustees shall have all the power and authority in the management and control of the utilities mentioned in the question submitted to the voters at such election as is conferred upon waterworks trustees appointed as provided in chapter 398."

The waterworks board, according to section 398.9, Code 1958, with respect to its money, shall do the following:

> " * * * All money collected by the board of waterworks trustees shall be deposited at least weekly by them, with the city treasurer, and all money so deposited and all tax money received by the city treasurer from any source, levied and collected for and on account of the waterworks, shall be kept by the city treasurer as a separate and distinct fund. * * * "

Such money, according to an opinion of this department appearing in the report for 1954 at page 178, which, basing its conclusion upon section 453.1, Code 1954, providing as follows:

> "The treasurer of state, and of each county, city, town, and school corporation, and each township clerk and each county recorder, auditor, sheriff, each clerk and bailiff of the municipal court, and clerk of the district court, and each secretary of a school board shall deposit all funds in their hands in such banks as are first approved by the executive council, board of supervisors, city or town council, board of school directors, or township trustees, respectively."

said:

> "By virtue of the foregoing provisions of section 453.1 of the Code, the funds received by the municipal treasurer are subject to the provisions of the state sinking fund law set forth in chapter 454 of the Code."

By reason hereof I regard this as a public fund.

(2) This being a public fund, it is also a deposit and not an investment or loan, according to the case of Hunt v. Hopley 120 Iowa 695, at 699, where this distinction between an investment and a deposit is made:

> "The distinction between a deposit and a loan is illustrated in that case (Independent School District v. Hubbard) for, while demand certificates of deposit on solvent banks were treated as equivalent to cash, time certificates bearing interest were denounced as private loans of public money, amounting to conversion. In Law's Estate, 144 Pa. 499,(22 Atl. Rep. 831, 14 L.R.A. 103), the difference was pointed out: 'Deposit is where a sum of money is left with a banker for safe keeping, subject to order, and payable, not in the specific money deposited, but in an equal sum. It may or it may not bear interest, according to agreement. While the relation between the depositor and his banker is that of debtor and creditor, simply, the transaction cannot, in any proper sense, be regarded as a loan, unless the money is left, not for safe keeping, but for a fixed period, at interest, in which case the transaction assumes the characteristics of a loan.'"

By reason of the foregoing, I am of the opinion that the public fund referred to as the proceeds from services rendered by the Atlantic Municipal Utilities is a deposit and subject to the provisions of the state sinking fund law.

Very truly,

OSCAR STRAUSS

First Assistant Attorney General

OS:mmh4

COUNTY AND COUNTY OFFICERS
Improvement Bids

1. Contracts for building improvements in excess of $2,000 let by the board of supervisors of the county in which said improvements are to be made, without advertisement for bids as provided in Code sections 332.7 and 332.8, are illegal and
2. Said board of supervisors is without authority to direct the county auditor to issue warrants for expenditure of funds based on said illegal act.

June 6, 1961

(Strauss to Simpson, Boone Co Atty, 6-6-61)

Mr. Stanley R. Simpson
Boone County Attorney
913 Eighth Street
Boone, Iowa

Dear Mr. Simpson:

This will acknowledge receipt of your letter of May 22, 1961, which states the following:

> "This office requests your opinion on the following legal proposition:
>
> > "The Boone County Board of Supervisors have entered into contracts and made building improvements at the Boone County Home in excess of $2,000.00, as provided in Sec. 332.7, Code of Iowa 1958.
>
> "On February 20, 1961, there appears in Minute Book 17, Page 322 in the minutes of the Board of Supervisors, the following motion:
>
> > 'Moved by Glenn Lehman, seconded by Charles Ball to accept the proposal for completing the interior of the wing at the County Home, submitted by the Madrid Lumber Company in the amount of $4,777.25.' Motion carried.
>
> "The Board failed to give public notice for the advertisement of bids as required in Sec. 332.7 and Sec. 332.8 of the Iowa Code.
>
> "The Madrid Lumber Company has completed its work, that said work has been approved by the Board and the Madrid Lumber Company now requests payment of $4,777.25 for said services.
>
> 1. Was the action of the Board of Supervisors as stated above, legal or illegal, when said Board failed to give public notice for

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advertisement of bids as provided for in Secs. 332.7 and 332.8 of the Iowa Code?

2. If said act by the Board of Supervisors is found to be illegal, then can said Board direct the County Auditor to issue warrants for expenditure of funds based on an illegal act?

"As you will note, this request for legal opinion is in conjunction with a prior opinion requested by this office earlier this month."

(1) This question is answered by opinion of this department appearing in the Attorney General's Report for 1940, at page 157, where it was stated in the request, among others, the following:

"Construction lettings. What is the position of a board of supervisors that proceeds to do thousands of dollars worth of construction work of various classes with day labor forces without advertising for bids? The method of procedure followed varies somewhat. In some counties projects will be divided into sections such that the cost of any one section or project is not estimated to amount to more than $1,500.00. In other counties, apparently no attention whatsoever is paid to this requirement of the law, and the board of supervisors calmly proceeds to spend all of their construction funds on a day labor basis without holding any advertised lettings whatsoever."

The answer:

"As a general proposition it is apparent that the specific acts complained of are illegal, and in those cases where the legislature has provided a penalty for a specific violation the same may be invoked by proper authority."

While the opinion in question involved secondary road construction under specific statutes, the rule undoubtedly controls the Board of Supervisors in acting under the provisions of sections 332.7 and 332.8, Code 1958, which are as follows:

"332.7 Contracts and bids required. No building shall be erected or repaired when the probable cost thereof will exceed two thousand dollars except under an express

written contract and upon proposals therefor, invited by advertisement for three weeks in all the official newspapers of the county in which the work is to be done."

"332.8 Bids -- plans and specifications. Contracts for buildings and repairs specified by section 332.7 shall be let to the lowest responsible bidder at a time and place which shall be distinctly stated in the advertisement. The board may on the day fixed for letting such contract adjourn the hearing to some later date and place, of which all parties shall take notice. The boafd may reject any and all bids and advertise for new ones. The detailed plans and specifications for such improvements shall be on file and open to public inspection in the office of the auditor of the county in which the work is to be done before advertisement for bids."

(2) Answer to your Question No. 2 is found in AMERICAN JURISPRUDENCE, Volume 42, page 379, Title: Public Administrative Law, as follows:

"§ 68 Necessity for Compliance with Statute. -- Administrative authorities are creatures of statute and have only such powers as the statute confers on them. Their powers must be exercised in accordance with the statute bestowing such powers, and they can act only in the mode prescribed by statute. (13) If a power or duty is imposed upon them jointly or as a body, it may not be exercised by them acting individually and separately. They cannot rightfully dispense with any of the essential forms of proceedings which the legislature has prescribed for the purpose of investing them with power to act. A commission may not assert the general power given it and at the same time disregard the essential conditions imposed upon its exercise. Officers must obey a law found upon the statute books until in a proper proceeding its constitutionality is judicially passed upon."

Footnote 13:
"The authority of public officers to proceed in a particular way and only upon specific conditions as to the issuance of evidence of indebtedness implies a duty not to proceed in any manner other than that authorized by law."

And insofar as it concerns the duty of public officers in the issuance of evidence of indebtedness, the rule is particularly pertinent.

The case of First National Bank v. Filer, 87 American Law Reports, 267, 145 So. 204, states the following:

> "Public officers cannot rightfully dispense with any of the essential forms of proceedings which the Legislature has prescribed for the purpose of investing them with power to act in the matter of contracting debts and issuing evidence thereof. McClure v. Oxford Twp., 94 U.S. 429, 24 L. ed. 129. And since the issuance of evidences of indebtedness that might have been valid under a state of facts that might have existed gives rise to a presumption of the existence of the facts essential to validity (Independent School District of Sioux City, Iowa, v. Rew. 111 F. 1, 49 C.C.A. 198, 55 L.R.A. 364), the authority of public officers to proceed in a particular way and only upon specific conditions as to such matters implies a duty not to proceed in any manner other than that which is authorized by the law."

The answer to your question No. 2 is in the negative.

Very truly,

OSCAR STRAUSS

First Assistant Attorney General

OS:mmh4

STATE OFFICERS AND DEPARTMENTS: Board of Control -- Board of Control employees are not within the jurisdiction of the Code 1962 Division of Personnel. Iowa Code section 8.5(6c), amended by section 1, Ch. 65, 58th G. A.; Sec. 59, H.F. 708, 59th G. A.; Sec. 18, S.F. 508, 59th G. A. (Creger to Brown, Adm. Asst Bd of Control, 6-6-61)

June 6, 1961

Board of Control of State Institutions
State Office Building
L O C A L

Attention: M. J. Brown, Administrative Assistant

Gentlemen:

We are in receipt of your letter of May 10, 1961, in which you state:

"Please give us in writing your opinion on the application of Chapter 8.5, Code of Iowa, 1958, as amended to the appropriation of funds for the Board of Control Administrative Office and Field Personnel, as provided in Section 7 of House File No. 708, as passed by the 59th General Assembly:

"1. Are the funds thus appropriated for payment of salaries subject to Chapter 8.5 of the Code of Iowa, 1958, or?

"2. Does Chapter No. 65, House File 359 (Acts 58th G. A.) apply since House File No. 708 does not contain an inclusion clause?

"3. Was the exclusion clause in Senate File 508 relative to institutional employees necessary inasmuch as Chapter No. 65 (Acts 58th G. A.) excluded these employees from being subject to Chapter 8.5 of the Code of Iowa, 1958?

"4. Does Section 59 of House File 708 make Chapter 8.5 applicable since all other salaries appropriated therein are subject to Chapter 8.5, and the absence of an exclusion clause, such as in Senate File 508, automatically makes all employees receiving compensation therefrom subject to Chapter 8.5?"

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In our opinion, your first question must be answered in the negative, and your second question in the affirmative. Iowa Code section 8.5(6c), as amended by section 1, Chapter 65, Acts of the 58th G. A., provides as follows:

> "The employees under the attorney general, employees of the supreme court, employees of the clerk and reporter of the supreme court, employees of the board of control or employees in institutions under the board of control, and those employees under the state banking board and the employees of institutions under the state board of regents shall not come under the division of personnel."

Thus, by statute, the Board of Control and institutions under its direction are removed from the jurisdiction of the Department of Personnel.

Section 59, House File 708 (59th G. A.), provides as follows:

> "Where any provisions of the law of this State are in conflict with this Act, the provisions of this Act shall govern for the biennium."

We find no section of House File 708, nor any other Act of the 59th General Assembly, which is inconsistent with the provisions of Iowa Code section 8.5(6c) as amended by Chapter 65, 58th G. A., supra; nor, in our opinion, is any provision of House File 708 in conflict with the provisions of Iowa Code section 8.5(6c). Section 7 of House File 708 merely lists the appropriations made for the operation of the Board of Control and the institutions under its jurisdiction for the biennium beginning July, 1961. This section contains no provision which places the Board of Control and its institutions under the jurisdiction of the Division of Personnel, nor does any other section of 708 nor any other Act of the 59th G. A. Therefore, the funds appropriated by this section are especially excepted from the operation of section 8.5 of the Code of Iowa (1958) by the operation of Chapter 65, Acts of the 58th G. A.

Your third inquiry is answered in the negative, for the reasons contained in the above paragraph. Section 18 of Senate File 508, 59th G. A., provides:

> "Chapter eight (8) of the Code shall apply to this Act except that employees whose salaries are appropriated herein shall not come under the division of personnel under section eight point five (8.5) of the Code."

Since all employees of the Board of Control or employees in institutions under the Board of Control are expressly exempted from the jurisdiction of the Division of Personnel by Iowa Code section 8.5(6c), as amended by Chapter 65, Acts of the 58 G. A., and since no legislative action has repealed or suspended the operation of Iowa Code section 8.5(6c), the language of section 18, Senate File 508 is, in our opinion, surplus language.

Your fourth inquiry is answered in the negative for the reason that there is no conflict between section 59 of House File 708 and Iowa Code section 8.5(6c). Again, House File 708 merely makes appropriations, and lays down no rules for the administration of the appropriations once made, with the exception of course that the funds shall be used for the purposes to which they were appropriated.

Very truly yours,

JOHN M. CREGER
Assistant Attorney General

JMC:bl

SCHOOLS: Tuition -- A school board cannot pay tuition to an out-of-state school board unless the conditions of Section 282.17, Code 1958, have been complied with. (Rehmann to Bruner, Carroll Co Atty 6-7-61)

June 7, 1961

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

Dear Mr. Bruner:

This is to acknowledge receipt of your letter of May 8, in which you state the following:

> "Saveral months ago, one John Walz, age 15, was the defendant in juvenile Court proceedings held in this County. Both John and his parents, Mr. and Mrs. Elmer J. Walz, are longtime residents of this city.
>
> "At the conclusion of the juvenile hearing, the case was ordered to be continued and John was paroled to our district Juvenile Probation Officer, who felt it advisable that John be removed from his local environment and, therefore, placed him in the 'Home on the Range for Boys', a private institution at Sentinel Butte, North Dakota.
>
> "Since his stay in this institution, John's care and keep have been paid for by his parents. This institution does not have its own school and its boys attend a public school at Beach, North Dakota. Up to this time, the Beach School District has made no tuition charge for these boys.
>
> "However, (as you will note by the enclosed copy of a letter received by the parents from the institution) the North Dakota Legislature has legislated that tuition must thereafter be paid. For the reason that they are residents of and included in the Carroll Independent School District, Mr. and Mrs. Walz have asked the school district to pay the $260.00 tuition for their son.
>
> "My question is whether the Carroll Independent School District may legally do so."

61-6-8

In reply thereto, we advise as follows:

Section 282.7, Code 1958, provides in pertinent part:

"282.7 Attending in another corporation--payment. The board of directors in any school district may by record action discontinue any or all of its school facilities. When such action has been taken, * * * high school pupils may attend school of choice and be entitled to tuition, * * *."

Section 282.17, Code of Iowa 1958, provides:

"282.17 High school outside home district. Any person of school age who is a resident of a school corporation which does not offer a four-year high school course, and who has completed the course as approved by the department of public instruction for such corporation, shall be permitted to attend any public high school of equivalent standing in an adjoining state, if said school in the adjoining state be nearer to the pupil's residence than any approved public high school in the state of Iowa, but no board shall pay tuition to a high school outside the state for pupils whose actual residence is nearer to an approved high school in Iowa when measured by the nearest traveled public road."

Generality speaking, a municipal corporation of this state cannot pay to another corporation outside of the state any public monies belonging to the instate municipal corporation. However, your attention is directed to Section 282.17, Code 1958, herein quoted above, which makes specific statutory exception to this rule. From the facts as presented in your letter, it would appear that the person in question would not come within the statutory prerequisites for having his tuition paid by the school district.

Therefore, under the doctrine of expressio unus est exclusio alterius we are constrained to hold that the Carroll Independent School District could not pay the tuition of the individual in question.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:SB

1. Under the provisions of Senate File 116, the amount of property transferred is a matter of agreement between the executive council and the bank as trustee, who would also agree upon "such price and upon such terms and conditions as the executive council, upon a majority recommendation of the state conservation commission, shall deem most advantageous to the state of Iowa."

2. The power of authorizing issuance of a patent to this land is dependent upon compliance with the foregoing provisions of Senate File 116.

3. The Agreement submitted apparently designates one dollar as being in full payment of all consideration for this property. Consideration of only $1 would constitute a gift by the State, and this does not appear to be the intention of the legislature. However this will not prevent the Council from finding that $1 is adequate consideration if it also finds that the State's interest in the property has only such value.

June 13, 1961

EXECUTIVE COUNCIL OF IOWA
Statehouse
L O C A L

Strauss to Exe Coun., 6-13-61

Vivian L. Rooker, Secretary to Mr. Gill

Dear Mrs. Rooker:

This will acknowledge receipt of yours of June 12, 1961, with accompanying copy of an Agreement in connection with the conveyance of certain land in Lee County, Iowa, authorized by an Act of the 59th General Assembly, Senate File 116. On reference to this Agreement, I am of the opinion that it does not represent the conditions which the legislature set forth in authorizing this sale. I would call your attention to the following part of Section 1, and the provisions of Sec. 2, of Senate File 116, both exhibited as follows:

> "* * * This tract contains approximately two hundred and four (204) acres, more or less, or so much thereof as the executive council and Fort Madison Savings Bank, as trustee, may agree upon, at such price and upon such terms and conditions as the executive council, upon a majority recommendation of the state conservation commission, shall deem most advantageous to the state of Iowa.
>
> "Sec. 2. Upon compliance with the provisions of section one (1) of this Act, and upon receipt from Fort Madison Savings Bank, as trustee, of the purchase price thereof, the governor and the secretary of state of Iowa are hereby authorized to execute and deliver, in the name of the state of Iowa and with the great seal of the state attached, a patent conveying said real estate to said Fort Madison Savings Bank, as trustee, its successors, grantees and assigns."

61-6-10

1. Under these provisions, the amount of property to be transferred is a matter of agreement between the executive council and the bank as trustee.

2. The submitted agreement should provide an agreement "upon such price, and such terms and conditions as the executive council, upon a majority recommendation of the state conservation commission shall deem most advantageous to the state of Iowa."

3. The power of authorizing issuance of a patent to this land is dependent upon compliance with the foregoing provisions of Senate File 116.

4. The consideration of only one dollar for this property would constitute a gift by the State, and this does not appear to be the intention of the legislature. However, this will not prevent the Council from finding that one dollar is adequate consideration, if it also finds that the State's interest in the property has only such value.

Very truly,

OSCAR STRAUSS

First Assistant Attorney General

OS:mmh3

Encl: Copy of Agreement

Counties: Interest on Special Assessments. §391.60. In the computation o interest on special assessments under §391.60 a June to June basis must l used extending from the date of the levy to the following June first. I: the levy is made after June 1 and prior to Jan 1 a refund of prepaid interest might be required.

(Bump to Ford Des Moines Co Atty 6-15-61)

June 15, 1961

Mr. T. K. Ford
Des Moines County Attorney
ATT: Wm. M. Hildreth
220 Tama Building
Burlington, Iowa

Dear Mr. Hildreth:

This is to acknowledge receipt of your letter of May 17, 1961, in which you set forth the following question:

> "The County Treasurer of Des Moines County, Iowa, has inquired as to the meaning and application of the last paragraph of Section 391.60 of the Code, which reads as follows: "Upon the payment of any installment, there shall be computed and collected interest on the whole assessment remaining unpaid up to the first day of June following".
>
> He (County Treasurer) advises that as to special assessments, he has computed interest to March 31, as in the case of ordinary taxes.
>
> Assuming that a taxpayer pays one installment of his assessment during the month of March, how is it that interest can be collected of the unpaid installments up to the first day of June following and remain consistent with the other paragraphs of said section?"

As you are aware Section 391.60 provides:

> "Installments--payment--delinquency. The first installment, or total amount of assessment if less than twenty-five dollars, shall mature and be payable thirty days from the date of such levy without interest, and the other assessments, with interest, from the date of levy by the council, on the whole amount unpaid, annually thereafter at the same time and in the same manner as the March semi-annual payment of thirty days after levy by the council.
>
> Any or all installments not yet paid together with accrued interest thereon may be paid on the due date of any installment.

61-6-11

> All such taxes with interest shall become delinquent on the first day of March next after their maturity, and shall bear the same interest with the same penalties as ordinary taxes, and when collected the said interest and penalties shall be credited to the same fund as the said special assessment.
>
> Upon the payment of any installment, there shall be computed and collected interest on the whole assessment remaining unpaid up to the first day of June following."

The computation of interest on special assessments under the last paragraph of the above quoted section is to be made on a June to June basis. In other words, assuming a levy was made on February 1, 1961, the interest is to be computed on the whole assessment remaining unpaid from February 1, 1961 to June 1, 1961. This would have the effect of requiring an advance interest payment with the first installment. On the second installment due January 1, 1962, the interest would similarly be computed from June 1, 1961 to June 1, 1962. Assuming, however, that on the second installment the taxpayer elected to pay off the entire balance of the assessment the interest to be computed at the time of that final payment would be up to and including only the date of the final installment payment. (Obviously, in the above illustration the due date of the first installment"... shall mature and be payable thirty days from the date of such levy without interest..." (§391.60, Iowa Code, 1958).

In a situation where the levy is made after June 1, 1961 and prior to January 1, 1962 (1956 Ops. Atty. Gen. p.22, 1930 Ops. Atty. Gen. p.50) the same reasoning applies with the exception that a refund of prepaid interest might be required on the final installment payment.

Assuming a levy was made on Sept. 1, 1961, the interest is to be computed "on the whole assessment remaining unpaid" from September 1, 1961 to June 1, 1962. The second installment would then be due on January 1, 1962 (see letter opinion attached, #58-4-6 Rodie to Parkin). No additional interest is computed on this installment.

It is obvious that an overpayment of interest results at this point, that being the prepayment of interest made with the first installment for the period of January 1, 1962 to June 1, 1962. This overpayment is the result of the computation of interest of the "Whole assessment remaining unpaid up to the first day of June following..." (the installment paid January 1, 1962 represents part of the sum upon which the interest was computed.)

This result is reached on the basis of the wording of the last paragraph of s391.60, supra, which you have questioned. For your edification, we set forth again the pertinent language with our emphasis: "Upon the payment of any installment, there shall be computed and collected interest..."

Sincerely yours,

W. N. BUMP
Solicitor General

WNB/gh

STATE OFFICERS AND DEPARTMENTS Bd of Regents—Psychopathic Hosp

The $25,000 provided in Sec. 2 of House File 288, 59th G.A., for the State Board of Regents for the psychopathic hospital at Iowa City, Iowa, to further the research studies of alcoholism is an appropriation from the Liquor Control Act fund created and existing under the provisions of paragraph 2 of section 123.50, Code 1958. The appropriation made to the Liquor Control Commission by House File 708 Acts of the 59th G. A., in the sum of $3,750,000 for each year of the biennium beginning July 1, 1961, is expendable for general administrative purposes. June 27, 1961

(Strauss to Selden, St. Comptl, 6-27-61)

Mr. Marvin R. Selden, Jr.
State Comptroller of Iowa
Statehouse
L O C A L

Dear Mr. Selden:

This will acknowledge receipt of yours of the 5th instant in which you submitted the following:

"House File 288, Acts of the 59th General Assembly provided for $25,000.00 from the funds of the Liquor Commission to be assigned to the State Department of Health for the study and dissemination of information on alcoholism. It is noted that the legislative appropriation is for administrative expenses, while the net proceeds of the Liquor Control Act transfer to the General Fund (Chap. 123).

"We respectfully request an opinion as to the following:

"Is this $25,000.00 to come out of the Liquor Control Act Fund (Section 123.50-2) or is it to come out of their total appropriations?"

In reply thereto I am of the opinion that the appropriation of $25,000 as provided in Sec. 2 of House File 288, 59th General Assembly, in the following terms:

"There is hereby established, within the state department of health, the Iowa commission on alcoholism and there is hereby appropriated to the state board of regents for the psychopathic hospital at Iowa City, Iowa, to further the research studies of alcoholism, the sum of twenty-five thousand (25,000) dollars out of the funds of the liquor control commission. The commission shall consist of the following members: The commissioner of public health and eight (8) other members to be appointed by the governor, at least two of whom shall be physicians, one a member of the general assembly, one a representative of industry, one an attorney, one a member of the clergy, and two recovered alcoholics."

#61-6-14

refers to the Liquor Control Act Fund created and existing under the provisions of paragraph two (2) of section 123.50, Code 1958. The appropriation made to the Liquor Control Commission by House File 708, Acts of the 59th General Assembly, in the sum of $3,750,000 for each year of the biennium beginning July 1, 1961, is expendable for general administration purposes, which does not include the foregoing-named expenditures.

Yours truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh4

STATE OFFICERS AND DEPARTMENTS

Fair Board, architect -- The State Fair Board of Iowa may employ a competent architect to perform services incident to the construction authorized by the 59th General Assembly (House File 716), and pay on a contract basis for such services out of the appropriated fund.

Strauss to Gill, Sec Exec. Coun., 6-27-61

June 27, 1961

EXECUTIVE COUNCIL OF IOWA
Statehouse
L O C A L

Gary S. Gill, Secretary

Dear Mr. Gill:

This will acknowledge receipt of yours of June 2, 1961, in which you submitted the following:

> "The 59th General Assembly, in House File 716, appropriated money for capital improvements at the Iowa State Fair Grounds, this money to be spent only with the approval of the Executive Council. This bill was amended as follows:
>
> > 'The State Fair Board, with the approval of the Executive Council, shall employ a competent architect to draw up plans and specifications for the repairs herein above listed.'
>
> "This bill was then further amended by striking the word 'competent' and inserting in lieu thereof the word 'state'.
>
> "The Executive Council respectfully requests an opinion on whether the Council can employ an Architect on a fee basis or if they must hire an Architect on a salary basis in view of the second amendment."

In reply thereto I advise as follows:

In view of the plain intent of the legislature to authorize the described capitol improvements, I am of the opinion that this intent be not frustrated by the direction to employ an occupant of a public office which does not exist for the purpose of drawing up plans and specifications. According to

61-6-12

SUTHERLAND STATUTORY CONSTRUCTION, 3rd Edition, paragraph 4703:

> "To discover the true construction of any particular clause of a statute, the first thing to be attended to, no doubt, is the actual language of the clause itself, as introduced by the preamble; second, the words or expressions which obviously are by design omitted; third, the connection of the clause with other clauses in the same statute, and the conclusions which on comparison with other clauses, may reasonably and obviously be drawn . . . . If the comparison of one clause with the rest of the statute makes a certain proposition clear and undoubted the act must be construed accordingly and ought to be so construed as to make it a consistent whole. If after all it turns out that that cannot be done, the construction that produces the greatest harmony and the least inconsistency is that which ought to prevail."

Therefore, to effectuate this intent there appears implied authority to employ a competent architect to perform the architectural services described. Such architectural services have been held by this department to be a part of a construction project. OAG 1922, page 374, so holds:

> "* * * The first question relates to the validity of the action of the board of supervisors in entering into the contract with the architect for the approving and furnishing of plans and specifications for the erection of a court house.
>
> "In considering this question it is necessary to determine what relation the plans and specifications bear to the construction or erection of a court house. Plans and specifications are a very important part of any major b building enterprise. No one would attempt to build a court house without plans and specifications. The contract with the architect to draw plans and specifications for the erection of a court house is just as much a part of the building project as the contract with the contractor to build and erect a court house from those plans. Both contracts are in the same category. They are inseparable as being integral parts of the building operation."

In that view the Fair Board may employ a competent architect to perform the services incident to the authorized construction and pay on a contract basis for such services, out

of the appropriated fund.

Very truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh4

COUNTY AND COUNTY OFFICERS : Transfer of funds -- There is no authority to transfer funds for the purpose of meeting an increase in the salary of the assessor. The assessor's salary when fixed for the term, may not be changed or altered during the term.
(Strauss to Goreham, Poweshiek Co. Atty, 6-27-61)

June 27, 1961

Mr. Fritz Goreham
Poweshiek County Attorney
Peoples Savings Bank Building
Montezuma, Iowa

RE: Salary of county assessor

Dear Mr. Goreham:

This will acknowledge receipt of yours of June 6, 1961, in which you submitted the following:

"I would like an Attorney General's ruling on the following set of facts and Chapter 291 of the Laws of the Fifty-Eighth General Assembly.

"Chapter 291 deals with the County Assessor and the question at hand is his salary. When the Conference Board met last June to approve the budget for the calendar year 1961 the Assessor asked for $5300.00. The Board allowed him $4300.00 with the reservation that he would get a commensurate raise if the elective county officials were given a raise by the Legislature. This is incorporated in the Minutes of the Conference Board.

"Our pay raise takes effect July 1, 1961, which means that we will receive $200.00 of our $400.00 raise this year. The problem is that Chapter 291.16(4) states:

'***The assessor shall not issue requisitions so as to increase the total expenditures budgeted for the operation of the assessor's office. However, for purposes of promoting operational efficiency, the assessor shall have authority to transfer funds budgeted for specific items for the operation of the assessor's office from one unexpended balance to another; such transfer shall not be made so as to increase the total amount budgeted for the operation of the office of assessor, and no funds shall be used to increase the salary of the assessor or the salaries of permanent deputy assessors.'

61-6-13

"Thus, is the Assessor without authority to transfer the funds in order to take care of the $200.00 he is entitled to by the arrangement with the Conference Board?

"It is my opinion that he is without authority to do so, but I want to get your ruling since it is a touchy subject with the Board of Supervisors and the Assessor. The practicalities of it is that he could get a $600.00 increase for 1962 to cover the $200.00, but the Board doesn't want to do that.

"The Conference Board meets on June 22, 1961, so I would appreciate your ruling before so that it will be in their hands on that date."

In reply thereto I advise as follows:

1. In answer to your specific question, I agree with your conclusion that there is no authority to transfer funds for the purpose of meeting an increase in the salary of the assessor. This is also the view of the department as shown by the opinion issued September 8, 1959, to Glenn D. Sarsfield, State Comptroller, in which this confirmation appears in the following language:

"The budget adopted in July 1959, under the provisions of Chapter 291, Code of 1958, operative in the year 1960, would be ineffective to authorize this increase. And insofar as increasing the salary of the county assessor, after the salary has been fixed in the annual budget, Section 16 of Chapter 291, Acts of the 58th General Assembly, among other provisions, provides this:

'The assessor shall not issue requisitions so as to increase the total expenditures budgeted for the operation of the assessor's office. However, for purposes of promoting operational efficiency, the assessor shall have authority to transfer funds budgeted for specific items for the operation of the assessor's office from one unexpended balance to another, such transfer shall not be made so as to increase the total amount budgeted for the operation of the office of assessor, and no funds shall be used to increase the salary of the assessor or the salaries of permanent deputy assessors.'

"Accordingly, the budgetary amount of the salary of the assessor may not be increased, nor funds used to increase that salary."

2. While not specifically asked, I would advise that it has been the view of the department in interpreting sections 441.2 and 441.3, Code 1958, now repealed, and subsection two (2) of section 405.18, Code 1958, also likewise now repealed, that the assessor's salary either county or city, when fixed for the term, may not be changed or altered during the term.

See Opinion of the Attorney General appearing in the Report for 1950 at page 180. That opinion, while interpreting said sections 441.2 and 441.3, reasoning based upon the case of Kellogg v. Story County, 219 Iowa 399, is applicable to the situation submitted.

The provision for fixing the salary of the assessor (subsection 2 of Sec. 16, Chapter 291, Laws of the 58th General Assembly) is as follows:

At such meeting the conference board shall authorize:
"1. * * *
"2. The salaries and compensation of members of the board of review, the assessor, chief deputy, other deputies, field men, and other personnel, and determine the time and manner of payment.
"3. * * * "

This is the exact wording of subsection two (2), section 405.18, Code 1958, now repealed, fixing the salary of city assessors and interpreted as herein exhibited.

Very truly,

OSCAR STRAUSS,

First Assistant Attorney General

OS:mmh4

HEALTH: Basic science examination fees -- Applicants for examinations or certificates under Section 146.12 received on or before midnight of July 3, 1961, may be filed on payment of $10.00 fee. Thereafter the fee is $20.00 under Senate File 459, Acts 59th G.A.
(Bianco to Hertel, Bd of Exam, 6-30-61)

June 30, 1961

Mr. Elmer W. Hertel, Secretary
Board of Examiners, Basic Sciences
Wartburg College
Waverly, Iowa

Dear Mr. Hertel:

Reference is made to your favor of June 8, 1961, which reads:

> "I am writing in reference to the change in our Basic Science law. As you wrote me on May 17, 1961, from and after July 4, 1961, a fee of $20.00 will be required.
>
> "This question has arisen, namely, does the application have to reach my office prior to July 4,1961, to qualify under the present law which requires a fee of $10.00, or if it is merely dated before July 4, 1961 will that qualify it under the old law? My interpretation is that any application, no matter when dated, which reaches my office after midnight July 3, 1961, will require the $20.00 fee.
>
> "I would appreciate your interpretation of the same."

In reply thereto you are advised:

I have reconstructed the pertinent part of Section 146.12 of the Code, as amended by Senate File 459 as follows:

> "146.12 Fees. The fee for examination or any re-examination by the board shall be twenty dollars. The fee for the issuing of a certificate by authority of reciprocity, as provided herein, shall be twenty dollars. All fees shall be paid to the secretary of the board by the applicant at the time of filing application."

#61-6-17

The answer to your question we believe lies in the underlined portion of the statute here quoted. It requires that the fees shall be paid at the time of filing application. The application is filed with you as secretary of the board, and it is your duty to pay all fees into the state treasury.

The $20.00 fee does not become effective until July 4, 1961.

Therefore any applications reaching your office on or before midnight of July 3, 1961, can be filed on payment of the $10.00 fee as required under the present terms of the statute.

Yours very truly,

FRANK D. BIANCO
Assistant Attorney General

FDB:sb

COUNTIES AND COUNTY OFFICERS: Incompatibility -- No incompatibility between administrative assistant to Soldiers' Relief Commission and Justice of the Peace.

Rehmann to O'Connor, Chickasaw Co Atty, 6-30-61

June 30, 1961

Mr. James D. O'Connor
Chickasaw County Attorney
O'Donohoe and O'Connor
Attorneys at Law
New Hampton, Iowa

Dear Mr. O'Connor:

This is to acknowledge receipt of your letter of May 12, in which you state the following:

> "The undersigned respectfully requests an opinion of your office on the following question: Is it legal for an individual who is now an administrative assistant to the Chickasaw County Soldiers' Relief Commission to act as Justice of the Peace in addition to his administrative duties with the Commission?
>
> "There appears to be no statutory or constitutional prohibition here; and if the above arrangement is objectionable, it would be on Common Law grounds. The Common Law and Iowa Authority are set out in Annotation No. 8 of Section 69.2 I.C.A. The Iowa Supreme Court has stated that incompatibility between offices depends upon whether one is subordinated to the other and whether the duties of the two are inherently inconsistent with regard to the public interest. Meijerinks Estate v. Lindsey, 1927, 203 Ia., 213 NW 934. The Attorney General has ruled that one person may hold more than one office unless there is some incompatibility in the duties of the several offices. Opinions of the Attorney General, 1911-1912, page 785. The man involved here holds his present position by reason of authority granted the commission by Section 250.6, Code of Iowa, 1958. It would appear to the undersigned that in this capacity, the man is an employee rather than an office holder. It

± 61-6-22

"has been held that the question of incompatibility does not arise when one of the positions is an office and the other is merely an employment. 67, C.J.S., Officers 136.

"The undersigned sees no conflict and is of the opinion that both positions can be held by the same person."

We concur in your conclusion that there is no incompatibility in an individual being an administrative assistant to the Soldiers' Relief Commission and a Justice of the Peace.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:sb

MOTOR VEHICLES: Mobile homes -- House File 402, Laws of the 59th G. A. -- Whether a unit is equipped for use as a conveyance under the definition of "house trailer and mobile home" is a fact determination for local officials; owner of mobile home not situated in mobile home park - fees payable monthly until October 1961 - fees payable semiannually thereafter; owner of unoccupied mobile home not relieved from property tax; house trailer and mobile home registration fee under Ch. 321 not in lieu of other taxes; sections 135D.9, 135D.10, 135D.21, 135D.1(1), 321.130, Code 1962

Snell to Gittins, St Rep, 6-30-61

June 30, 1961

Honorable Harry R. Gittins
State Representative
Pottawattamie County
Underwood, Iowa

Dear Mr. Gittins:

This will acknowledge receipt of your recent request for an opinion on House File 402 passed by the 59th General Assembly. A copy of our opinion on this legislation, requested by the Department of Public Safety, is enclosed.

In your letter, you make the following statement:

> "I think that every such home that was originally purchased as a Mobile Home or "house trailer" should be required to be registered with the county auto license department even though since purchase the owner has made considerable actual or pretended effort to demobilize his vehicle."

The definition of house trailer and mobile home is provided by Chapter 216, Laws of the 58th G. A.:

> "Section 1. Section three hundred twenty-one point one (321.1), Code 1958, is hereby amended by adding thereto the following subsection:
>
> "'House trailer and mobile home' means a trailer or semitrailer which is designed, constructed and equipped as a dwelling place, living abode or sleeping place, either permanently or temporarily, and is equipped for use as a conveyance on streets and highways."

Under this definition, it is necessary that the trailer or semi-trailer be equipped for use as a conveyance. It would seem that whether the trailer or semi-trailer is so equipped must be determined as of July 4, 1961, when House File 402 is effective, and thereafter. This is a factual determination that would have to be made on an individual basis by local officials.

#61-6-23

Your letter also inquires about the amendments made to section 135D.9 as follows:

> "Also, the Act will require the advance payment of the monthly fee under section 135D.9 as amended by H.F. 402. It appears that the July, August, and September monthly fees would be immediately due (July 4th) on Mobile Homes situated outside of mobile home parks. It was my intention at least that unoccupied homes or trailers or such used only occasionally be assessed as personal property."

House File 402 amends the part of section 135D.9 pertinent to your question, so that it will read as follows:

> " * * * In the event that an occupied mobile home is not harbored in a mobile home park the owner of said mobile home shall pay the fee provided in this section. Such fee shall be paid semiannually. The fee due for April through September shall be paid by the tenth day of April. The fee due for October through March shall be paid by the tenth day of October. On the tenth day of May and on the tenth day of November said semiannual fees become delinquent and on the tenth of each month thereafter that the fee remains unpaid a ten percent penalty shall be added and the county treasurer shall not renew the motor vehicle registration until such delinquent fees and penalties, if any, have been paid. If any mobile home is moved during the six-month period for which a fee has been paid, the county treasurer shall, upon request of the owner, refund his pro rata share of the fee paid. If said fee is not paid, the amount of the unpaid fee shall become a tax and the tax shall be assessed against the land from which the mobile home was removed."

As amended, this section appears to be in conflict with section 135D.10, which provides for payments by the owner where the mobile home is not situated in a mobile home park on or before the tenth day of each and every month following thereafter. House File 402 is effective July 4, 1961. The Act provides, however, that the fees due for April through September shall be paid by April 10. Since the Act is not effective until July 4, the provision for payment by April 10 is inapplicable to the year 1961. Consequently, until the semiannual payments provided for in House File 402 can be effectuated, which initially will be the October 1961 through March 1962 period, the monthly payment provisions of section 135D.10 apply. It is a maxim of statutory construction that conflicting statutes

will be construed to harmonize if possible. See Iowa-Nebraska Light & Power Co. v. City of Villisca, 220 Iowa 238, 261 N. W. 423 (1935); Andrew v. Iowa State Bank of Osceola, 216 Iowa 1170, 250 N. W. 492 (1933). After September 1961, the provision for semi-annual payments set out in House File 402 will prevail. Where there is a conflict between statutes, the statute passed later in time must prevail. State v. Harper, 220 Iowa 515, 258 N. W. 886 (1935); Curlew Consol. School Dist. v. Palo Alto County Bd. of Ed., 247 Iowa 112, 73 N. W. 2d 20 (1956).

Regarding the question of unoccupied mobile homes or trailers, section 135D.21 provides:

> "135D.21 Fee in lieu of property tax. All mobile homes for which a monthly fee is collected under the provisions of this chapter shall not be assessed for property tax but this exemption shall not apply to the property contained in any mobile home."

Section 135D.9 assesses a monthly fee for each occupied mobile home. For purposes of Chapter 135D, "mobile home" is defined as follows in section 135D.1(1):

> "135D.1 Definitions. The following definitions shall apply to this chapter:
>
> "1. 'Mobile home' shall mean any vehicle used or so constructed as to permit its being used as a conveyance upon the public streets or highways and duly licenseable as such, and shall include self-propelled or nonself-propelled vehicles, so designed, constructed, reconstructed or added to by means of an enclosed addition or room in such manner as will permit the occupancy thereof as a dwelling or sleeping place for one or more persons, having no permanent foundation and supported by wheels, jacks or similar supports."

From this definition, the occupancy referred to is for one or more persons as a dwelling or sleeping place. If the mobile home is occupied for a month or major fraction thereof, under section 135D.9, the monthly fee is assessed for said month. Section 135D.21 relieves all mobile homes for which a monthly fee is collected from property tax. Consequently, I am of the opinion that the owner of an unoccupied mobile home would not be assessed a monthly fee under section 135D.9 and would therefore not be relieved from property tax under the provisions of section 135D.21.

Further, the exemption for house trailers provided by section 321.130 is eliminated by section 4 of House File 402. Therefore, the registration fee imposed on house trailers and mobile homes by Chapter 321 is not in lieu of other taxes thereon.

Very truly yours,

BRUCE M. SNELL, JR.
Assistant Attorney General

BMS:bl

MOTOR VEHICLES: House trailers and mobile homes -- House File 402, Laws 59th G. A.: Registration fee is not proratable nor refundable, and penalty commences on August 1, 1961; registration fee paid under prior law is not refundable; definition does not include trailers used only to transport equipment. Sections 321.1, 321.123, 321.105, 321.106, 321.134, 321.126. Code 1962
June 30, 1961

Snell to Pesch, Pub. Saf. Comm, 6-30-61

Mr. Carl H. Pesch, Commissioner
Department of Public Safety
L O C A L

Dear Mr. Pesch:

This is to acknowledge receipt of your recent opinion request, in which you state:

"The Fifty-ninth General Assembly has enacted into law House File 402 which becomes effective July 4, 1961. Section 3 of this Act provides for the registration fee of $5.00 under Section 321.123, Code of Iowa, for house trailers and mobile homes, regardless of whether or not they are used on the highways.

"The following questions are submitted for consideration:

"1. Since this law becomes effective July 4, 1961, does the full annual fee of $5.00 apply for the balance of the year 1961, or does a prorated fee of $2.50 pursuant to the provisions of Section 321.106, Code of Iowa, apply for the balance of the year?

"2. With reference to Section 321.134, when would the registration fee for 1961 for house trailers and mobile homes become delinquent and how should the penalty be computed?

"3. Does the house trailer and mobile home registration fee come within the refund of fees provisions of Section 321.126?

#61-6-21

"4. If a house trailer or mobile home is presently registered for the year 1961 as a trailer pursuant to the provisions of Section 321.123, is the owner thereof required to obtain a house trailer and mobile home registration after July 4 pursuant to the provisions of House File 402? If such a registration is required, is the owner entitled to a refund of the unused portion of the 1961 registration fee under any of the provisions of Section 321.126?

"5. Chapter 216, Acts of the Fifty-eighth General Assembly, establishes a definition of 'house trailer and mobile home'. Do small camping trailers, or trailers of a collapsible or folding type on which sleeping, cooking and other camping equipment is transported, come under this definition?"

House File 402, entitled "An Act Relating to Fees on House Trailers and Mobile Homes", was enacted by the 59th General Assembly and is effective on July 4, 1961. This Act provided the following change in section 321.123, 1958 Code of Iowa:

"Sec. 3. Section three hundred twenty-one point one hundred twenty-three (321.123), Code 1958, is amended by adding thereto the following new subsection:

"'House trailers and mobile homes, regardless of whether or not they are used on the highways, five dollars.'"

Prior to this addition, the statute read as follows:

"321.123 Trailers. All trailers and mobile homes except those defined as semi-trailers shall be subject to a registration fee to be fixed in accordance with the following schedule, provided, however, trailers whose empty weight is 2,000 pounds or less and wagon box trailers subject to a registration fee of five dollars or less shall be exempt from the certificate of title and lien provisions of this chapter:

"1. When equipped with pneumatic tires:

Wagon box trailers used by a farmer in transporting produce, farm products or supplies hauled to and from market, five dollars.

Trailers with a gross weight of one thousand pounds or less, three dollars.

Trailers with a gross weight exceeding one thousand pounds and not exceeding two thousand pounds, ten dollars.

Trailers with a gross weight exceeding one ton and not exceeding two tons, twenty dollars.

Trailers with a gross weight exceeding two tons and not exceeding four tons, thirty dollars.

Trailers with a gross weight exceeding four tons and not exceeding six tons, forty dollars.

Trailers with a gross weight exceeding six tons and not exceeding eight tons, fifty dollars.

Trailers with a gross weight exceeding eight tons and not exceeding ten tons, sixty dollars.

Trailers with a gross weight exceeding ten tons and not exceeding twelve tons, seventy dollars.

Trailers with a gross weight exceeding twelve tons and not exceeding fourteen tons, eighty dollars.

"2. When equipped with two or more solid rubber tires:

Trailers with a gross weight exceeding one ton and not exceeding two tons, thirty dollars.

Trailers with a gross weight exceeding two tons and not exceeding four tons, forty dollars.

Trailers with a gross weight exceeding four tons and not exceeding six tons, fifty dollars.

Trailers with a gross weight exceeding six tons and not exceeding eight tons, sixty dollars.

Trailers with a gross weight exceeding eight tons and not exceeding ten tons, seventy dollars.

Trailers with a gross weight exceeding ten tons and not exceeding twelve tons, eighty dollars.

Trailers with a gross weight exceeding twelve tons and not exceeding fourteen tons, ninety dollars."

The 58th General Assembly had defined house trailers and mobile homes in Chapter 216, Laws of the 58th G. A., thereby amending section 321.1, Code 1958:

> "Section 1. Section three hundred twenty-one point one (321.1), Code 1958, is hereby amended by adding thereto the following subsection:
>
> "'House trailer and mobile home' means a trailer or semitrailer which is designed, constructed and equipped as a dwelling place, living abode or sleeping place, either permanently or temporarily, and is equipped for use as a conveyance on streets and highways."

The 59th General Assembly, in using the words "house trailers and mobile homes", obviously had reference to the above definition enacted by the 58th G. A. and not to "trailers" as defined in section 321.1.

It is significant that House File 402 does not amend section 321.106 or section 321.105. In Bennett v. Greenwalt, 226 Iowa 1113, 1132, 286 N. W. 722 (1939), the Court stated:

> "Where an amending act plainly states that it amends a specified section or part of an existing statute, it cannot be judicially construed as amending an unmentioned section."

Sections 321.105 and 321.106 are in pari materia. It is a general rule that statutes relating to the same subject adopted at the same session are construed together. See Iowa Motor Vehicle Ass'n. v. Board of Railroad Com'rs., 207 Iowa 461, 221 N. W. 364, aff., 50 S. Ct. 151, 280 U. S. 529, 74 L. Ed. 595. Section 321.106 speaks of the registration fee provided by section 321.105 to be paid for each motor vehicle or trailer. By definition "trailer" also includes "semitrailer". See section 321.1. Neither section refers to house trailers and mobile homes. Nor did the legislature add house trailers and mobile homes to sections 321.105 and 321.106 when House File 402 was considered and passed. Thus, in answer to question one, the full fee of $5.00 applies for the balance of 1961 and said fee is not proratable.

Section 321.134 provides in part:

> "321.134 Monthly penalty. On February 1 of each year, a penalty of five percent of the annual registration fee shall be added to all fees not paid by that date, and five percent of the annual registration fee shall be added to such fees on the first of each month thereafter

> that the same remains unpaid, until paid, provided that said penalty in no case shall be less than one dollar, and provided that the owner of a vehicle who, before February 1 of any year, surrenders all registration plates for said vehicle to the county treasurer of the county in which said plates are of record, shall have the right to register said vehicle at any later period of said year by paying the full yearly registration fee without said penalty. * * * "

This statute provides for the 5% penalty to be added to the registration fee on the first of each month after February 1 that the fee remains unpaid. Since House File 402 is effective July 4, 1961, the first month after February that the fee remained unpaid would be August. Therefore, in answer to question two, the penalty provided in section 321.134 commences on August 1, 1961 on the $5.00 registration fee for house trailers and mobile homes.

The answer to question three is in the negative. Section 321.126 applies only to a "motor vehicle". A house trailer and mobile home is not a motor vehicle as defined by section 321.1. See also Opinions of Attorney General 1949, page 25.

The subsection added to section 321.123 by House File 402 assesses the fee regardless of whether or not the house trailers and mobile homes are used on the highways. No exception is included in the statute for other registrations. It appears, therefore, that the legislature did not contemplate that any refunds would be given and, as indicated supra, section 321.126 applies only to motor vehicles. Consequently, the answers to the two questions asked under question number four are yes and no, respectively.

With regard to question five, "house trailer and mobile home" is defined by Chapter 216, Laws of the 58th G. A., set out supra. That definition specifies, inter alia, a trailer or semi-trailer which is designed, constructed and equipped as a dwelling place, living abode or sleeping place, either permanently or temporarily. The word "dwelling place" is defined in Restatement, Conflict of Laws, section 13b, thusly:

> "b. Meaning of 'dwelling-place'. The word 'dwelling-place' is used as the most colorless word that can be employed; a word which has no legal connotation, and is not confined to any physical sort of living quarters. The dwelling-place may be fixed in a single room or apartment, or in a house or other building; or it maybe no more definitely fixed than in a city or county or state. Thus, if a man's dwelling-place has been in a house, but the house has been burned, he may still have a dwelling-place in the city in which the house stood."

"Abode" has been defined as the place in which a person dwells, and has indicated a living place impermanent in character. See Words and Phrases, Vol. 1, 1961 Cum. Ann. Pocket Part, pp. 47-48. The phrase "sleeping place" and the above two phrases are tied in the definition to a trailer or semi-trailer designed, constructed and equipped for dwelling, living or sleeping. It appears from the definition that the legislature intended, by the use of the underlined words, that the dwelling place, living abode or sleeping place be physically provided by the trailer or semi-trailer itself, rather than that the trailer or semi-trailer would come within the definition by merely transporting equipment for such purposes. However, a trailer used to transport camping equipment that also physically provides the dwelling place, living abode or sleeping place would come within the definition in Chapter 216, Laws of the 58th G. A., provided that it is equipped for use as a conveyance on streets and highways as required by the definition. Therefore, since the definition of house trailer and mobile home appears to be limited as indicated and your question indicates that the trailers are used only to transport equipment, the answer to question five is in the negative.

Very truly yours,

BRUCE M. SNELL, JR.
Assistant Attorney General

BMS:bl

COURTS : No. Rutland

Judges' retirement --

1. The rate and limitation of the Judges' Retirement Act as applied to both judges idn active service and those eligible for retirement but who have not actually retired, insofar as prior service is concerned, is controlled by the rate of contributions and limitations as fixed by S.F. 190, 59th G. A.

2. The rate and limitation of the annuity as applied to judges now drawing annuity, will be computed and paid under the provisions of S.F. 190, 59th G.A., after its effective date, July 4, 1961; until said date the annuity will be computed upon the statute prior to its amendment by the said S.F. 190, 59th G.A.

3. Increase in the amount of contribution by members who are not now receiving annuity benefits, over those who are retired judges, resulting in increased benefits to them by reason of such increased contributions, is not a matter for the Courts, but for the legislature to determine.

Strauss to Seldon, St Comp, 6-30-61

June 30, 1961

Mr. Marvin R. Selden, Jr.
State Comptroller
B U I L D I N G

Dear Mr. Selden:

This will acknowledge receipt of yours of May 16, 1961, in which you submitted the following:

"Senate File 190, Acts of the 59th General Assembly, amended Chapter 356, Acts of the 58th General Assembly, which further amended Chapter 605A, Code of Iowa, 1958, making certain changes in the Judicial Retirement System.

"This Act did the following:

1. Increased the rate of contribution to the 'fund' by the judges both as to prior service and salary deduction and increased the maximum contribution attributable to prior service.

2. Increased the rate for computing the annuity and also the maximum limitation of same.

"This Act, along with House File 708, Section 33 and Section 43, did not alter the state's share of contributions, nor did this Act alter the cities' and counties' shares of contributions.

"At the present time there are several active judges and four retired judges (not drawing annuity due to age qualification) who have not contributed to the 'fund' for prior services.

"I respectfully request an opinion as to the following:

1. At what rate and limitation are the judges mentioned in the previous paragraph to contribute for 'prior service'?

#61-6-20

2. Is the increased rate and limitation of the annuity applicable (upon the effective date of this Act) to the judges now drawing an annuity, and if so would the July annuity be computed at the old rate through July 3 and the new rate thereafter?"

In reply thereto, I advise as follows:

Without exhibiting here the statutory changes made by both the 58th and 59th General Assemblies, it is to be observed that such amendments evidence no distinction in their terms between judges in active service, judges eligible for retirement but not at this time in actual retirement and receiving benefits, and judges who have previously retired and are now drawing annuities under the judges' retirement system. In that situation I am of the opinion that both of your questions are controlled by either or both the argument and precedent of the case of McCord v. Iowa Employment Security Commission, 244 Iowa 97. Addressing itself to the question of whether a public school teacher who is in retirement and receiving benefits under the Iowa Old Age and Survivors Insurance System is entitled to increased benefits provided by an amendment to that Act, being Chapter 69, Acts of the 53rd G.A., which became effective May 12, 1949, it was there stated (pages 101, 102):

> "The legislature changed the monthly benefit payable to all qualified individuals after the effective date of the amendment. The law making the monthly benefit payable to any qualified individual who 'has filed application' for benefits was not changed. The benefit for anyone who 'has filed application' was changed. It is perfectly obvious on the face of the statute that the legislature intended no such restriction with discriminatory consequences as held by the commission. There were no words or directions in the amendment indicating it was only to apply to benefit applications originally filed thereafter.

> As the learned trial court stated: 'After May 12, 1949, there was no other basis on which primary insurance benefits of individuals who were then entitled to receive them, thereafter could be figured except under the provisions of section 97.45 as amended by the Acts of the 53d General Assembly.' We agree with the trial court's ruling. We decide the issue upon the plain obvious intent embodied in the expressed language of the law and the amendment, which eliminates the necessity of much discussion of authorities or subordinate rules of statutory construction. It is significant that the commission does not cite a single decision of any court in support of its proposition that the amendment is not applicable to employees who had retired prior to the effective date of the amendment. In 118A.L.R. 992, there is an annotation and a collection of cases under the general heading: 'Increase of pension benefits as applicable to those already receiving benefits.' Many of the cases found in the annotation would be some authority for our holding here but there is so much difference in the pension statutes involved in those cases that we will not discuss them. Such laws as our Old-Age and Survivors' Insurance System law are quite common today. Our law is practically a copy of the Federal Social Security Law, U. S. Code, 1946, Ed., Title 42, subchapter II, section 40 et seq.), which apparently it is designed to supplement. It is of interest to note that increases in the old-age insurance benefits payable under the Federal Act have been made available to those already receiving such benefits. See amendment of August 28, 1950 (64 Stat. at L. 521), and amendment July 18, 1952 (Eighty-second Congress H. R. 7800)."

Based on the foregoing, I answer your questions as follows:

1. The rate and limitation of the judges' retirement Act as applied to both judges in active service and those eligible for retirement but who have not actually retired, insofar as prior service is concerned, is controlled by the rate of contributions and limitations as fixed by Senate File 190, Acts of the 59th General Assembly.

2. In answer to your Question No. 2, I would advise that insofar as judges now drawing an annuity are concerned, the rate and limitation of the annuity will be computed and paid under

the provisions of the foregoing designated Senate File 190, Acts of the 59th G.A., after the effective date of such numbered Senate File on July 4, 1961. Until such time the annuity will be computed upon the statute prior to its amendment by Senate File 190, 59th G.A.

3. It will be observed that the increase in the amount of contribution by members who are not now receiving annuity benefits over those who are retired judges, resulting in increased benefits to them by reason of such increase, is not a matter for the Courts. This was the view of the Court in the case of Byers v. Iowa Employment Security Commission, 247 Iowa 830, 836, where it is said:

> "It is claimed that to allow benefits here would be unfair, inequitable and unjust, for the reason that such benefits might exceed benefits received by members who had made contributions. No attack is made upon the constitutionality of the section in question, only as to the wisdom and propriety thereof. That question is for the legislature, not the courts, to determine."

Very truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh4

TAXATION: Homestead Tax Credit; divided interest, divorced husband: Where divorced W, a record owner, retains occupancy of property, she is the one entitled to the homestead tax credit. Sections 425.11 (1) and (2), Code of Iowa (1958).

(MURRAY TO SCHROEDER, JACKSON CO. ATTY., 7/6/61)

#61-7-3

Asher E. Schroeder
Jackson County Attorney
Maquoketa, Iowa

Dear Mr. Schroeder:

This will acknowledge your letter of April 18, 1961, in which you request the opinion of this department on the following question:

> "H. and W. were formerly married and lived on a farm of 130 acres. The Deed of record shows the owners of this farm to be H., W., F. and M. (F. and M., being parents of H.) H. and W. were divorced two (2) years ago. H. still appears as a part owner of the farm, but is no longer living there. W. continues to live on the farm with her four (4) minor children. F. and M. live elsewhere.
>
> "The local Assessor has stated that the owners of this particular farm do not fall within the category of those who qualify for a Homestead Exemption. However, it would appear to me that the Section first referred to above (Section 425.11 (2), Code of Iowa (1958), as amended by the 58th General Assembly, Chapter 301, section 1, would bring such persons as I have described above within the meaning of the word 'owner'."

Section 425.11, subsections 1 and 2 read, as amended by Chapter 301, section 1, Acts of the 58th General Assembly, as follows:

> "425.11 Definitions. For the purpose of this chapter and wherever used in this chapter:
>
> "1. The word, 'homestead', shall have the following meaning:

#61-7-3

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

"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 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."

From the wording of the statute, it appears that occupancy is a necessary element to claim the homestead exemption. Thus, W. would qualify for the exemption in that she is living there with the four (4) minor children. Since H., F. and M. live elsewhere, they do not qualify within the exemption statute.

Very truly yours,

George W. Murray
Special Assistant Attorney General

GWM/MSB/bjf

COUNTIES & COUNTY OFFICERS
ISSUANCE OF MARRIAGE LICENSE --

The clerk of the district court may legally issue a license to marry to persons who have been divorced within one year, providing that the divorce was not granted in the State of Iowa. (Code section 598.17) (STRAUSS TO BUTLER, CERRO GORDO CO. ATTY., 7/7/61) #61-7-4

July 7, 1961

Mr. David J. Butler
Cerro Gordo County Attorney
Mason City, Iowa

RE: Marriage licenses

Dear Mr. Butler:

This will acknowledge receipt of your letter of June 22, 1961, in which you submitted the following:

> "I have had a request from the Clerk of Court of Cerro Gordo County for an opinion in connection with the issuance of marriage licenses. The new marriage law provides that the Clerk of Court shall issue a marriage license if he is satisfied as to the age and competency of the parties to contract a marriage. The question arises as to the competency of a party to contract to marriage who has been divorced in another state other than Iowa within a year previous to the time application is made for an Iowa marriage license. There is no question but what the Clerk of Court will not issue a marriage license if the party has been divorced within one year in an Iowa Court. However, in our County we have many applications for marriage licenses from persons from the State of Minnesota who have been divorced within one year. Is the Clerk of Court authorized to issue a marriage license if he has knowledge of the fact that the applicant has been divorced within one year in a state other than the State of Iowa?"

The accompanying letter of the Clerk of Court has had our consideration in connection with this situation.

In reply thereto I would advise you that interpreting sections which are now 598.17 and 598.18, Code 1958, both of

#61-7-4

which are exhibited as follows:

> "598.17 Remarriage. In every case in which a divorce is decreed, neither party shall marry again within a year from the date of the filing of said decree unless permission to do so is granted by the court in such decree. Nothing herein contained shall prevent the persons divorced from remarrying each other.
>
> "598.18 Violations. Any person marrying contrary to the provisions of section 598.17 shall be deemed guilty of a misdemeanor and punished accordingly."

this department concluded in an opinion appearing in the Report of the Attorney General for 1940 at page 274, that

> "the clerk of the district court may legally issue a license to marry to persons who have been divorced within one year, providing that the divorce was not granted in the State of Iowa."

copy of which opinion is attached.

Very truly,

OSCAR STRAUSS

First Assistant Attorney General

OS:mmh

Encl: 1

COUNTIES AND COUNTY OFFICERS: Recreation Commission Fund -- Levy of one mill for recreation or conservation purposes, authorized by Chapter 132 of the 58th G. A., is operative notwithstanding the provisions of H. F. 398, 59th G. A. authorizing an additional limited county levy.

July 7th 1961

(STATE -- TO SELDEN, ST. COMPTR., 61-7-5) 61-7-5

Mr. Marvin R. Selden, Jr.

State Comptroller

B U I L D I N G

Dear Mr. Selden:

This will acknowledge receipt of your letter of June 28, 1961, in which you submit the following:

"The 59th General Assembly passed a bill known as H.F. 398, which provides that counties whose ordinary operating expenses could not be covered by a two-mill levy, could increase that levy for the years 1961 and 1962 by levying an additional two mills.

"The bill also provides that counties with an assessed valuation of $26,000,000 or more wherein said additional tax is levied could not increase the total levy in dollars for all county purposes by more than two per cent of the greater of the two preceding total annual levies for all purposes.

"The 58th General Assembly passed a bill known as S. F. 526, pertaining to the additional levy of one mill for recreation and conservation purposes.

"We would like for you to analyze the two bills in conjunction with each other and give us your opinion on the following question:

"Does the 2% limitation prevail regardless of the provisions of S.F. 526 which removes the ceiling from the Recreation Commission Fund, or may the county levy the necessary millage to operate the commission without regard to H.F. 398.

"Due to the fact that the county budgets are now being prepared, we would appreciate receiving your opinion as soon as possible."

In reply thereto I advise as follows:

61-7-5

House File 398, 59th G.A., which became a law July 4, 1961, is an extension of House File 125 of the 58th G.A.; House File 125 of the 58th G.A. was a temporary Act, in force and effect during the years 1959 and 1960, and House File 398 of the 59th G.A., merely extends this law to make it effective during the years 1961 and 1962.

Senate File 526 of the 58th G.A., now Chapter 132, Laws of that Assembly, became a law on May 22, 1959, and was in full force and effect on July 4, 1961, at the time House File 398 of the 59th G.A. became a law, including in the terms of Senate File 526 the following:

> "This law shall be construed as supplemental and in addition to existing statutory authority and as providing an independent method of financing the cost of acquiring land and developing the same for public park, parkway, preserve, playground, or other recreation or conservation purposes, and for the issuance and sale of bonds in connection therewith, and shall not be construed as subject to the provisions of any other law."

It seems clear, therefore, that it was the legislative intent that the foregoing provision is to be given full force and effect notwithstanding the provisions of House File 398 of the 59th General Assembly.

Therefore, in answer to your question, I would advise that the county levy to operate the County Conservation Commission may be applied without regard to the provisions of House File 398 of the 59th General Assembly.

Very truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:mmh4

ELECTIONS: voting machines -- One-half mill levy provided by S. F. 49, Acts of the 59th G. A., for the purpose of voting machines, is operative, notwithstanding the provisions of H. F. 398, 59th G. A., authorizing an additional limited county levy. (STRONG to ADAMS, Co. Audr., Webb.) #61-7-6

13 July 1961

Mr. Chet B. Akers
Auditor of State
Des Moines, Iowa

Attention: Mr. Earl C. Holloway

Dear Mr. Akers:

This will acknowledge receipt of yours of the 16th ult. in which you have submitted the following:

> "The last session of the legislature passed a bill known as S. F. No. 49, which provides the counties may levy 1/2 mill for the purchase of voting machines.
>
> "The question is, will this 1/2 mill have to be considered when the counties use H. F. 398, passed by the 59th G. A. and is an extension (two years) of H. F. 125, 58th G. A., to compute the levy for the county fund tax.
>
> "Can both levies be used when figuring the taxes."

I advise as follows:

Chapter 94, Acts of the 58th General Assembly provides as follows:

> "AN ACT to amend Chapter fifty-two (52), Code 1958, relating to voting machines.
>
> "BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:
>
> "SECTION 1. Section fifty-two point three (52.3), Code 1958, is hereby amended by striking the period (.) in line eight (8) and inserting in lieu thereof the following:
>
> "', or levy not to exceed one-half (1/2) mill annually; and any amounts so levied and collected in excess of actual costs of voting machines shall revert to the general fund of the county, city or town concerned. In the case of a city or town, such levy shall be made for the municipal enterprises fund."'

Lacking the signature of the President of the Senate it does not have the force of law. See State v. Lynch, 169 Iowa, Page 148, where a bill passed by the Legislature, lacking the signature of the Speaker, was so declared. Senate File 49, Acts of the 59th General Assembly

#61-7-6

obviously was enacted as a substitute for Chapter 94, 58th General Assembly in substantially the same terms as Chapter 94, of the 58th General Assembly, and amended the same statute Section 52.3, Code of 1958, and placed in such statute in the same line thereof as Chapter 94, of the 58th was placed by the 58th General Assembly. Thus the foregoing legislative history shows the 59th General Assembly enacted at the same session, House File 398 and Senate File No. 49. Thus, as between the levies authorized by House File 398 and Senate File No. 49, it would appear that within the rule of Eckerson v. City of Des Moines, 137 Iowa, 452, 489, where it is said:

> "'***** Repeals by implication are not favored, and only where we are driven thereto by the necessities of the situation do we hold that a repeal has taken place. Railroad v. Supervisors, 67 Iowa 199; Lambe v. McCormick, 116 Iowa 169. Especially where the two acts supposed to be in conflict were enacted by the same General Assembly, they should be so construed as to give effect to each if that is reasonably possible. White v. Meadville, 177 Pa. 643 (35 Atl. 695, 34 L. R. A. 567); Hawes v. Fleighler, 87 Minn. 319 (92 N. W. 223); 1 Lewis Statutory Construction section 268.* * * *"'

and the following language in the Hawes Case cited above:

> "'This is in harmony with the rule that repeals by implication are not favored, and reconciles a seeming conflict between two legislative acts passed so close together that it would seem as if they were intended to harmonize with each other."'

that the intention of the legislature was that both the levies of the Senate File 49 and House File 398, would be operative.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:EPS

COUNTIES AND COUNTY OFFICERS: Insane liens - purchase of insurance to protect lien on homestead -- Under the provisions of Chapters 332 and 230, Code of 1958, boards of supervisors have no power to purchase insurance on homestead of recipient to protect lien of county for assistance rendered. (BIANCO TO DUNN, HARDIN CO. ATTY., 7/13/61) 61-7-7

7-13-61

Mr. William N. Dunn
Hardin County Attorney
Eldora, Iowa

Dear Mr. Dunn:

We refer to your favor of June 3, 1961, requesting opinion on the following question:

> "Under the provisions of Chapter 230.25 of the 1958 Code of Iowa, assistance furnished to a person who has been committed to a County Home constitutes a lienon any real estate owned by that person. Where the real estate consists of a homestead and there are no relatives who will assume the responsibility for maintaining insurance on the property, does the County Board of Supervisors have authority to carry insurance on the building in order to safeguard the property for their lien?"

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 by statute, or necessarily implied from the powers so conferred. (See In re Estate of Frentress, 249 Iowa,783, 89 N. W. 2d 367).

I find no express or implied power granted to County Boards of Supervisors within the powers stated in Chapter 332 of the Code, whereby said boards could purchase or carry insurance on the property described in your letter.

Sections 230.27 et seq, which provides the method by which the county may be reimbursed for assistance granted persons who are mentally ill we believe is exclusive, and does not include any method by which the county may insure itself against loss. (See In re Estate of Frentress, supra).

61-7-7

Therefore in our opinion the answer to your question must be negative.

Very truly yours,

FRANK D. BIANCO
Assistant Attorney General

FDB:js

County Auditor is not entitled to extra compensation for discharging duties of recorder where vacancy in that office exists. (STRAUSS To HESLINGA, MAHASKA CO. ATTY., 7/13/61.) #61-7-8

July 13, 1961

Mr. Harold B. Heslinga
Mahaska County Attorney
118 North Market Street
Oskaloosa, Iowa

Dear Mr. Heslinga:

This is to acknowledge yours of the 7th inst. in which you submit the following:

> "On the 30th day of June, 1961, a vacancy occurred in the office of Mahaska County Recorder and the County Auditor has been discharging the duties of the office in accordance with Section 335.1 of the 1958 Code of Iowa.
>
> Is the auditor entitled to extra compensation for the discharge of the additional duties? If so, is Section 332.3 (10) applicable or Section 6 of House File 461 of the Acts of the 59th General Assembly?"

In reply thereto I would advise you on the authority of the following appearing in the Report of the Attorney General for 1922 at page 286:

> "It is unnecessary to set forth the statutes relating to the duties of a county attorney or to the provisions of the statute relative to his salary. Suffice it to say, that the duties of a county attorney include services of every kind for the benefit of the county or the several offices in the county government. Services for the collection of money due the county is clearly within the duties of the county attorney whatever may be the source from which the money is due. It is a well established rule of law that public officials are only entitled to such compensation for the performance of their prescribed duties as is fixed by statute, and that where a salary or other fixed compensation is provided for such official, and no other

#61-7-8

fees or compensation is provided by statute, then such salary or fixed compensation includes within itself all compensation to be paid for the performance of such duties.

See in this connection the following cases: Moore vs. Independent District, 55 Iowa 654; McNider vs. Sirrien, 84 Iowa 745; Guanells vs. Pottawattamie County, 84 Iowa 36; Ryce vs. Osage, 88 Iowa 558; Sprout vs. Kelly, 37 Iowa 44; State vs. Adams. (No. App.) 72 S. W. 656; Wood vs. Board of Commissioners, 25 N. E. 188; Tuall vs. County Commissioners, 4 Ohio Dec. 318; McGovern vs. Board of Commissioners, (Volo) 131 Pac. 274; Troup vs. Morgan County (Ala.) 19 So. 504; DeBolt vs. Trustees of Cincinnati Twp., 7 Ohio S. R. 237. See Also Burlingame vs. Hardin County, 180 Iowa 919."

Your auditor is not entitled to extra compensation for the performance of these additional duties.

Very truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:gh

COUNTIES AND COUNTY OFFICERS: Commission of Hospitalization - Confinement of Mentally Ill -- Commission of Hospitalization is authorized to designate place of confinement of mentally ill prior to meeting of Commission and pending its investigation by Section 229.2, 1958 Code of Iowa. (ALLEN TO SAMORE, Woodbury Co. Atty., 7/13/61.) #61-7-11

7-13-61

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

Dear Mr. Samore:

Receipt is hereby acknowledged of your recent letter in which you request an opinion as follows:

> "Inquiry is made and your opinion is respectfully requested as to the disposition of mental cases which, upon complaint, are apprehended under circumstances which indicate mentally unbalanced acts of violence such as warrants immediate apprehension and incarceration to prevent harm to the complainant, the mental patient himself, and the public in general. The facilities of the local police department are inadequate to handle such cases until the time of the meeting of the Insanity Commission the following day. The Sheriff's office has refused to accept the mental patient. We are thus faced with the problem of taking into custody mental patients and the necessity of maintaining custody when no facilities are available.
>
> "Your opinion is requested as to the responsibility of respective parties in case of harm to the patient, self-inflicted, or as to suitable maintaining of custody in the interim period from apprehension of the afternoon of one day until the time of the sanity hearing the following day."

In the case of Maxwell v. Maxwell, 189 Iowa 7, 177 N.W. 541, 10 A.L.R. 542, the Supreme Court of Iowa referred to the rights and responsibilities of those faced with an emergency arising from mental illness, as follows:

> "We think the general rule is that where it is made to appear that one is not capable of rational self control, and by reason thereof his own safety or the public safety is imperiled, one who, by relationship or otherwise, is the natural or proper custodian of an insane person, may lawfully restrain him in some proper place

#61-7-11

for treatment, for the good of the patient or for the protection of the public, and this without warrant and without judicial proceedings. The right to restrain an insane person is not governed by the general law which provides that no one shall be deprived of life, liberty, or property without due process of law. Restraint under such conditions does not offend against the constitutional inhibition." (See: Op. Atty. Gen. 1922, p. 328).

Thus, it seems clear that a law enforcement officer is authorized to arrest or take into his custody, one who is apparently suffering from mental illness to such an extent that acts of violence appear likely to result.

Section 229.2, 1958 Code of Iowa, provides that "the commission (of Hospitalization) may provide for the custody of such person until its investigation is concluded." Section 229.24 to 229.26 of the Code authorize the commission in certain cases to provide for the care of mentally ill persons by friends and relatives or in the county home or in some other suitable place. (See: Op. Atty. Gen. 1911-12, pp. 375, 430).

It is therefore our opinion that the commission of Hospitalization is authorized to designate the county home or some other suitable place in which mentally ill persons may be confined for the protection of themselves or the public prior to the meeting of the Commission and pending its investigation.

Very truly yours,

JOHN H. ALLEN
Assistant Attorney General

JHA:je

COUNTIES AND COUNTY OFFICERS: Board of supervisors -- Only appointing officer has authority to revoke appointment of county employees duly appointed with approval of board of supervisors. OAG 1942, p. 29. (Strauss to Hughes, Ringgold Co. Atty., 7/13/61) #61-7-12

13 July 1961

Arlen F. Hughes
Ringgold County Attorney
Mount Ayr, Iowa

Dear Mr. Hughes:

This will acknowledge receipt of yours of the 28th inst. in which you submitted the following:

"I would like an opinion from your office concerning the discharge of assistants and clerks in the various County Offices.

"Section 341.1, Code of Iowa, provides for the appointment of assistants and clerks for the various offices to be approved by resolution of the Board of Supervisors.

"Section 341.3, Code of Iowa, provides for the discharge of such appointive officers by the person making the appointment.

"Section 341.6, Code of Iowa, provides the Powers and Duties of such assistants and clerks.

"In January of 1961, The Ringgold County Treasurer, the Ringgold County Auditor, and the Ringgold County Attorney submitted appointment of one clerk each for their respective offices, which the Board of Supervisors duly approved by Resolution fixing the salaries for the same for the year 1961. Each of these appointed officials is faithfully performing the duties assigned him by his appointing officer, and is needed in each respective office. The County Board of Supervisors has indicated their intention of discharging each of these appointed officers during the year 1961.

"Sections 66.1 and 66.2 provides for the removal of appointive and elected officers and confers jurisdiction for such removal of officers on the County level to the District Court of the County where the officer's duties are to be performed.

"In view of the above and foregoing, it is my opinion that the Clerks and assistants in the various county offices, being duly appointed and approved by resolution of the Board of Supervisors of Ringgold County, can now only be discharged in the manner provided in Chapter 66 of the Code of Iowa, or by discharge by the appointive officer as provided in Section 341.3, Code of Iowa.

61-7-12

"Therefore, I would like an opinion from your office answering the question: Does the Board of Supervisors have the power to discharge assistants and clerks of the various County offices, who were duly appointed and approved by resolution of said Board of Supervisors in January of 1961 to hold office for the year 1961?"

In reply thereto I would advise you that on the authority of the opinion of this Department appearing in the report for 1942, Page 29, the answer to your question is in the negative. Copy of this opinion is herewith enclosed.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:EPS

Encl.

Mr. Donald E. Skiver
Osceola County Attorney
315 Ninth Street
Sibley, Iowa

July 13, 1961

Dear Mr. Skiver:

This is to acknowledge receipt of yours of the 26th inst. in which you submit the following:

> "...I would like to submit the following question to you for your opinion.
>
> House File 271 as passed by the Legislature provides as follows:
>
> AN ACT
>
> RELATING TO MARRIAGE LICENSES FOR MINORS WHO HAVE NO LIVING PARENTS OR GUARDIANS. BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA.
>
> Section 1. Section five hundred Ninety-five point three (595.3), Code 1958, as amended by chapter one hundred fifty-two (152), Acts of the Fifty-eighth General Assembly, is hereby amended by inserting in subsection two (2), line seven (7), after the word "certificate" the following:
>
> "but if such minor has no guardian then the judge of the district court having jurisdiction in the county may, after hearing, upon proper cause shown, execute such certificate.
>
> Sec. 2. Section five hundred ninety-five point five (595.5), Code 1958, is hereby repealed.
>
> Sec. 3. Section five hundred ninety-five point seven (595.7), Code 1958, is hereby amended by striking from line five (5) the period after the word 'return' and adding the following: '; and

upon receipt of such return, the clerk shall mail notification of such marriage to the county clerk of court or other comparable authority in the county or counties of residence in the United States of the contracting parties.'

Sections two and three (2 & 3) of the Act appear unrelated to the Title. It would appear that since Section 2 repeals Section five hundred ninety-five point five (595.5), the same would be effective regardless of the Title.

A conflict appears in Section three (3) as to whether the notification to be mailed applies only to marriage licenses for minors or to all marriages where one or both of the contracting parties resides outside the County."

In reply thereto I am advising you with respect to the specific question which you have raised. I am of the opinion that the notification is to be mailed under the provision of Section 595.7, Code 1958, as amended by the 59th General Assembly and applies without distinction to all marriage licenses whether issued for minors or adults. Section 595.7 as it appears in the 1958 Code was enacted in the same terms at the Extra Session of the 40th General Assembly as part of the general revision of the chapters then existing relating to marriages.

I see nothing in the amendment by the 59th General Assembly from which an inference can be drawn that there be any difference in the mailing of the notification between marriages of minors or adults.

Very truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:gh

TAXATION: Moneys and Credits: Section 429.2--Moneys and Credits in the hands of an executor and belonging to nonresident legatees are subject to the Moneys and Credits tax.

June 15, 1961

Jack W. Frye
Floyd County Attorney
Charles City, Iowa

Dear Mr. Frye:

We acknowledge your recent letter of May 4, 1961, in which you make the following inquiry on behalf of the County Treasurer.

> "Are monies and credits in the hands of an executor and belonging to non-resident legatees subject to the monies and credits tax imposed by Chapter 429 of the 1958 Code of Iowa as amended?"

You refer in your letter to In Re Coopers Estate (1940), 229 Iowa 921; 295 N.W. 448, and also to a portion of an opinion from the matter of Anna C. S. Shaible, deceased, which decree was rendered May 2, 1941, in the District Court of Cerro Gordo County, Iowa, 12th Judicial District. For purposes of completeness here, we are setting out the portion of the Shaible opinion which you referred to us and it is as follows:

> "It appears without dispute that all of the property of this Estate is devised to the charitable organization and to non-residents of the State of Iowa. Under the authority of the case of Augustine ve. Linn County, decided in the Supreme Court of this State on December 31st, 1940, and reported in 295 N.W. 448, there can be no question as the exemption of the legacy to the Board of Hospitals, Homes, and Deaconess Work of the Methodist Episcopal Church. Under the holding of this case, it is further apparent that the executrix holds the money bequeathed to the

> non-resident legatees, as trustees, and that the real ownership of said moneys is in the said legatees, subject only to the payment of taxes and expenses of administration. If money and credits bequeathed to a charitable organization are not subject to the money and credits tax while in the hands of the executrix, then, if the court is to be consistent, it must hold that moneys and credits in the hands of the executrix and belonging to nonresident legatees cannot be subject to the moneys and credits tax. The exemption should apply to non-resident legatees if it is made to apply to charitable organizations."

You also refer to an informal opinion listed as Adams to Kreuter, Assistant Linn County Attorney, 7/20/60) #60-7-22. This deals with moneys and credits as part of assets of an estate in the hands of an executor who has moved from one county in Iowa to another county in Iowa and has taken the moneys and credits to his new residence. The problem there was one of place of assessment with no problem as to the taxability of the moneys and credits. Your question involves this latter problem.

We are of the opinion that the moneys and credits in your question are subject to the tax imposed by Chapter 429, Code of Iowa (1958). Since no problem arises if the legatees are residents of Iowa, it is enough to consider whether the nonresidency of ownership is controlling or merely evidence to consider toward establishing the moneys and credits as taxable items in the first place. If they are in such a taxable category, whether or not the owner is a resident is immaterial. The question in Coopers Estate, above referred to, was whether moneys and credits held by an estate in process of settlement were even subject to the moneys and credits tax inasmuch as all the beneficiaries under the Will were charitable, educational and religious institutions, the property of which is exempt (Section 427.1 (10), Code of Iowa (1958)). The court said that because estate property vests immediately upon the death of the decedent, the exemption applicable to the organization involved controls the taxability of moneys

and credits in the estate even though the organizations were outside the state and thus were not taxable. As applied to the matter of Anna C. S. Shaible, District Court of Cerro Gordo County, the Cooper case does not appear to control the question of whether moneys and credits in the hands of an executor and belonging to nonresident legatees are taxable if the nonresident legatees referred to are not charitable, religious or educational institutions. The change of ownership on decedent's death is enough of an event to remove moneys and credits from the taxable category of property if the ownership itself exempts it as in the Cooper case. But the change of ownership to a mere nonresident and nothing more, does nothing to invoke a statutory exemption.

In Re Millers Estate (1902), 116 Iowa 446, involves the moneys and credits tax question as applied to an ancillary proceeding of a nonresident decedent. Here, the decedent sent money into the state for purposes of investment. There was delay in the transfer of the moneys and credits from the resident agent to the executor, which delay resulted in a moneys and credits tax levy in the hands of an executor. The court held the taxable status of the funds had been established before they came into the hands of the executor and to so tax them at that time was to continue a proper procedure. The court at page 449 said:

> "1. Does the fact of the death of John F. Miller, and the resulting termination of the agency, have any effect upon the right of the state to tax the funds in his hands? We are unable to see upon what principle it can be said that moneys and credits cease to be taxable under such circumstances. It is true that by the death of John F. Miller the agency of W. W. Miller terminated, and he thereafter held the property subject to the demand of the duly appointed executor. The mere fact that the principal administration was in a foreign state could have no effect to take away from this state its taxing power over property left within its jurisdiction."

And, at page 450, the court said:

> " * * * While the agency of W. W. Miller then ceased, the property remained here subject to local administration, demanding the attention and protection of the courts; and, in our judgment, until such administration was complete, and the proper order entered for the transfer of the funds to the non-resident executor, the right of taxation in this state continued. The fact, if it be a fact, that the appointment of W. W. Miller as executor was an error, is entirely immaterial to the consideration of the question before us. Until that appointment was revoked, he was the legal custodian of the assets of the estate within this jurisdiction, and for the time being the legal title was also in him. It was his duty to list it for taxation, and it is likewise the duty of his successor in the ancillary administration to pay the tax. * * *."

We are of the opinion that moneys and credits which are now in the hands of an executor, were formerly owned by the decedent as resident of Iowa and taxed to him as moneys and credits at his Iowa domicile, and have now become subject to the demands of beneficiaries of his Will as legatees under said Will, are still subject to tax. The transformation of the ownership from decedent to legatee, resident or nonresident, without futther being said, is not a sufficient event in itself to remove the situs of the intangible that has already been established, nor to remove the intangibles from the taxable category in which they have been previously placed.

Very truly yours,

George W. Murray
Special Assistant Attorney General

GWM/JMS/bjf

EVAN HULTMAN
ATTORNEY GENERAL

GEORGE V. MURRAY
SPECIAL ASSISTANT ATTORNEY GENERAL

ADDRESS REPLY TO
THE ASSISTANT ATTORNEY GENERAL
STATE TAX COMMISSION
STATE OFFICE BUILDING
DES MOINES, IOWA

July 13, 1961

John J. O'Connor
Chairman
State Tax Commission
Local

Dear Mr. O'Connor:

We have your letter of June 5, 1961, in which you ask, regards the application of an opinion of the Attorney General, dated November 14, 1957, the following question:

> "In view of the fact that a number of 1960 military tax exemption claims reached for investigation by our field auditors in the first six (6) months of the year 1961, were disallowed under the November 14, 1957 ruling or opinion, the question has been presented by said field auditors as to whether as a matter of uniformity and fairness, they should continue during the balance of the year 1961 in investigating other 1960 military tax exemption claims, to apply the 'controlling date' ruling contained in said 1957 official opinion, or whether after July 4, 1961, when H.F. 502 takes effect, they are required to apply the 'controlling date' specified in said H.F. 502 and ignore the 1957 Opinion on the matter."

The Act to which you refer as H. F. 502 is herein set out:

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

"Section 1. Section four hundred twenty-seven point six (427.6), Code 1958, is hereby amended by adding to the first paragraph the following:

"Provided, notwithstanding the filing of the claim on or before July first of any year, the claimant shall be the legal or equitable owner of the property upon which exemption is claimed, on the first day of July of the year in which said exemption is claimed."

We are of the opinion that the auditors should continue to disallow claims under the "controlling date" set out in the 1957 opinion. Since H. F. 502 sets out no publication date, its effective date is governed by Section 3.7, Code of Iowa (1958), which states:

"3.7 Acts effective July fourth

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

Applying the above to this amendment, it would seem that since the act is effective July 4, 1961, the first applicable "July 1" is July 1, 1962, with the result that only claims filed after July 4, 1961, are given the benefit of its provisions. Claims filed previous to July 4, 1961, i. e., those required to be filed before July 1, 1961, for the taxable period of 1961, are still governed by the law in existence as of the date of their filing and perfection of claim. For auditing purposes, the claims must, therefore, be examined in light of the law as it existed when the claims were perfected, and this is set out in the official Attorney General's opinion above referred to, dated November 14, 1957. This opinion requires the property of the claimant to be owned by him as of the date his claim is passed on by the Board of Supervisors, so any claims filed on or before July 1, 1961, (and being audited in 1962) should be disallowed if such is not the case.

We believe this answers your question.

Very truly yours,

George W. Murray

George W. Murray
Special Assistant Attorney General

GWM/JMS/bjf

STATE OFFICERS & DEPARTMENTS: Section 48, H. F. 708, placing Liquor Control Commission under Budget and Financial Control Act (Code, ch. 8) does not abrogate the general powers of the Commission. Iowa Code, section 123.11, 123.6, 123.16, 123.17 (1958).

7-17-61

Iowa Liquor Control Commission
L O C A L

Attention: C. J. Burris, Chariman

Gentlemen:

We have your letter of June 6, 1961, in which you state:

> "The Iowa Liquor Control Commission requests an Attorney General's opinion on the following:
>
> "Does the last paragraph of Section 48, House File 708, abrogate any other powers in relation to the duties of the Iowa Liquor Control Commission."

Section 48, House File 708, appropriates funds for the Liquor Commission from the General Fund of the State of Iowa. The last paragraph thereof strikes the last sentence of Iowa Code section 123.11 (1958), which reads as follows:

> "All of said salaries and expenses shall be payable out of the liquor control act fund created by this chapter."

and substitues the following therefor:

> "All expenses and salaries of commissioners and employees shall be paid from appropriations for such purposes and commissioners shall be subject to the budget requirements of Chapter Eight (8) of the Code."

Chapter 8 of the Code of Iowa (1958), being the Budget and Financial Control Act, gives to the Governor and the State Comptroller certain powers over fiscal matters of various state departments. Chapter 8, however, does not grant to the Governor or the Comptroller the general powers of supervision and control vested in the various boards and commissions in charge of the several state departments. Iowa Code section 123.6 (1958) provides:

> "Commission created. There is hereby created a commission composed of three electors of this state to be known and designated as the Iowa liquor control commission, not more than two of whom shall belong to the same political party, and not two of whom shall, at the time of appointment, reside in the same congressional district. The commission shall be held strictly accountable for the enforcement of the provisions of this chapter. (emphasis added).

While section 48 of House File 708 (59th G. A.) does subject the fiscal matters of the Iowa Liquor Control Commission to the budget requirements of Chapter 8 of the Code of Iowa, this section does not, in our opinion, abrogate or supersede the provisions of Iowa Code section 123.6 and the Commission is still, therefore, "strictly accountable for enforcement of the provisions" of the Iowa Liquor Control Act. Nor does section 48, House File 708, usurp any of the power created in the Commission by Iowa Code sections 123.16 and 123.17.

Your inquiry is therefore answered in the negative.

Very truly yours,

JOHN M. CREGER
Assistant Attorney General

JMC:js

COUNTIES AND COUNTY OFFICERS: Retirement of bonded indebtedness by county hospital -- Method of redemption of callable bonds, in order serially or otherwise, should be contained in resolution of authority for issuance of such bonds. (Strauss to Bainter, Henry Co. Atty., 7/20/61) #61-7-17

20 July 1961

Harlan W. Bainter
County Attorney
Henry County, Iowa
Mt. Pleasant, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 11th inst. In which you submit the following:

"Our Henry County Memorial Hospital has directed an inquiry to my office with regard to the retirement of some of their bonded indebtedness.

"It appears that in 1955 the hospital incurred $225,000.00 in bonded indebtedness, the same constituting 225 $1000.00 bonds scheduled to mature serially issued in accordance with Section 76.1 of the Code. In accordance with the issue, and with regard to bonds numbered 25 to 225, inclusive, the hospital holds an option for redemption prior to maturity on any interest payment date on or after May 1, 1960.

"The specific question is as to whether or not these bonds bust be retired in order or whether or not the hospital may retire the bonds in reverse by commencing with Issue No. 225.

"I note that the pertinent Code Section would appear to be Section 76.1 of the 1958 Code of Iowa. I note that the last sentence of this Code Section reads "Each issue of bonds shall be scheduled to retire serially in the same order as numbered". This latter provision was substituted in 1929 for a provision that provided "As fast as funds allow, beginning with the second year, after the payment of interest due, bonds shall be called and retired in the same order as numbered." It would appear to me that the bonds need not be retired in order.

The next interest payment date for our hospital is in November of 1961, and I would ask your direction with regard to this particular matter. With very kindest regards, I remain. . ."

#61-7-17

In reply thereto I advise you as follows:

I do not believe the Section to which you refer, Section 76.1 Code of 1958, is applicable to the retirement of callable bonds. The Section referred to concerns the schedule of retirement to be prescribed in each issue of bonds.

The answer to the question submitted will undoubtedly be found in the resolution of authority which will provide the method of redemption of bonds where an option to call them is exercised. If such resolution does not contain the manner in which callable bonds will be retired the problem should then be resubmitted.

Sincerely,

OSCAR STRAUSS
FIRST ASSISTANT ATTORNEY GENERAL

OS:EPS

MOTOR VEHICLES: Point system -- Points may be added to a driver's record for convictions for traffic offenses when the defendant driver fails to appear for trial and bail is forfeited. Sections 321.208, 766.1 and 777.19, Code 1958.

July 24, 1961

Mr. Walter L. Saur
Fayette County Attorney
Oelwein, Iowa

Attention: Mr. J. G. Johnson, Assistant

Dear Sir:

This will acknowledge receipt of your recent opinion request, in which you state:

"We are requesting an opinion from your office concerning the interpretation and application of Code Section 777.19 as it relates to convictions for traffic offenses when the defendant does not appear.

"The situation confronting us concerns a party arrested for speeding. This man plead not guilty but failed to appear at the time set for trial. The justice of the peace entered a guilty verdict against him and sought our aid to enforce this judgment. The above named code section indicates that either the defendant or his attorney must be present at the trial of such a case, and that in the absence of one of these parties, the J. P. court would not have jurisdiction over the defendant to render verdict or judgment against him. The only case we could find on this subject, State vs. Young, 86 Iowa 406, appears to support this position.

"The fact that makes this result of particular interest is that it seems to be a common practice for a person who is arrested for speeding to post a bond and proceed on his way. When he fails to appear, the bond is forfeited, and no effort is made to secure his presence for a trial; but a record of 'conviction' is forwarded to the Safety Department and he is charged with 'points' accordingly. If this procedure finds

some support among the statutes other than 777.19 (perhaps 766.4), then it would appear that our J. P. could enforce his judgment. However, if this is not the case, then our question concerns the legality of all of the 'convictions' entered under the common method of posting bond and failing to appear."

Section 777.19 of the 1958 Code of Iowa provides for the following requirements regarding a defendant's personal presence at the trial:

"If a felony is charged, the defendant must be personally present at the trial, but the trial of a misdemeanor may be had in his absence, if he appears by counsel."

In the event that a defendant fails to appear for trial, the proper procedure for forfeiture of bail is outlined in Chapter 766, 1958 Code of Iowa. Section 766.1 therein provides:

"If the defendant fails to appear for arraignment, trial, or judgment, or at any other time when his personal appearance in court is lawfully required, or to surrender himself in execution of the judgment, the court must at once direct an entry of such failure to be made of record, and the undertaking of his bail, or the money deposited instead of bail, is thereupon forfeited."

The forfeiture of bail, so far as motor vehicle offenses are concerned, has beengiven special consideration by the legislature. The legislature provided in section 321.208 that:

"For the purposes of this chapter the term 'conviction' shall mean a final conviction. Also for the purposes of this chapter a forfeiture of bail or collateral deposited to secure a defendant's appearancein court, which forfeiture has not been vacated, shall be equivalent to a conviction."

Under authority of section 321.208, a forfeiture of bail is deemed a conviction, and the record thereof is forwarded to the Department of Public Safety. The "point system" set up by the Department is based upon the assessment of points for "conviction" of a motor vehicle offense. See July 1959 Supp., Iowa Departmental Rules. Chapter 222, Laws of the

58th G. A., provides for the promulgation of a point system for the purpose of weighing traffic "convictions".

Therefore, based on the above authority, I am of the opinion that the cited statutes provide authority for the adding of points by the Department of Public Safety to the record of a driver who has forfeited bail, on the ground that said forfeiture is equivalent to a conviction for this purpose.

Section 766.4 of the 1958 Code of Iowa sets out the procedure for forfeiture of bail in a Justice of the P ace Court. That statute provides that notice be given for appearance before the District Court and for the District Court to proceed as though the forfeiture had occurred in that Court. The judgment of forfeiture is entered by the District Court under authority of Section 766.3.

Chapter 767 on Recommitment After Bail gives the procedure for enforcement of the judgment of forfeiture. It is stated in Section 767.1 (1) that:

> "767.1. Grounds for Recommitment. The district court in which a criminal action is pending, or during the pendency of an appeal from its judgment therein, or in which a judgment is to be carried into effect, may, by an order entered on the record, direct the defendant to be arrested and committed to jail until legally discharged, after he has given bail, or deposited money instead thereof, in the following cases:
>
> "1. When by reason of his failure to appear he has incurred a forfeiture of his bail, or money deposited instead thereof."

This statute provides for the arrest of the defendant after the forfeiture of bail which establishes jurisdiction in the district court for further proceedings. The United States District Court for the Northern District of Iowa in In Re Morgan, 80 F. Supp. 810 on Page 819, sets out the jurisdictional principle as follows:

> "An arrest of a person upon the ground that he is guilty of an offense interdicted by statute is the first step in, and an integral part of, the process of bringing such person before the court or courts of that sovereingty whose statute has been violated. When an arrest has been made for such object or purpose, the jurisdiction of the particular court is then invoked."

Thus, it is my opinion that you can enforce a judgment resulting from a forfeiture of bail before a justice of the peace, as indicated above.

Very truly yours,

BRUCE M. SNELL, JR.
Assistant Attorney General

BMS:EPS

INSTITUTIONS: Penal Institutions-- Warden has no authority to allow inmates outside confines of institutions for purposes other than those specified by statute. Iowa Code sections 255.28, 246.18, 246.19, 246.9.

July 24, 1961

Board of Control of State Institutions
L O C A L

Gentlemen:

We are in receipt of your letter of March 1, 1961, in which you state:

> "At the present time, inmates are taken to the University Medical Center, Iowa City, Iowa, for medical care. I assume that the Wardens and Superintendents may do this under Section 255.25. However, there has been another practice which raises a question as to its legality. That is, the practice of placing men without prison supervision at the University Hospital for medical experiments. Can this legally be done? Whose approval must be secured if it can be done legally?
>
> "Another practice that has been going on for some time is that of permitting groups of inmates to leave the institutions for various activities such as: (a) athletic contests; (b) to furnish music and entertainment for outside organizations; (c) to attend special classes away from the institution. Again, can the Wardens and Superintendents legally permit this?"

In reply thereto, you are advised that the Board of Control of State Institutions is legal custodian of all prisoners in the penal institutions. See opinions of the Attorney General, 1932, page 247. As such, its administration of prisoners must be conducted within statutory limitations. Thus, if no statute authorizes sending prisoners outside the institutions for the purposes you have enumerated, then this practice is not lawful.

Your attention is directed to Iowa Code Section 255.28, which provides:

> "Transfer of patients from state institutions. The board of control of state institutions, and the board in control of Iowa braille and sight-saving school, the school of the deaf, the Iowa Annie Wittenmyer Home, and the juvenile home, may respec-

tively, send any inmate of any of said institutions or any person committed or applying for admission thereto, to the hospital of the medical college of the state university for treatment and care as provided in this chapter, without securing the order of Court required in other cases. Said boards shall respectively pay the traveling expenses of any patient thus committed, and when necessary the traveling expenses of an attendant for such patient, out of funds appropriated for the use of the institution from which he is sent."

Since this section clearly specifies the institutions from which inmates may be sent to university hospitals for treatment, and since the correctional institutions are not included, this section does not, in our opinion, authorize the wardens and superintendents of training schools, reformatory and penitentiary to send inmates to the university medical center for medical care without court order. Such authorization, however, is found in Iowa Code section 218.90 (1958) which provides as follows:

"Transfer of prisoners. The board of control may transfer any prisoner under its jurisdiction from any institution supervised by the board of control to any other institution under said board of control and may transfer any prisoner to any other institution for mental or physical examination and treatment, retaining jurisdiction over said prisoner when so transferred."

As to the practice of allowing inmates to leave the institutions for medical experiments, athletic contests, special classes and entertainment purposes, your attention is directed to the following sections of the Iowa Code:

"246.18 Employment of prisoners -- institutions and parks. Prisoners in the penitentiary or men's reformatory shall be employed only on state account in the maintenance of the institutions, in the erection, repair, or operation of buildings and works used in connection with said institutions, and in such industries as may be established and maintained in connection therewith by the board of control. The board of control may detail prisoners, classed as trusties, from the state penitentiary or reformatory to perform services for the conservation commission within the state parks. The conservation commission shall provide proper supervision, housing and maintenance for said prisoners but the surveillance of said prisoners shall remain under employees of the board of control."

"246.19 Erections or repairs at other institutons. The board may temporarily detail, under proper surveillance, trustworthy prisoners to perform services in the construction or repair of any work imposed on the board at any institution under their control."

"246.9 According prohibited privileges. If any officer or other person employed in either of said institutions or its precincts, negligently suffer any convict confined therein to be at large without its precincts, or out of the cell or apartment assigned to him, or to be conversed with, relieved, or comforted contrary to law or the rules of the institution, he shall be punished by a fine not exceeding five hundred dollars."

These sections clearly specify the situations in which groups of prisoners may be allowed to leave the institutions. You will note that the employment of prisoners is limited to "maintenance of the institutions, in the erection, repair, or operation of buildings and works used in connection with said institutions, and in such industries as may be established and maintained in connection therewith by the board of control," and to certain outside work for the conservation commission. Since these sections fail to specify medical experiments, athletic contests and other activities outside the institutions, the legislature did not, in our opinion, intend to authorize the removal of inmates from the institutions for any of these purposes.

As to the practice of placing men outside the prisons without prison supervision, even for authorized purposes, you will note that Sections 246.18 and 246.19 both require surveillance. The amount of surveillance which would be reasonable and adequate in any particular circumstance should, in our opinion, be left to the discretion of the warden or superintendent, since he is the person with the most specific information and knowledge of each particular prisoner and the security requirements advisable for each.

Very truly yours,

JOHN M. CREGER
Assistant Attorney General

JMC:js

COUNTIES AND COUNTY OFFICERS: County board of supervisors -- County board of supervisors has no power to lease portion of county farm to county conservation board. Iowa Code sections 111A.4(2) and 332.3(17) (1958).

July 25, 1961

Mr. Howard B. Wenger
Fremont County Attorney
Hamburg, Iowa

Dear Mr. Wenger:

We have your letter of June 26, 1961, in which you state:

> "The County Conservation Board of Fremont County, Iowa, has made a request to the Board of Supervisors of the said county to lease 45 acres of the county farm to the Conservation Board to be used in connection with a proposal to establish a golf course.
>
> "Briefly the request is for a lease for a period of fifty years with an option to renew for an additional fifty years and with the option to purchase said leased ground, if ever offered for sale. The rental to be based upon current U. S. Government conservation reserve payments for similar land; the county at the present time has approximately 45 acres in the soil bank for which they are receiving conservation reserve payments.
>
> "The question presented is: Does the County Board of Supervisors have the right to enter into such a lease with the conservation board and if so what procedure should be followed by the County Board of Supervisors.
>
> "Code Section 111A.4(2) provides that the County Board of Supervisors may upon request of the County Conservation Board, designate, set apart and transfer to the County Conservation Board for use as parks, playground, etc., land owned or controlled by said county and not 'devoted or dedicated to other inconsistent public uses.' The county farm provides revenue for the poor fund and would continue to do so if leased to the conservation board."

61-7-26

Iowa Code section 332.3 (17) gives the board of supervisors power:

> "To lease or sell real estate owned by the public and not needed for county purposes." (Emphasis supplied)

In our opinion, the operation of a public golf course by the county conservation board is a "recreational purpose" within the meaning of Iowa Code section 111A.4(2), (1958), and therefore is also a county purpose under Iowa Code section 332.3(17), since it is an authorized function of the county conservation board.

Therefore, the board of supervisors has no power to lease the land, since it is needed for a county purpose, and your inquiry must be answered in the negative.

Very truly yours,

JOHN M. CREGER
Assistant Attorney General

JMC:bl

SCHOOL: Annual Audit: ~~Under Section 11.18 as amended by H. F. 66,~~ Consolidated school districts maintaining a high school are subject to an annual audit, as provided in Section 11.18, Code 1958, as amended by H. F. 66 of the 59th G. A. (Reaffirmed to Akers, 57, [illegible])

July 25, 1961

Chet B. Akers, Auditor
State of Iowa
State Capitol Building
Des Moines, Iowa

Attention: C. W. Ward, Supervisor

Dear Mr. Akers:

This is to acknowledge receipt of your letter of 14 June, in which you state the following:

> "In compliance with Chapter 11, 1958 Code of Iowa, pertaining to the duties of the State Auditor, it is essential that I have an official opinion to clarify House File 66, enacted by the Fifty-ninth General Assembly.
>
> "You will note that House File 66 states, "offices in independent and community school districts maintaining high schools". We also have consolidated school districts which are not mentioned in House File 66.
>
> "Are the consolidated districts subject to an annual audit although they apparently are not included in said House file?"

In reply thereto, we advise as follows:

Section 11.18, Code 1958, as amended by the 59th G. A. is for the purpose of ascertaining the financial conditions of school districts maintaining a high school. It is the governmental duty of the State Auditor to not only determine the actual financial condition of a school district but to determine whether or not the school district "is efficiently conducted and the maximum results for the money expended are obtained." (Section 11.4, Code 1958)

Only recently, the Supreme Court reviewed the classification of school districts in the case of Des Moines Ind. Comm. Sch. Dist v. Armstrong, 250 Iowa 634, 95 NW 2d 515 at 519. The Court said as follows:

#61-7-25

"Section 274.6, Code, 1958, I.C.A., states "School corporations composed of subdistricts shall be called school townships * * * *."

"Other school corporations shall be designated as follows:" (Here are listed independent, rural independent, consolidated and community school districts.)

"Section 274.6 has a long legislative history. Commencing at least as early as the Code of 1873 until 1924 school corporations were divided into two classes, those composed of subdistricts - called school townships - and independent or rural independent districts. Section 1, chapter 16, Acts 40th Extra General Assembly, in 1924 (section 4124, Code, 1924), added consolidated districts to school corporations other than school townships. Thus the law stood until the 56th General Assembly in 1955 by section 1, chapter 136, added community school districts to this second group.

"Rural Independent School Dist. No. 3 v. McCracken, supra, 212 Iowa 1114, 1122-1123, 233 N.W. 147, 151, decided in 1931, says: "By way of prefatory statement, it may be well to note the statutory classification of school corporations in this state. Our statute recognizes two kinds, namely: (1) School Townships that are divided into subdistricts; and (2) independent districts.* * * *

"* * * for the purpose of administration, and for the purposes of nomenclature and accommodating the size of the board to the size of the school corporation, independent districts are divided into a number of classes descriptive of the kind of territory included within the boundaries thereof. Section 4124, Code 1927, (now 274.6, Code 1958). This is, however, a mere matter of name. A consolidated school district classifies for some purposes as an independent district. Consolidated School District of Glidden v. Griffin, 201 Iowa 63, 206 N.W. 86."

It is our considered opinion consolidated school districts maintaining a high school are subject to an annual audit as provided in Section 11.18, Code 1958, as amended by H. F. 66 of the 59th G. A.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWRJr:EPS
cc Paul Johnston, Supt., P.I.

COUNTIES AND COUNTY OFFICERS: Auditor -- The payment of annual audits of the agricultural extension service, county assessor, and soldiers' relief, is within the area of county audits, and their separate funds are not available for the payment thereof. (Strauss to Carroll, Union Co. Atty., 7/25/61) #61-7-24

25 July 1961

Mr. E. L. Carroll
County Attorney
Union County
Creston, Iowa

Dear Sir:

Reference is made to your letter of the 30th ult. in which you submitted the following:

> "At the request of the County Auditor of Union County, he would like an opinion as to the payment of the annual audits for different boards and divisions here. He has before him a Strauss to Perkins, Polk County Attorney, 5-23-61 and which states that the Broadlawns Hospital County unit and the County Board of Education audits are payable by the County Hospital Trustees and the County Board of Education from their respective funds. He would like to know if this would apply down the line to the other taxing districts such as the Agriculture Extension Service, County Assessor and the Soldiers relief."

In reply thereto I advise as follows: The opinion to which you refer as issued May 23, 1961 to Polk County Attorney was based upon the following situation stated in the foregoing opinion, to wit:

> "Both of these bodies being certifying bodies, and having control of their own funds, the applicability of the provisions of Section 11.21 with respect to payment to the auditor of state by the governing officers of the county school board or county hospital trustees, when examined, would, to be consistent with the 1940 opinion herein quoted, require payment therefor from the funds of the county hospital trustees or the county board of education. Both of these funds are independent of any control by the board of supervisors."

#61-7-24

As applied to the agencies mentioned to wit, the Agriculture Extension Service, County Assessor and the Soldiers Relief, the foregoing statement is not applicable because none of these agencies is a certifying body and therefore do not control their own funds. The audit of such agencies therefore, is within the area of county audit and their separate funds are not available for payment thereof.

Very truly,

OSCAR STRAUSS
FIRST ASSISTANT ATTORNEY GENERAL

OS:EPS

COURTS: Compatibility -- A judge of the district court, during the term for which he was elected, is ineligible for any office except that of the Supreme Court. (Strauss to Engelkes, Judge Dist. Ct., 7/25/61) #61-7-23

25 July 1961

Hon C. E. Engelkes
District Court of Iowa
Tenth Judicial District
Grundy Center, Iowa

Dear Judge:

This will acknowledge receipt of yours of the 11th inst. in which you have submitted the following:

> "I am wondering whether or not the offices of District Judge and Director of the Community School District are compatible offices. As I understand the concept of "compatibility" I see no reason why they should not be; however, I thought perhaps your office had established a precedent which would govern your opinion on this question.
>
> "If you have previously rendered an opinion on this question, I would appreciate receiving a copy of it. If you have not previously considered the question I wonder if it would be proper for you to do so at this request."

In reply thereto I advise you that Section 5 of Article V denies eligibility to a District Judge to any other office during his tenure except that of Judge of the Supreme Court. Specifically the Section quoted provides this:

"Constitution of the State Of Iowa, ART. V, Sec. 5.

> "District Court and Judge. Sec. 5 . . . . The Judge of the District Court shall hold his office for the term of four years, and until his successor shall have been elected and qualified; and shall be ineligible to any other office, except that of Judge of the Supreme Court, during the term for which he was elected."

This provision has been the subject of two opinions of this Department one appearing in report of the Attorney General 1934, Page 616, where it is stated:

"OAG 1934, p. 616

"The object of the framers of the state Constitution in the adoption of Section 5 of Article V of the Constitution was to keep judges from aspiring to any political office except a higher judicial one."

and one appearing in the report of this Department for 1902, at page 116, where it was stated:

"OAG 1902, p. 116

"The purpose of the constitutional prohibition is to prevent one holding the office of district judge being subjected to the temptation of showing partiality to this person or that person, or this faction or that faction, for the purpose of gaining support for the appointment or election to some other office. It is to remove the district judge from any suspicion of using the office of judge for the purpose of making friends, which would help him to another position."

See also in this connection a comparable constitutional provision commented upon to the same effect by the Supreme Court of Kansas in the case State ex rel. Watson v. Cobb, 2 Kan. 32 (1863):

"Kansas Constitution, ART. 3, Sec. 13 reads:

"And such justices or judges shall receive no fees or perquisites, nor hold any other office of profit or trust under the authority of the State or United States, during the term of office for which said justices and judges shall be elected, . . ."

The court, in interpreting this Section said, at Page 56:

"The object sought to be accomplished by this provision, is that our high judicial officers may be removed as far as possible from the temptation to use the power and

Influence of their positions and authority for their own advancement. To prevent their minds from being distracted from their legitimate duties by ambitious hopes and struggles for preferment; to raise them above those political and partisan contests so unbecoming the desired purity, impartiality and calmness of the judicial character. Its effect is to prevent the acceptance of any other office by a judge or justice the term of whose judicial office has not expired, and to render such acceptance void."

With the assurance of my regards, I am,

Yours very truly,

OSCAR STRAUSS
FIRST ASSISTANT ATTORNEY GENERAL

OS:EPS

STATE OFFICERS AND DEPARTMENTS: Iowa Reciprocity Board -- Chapter 250, Laws of the 58th G. A., establishes the Iowa Reciprocity Board as a separate part of the State government, not a part of any other department.

July 25, 1961

Honorable Carl H. Pesch, Commissioner
Department of Public Safety
L O C A L

Dear Mr. Pesch:

This will acknowledge receipt of your opinion request of May 24, 1961, in which you state the following:

"Chapter 250, Acts of the 58th General Assembly, is an Act relating to reciprocity and apportionment of motor vehicles registrations and compensation tax on certain motor vehicles. Section 1 of said Act establishes a board to be known as the Iowa Reciprocity Board, same to be located at the seat of government. The board, among its other duties, appoints an executive secretary and such other necessary office personnel as may be needed to carry out the provisions of said Act. Also, as set forth in Section 1, the board may call upon the staff, facilities and personnel of the Public Safety Department, State Highway Commission, and the State Commerce Commission for assistance in performing its functions. Also, the Attorney General is obligated to give legal counsel and assistance to the Reciprocity Board.

"Under Section 5 of this Act, you will refer to lines 11 through and including 14 which provide in substance that the Department of Public Safety shall charge and collect an additional fee of $1.00 for each plate, sticker, etc., furnished for each vehicle registered in accordance with the provisions of this Act. You will also notice that Section 8 of this Act repeals Section 321.56, Code of Iowa 1958, which was the old provision for Reciprocity or a Reciprocity Board.

"The State Auditor's office is concerned about the accounting procedures being followed by the Reciprocity Board at present and as a member of the Reciprocity Board, I am also concerned with this matter. The question I

feel that must be resolved before the Reciprocity Board can work with the Comptroller and Auditor's office in setting up an acceptable accounting procedure, or procedures, is whether the Reciprocity Board is an entity in and of itself, or whether it is an integral part of the Department of Public Safety of the State of Iowa. My own opinion would be it is an entity, or separate board, having separate powers, separate functions, and separate responsibilities. However, I solicit your early opinion on this matter so that proper procedures may be set up under the guidance of the Comptroller and Auditor."

The Iowa Reciprocity Board derives its existence and authority to act from Chapter 250, Laws of the 58th General Assembly, which repealed section 321.56, 1958 Code of Iowa, the previous statute dealing with the reciprocity board. As you point out, Chapter 250 establishes a board to be known as the Iowa Reciprocity Board. Said Chapter provides for a three-member board composed of a member of the state highway commission, a member of the state commerce commission and the commissioner of public safety. The statute does not grant to any member more authority than has any other member. The board appoints the executive secretary.

Throughout Chapter 250, the powers and authority of the Iowa Reciprocity Board are set forth, indicating that the board has an existence separate from any other department of state government. Moreover, the board received a separate appropriation of money by the 58th General Assembly, Chapter 1, Section 45a, Laws of the 58th G. A. The appropriation for the Department of Public Safety was provided by Chapter 1, Section 47; for the Commerce Commission by Chapter 1, Section 6; and for the Highway Commission by Chapter 17, Laws of the 58th G. A.

The fact that Chapter 250 delegates certain functions to be performed by other departments than the Reciprocity Board does not contravene its separate existence. The work of the board relates to all three of the areas from which its membership is drawn and the board's activities are necessarily coordinated with the departments responsible in those areas. Of such a nature is the provision in section 5 of Chapter 250 referenced in your letter.

Thus, on the basis of the above authority and for the reasons indicated, it is my opinion that the Iowa Reciprocity Board has been established by the legislature as a separate part of the state government and is not a part of any other department.

Very truly yours,

BRUCE M. SNELL, JR.
Assistant Attorney General

BMS:bl

STATE OFFICERS AND DEPARTMENTS: Board of Control -- Board of Control has no authority to destroy or microfilm records of inmates, but can transmit the same to Archives. Iowa Code sections 218.22, 303.10, 303.11 (1958).

July 25, 1961

Board of Control of State Institutions
L O C A L

Attention: Mr. M. J. Brown, Administrative Assistant

Gentlemen:

We have your letter of May 23, 1961, in which you state:

> "Please give us a written opinion of the attorney general as to the lawful requirements of retaining inmate and patient records at the administrative office on persons committed to our institutions.
>
> "Our concern is whether it is necessary for us to retain indefinitely the personal record of such inmates or patients, particularly in view of the fact that a more detailed file containing the same information is maintained and retained at each individual institution, covering the persons committed thereto.
>
> "May we legally destroy the personal record of all inmates or patients who are deceased?
>
> "May we legally microfilm such inmate or patient records by using the facilities at the State Archives, or are these records of such confidential nature that they not be placed at the disposal of persons other than that outlined in Section 218.22."

Iowa Code section 218.21 provides:

> "Record of inmates. The board shall, as to every person committed to any of said institutions, keep the following record: Name, residence, sex,

age, nativity, occupation, civil condition, date of entrance or commitment, date of discharge, whether a discharge was final, condition of the person when discharged, the name of the institutions from which and to which such person has been transferred, and, if dead, the date, and cause of death."

We find no provision in the Code authorizing the destruction or microfilming of these records, and your inquiries are therefore answered in the negative.

Your attention is directed to Iowa Code sections 303.10 and 303.11, which provide:

"303.10 Records delivered -- classified list -- disposal of useless documents. The several state, executive, and administrative departments, officers or offices, councils, boards, bureaus, and commissioners, are hereby authorized and directed to transfer and deliver to the Iowa state department of history and archives such of the public archives as are designated in section 303.9, and take the curator's receipt therefor. Before transferring such archives, the office of present custody shall file with the curator a classified list of the same made in such detail as the curator shall prescribe. If the curator, on receipt of such a list, and after consultation with the chief executive of the office filing the same or with a representative designated by such executive, shall find that certain classifications of the archives listed are not of sufficient historical, legal, or administrative value to justify permanent preservation, he shall file a list thereof with the board of trustees with such recommendations for their disposal as he shall see fit to make. * * * "

"303.11 Removal of original. * * * The curator shall annually submit tothe trustees a list of papers and documents which have no further value, and upon approval of said trustees such items may be destroyed."

Thus, the Board of Control may deliver the appropriate records to the Archives, which has the option of destruction of useless documents.

Very truly yours,

JOHN M. CREGER
Assistant Attorney General

JMC:bl

STATE OFFICERS AND DEPARTMENTS: Secretary of State -- Section 491.15, Code 1958, conferring upon the Secretary of State the power of service agent for corporations in such section defined, restricts the power of the Secretary of State while acting as such agent to the service of original notice or process initiated or involved in civil suits in court. (Strauss to Synhorst, Sec'y. of State, 7/25/61) #61-7-25

25 July 1961

Hon. Melvin D. Synhorst
Secretary of State
Des Moines, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 10th inst. in which you submitted the following:

"This office has received by mail, a copy of Notice of Intention to Forfeit and Cancel Contract.

"We enclose a copy of the letter from the attorney.

"Our question is whether the Secretary of State should accept this service as service being upon him as contemplated and as provided by Section 491.15 of the Iowa code."

Copy of the letter enclosed is this:

"Melvin D. Synhorst,
Secretary of the State of Iowa,
State House,
Des Moines, Iowa.

Dear Mr. Synhorst:

Enclosed herewity please find Notice and two copies to be served in conformance with Section 491.15 of the Code of Iowa on non-resident defendant.

Very truly yours,

(signed) Charles L. Roberts

CLR:lk
Enc "

In reply to the foregoing I advise that I am of the opinion that Section 491.15, Code 1958 conferring upon you the power of service agent for corporations in such section defined, restricts your power of acting as such agent to the service of

61-7-25

original notice or process initiated or involved in civil suits in court. The notice described in your letter neither initiates such a suit nor is involved therein.

You are therefore advised that the named section does not confer upon you power to act as service agent in the situation presented.

Very truly yours,

OSCAR STRAUSS
FIRST ASSISTANT ATTORNEY GENERAL

OS:EPS

Insurance: Foreign life insurance company; §§508.5; 515.8 and 515.10: A foreign life insurance requesting a certificate to do business in Iowa only as a casualty company which meets the capital and surplus requirements for a casualty company but does not meet the capital and surplus requirements for alife insurance company cannot be authorized to write only casualty insurance in Iowa. The only statutory provision for permitting a life insurance company to write casualty insurance is §508.29 which provides that specified lines of casualty insurance may be written in addition to life insurance. (Bump To Timmons, Comm'r, 245 Ia.) ± 61-7-28

July 25, 1961

William E. Timmons, Commissioner
Insurance Department
State of Iowa
L O C A L

Dear Mr. Timmons:

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

> "...is it permissible for the commissioner of insurance to issue a certificate of authority to transact business under the provisions of Chapter 515, to a foreign insurance company chartered in its state of domicile as a life insurance company if it has sufficient capital and surplus to comply with the provisions of Sections 515.8 and 515.10 but less than sufficient capital and surplus to meet the requirements of Section 508.5?"

As you are aware, §508.5, Iowa Code, 1958, establishes the capital and surplus requirements for a stock life insurance company in Iowa and §§515.8 and 515.10 establish the capital and surplus requirements for a casualty insurance company formed on the stock plan. In the situation you have presented, a foreign life insurance company desires to sell only health and accident insurance (casualty classification) in Iowa. This foreign insurer has sufficient capital and surplus to comply with the statutory requirement for casualty insurance companies but insufficient capital to meet the Iowa requirements for stock life insurance companies.

Assuming for the purpose of this opinion that the foreign life insurance company is authorized by its charter or articles of incorporation to write other insurance than life insurance (§508.29), it then becomes necessary to determine what statutory authority exists, if any, for issuing to this life insurance company a certificate of authority to transact a limited insurance business in Iowa.

± 61-7-28

It has long been the rule in Iowa that a foreign insurance company is bound by the same rules and limitations applying to domestic companies. Dixon v. Northwestern Nat'l Life Ins. Co., 189 Iowa 1268 (1920). Similarly, §494.14, Iowa Code, 1958, provides:

> "...all foreign corporations...shall be subject to all the liabilities, restrictions and duties that are or may be imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers."

It would then appear that inquiry must be made of those provisions relating to like domestic companies. Section 508.29, referred to above, provides:

> "Authority to write other insurance. Any life insurance company...authorized by its charter or articles of incorporation so to do, may in addition to such life insurance, insure...the health of persons and against personal injuries..."

Chapter 508 makes no provision for any life insurance company to write other lines of insurance, except in conjunction with life insurance.

A careful examination of Chapter 515 (Insurance Other Than Life) reveals that there is no provision whereby a life insurance company may qualify to write insurance, other than life. (See generally: §515.77). The only cross reference between Chapters 508 and 515 is, as mentioned above, and in §508.30 (which makes life insurance companies writing other insurance subject to the provisions of Chapter 515). See also: Chapter 514A (Accident and Health Insurance).

In analyzing the case law on this problem we have discovered that there are no Iowa cases on point and one Illinois case which holds that a foreign life insurance company should be authorized to sell only accident and health insurance in Illinois, if the company's capital and surplus meet the requirements for a casualty company even though it does not meet requirements for a life insurance company. People ex rel Mountain States Life Ins. Co. v. Lowe, 340 Ill. 51 (1930). This case is distinguishable from the present problem in that the Illinois statute under which the ruling was made, Smiths Stat, 1929, §6 provided:

> "Any life or casualty insurance corporation... organized under the laws of any other State or country, may be authorized to transact in this State, the business of accident and health insurance, or either of them, and in addition thereto, the business of life insurance..."

Iowa does not have a similar statutory provision nor is it likely that a similar result would be reached under the present Iowa statutes.

In this regard we have also examined Allen v. Amer Indem Co., 55 S.W.2d44 (Ky. 1932) in which the Kentucky Commissioner of Insurance was compelled to issue a license to a foreign casualty company even though its charter permitted insurance of a combination of risks which were proscribed by the Kentucky statute. In so finding, the court stated that the Commissioner was not to consider the charter powers of the foreign corporation in its own jurisdiction but only those powers in Kentucky which would be controlled by local law and whether it would be given undue advantage over domestic corporations. We consider this case inapplicable to the present inquiry since the charter powers of the instant company are being considered only from the vantage of its right to do business in Iowa.

Notwithstanding the subject company meets the capital and surplus requirements to write casualty insurance in Iowa it is the opinion of this office that as a life insurance company it cannot be granted a certificate of authority to transact business under the provisions of Chapter 515 as a casualty insurer. Without specific statutory authorization, a domestic life insurance company would not be permitted such a certificate, and consequently neither can a foreign life insurance company be so authorized.

Respectfully submitted,

W. N. BUMP
Solicitor General

WNB/gh

The Board of Supervisors have no authority to refund taxes paid upon capital stock of a bank after it has been closed and placed in the hands of a receiver, or upon taxes of the capital stock of a bank the value of which has been destroyed.

July 26, 1961

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

Dear Dick:

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

"Our County Treasurer and County Board of Supervisors have a problem; the facts are briefly as follows.

"The Common Stock of the Sheldon National Bank (now defunct) was assessed for the years 1957, 1958, 1959, and 1960. Because of the financial condition of the Bank, the Board of Supervisors cancelled the 1960 assessment of the Bank Stock. The F.D.I.C. has requested a refund for the taxes assessed on this Bank Stock for the years 1957, 1958, and 1959 because the records of the embezzlement show that during those years the Bank Stock was actually worthless, or was at least in such condition that it would not be of par value.

"Does the Board of Supervisors of O'Brien County have power and authority to pay to the F.D.I.C. (as assignee of the Bank) for the Taxes collected against the Bank Stock for the years 1957, 1958, and 1959?

"Thanking you for your prompt attention to this inquiry I am * * *"

1. I advise as follows: Statutes pertaining to the situation described are Sections 430.9, Code of 1958 and Section 445.68, Code of 1958, both exhibited as follows:

"430.9 STOCK OF INSOLVENT BANK-REMISSION. Whenever a bank operated within the state has been heretofore or shall hereafter be closed and placed in the hands of a receiver, the board of supervisors shall remit all unpaid taxes on the capital stock, surplus, and undivided profits of said bank. (C35, 7004-g1; C39 7004.1; C46,50,54, 430.9)"

#61-7-29

"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. (R60, 818; C73, 800; C97, 1307; C24, 27, 31, 35, 39 7237; C46, 50, 54, 445.62

"Similar provision as to banks, 430.9"

However, whether the basis of the claim is under either or both of the foregoing numbered statutes, refund of taxes paid is not authorized. Insofar as support is found for this proposition based upon Section 430.9, I quote to you the following from an Opinion of this Department appearing in the report for 1938, Page 103:

"Section 7004-g1 provides:

'Stock of insolvent bank - remission. Whenever a bank operated within the state has been heretofore or shall hereafter be closed and placed in the hands of a receiver, the board of supervisors shall remit all unpaid taxes on the capital stock of said bank.'

The provisions of the above quoted section of the statute are sweeping and refer to banks which have been heretofore or shall hereafter be closed and placed in the hands of a receiver. Two things are necessary: that the bank be closed; and placed in the hands of a receiver. If those two things concur, the statute directs that the board of supervisors remit all unpaid taxes on the capital stock. The amount of taxes or the year for which assessed is immaterial, as the statute specifies all unpaid taxes.

"It is therefore our opinion that it is the duty of the board of supervisors to remit or cancel all unpaid taxes on the capital stock of the First National Bank of Buffalo Center."

A like conclusion was reached in the opinion appearing in the report for 1936, Page 145, where it was said:

> "It is clear then, that as Chapter 1 of the Laws of the 45th General Assembly, Extra Session, was not retroactive, that the taxpayers here can obtain no relief thereunder irrespective of whether the taxes were paid and the refund was asked, or whether they were not paid and a remission is sought. However, House File 471 of the Acts of the 49th General Assembly, which has just become a law, provides:
>
> > 'Whenever a bank operated within the State of Iowa has been heretofore, or shall hereafter be closed and placed in the hands of a receiver, the Board of Supervisors shall remit all unpaid taxes on the capital stock of said bank'
>
> You will note that this act is both retrospective and prospective and therefore covers taxes that were levied before the passage of the bill as well as those that will be levied after the bill becomes a law so long as they were unpaid.
>
> "It is, therefore, the opinion of this department that the petition of the stockholders who have not paid their taxes, should be granted by the Board of Supervisors, but that the stockholders who have paid their taxes, are not entitled to a refund."

In the case of Brunner v. Floyd County, 226 Iowa, Page 583, where this statute was being litigated and after disposing of the constitutional question, the Court observed:

> "(2) II. The original petition prayed for mandamus to compel refund of taxes already paid as well as the remission of the unpaid taxes and complaint is made that this constituted a misjoinder of causes of action. No attack upon this misjoinder was made by motion. Furthermore, the decree recites that appellee, with permission of the court, withdrew the portion of the prayer asking for refund of taxes already paid. Therefore, no error could properly be predicated upon this point.
>
> "(3) III. Nor would the fact that the stockholders petitioned the board of supervisors for a refund of taxes already paid, in addition to the remission of unpaid taxes, warrant the board in failing to act. Its duty in this respect was positive and it was required to comply with the statute irrespective of notice or demand. That the parties also claimed

refunds not contemplated by the statute would not excuse the failure of the board to remit such taxes as came within the purview of the statute since the performance of this duty was enjoined upon it by law."

2. Insofar as support for the proposition as it arises under Section 445.62, it is said in the Opinion of this Department appearing in the report for 1938, Page 9, the following:

"The only other section which might be applicable is Section 7237 of the Code of 1935, which, in sofar as it relates to this matter, states as follows:

'The board of supervisors shall have power to remit in whole or in part the taxes of any person whose property has been destroyed, if said taxes have not been delinquent for thirty days at the time of destruction. 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'

Interpreting the first part of said section then, as a prerequisite for the remission of taxes by the board, if they see fit, it is essential that the taxes on the stock either be paid or that the delinquency in the payment of the same be for not longer than thirty days at the time of the destruction or loss of capital stock.

"Construing the last part of Section 7237, we see that in addition to the loss, it also is necessary that the stockholders have paid a stock assessment, and according to the facts presented to us by you there was no stock assessment for the year that the remission is claimed, and it is the opinion of this office that that in itself is fatal to a recovery of the tax paid.

"It will also be noted in said section that a recovery can only be had for the year that the tax was paid and a stock assessment made. The tax on stock is due and payable the year following the year of taxation. For example, if

the bank went into receivership in 1932, the tax assessed in 1932 being payable in 1933 would be the only tax that would be subject to remission by the board of supervisors."

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:EPS

County Assessor may not also at the same time hold position of Town Clerk even if the duties to be performed in the other position are done at night after the County Assessor's duties have ended for the day. (STRAUSS TO HAS ADVISED SUPERVISORS ...

#61-8-1

August 1, 1961

Richard L. Hasbrouck
Guthrie County Attorney
Guthrie Center, Iowa

Dear Sir:

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

"The Guthrie County Assessor, Mr. Ed. Flynn, has requested that I submit this question to you so that there would be an official opinion.

"The question pertains to whether or not a County Assessor can hold more than one job. There has been an informal opinion issued April 15, 1958, which was based on an opinion of January 21, 1957, which stated that a County Assessor could not hold the position of Town Clerk and still be the County Assessor. However, I feel that the circumstances in this particular case may be greatly different from the circumstances which were in that earlier case.

"In the instant case the Town Clerk in question is appointed by the Town Council and the Mayor has no jurisdiction over the Town Clerk, that all of their meetings are held at night (after the Assessor's office hours), and all of the clerical work needed to fulfill the duties of the said Town Clerk are after office hours.

"There are situations where the County Engineer can perform street surveys for an incorporated Town and receive compensation for his work, and I am desirous of knowing whether or not this would be a different situation which confronts this situation.

"The main question is: Can a County Assessor hold another job if in the performance of that other job it is done at night and after the County Assessor's duties have terminated for that day.

"In the instant case, the Guthrie County Assessor, Mr. Ed Flynn, is the Town Clerk of the Town of Panora, and he also is the secretary of the Panora Public School. He receives a little compensation from each of these jobs, but they in no way conflict with his duties as County Assessor.

"Your cooperation in this matter will be appreciated."

In reply thereto I attach hereto copy of opinion issued April 15, 1958, holding that a County Assessor could not at the same time hold a position of Town Clerk. The statute there interpreted then existed as Section 441.3, Sub-section 1, Code of 1954. It now appears in the same terms as Section 291.17, Sub-section, 1, Acts of the 58th General Assembly.

Careful consideration has been given to your submission that the facts pertaining to the performance of the duties of Town Clerk would take the question out of the rule announced by the attached opinion. However, the Department is not disposed to recede from the opinion attached and is holding that the County Assessor may not also hold the position of Town Clerk.

Very truly,

OSCAR STRAUSS
FIRST ASSISTANT ATTORNEY GENERAL

OS:EPS

Encl.

INSTITUTIONS: Counties and county officers -- Board of supervisors has no power to require parents of children admitted to hospital for epileptics and schools for mentally retarded on a voluntary basis to remove said children from these institutions and provide private nursing care for them. Iowa Code sections 223.13, 227.11, 226.32, 229.30 (1958).

August 1, 1961

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

Dear Mr. Ball:

We have your letter of July 11, 1961, in which you state:

> "Chapter 223 of the 1958 Code of Iowa provides for the admission, care and payment of care of mentally retarded children and children afflicted with epilepsy. My question under this Chapter is, whether the Black Hawk County Board of Supervisors can require parents of children voluntarily committed to said institutions toremove said children from said institutions and provide for private nursing care for them when said child is a fit subject for such care."

Your attention is directed to Iowa Code section 223.13 (1958), which provides:

> "Voluntary admissions to the hospitals must be with the approval of the board of supervisors of the county of legal settlement, except those private patients received under section 223.5."

This section conditions the admission of voluntary patients upon the approval of the county board of supervisors of the county of legal settlement. We find no authority in the Code for later revocation of this approval. Iowa Code sections 227.11 and 226.32 authorize transfers and discharges of patients in specified instances, and such transfers and discharges are within the discretion of the Board of Control of State Institutions, except for those discharges authorized

by Iowa Code section 229.30 (1958), which may be ordered by the commission of hospitalization with the approval of the Board of Control. Your inquiry is therefore answered in the negative.

Very truly yours,

JOHN M. CREGER
Assistant Attorney General

JMC:bl

CRIMINAL LAW: Extradition -- Expense incurred in care of mentally ill fugitive from Iowa in foreign state should be borne by the foreign state until delivered into custody of the State of Iowa, under section 759.24, 1958 Code of Iowa.

August 4, 1961

Mr. Carroll Wood
Hamilton County Attorney
713 Willson Avenue
Webster City, Iowa

Dear Mr. Wood:

This will acknowledge receipt of your recent letter, in which you state as follows:

> "During the early part of January I commenced an extradition proceeding against Marcus L. Sherburne, who was being held by authorities at St. Paul, Minnesota. The Governor of Minnesota issued his Warrant and defendant filed a Writ of Habeas Corpus the District Court denying the Writ. Defendant then appealed to the Supreme Court of Minnesota on the Writ of Habeas Corpus.
>
> "Since January defendant has been held in custody in the Ramsey County Jail in St. Paul, Minnesota. There is very little likelihood that his appeal will be heard before November, 1961.
>
> "In the meantime, defendant has been found to be in need of mental treatment and such treatment is being given to him by the State of Minnesota. He is being removed to the Criminally Insane Ward at the State Reformatory at St. Peter, Minnesota.
>
> "The Ramsey County Attorney, Mr. William B. Randall, has requested that the State of Iowa bear all or part of the expense of the confinement and treatment of defendant pending the appeal to the Minnesota Supreme Court. Is the State of Iowa required to reimburse the foreign State for the care and treatment of a defendant being held by such foreign state under our extradition proceedings?"

In answer to your request, it should first be noted that section 759.24, 1958 Code of Iowa, provides:

> "When punishment of the crime shall be the confinement of the criminal in the penitentiary, the expenses shall be paid out of the state treasury, on the certificate of the governor and warrant of the comptroller; and in all other cases they shall be paid out of the county treasury in the county wherein the crime is alleged to have been committed. The expenses shall be the fees paid to the officers of the state on whose governor the requisition is made, and all necessary and actual traveling expenses incurred in returning the prisoner." (Emphasis added)

It therefore appears that neither the State of Iowa nor any subdivision thereof is authorized to pay any fees in connection with an extradition, other than those enumerated in the above statute.

Furthermore, as stated in Shapely v. Cohoon, 258 Fed. 752, at page 755:

> "The state alone, as parens patriae is charged with the duty of caring for the insane within its borders, and may adopt whatever method of procedure it may desire for inquisition into their confinement, provided the same is not in contravention of the Constitution or laws of the United States." (Emphasis added)

See also, 44 C. J. S., Insane Persons § 3, pp. 48-49.

It seems clear that the State of Minnesota would have had the duty of caring for the subject whether or not extradition proceedings were initiated by the State of Iowa, and until such time as he is delivered into the custody of agents of this State, the responsibility for his care should remain with the State of Minnesota.

We must therefore answer your question in the negative.

Very truly yours,

JOHN H. ALLEN
Assistant Attorney General

JHA:bl

of a credit union cannot delegate authority to one of its member or to a committee to act upon applications for membership in the corporation. (533.
(2) A credit union cannot deduct patronage dividends or refunds of interest received on loans ~~xx~~ to memb ers from gross income or gross earnings prior to computation of legal reserve requirements. (533.17) (Ramp to Stafford, 8/4/61) #61-85

August 4, 1961

Clay W. Stafford, Superintendent
Department of Banking
State of Iowa
L O C A L

Dear Mr. Stafford:

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

> "...1. May the board of directors of a credit union delegate to one of its number or to a committee composed of two or more of its number the responsibility to act upon applications for membership in the credit union?...
>
> 2. May a credit union deduct so called patronage dividends to its membership or refunds of interest received on loans to its membership from gross income before computation of amounts for transfer to legal reserve?..."

Section 533.9, Code of Iowa, 1958, sets forth the powers of directors and officers of credit unions. In pertinent part Section 533.9 provides:

> ..."<u>It shall be the duty of the directors to have general management of the affairs of the credit union, particularly to:</u>
>
> 1. Act on applications for membership.
>
> 2. Determine interest rates on loans and deposits.
>
> 3. Fix the amount of the surety bond which shall be required of all officers and employees handling money.
>
> 4. <u>Declare dividends</u>, and to transmit to the members recommended amendments to the bylaws."

> "5. Fill vacancies which occur in the board between meetings of the members until the next annual meeting and until successors are elected and qualify.
>
> 6. Determine the maximum individual share holdings and the maximum indicidual loan which can be made with and without security.
>
> 7. Have charge of investments other than loans to members."***

Examination of these specifically enumerated duties leaves no question that these items are nondelegable "discretionary" duties. Ind. School Dist of Danbury v. Christiansen 242 Iowa 963, 49 NW 2d 263, (1951). Compare Schulte v. Ideal Food Prod Co., 209 Iowa 767, 771 (1929) (powers of board of directors when not restricted by articles or bylaws and when they do not involve the exercise of discretionary powers by the board of directors themselves are generally held properly delegated.) See also 101 C.J.S. §758. Thus, the conclusion is apparent that the board of directors of a credit union cannot delegate to one of its members or to a committee the responsibility to act upon applications for membership.

The standard approved bylaws enclosed with your letter make no provision for delegation of the above responsibility. (See Art. V, §3). However, it is our opinion that should such power be specifically delegated in the bylaws it would be contrary to §533.9, supra, and in light of the foregoing if such amendment were proposed, should not be approved by the Superintendent of Banking.

In answer to your second question, it is the opinion of this department that no deductions can be made from the gross income or gross earnings of a credit union prior to its computation for the legal reserve requirement set forth in §533.17, Iowa Code, 1958, which provides:

> "Legal reserve. All fees and fines shall, after the payment of organization expenses, be added to the legal reserve of the corporation.
>
> In addition thereto, at the end of each fiscal year until such time as said legal reserve equals ten percent of the sum of the share and deposit account balances of the corporation, there shall be transferred to said reserve not less than ten percent of the corporation's gross income for the year. Thereafter there shall annually be added to said reserve at the end of each fiscal year such percent of the gross

"earnings, but not exceeding ten percent, as shall be required to maintain said reserve at ten percent of the sum of the said share and deposit account balances."***

Reduction of gross income by any deduction, whether it be for a patronage dividend or a refund of interest on loans would obviously leave something less than the "gross" figure contemplated by the legislature for the computation of the reserve. See generally, Hamilton Nat. Bank v. Dist. of Columbia, 156 F2d 843.

Sincerely yours,

W. N. BUMP
Solicitor General

gh

COUNTIES AND COUNTY OFFICERS: Drainage assessments -- The county treasurer, upon payment of drainage assessment, may not impose all the interest thereon that would accrue if the assessment were not paid until maturity.

#61-8-9

August 7, 1961

Mr. David J. Butler
Cerro Gordo County Attorney
Mason City, Iowa

Dear Mr. Butler:

This will acknowledge receipt of yours of June 22, 1961, in which you submitted the following:

> "A question has been raised as to the authority of the County Treasurer to require a owner against whom a drainage assessment has been made to pay interest on the drainage assessment from the date of the assessment to the next March 31st following where payment of the drainage assessment is made after 20 days from date of levy and prior to March 31st. Section 455.57 of the 1958 Code of Iowa provides that all assessments for drainage shall be levied as a tax and shall bear interest at 4 per cent per annum from date of levy, payable annually. Section 455.63 of the Code of Iowa provides that a person or corporation shall have the right within 20 days after the levy of assessments to pay his or its assessment in full without interest. The taxpayer in the County against whom a drainage assessment had been levied attempted to pay his drainage assessment approximately 10 days after the expiration of the 20-day period following the levy. He was told that accrued interest would have to be paid from the date of levy to March 31st of 1961. I would like to have an opinion from your office as to whether or not the Treasurer is correct in refusing to accept this drainage assessment without the payment of accrued interest or whether or not a taxpayer should be allowed to pay the assessment with 4 per cent interest accrued from the date of levy to the date of payment of the assessment."

Your request and attached memo have been carefully reviewed, and in reply thereto we advise as follows:

According to section 455.57, Code 1958, drainage assessments are levied as follows:

> "Levy -- interest. When the board has finally determined the matter of assessments of benefits and apportionment, it shall levy such assessments as fixed by it upon the lands within such district, and all assessment shall be levied at that time as a tax and shall bear interest at four percent per annum from that date, payable annually, except as hereinafter provided as to cash payments thereof within a specified time."

Thereunder, from the date of the assessment, the assessment bears interest from that date at the rate of four percent per annum, payable annually, except where such assessments are paid in cash under the terms of section 455.63, providing as follows:

> "Payment before bonds or certificates issued. All assessments for benefits, as corrected and approved by the board, shall be levied at one time against the property benefited, and when levied and certified by the board, shall be payable at the office of the county treasurer. Each person or corporation shall have the right, within twenty days after the levy of assessments, to pay his or its assessment in full without interest, and before any improvement certificate or drainage bond is issued therefor, and any certificate at any time after issue, with accrued interest."

Accordingly, as there provided, unless the assessment is paid in cash within 20 days of the levy, such assessment shall bear interest at four percent, payable annually. In that situation, the right of the taxpayer to pay his assessment at any time not being in question, there is presented the right to require payment of interest upon the assessment from the time of its payment, after the expiration of the 20-day period allowed under the provisions of section 455.63, until the due date of the assessment matures. In other words, notwithstanding

the fact that his assessment is paid in full, interest is imposed upon such assessment until the time when it should have been paid according to law.

There is no express authorization for such an imposition, nor will that right be implied, absent express authority. This situation has had the consideration of the courts. In the case of State ex rel Todd v. Thomas, County Treasurer, 127 Neb. 891, 257 N. W. 265, 96 A. L. R. 1470, where this question was presented in a matter involving a levy of special assessments for paving by cities, it was stated:

> "With these considerations in mind, we hold that, in the absence of any prohibition in the statutes as they existed in 1920, and in view of the provisions as they then existed and the amendment thereto appearing in section 77-1903, Comp. St. 1929, this court cannot require relator to pay all the interest that she would have to pay if she allowed the instalments to run until their final maturity in 1939. We believe that the Legislature did not intend to prevent such payment by any person at any time with interest to date of payment. To hold otherwise would be unjust and inequitable, and cannot be tolerated or enforced by this court. It would amount to taking her property without consideration or compensation therefor, and would not leave her on an equal footing with the property owners who did not see fit to anticipate and pay their assessments until they severally matured. If the payment of interest is considered as a penalty for failure to pay within 50 days, then we have the strange anomaly of -- the sooner the compliance thereafter, the greater the penalty. Our court said in Howard v. Jensen, 117 Neb. 102, 219 N. W. 811, 812: 'The consequences that would result from construing the provisions of a statute should be taken into consideration in determining the intention of the Legislature.'"

In answer to your question, I would advise you that the treasurer is correct in refusing to accept the drainage assessment without the payment of accrued interest to the date of

payment, but the treasurer has no power to exact the payment of the assessment with the interest that would have accrued to the date of maturity if the assessment had not been paid.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:bl

CITIES AND TOWNS: Incompatibility -- There is no statutory prohibition, incompatibility, or conflict of interests involved in holding the offices of highway commissioner and member of city board of assessment and review at the same time. (57 R [illegible] TO NAZETTE, LINN CO. ATTY., CR, IA.) #61-8-7

August 7, 1961

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

Dear Dick:

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

> "Mr. Howard B. Helscher of this City, who was recently appointed to the Iowa Highway Commission, has been a member of the Cedar Rapids Board of Assessment and Review for a number of years and for this receives the sum of $200.00 per year.
>
> "Mr. Helscher has conferred with us with respect to whether or not there is a conflict of interest between these two positions and whether he should resign from the Cedar Rapids Board of Assessment and Review or whether it is possible to continue on this Board. He of course does not wish to continue on this Board if it is improper to do so.
>
> "We shall appreciate having you give us the benefit of your thinking in connection with this matter."

In reply thereto, I would advise that I find no statutory prohibition against the holding of the office of Iowa Highway Commissioner and member of the Cedar Rapids Board of Assessment, nor do I find that occupancy of these two offices involves incompatibility or a conflict of interests between them.

My personal regards.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:bl

COUNTIES AND COUNTY OFFICERS: Medical examiners -- The medical examiner is under no duty to pay burial expenses of a person who dies within his jurisdiction.

#61-8-8

August 7, 1961

Mr. Dale D. Levis
Audubon County Attorney
Audubon, Iowa

Dear Mr. Levis:

This will acknowledge receipt of your opinion request of April 26, 1961, in which you state the following:

"I have the following question under Chapter 339 of the Code of Iowa, County Medical Examiner.

"Section 339.11 Property of the Deceased, provides as follows: Any property or money found with or upon the person of the deceased, if there be no person entitled by law to such money or property shall be turned over by the County Medical Examiner to the Clerk of the District Court to be held until disposed of according to law.

"What is 'according to law'?

"The old section 339.19 of the Code of Iowa, 1958, provided for the disposition of the body and the expenses in connection therewith to be paid by the coroner, and provided that the coroner pay expenses for burial from the property found with the body, and if there be none, from the county treasury, by certifying the account of the expenses. That section along with most of the other sections of old 339 was repealed by the present law. Now the question is, does the county medical examiner now pay the burial expenses from the property found with the body, and if not, who does?

"We have the following specific condition in our county. John Doe died in Audubon County, leaving no known relatives in this country. He was born in Denmark.

He was a World War I veteran. He was receiving a veteran's pension. On the date of his death he had a few articles of clothing, $80.00 cash on his person, $136.00 in the bank -- checking account, a Westcox pocket watch, knife and electric razor. The watch, knife and razor and $80.00 cash has been turned over to the county clerk of court by the county medical examiner. The local American Legion has made application for his burial allowance from the Veteran's Administration, which we anticipate to be in the amount of $250.00.

"The cost of burial, cemetary lot and marker and foundation is anticipated to be a little over $400.00. It is anticipated that $250.00 will be received from the Veteran's Administration for burial.

"Is it the responsibility of the medical examiner to pay the funeral expenses and any small items of debts of the decedent that come to his attention, and if so, is he to draw an order on the clerk of court with whom he has already deposited the cash money. Does the medical examiner have the duty or authority to draw a check on the checking account in the amount of $136.00 from the bank to apply on the burial expenses?

"If the answers to the above are in the affirmative, does he still have the power and duty to submit a bill to the County Supervisors and are they required to pay the balance on the statement submitted by the examiner?

"If there is a small amount left after paying funeral expenses, what disposition is made of that amount and who has authority to dispose of it?

"What records of these transactions should be kept and with whom and where filed?"

In reply thereto, we advise as follows:

Chapter 258, section 1, paragraph 10, Acts of the 58th General Assembly, provides:

"After an investigation has been completed, including an autopsy if one is made, the dead body shall be delivered to the relatives or friends of

the deceased person for burial. In no case shall the county medical examiner use his influence in favor of any particular funeral director but should assist the family or friends to the end that their wishes are respected. If no person claims the body, it shall be disposed of in accordance with chapter one hundred forty-two (142), Code 1958."

Section 142.1, Code 1958, provides:

"The body of every person dying in a public asylum, hospital, county home, penitentiary, or reformatory in this state, or found dead within the state, or which is to be buried at public expense in this state, except those buried under the provisions of chapter 249, and which is suitable for scientific purposes, shall be delivered to the medical college of the state university, or some osteopathic or chiropractic college or school located in this state, which has been approved under the law regulating the practice of osteopathy or chiropractic; but no such body shall be delivered to any such college or school if the deceased person expressed a desire during his last illness that his body should be buried or cremated, nor if such is the desire of his relatives. Such bodies shall be equitably distributed among said colleges and schools according to their needs for teaching anatomy in accordance with such rules as may be adopted by the state department of health. The expense of transporting said bodies to such college or school shall be paid by the college or school receiving the same. In the event the deceased person has not expressed a desire during his last illness that his body should be buried or cremated and should have no relatives that request his body for burial or cremation, if a friend objects to the use of the deceased person's body for scientific purposes, said deceased person's body shall be forthwith delivered to such friend for burial or cremation at no expense to the state or county. Unless such friend provides for burial and burial expenses within five days, the body shall be used for scientific purposes under this chapter."

Under the county medical examiner statute, the medical examiners must dispose of a deceased person's body by surrendering it to relatives or friends or, if no one claims it, then the provisions of Chapter 142, Code 1958, become effective. The medical examiner is under no duty to dispose of a dead body.

Chapter 258, section 1, paragraph 11, Acts of the 58th General Assembly, provides:

> "Any property or money found with, or upon the person of the deceased, if there be no person entitled by law to such money or property, shall be turned over by the county medical examiner to the clerk of the district court, to be held until disposed of according to law."

If the medical examiner turns over personal property of the deceased to the clerk, then the clerk must hold the same until an administrator or executor is appointed for the estate whose duty it is to collect the personal property of the deceased. Iowa Practice, Vol. 3, Sec. 656, page 457.

If the estate of the deceased is not probated according to Chapter 635, Code 1958, then the property is disposed of by the clerk in accordance with section 636.1, Code 1958.

On the other hand, if no heirs are found, and the body is disposed of as provided above, the personal property held in the hands of the clerk would escheat to the state, according to the provisions of section 636.50 et seq., Code 1958.

Therefore, in answer to your problem, the county medical examiner is under no duty to pay the burial expenses of a person who died within his jurisdiction. That property which has been turned over to the clerk of court should be disposed of either by remitting the same to the duly appointed executor or administrator of the estate or by having the same escheat to the State of Iowa. In view of the conclusion reached in this opinion, it is unnecessary to answer the other questions propounded in your letter.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:bl

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

#61-8-11

August 8, 1961

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 for an Attorney General's Opinion dated March 8, 1961. Your question is:

> "The taxpayer is a resident of and employed in the State of Iowa. He owns twenty-five (25) farms in Minnesota. He sold one. He has paid income tax to the State of Minnesota on the capital gain realized from the sale of the farm. Minnesota is a state with which Iowa has reciprocity. The problem is, is the capital gain realized from the sale of the farm in Minnesota subject to tax in Iowa?"

The applicable statute is 422.8 (1), Code of Iowa (1958):

> "422.8 Allocation of income earned in Iowa and other states. Under rules and regulations prescribed by the state tax commission, net income of individuals shall be allocated as follows:
>
> "1. In the case of resident taxpayers, net income from the operation of a business in a state other than Iowa shall be allocated to such other state if a state income tax has been or will be paid on said net income to said other state and if said other state allows a similar allocation of net income from the operation of a business outside said other state. Net income from the operation of a business, as used in this section, shall not include salaries, commissions, fees, or other remuneration for personal or professional services."

1955 A.G.O. 65, we believe is conclusive in this matter. There, on page 67, it is stated:

"It should be noted that Section 422.8, as amended by H. F. 225, permits allocation only of 'net income from the operation of a business.' Nothing in the Act indicates that the term 'operation' includes sale or disposal of the business. Therefore, when the business is sold, the capital gain or loss resulting therefrom is not subject to allocation but must be reflected in Iowa taxable income."

Therefore, the answer to your question is yes, the capital gain realized from the sale of the farm in Minnesota is subject to Iowa Income Tax.

Very truly yours,

George W. Murray
Special Assistant Attorney General

GWM/WEA/bjf

TAXATION: Property Tax: Qualification of a widow for military service tax exemption. Section 427.4, Code of Iowa, 1958. (MULRAY TO SHILL, ASST. WEBSTER CO. ATTY., 8/8/61) #61-8-10

August 8, 1961

Mr. H. Andrew Shill
Assistant Webster County Attorney
220-222 Snell Building
Fort Dodge, Iowa

Dear Mr. Shill:

This will acknowledge your request of June 22, 1961, pertaining to the following facts:

> " 'V', a veteran of World War I, became deceased in the year 1957, leaving his wife, 'W', surviving him. In October, 1959, 'W' was married to 'H', and that marriage was annulled by Decree of a District Court in Iowa on December 7, 1960. 'W' is the owner of property in her own right and has applied to the local assessor for a military service tax exemption for 1961 taxes due in 1962 on her property, claiming that she is the widow 'remaining unmarried' of 'V', and as such is entitled to the exemption under the provisions of subsection 1 of Section 427.4, Code of Iowa 1958. In view of the fact that 'W' was in October, 1959, married to 'H' in a regular marriage ceremony and apparently had the intent to no longer remain the widow unmarried of 'V', the question is can 'W' as a result of the annulment decree in her case qualify for the military service tax exemption as the 'widow remaining unmarried' of 'V'? 'W' is not a war veteran herself. Her marriage to 'H' was annulled under Item 2 of Section 598.19, 1958 Code of Iowa. Who qualifies as a 'widow remaining unmarried' as those words are used in subsection 1 of 1958 Code Section 427.4?"

Section 427.4, Code of Iowa, 1958.

> "427.4 Exemptions to relatives. In case any person in the foregoing classifications does not claim any such exemption from taxation, it shall be allowed in the name of such person to the same extent on the property of any one of the following persons in the order named:
>
> "1. The wife, or widow remaining unmarried, of any such soldier, marine, or nurse, where they are living together or were living together at the time of the death of such person."

#61-8-10

For this purpose, there must be a distinction drawn between divorce and annulment. This was done in 1923-24 Report of Attorney General 330 where it was stated:

> "The term 'divorce' denotes a dissolution or suspension by law of the marital relations. It means a dissolution of the bond of matrimony. When a marriage is dissolved, the action of the court proceeds upon proof that a valid marriage existed and created rights and liability. The decree of divorce places the party in a new status of relationship and does not restore them to their former status. On the other hand, the decree of annulment declares in effect that no valid marriage ever existed and restores the party to their former position. The decree of divorce operates from the time it is rendered, but the decree of annulment relates back to the time the void marriage was entered into."

In the instant situation, the widow may still qualify for the exemption since her intervening marriage was annulled and, thus, legally never took place. Her status prior to the annulled marriage is restored and she is entitled to the exemption as set out in the statute.

Very truly yours,

George W. Murray
Special Assistant Attorney General

GWM:MSB:fs

COUNTIES AND COUNTY OFFICERS: Board of supervisors -- There is neither implied power nor express power in the board of supervisors to permit the construction of a building on the county home grounds subject to purchase by the board after the building has served the purposes of the builder. (STRAUSS TO DEBUTTS, MARSHALL CO. AUD., 8/9/61) #61-8-12

August 9, 1961

Mr. Floyd DeButts
Marshall County Auditor
Courthouse
Marshalltown, Iowa

Dear Mr. DeButts:

Reference is herein made to the conference of Monday, August 7th, with you and certain members of the Board of Supervisors, concerning the power of the Board to permit the construction of a building on the county home grounds, subject to purchase by the Board after it has served the purposes of the builder.

I would advise that the authority of the Boerd of Supervisors derives from its express powers bestowed by the Legislature, and from such other powers as are incident and necessary to the fulfilling of the express powers.

However, I find neither express nor implied power in the Board to permit such construction on the county home grounds, nor to enter into a contract of purchase for such building.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:bl
cc: Earl Holloway,
State Auditor's Office

#61-8-12

TAXATION: Property Tax: Assessment of Trust Property for real estate tax. Charitable trusts qualify for tax exemption in hands of trustee. Section 427.1(9), Code of Iowa (1958). (Mueller to Schrader, Jones Co. Atty., 8/10/61) #61-8-13

August 10, 1961

Mr. Rex Schrader
Jones County Attorney
Monticello, Iowa

Dear Mr. Schrader:

This will acknowledge your request of May 24, 1961, pertaining to the following facts:

"Enclosed with this letter you will find a copy of a Will in which Item 7 sets up a trust with the Monticello State Bank as Trustee. This Will was filed for probate and the trust is now in operation. The trust property consists of a farm located in Cass Township, Jones County, Iowa, which is leased for profit and the proceeds from that leasehold interest are used by the Trustee to maintain a building commonly called a 'Youth Center'. This 'Youth Center' was built with money from the trust amounting to approximately $50,000 (this is wholly my approximate figure and I cannot submit any proof of this), along with the sum of approximately $30,000 from the Jones County Fair Association. This building is used as a community center in Monticello. The Trustee charges small rentals for various uses of the building and during the week of the Jones County Fair it becomes the fair exposition building and, of course, for one to use the building one must pay admission to the fair grounds.

"The question that I have is whether the farm is exempt from assessment for property tax purposes and whether the building and land known as the 'Youth Center' is exempt?"

Section 427.1(9), Code of Iowa (1958), reads as follows:

"427.1 Exemptions. The following classes of property shall not be taxed:

"* * *.

"9. Property of religious, literary, and charitable societies. All grounds and buildings used by literary, scientific charitable, benevolent, agricultural, and religious institutions and societies solely for their appropriate objects, not exceeding three hundred twenty acres

61-8-13

> in extent and not leased or otherwise used with a view to pecuniary profit. All deeds or leases by which such property is held shall be filed for record before the property herein described shall be omitted from the assessment."

When determining the exempt nature of the farm and the "Youth Center", one must look to the trust itself as a basis to allow the exemption. The deposition was designed to qualify as a charitable trust. By the terms of the Will, the trustee was limited as to the types of beneficiaries that were to receive the bequests. In analyzing the precedents on the subject, one finds that the beneficial interest in the trust determines the basic nature of the exemption.

In Ellsworth College v. Emmet County, 156 Iowa 52; 135 N.W. 594, it was held that the status of property was determined by the nature of the beneficial interest. In the Ellsworth case, property was given to a trustee as part of an endowment fund of the college. The Court defined "ownership" as meaning the equitable owner and, even though the legal title was in the trustee, the endowment fund had the equitable interest. This interest was deemed to be the point upon which to base the decision. The Court emphasized that the ultimate beneficiaries are the equitable owners.

The use, rather than the classification, of the interest determines the exempt nature. The proceeds of the farm lease and the rentals of the "Youth Center" are poured back into the trust corpus. The trustee, in his discretion, under the Will, may use this fund for charitable purpose as he deems desired by the testator. It must be noted that the "Youth Center" is used by many

groups, Future Farmers of America, 4H and other civic organizations, without charge. In re Cooper, 229 Iowa 921; 295 N.W. 448, held that property in the hands of the trustee was exempt if the property itself would qualify for the exemption under the statute. The fact that the holder is a mere trustee is not a basis to deny the exemption.

In McColl v. Dallas County, 220 Iowa 434; 262 N.W. 824, property was given to a trustee to be used for school purposes. The original worth of the property was approximately $12,000. During the years, the trustee invested the money and obtained securities and the worth grew to $135,000. The Court enjoined collection of the property tax in that this property was held for school purposes and not for pecuniary profit. The fact that property appreciated in value due to foreclosure and forfeiture does not change the status of the trust purpose. It was also stated that none of the proceeds were ever used to purchase property. In the present situation, the proceeds are not used for pecuniary profit but to enhance the trust corpus and thereby create a larger amount for the trustee to work with to fulfill the desired intent of the testator.

In a recent case, National Bank of Burlington v. Huneke, 250 Iowa 1030; 98 N.W.2d 7, a testator created a trust to be used to build a hospital to suit the needs of the community. The charges were to be on an "ability to pay basis" and then only to the extent of operating expenses. The Court held that the property was exempt from the moneys and credits tax on the theory that the character of the trust determines whether the exemption applies prior to or pending its actual use. The character of the trust created in the present situation is constructed with only

the charitable benefit as the theory for the trustee to base his actions. The trustee is responsible for carrying out the intent of the testator. Even though all of the property has not been exhausted, the nature or character of the trust is charitable and must be treated as such.

The farm and the "Youth Center" are now being used to carry out the trust. Since all the proceeds are being used to advance the character of the trust, there is no view to pecuniary profit. As stated in the National Bank of Burlington case, supra, "The type and character of the trust, not the trustee, is what determines its use and thus its eligibility to a tax exemption under the statute."

It is assumed that the "Youth Center" is still part of the trust corpus, since title is still in the trustee. The farm and the "Youth Center" are analogous to a trustee holding a share of stock, letting the income accumulate and then distributing to the beneficiaries of the trust. In this case, the "Youth Center" is not a beneficiary but only a facility of the trust, for which the trustee is still accumulating income and waiting to distribute it to the beneficiaries set out in the Will.

It is, therefore, concluded that both the farm and the "Youth Center" are exempt. The trustee may accumulate income and thereby increase the trust corpus before distributing it to the beneficiaries described in the Will. Since the nature of the trust is charitable, the trust corpus is exempt while in the hands of the trustee.

Very truly yours,

George W. Murray
Special Assistant Attorney General

GWM:MSB:fs

COUNTIES AND COUNTY OFFICERS: Contracts for construction -- 1. The requirement of section 309.40, Code 1958, requiring advertising and public letting on contracts involving more than $5,000, is restricted to contracts for construction. 2. The power of the highway commission over such contracts, under section 309.80, Code 1958, is limited to the approval of contracts made by the board of supervisors based upon the provisions of section 309.40.

August 10, 1961

(SHOULD BE ADDRESSED TO MR. WILLETT, TAMA CO. ATTY., 8/10/61.) #61-8-14

Mr. Walter J. Willett
County Attorney of Tama County
Tama, Iowa

Dear Walt:

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

"I would appreciate an opinion in regards to a matter pertaining to maintenance of a bridge on a secondary road in Tama County, Iowa.

"Tama County has a maintenance expenditure on an expensive bridge coming up in the neighborhood of $12,000. That only a few constructors in the State of Iowa are qualified to do the work and it will cost approximately $4000 more to have a letting and bids on such work.

"It is my understanding that there has been somewhat difference of opinion in the State Highway Department that has to approve this matter whether or not on maintenance you have to have a bid and letting under Section 309.80 of the Code or that a bid and letting is required as on construction work under 309.40. The question I would like to submit is the following:

"Does the County have to advertise and have a public letting on a maintenance expenditure of more than $2000 as set forth in Section 309.80 of the 1958 Code of Iowa? This Section states that only the approval of the State Highway Commission must first be obtained and does not state that it is necessary to advertise and have a public letting. I understand under Section 309.40 this applies to construction work and materials for bridges but not maintenance.

"I understand there are quite a number of Attorney General's Opinions which I do not have in regards to this matter. There is one I noticed in the Annotation in 1938, Page 188 which held that Section 309.40 requiring advertisement for bids and a public letting that this Section only contemplated construction. My question pertains only to maintenance and it is my thought that under Section 309.80 that no advertisement or public letting on

#61-8-14

> maintenance is necessary. If this is not true then it will cost the Counties thousands of dollars unnecessary for every small maintenance job over $2000.00. It would appear that the intent of the statute on maintenance would not require an advertisement and public letting.
>
> "I would appreciate an informal letter or opinion if you care to make one on this question."

In reply thereto I advise as follows.

1. Insofar as Section 309.40, Code 1958, is concerned it has been the view of the Department that the provisions therein in the making of contracts where they involve more than $5,000, requiring advertising and the public letting is restricted to contracts for construction. This is shown by opinion appearing in the Report for 1938, Page 188, to which you refer, where it is stated:

> "April 26, 1937. Mr. Richard A. Stewart, County Attorney Washington, Iowa: Replying to your inquiry of this date as to whether Section 4644-c42 of the Code contemplates construction work only, or is intended to cover road construction and maintenance, it is our opinion that said section applies to construction only."

and to an opinion appearing in the report of this Department for the year 1936, Page 45, where it is said:

> "BOARD OF SUPERVISORS: COUNTY SECONDARY ROADS: PURCHASE OF MATERIALS FOR ROAD MAINTENANCE WORK:
> '"That section (4644-c42) does not require the Board of Supervisors to purchase materials which are to be used in the maintenance of secondary roads by advertising for bids"'.

The foregoing represents the continuing view of the Department.

2. Insofar as the bearing that Section 309.80, has upon the problem I am of the opinion that the power of the Highway Commission in respect to the question under discussion is not original but is limited to the approval of an act or thing done by another. Thus the question whether the Section 309.80, requires the making of a contract after a public letting is not a part of the power of approval vested in the Highway Commission. The meaning of that term as used in statutes vesting in public officials the power of approval had the consideration of this Department in the opinion issued July 7, 1961, where it was stated:

> "Answer to your question inheres in the following language contained in the foregoing Section 1, to wit:
> '"subject to the approval of the executive council of the state,"'
>
> "After making the appropriation of $1,406,442.43, it is, according to the Act, "to be used, under the direction of the Iowa employment security commission, subject to the approval of the executive council of the state,".
>
> "I am of the opinion that such language does not invest the executive council with original power to substitute its own judgment as opposed to that of the Iowa Employment Security Commission in the purchase of the boilers described in your letter. Their power, under the provisions of Senate File 447 heretofore quoted is described therein as 'an approval' of the expenditure of the money under the direction of the Iowa Employment Security Commission. Such language 'subject to the

approval' has had consideration and judgment of the Supreme Court of Iowa in the case of State v. Rhein, Treasurer, 149 Iowa 76, 81, wherein it was stated:

> '"It is a very common expedient in the making of Constitutions and statutes to vest power to appoint or designate in one officer or board subject to the approval of another officer or board, and, so far as we know, no single instance has ever arisen where it has been held that the officer or body which is given the power of approval only may assume or exercise the power of selection or appointment. To 'approve' or give 'approval' is in its essential and most obvious meaning to confirm, ratify, sanction, or consent to some act or thing done by another. See Webster's International Dictionary. Also, illustrating in some measure the meaning of 'approval' as used in statutes, see State v. Smith, 23 Mont. 44 (57 Pac. 449);
> Cosner v. Supervisors, 58 Cal. 274;
> Thaw v. Ritchie, 5 Mackey (D.C.) 200;
> Board v. City, 5 Okla. 82 (48 Pac. 103).
> To arrive at any other conclusion than we have indicated requires a reading into the statute of much that is neither expressed nor necessarily implied, and to treat, as obscure and ambiguous language which seems to us to be reasonably clear and perspicuous."'

"The foregoing appears to be the general rule according to WORDS AND PHRASES, Volume 3A, page 505, where, on the authority of In re Rooney, 11 N.E.2d 591, 592, 298 Mass. 430, it is said:

> '"Approval', when it appears in statutes, generally means affirmative sanction by one person or by a body of persons of precedent act of another person or body of persons."'

Very truly,

OSCAR STRAUSS
FIRST ASSISTANT ATTORNEY GENERAL

OS:EPS

COUNTIES AND COUNTY OFFICERS: Combination of offices -- 1. Insofar as a proposed combining of the offices of county recorder and county clerk, form of petition is approved subject to suggested changes. 2. Proposal may be submitted to electors at a special election, which may be held at the same time as the primary election to be held in 1962. 3. Insofar as fixing the salary arising out of the combining of such offices, section 6 of Ch. 189, Acts 59th G. A. would control the fixing of such salary, and not the provisions of section 5, Ch. 253, Acts 58th G. A. (Strauss to Carstensen, St. Rep., Clinton) #61-8-18

August 14, 1961

Honorable Lawrence D. Carstensen
State Representative
505 Wilson Building
Clinton, Iowa

Dear Mr. Carstensen:

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

"The 58th General Assembly enacted into law Senate File 346, which provides for the combining of the duties of certain county officers and employees.

"It is contemplated that petitions will be circulated in the near future in Clinton County, Iowa, requesting the calling of an election on the question of combining the offices of the County Recorder and Clerk of the District Court. A copy of the proposed petition is enclosed.

"In connection with the use of Senate File 346, being Chapter 253 of the Acts of the 58th General Assembly, you are respectfully requested to advise as follows:

"1. Is the petition submitted in proper and adequate form?

"2. Would it be proper for the Board of Supervisors to hold the election on the question at the same time as the 1962 primary is held?

"3. It is noted that Section 5 of Chapter 253 provides that the salary will be set by the Board of Supervisors; however the 59th General Assembly, in Section 6 of House File 461, provided that if any county offices or positions are combined the salary thereof shall be thirty per cent greater than the salary otherwise established for such office. Are we correct in our assumption that House File 461 will prevail?"

#61-8-18

In reply thereto, we would suggest the following:

1. That, insofar as question number 1 is concerned, instead of using the general language of the statute, that the petition of the electors "equal in number to twenty-five percent (25%) of the votes cast for any county office receiving the greatest number of votes in the last preceding general election", there should be substituted therefor the particular county office which received the greatest number of votes in the preceding general election.

2. If the petition be changed in the above particular, I suggest the use of the statutory word "proposal" instead of "proposition". Otherwise, the petition appears to be in proper form.

3. In answer to your question number 2, I would advise that the election authorized by section 1 of Chapter 253, Acts of the 58th General Assembly, to be called by the Board of Supervisors, is a special election within the provisions of section 49.2(3), Code 1958, providing as follows:

> "49.2 Terms defined. For the purposes of this chapter: * * *
>
> "3. The term 'special election' means any other election held for any purpose authorized or required by law.",

and may be held at the same time as the primary election to be held in 1962. See opinion of the Attorney General appearing in the Report for 1938 at page 659.

4. In answer to your question number 3, I agree with you that section 6 of Chapter 189, Laws of the 59th General Assembly,

providing with respect to the salary of the combined offices as follows:

> "SEC. 6. If any county offices or positions are combined, the salary thereof shall be 30% greater than the salary otherwise established for such office. The salary for deputy county officers shall, nonetheless, continue to be based on that salary which would be drawn by the principal officer if combination of offices had not been effected.",

is an implied repeal of section 5 of Chapter 253, Acts of the 58th General Assembly, which provided, so far as applicable, the following:

> "SEC. 5. When the duties of any officer or employee named in section one (1) of this Act are assigned to an elective officer designated in such section, the board of supervisors may set the salary for such elective officer in lieu of the salary provided in chapter three hundred forty (340), Code 1958. * * * ",

and that the act of the 59th General Assembly will prevail.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:bl

HEALTH: Commission on Alcoholism -- appropriations -- Under the provisions of Sec. 2, Ch. 104, Laws of the 59th G. A., none of the funds appropriated therein ($25,000.00) can be used by or placed under the control of the Iowa Commission on Alcoholism.
(BIANCO TO ZIMMERER, COM'R. PUB. HEALTH, 8/14/61) #61-8-17

August 14, 1961

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

Dear Dr. Zimmerer:

Reference is made to your letter of July 31, 1961, reading as follows:

> "With reference to the bill relating to alcoholics and alcoholism, I should like an opinion as to the interpretation of the second (2) section which states:
>
> "'There is hereby established within the State Department of Health the Iowa Commission on Alcoholism and there is hereby appropriated to the State Board of Regents for the Psychopathic hospital at Iowa City to further the research studies of alcoholism the sum of twenty-five thousand ($25,000.00) dollars out of the funds of the Liquor Control Commission.'
>
> "Is this money or any part of it for the use of or under control of the Iowa Commission on Alcoholism?"

In reply thereto, we beg to advise:

The fundamental rule of construction is to ascertain and give effect to the intention of the Legislature as expressed in the statute. In the consideration of the question presented herein, there must be added the further cardinal rule that where a statute is plain and unambiguous, there is no room for construction.

The original bill, House File 288, as filed in the House of Representatives, contained this provision, to wit:

> "Sec. 2. There is hereby established, within the state department of health, the Iowa commission

#61-8-17

on alcoholism and assigned to it the sum of fifty thousand (50,000) dollars out of the funds of the liquor control commission. * * * "

The Committee on Appropriations filed an amendment which was adopted and is now contained in the present law, in Sec. 2 of Chapter 104, Laws of the 59th General Assembly, as quoted above in your letter.

This obviously shows the intent of the Legislature in adopting the law in its present form, and where the language of the statute is so plain and unambiguous, there is no room for construction.

Therefore, it is our considered opinion, in answer to your question, that none of the funds appropriated by Section 2 of Chapter 104, Laws of the 59th G. A., can be used by or placed under the control of the Iowa Commission on Alcoholism.

Respectfully submitted,

FRANK D. BIANCO
Assistant Attorney General

FDB:bl

COURTS: Expenses of district judge -- Neither the county general fund nor the court expense fund is available for payment of rent for an office of judge of the district court outside the courthouse. (STRAUSS TO BARLOW, PALO ALTO CO. ATTY., JUL 31) #61-8-19

August 14, 1961

Mr. Charles H. Barlow
Palo Alto County Attorney
Emmetsburg, Iowa

Dear Charley:

This will acknowledge receipt of yours of the 17th ult., in which you submitted the following:

> "I have been asked by the Auditor of Palo Alto County and by one of the Judges of the Fourteenth Judicial District to obtain a current opinion of your office based upon the following facts:
>
> "The Palo Alto County Courthouse is small and undersized and our general fund, according to the recent report of the State Auditor is in critical shape. Our Courtroom is equipped with two conference rooms of which one is being currently used as a Judges chamber. One of the Judges of the Fourteenth Judicial District resides in our County and is finding the Courthouse grossly inadequate as it is not heated in the evenings or over the weekend when he is most likely to be using the facilities. (Not to mention the fact that the only restrooms are located in the basement whereas the Courtroom and two adjoining rooms are on the second floor). Until the last Audit, the judge rented a moderate office outside of the Courthouse and the Board of Supervisors honored monthly claims for rental payment from the General fund, however, upon being otherwise informed by the State Auditor, no further claims have been honored.
>
> "My question is can rental for outside office space for Judges be reimbursed from either the County General fund for the Court expense fund?

"My review of the statutes and annotations indicates the Opinions of the Attorney General 1938 p. 81 held that the cost of routine business of the court such as the furnishing of quarters is a general fund obligation, however, I note that Section 444.10 was amended by Acts of the 50th General Assembly by deleting words 'by reason of extraordinary or unusual litigation' and by including 'all expenses incident to the maintenance and operation of the courts'. This amendment would appear to have broadened the Section considerably.

"In Opinion of the Attorney General 1938 pages 224-230 appears that which I will politely refer to as 'dictum' to the herein question as answer B (p. 229) passes upon the question of maintenance rather than furnishing of quarters, however it cites Code Section 332.3(15) Code of Iowa stating that such expenses for maintenance constitutes an obligation on part of the Board of Supervisors and therefore, is an obligation of the general fund. Notwithstanding the above opinion, I would like to submit that I believe that reimbursement of rental payment for judges quarters from the Court expense fund should be a legitimate expenditure in view of the fact that in our particular financial circumstances, all of the tests set out in Opinion of the Attorney General 1948 as appear on page 227 are met in that (1) a monthly rental is capable of being budgeted (2) our general fund is insufficient and our Court expense fund has been previously established (3) additional and practical court facilities are necessary (4) its use should be an incidental court purpose (5) the levy is still necessary for the operation of our county (requirement #6 was deleted per Acts of the 58th General Assembly).

"Although Section 332.3(15) states that the Board of Supervisors shall have the power '15. To build, equip, and keep in repair the necessary buildings for the use of the county and of the Courts'., please note that our general fund is in no condition to so provide additional necessary facilities and we have been advised by representatives of the State Auditor's Office that judges cannot be reimbursed out of the general fund for rental expenditures since they are not County Officers within the contemplation of Section 332.9 Code of Iowa 1958.

"It is hoped that the broadened Section 444.10 is susceptive of a favorable interpretation on this question since I believe that reasonable judges office quarters should constitute reasonable and necessary court expenses."

In reply thereto, I would advise you that the problem as set forth in your letter has had the careful consideration of the department, but we find no authority for the use of the general fund to pay the expenses of providing quarters for the resident judge, nor do we think the court expense fund is available for this purpose.

The opinion of the department with respect to the use of the court expense fund, appearing in the Report for 1948 at page 224, does not, we believe, justify extending its use for the purpose described. It is properly an expense of a judge, but not one for which there is authority to pay.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:bl

COURTS: Court reporters -- Court reporters are public officers and that status is not changed to that of employer and employee by House File 461, 59th G. A., now Ch. 189, Acts of the 59th G. A.

(Address to Thomas E. Tucker, Dep. Co. Atty., Fort Madison, Iowa.)

(J.J.K.) #61-8-21

August 14, 1961

Thomas E. Tucker
Deputy County Attorney
Fort Madison, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 17th inst. in which you submitted the following:

"Mr. Burton Boudreau, the Court Reporter for the First Judicial District, has informed me of his request for an interpretation of Iowa Code Section 605.8 as it was amended by the 59th General Assembly, and your reply of July 10.

"Section 605.8 of the 1958 Code of Iowa, after the amendment of the 59th General Assembly, states:

> Shorthand Reporters of the District Court shall be paid $27.50 per day for each days attendance upon said Court, or employment, under the direction of the Judge, out of the County Treasury where such Court is held, upon the certificate of the Judge holding the Court, or directing the employment, provided however, that the maximum compensation for one day attendance at Court shall not exceed perdiem herein designated. Payments shall be made at least once each month.

"My question is, does the addition of the words, "or employment" and "or directing the employment" now make the Court Reporter a regular full time employee entitled to compensation for each day he reports to work, or is he still under the direction of the Court and his working days, either in Court or out of Court, depend solely upon the direction of the Judge?

"Thank you very much for your attention to this matter

Yours very truly

/s/ Thomas E. Tucker

Deputy County Attorney"

#61-8-21

In reply to your question with regard to the use of the words "or employment" and "or directing the employment" has upon the status of shorthand reporters in their relation to the district courts, I would advise as follows.

While such words ordinarily imply the relationship of master and servant or employer and employee, I am of the opinion that in the context used there is neither express or implied intent of the legislature to establish such relationship between the court reporter and the courts they may serve. All that the language does is to enlarge the area of court reporters' services. It will be observed that the court reporters are holders of public office created by statute and by statute their duties prescribed. See Sections 605.6 - 605.7, Code of 1958. This difference between public office and public employment is described in 42 American Jurisprudence title Public Officers, Page 889, in the following terms:

> "Public office, as hereinbefore defined and characterized, is in a sense an employment, and is very often referred to as such. But there is a distinction between a public office and a public employment which is not always clearly marked by judicial expression and is frequently shadowy and difficult to trace. The distinction, however, is one which in many instances becomes important and which the courts are called upon to observe. Although every public office may be an employment, every public employment is not an office, and the word "employee" as used in statutes has in many cases been construed as not including officers.

"When a question arises whether a particular position in the public service is an office or an employment merely, recourse must be had to the distinguishing criteria or elements of public office. These have been set forth and explained in previous sections and need only be summarized here. Briefly stated, a position is a public office when it is created by law, with duties cast on the incumbent which involve some portion of the sovereign power and in the performance of which the public is concerned, and which also are continuing in their nature and not occasional or intermittent; while a public employment, on the other hand, is a position in the public service which lacks sufficient of the foregoing elements or characteristics to make it an office."

By reason of the foregoing I am of the opinion that the Section 605.8, 1958 Code as amended by House File 461, 59th General assembly does not convert the office of court reporter into an employment and such reporter shall perform his official duties as prescribed by statute.

Very truly,

OSCAR STRAUSS
FIRST ASSISTANT ATTORNEY GENERAL

OS:EPS

STATE OFFICERS AND DEPARTMENTS: Mine Inspector -- Section 82.18 that does not give the mine inspector authority to require ~~an abandoned~~ mine be resealed or refilled if the original seal or fill proves inadequate. An owner, operator, lessee, or agent is not criminally liable under section 82.18 for failing to reseal or refill said mine. (SNELL TO JENKINS, MONROE CO. ATT'Y, 8/14/61) August 14, 1961 #61-8-16

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

Dear Mr. Jenkins:

This is to acknowledge receipt of your recent letter, in which you request an opinion of this office, and in which you stated the following:

"On the 22nd day of July, 1960, an abandoned mine was filled and sealed by the then leasee of the mine, Darwin Gordon of Bussey, Iowa. The mine was a slope mine and the particular shaft filled was an air shaft. The mine was in fact sealed on the 22nd day of July, and on the 23rd day of July, 1960, the local mine inspector, Mr. Dean Aubrey, approved the seal.

"In December of 1960 this matter was again brought to Mr. Aubrey's attention and the situation was investigated. At that time Mr. Aubrey advises me that the fill had settled approximately 75 feet and was at that time and has been since in a dangerous condition.

"Section 82.18 of the 1958 Code of Iowa provides:

"'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 . . . '

"'Any owner, lessee, operator, or agent thereof, or officer, or agent of any firm or corporation, refusing or neglecting to comply with the provisions of Section 82.18 . . . shall be fined not exceeding $500.00 or be imprisoned in the county jail not exceeding six months, or both.'

"I am advised by Mr. Aubrey that under date of May 31, 1960, he has an opinion directed to him from Frank Craig,

#61-8-16

Assistant Attorney-General, in which Section 82.18 is construed. That opinion involved a similar situation although it had an element of time in it that is not present here. In the opinion referred to the mine involved was abandoned in 1935. Section 82.18, according to this opinion, was not effective until July 4, 1935. That opinion could have been and apparently was decided on the ground that statutes of this nature may not act retroactively and held that the mine owner was under no further obligation to refill and reseal said shaft. However, the opinion goes somewhat farther than this and states that in the event the mine is permanently filled or sealed immediately after abandonment and the fill is approved by the mine inspector Section 82.18 is satisfied and the mine inspector has no further authority to require the mine to be refilled or resealed if the fill or seal subsequently proves to be inadequate.

"It is the latter part of this opinion which appears to be a volunteer statement by the writer of this opinion that is causing some difficulty in our present case.

"Mr. Aubrey and I after having discussed the matter have felt that a review of this decision by your office might be advisable in light of this particular situation.

"My question, therefore, is this:

"Where a mine has been sealed and filled in accordance with the provisions of Section 82.18 and has been approved by the mine inspector, but the fill later proves to be inadequate and is in such condition that a person or animal may fall into the abandoned mine, is the owner, lessee, operator, or agent thereof criminally liable under the provisions of Section 82.21 for failure to <u>permanently</u> fill or seal said mine?"

Although section 82.18 has been amended by Chapter 80, section 5, Laws of the 59th General Assembly, said amendments do not affect the question about which you inquire. You have referred in your letter to the opinion of this office from Mr. Frank Craig to Mr. W. Dean Aubrey, dated May 31, 1960. It is my opinion that your question is answered by Mr. Craig's opinion, copy of which is enclosed, and in which he states that if all the 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 said section does not give the Mine Inspector authority to require the mine to be refilled or resealed if the fill or seal subsequently proves to be inadequate.

However, it would seem that the danger created by the mine specified in your letter might well be eliminated by an action to abate a public nuisance.

Therefore, on the basis of the authority and reasoning set forth in the Opinion of Mr. Craig, the answer to your question is in the negative.

Very truly yours,

BRUCE M. SNELL, JR.
Assistant Attorney General

BMS:bl
Enclosure
cc: Dean Aubrey, Mine Inspector

CITIES AND TOWNS: Annexation -- 1. Where annexation to a town has been completed, the proper levying body is the town to which such property has been annexed. 2. The assessor has the power and the duty to determine in the first instance whether property in the city is or is not being used for agricultural purposes.
(STRAUSS TO HASBROUCK, GUTHRIE CO. ATTY.,
8/14/61) #61-8-15

August 14, 1961

Mr. Richard Hasbrouck
Guthrie County Attorney
Guthrie Center, Iowa

Dear Mr. Hasbrouck:

This will acknowledge receipt of yours of the 25th ult. in which you state the following:

"I have been asked by the Guthrie County Auditor and the Guthrie County Assessor to have you make an official opinion the following questions:

"1. What authority does the Assessor have to change a tract of land back to a corporation tax (within the incorporated city limits of a town), and who is to determine that it is not being used for agricultural purposes?

"2. What time of the year would it be permissible to make this change?

"In this instant case, the Town of Adair has incorporated some land adjacent to the Town, and the Town of Adair desires to tax this land as part of the city taxes, but Guthrie County is still levying a property tax on this land.

"I have done a little research on Section 404.15, and I am sorry to say I have not located any ruling that took into consideration the facts and questions which confront me.

"From my legal research, I find that the law of Iowa is silent as to who has the responsibility to say whether the land in question is being used for agricultural or horticultural purposes where thesame is located within the limits of a municipal corporation.

#61-8-15

> "I presume the statutory date of levy, which is the second Monday in September of each year (Code section 444.9) might very well be the date on which final determination would have to be made as to whether a tract of land was agricultural lands within the limits of a municipal corporation. However, once again, I do not find anything in the law that specifically states just when the determination must be made in such matters.
>
> "Your cooperation in this matter will be deeply appreciated."

In reply thereto, I would advise as follows:

1. In answer to your question with respect to the power to levy, I would advise that if, at the time of levy, annexation has been completed, then the Town of Adair is the proper levying body. This is the rule to which the Department is committed in an opinion issued May 21, 1956, which stated:

> "It is abundantly clear from the Grout v. Illingworth decision above cited (131 Iowa 281, 108 N. W. 528) that there is no necessity that real property be a part of the taxing district levying taxes on January 1st of the year of levy so long as it occupies that status on the date of levy."

In quoting from an opinion issued June 27, 1956, it is stated:

> "If at the time of the levying of the 1956 taxes payable in 1957 Crestwood has a status of a legal municipal corporation it may levy its municipal taxes payable in 1957 . . . This conclusion excludes Polk County from budgeting on the anticipated needs of this area pending final determination of thelegality of the Crestwood incorporation."

2. In answer to your question as to who has the responsibility to say whether the land in question is being used for agricultural purposes, where the same is located within the limits of the municipal corporation, I am of the opinion that it is the duty of the assessor in the first instance to determine this question, under the provisions of

section 17, Chapter 291, Acts of the 58th General Assembly; and section 21 of the same, which specifically provides the following:

> "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."

The assessment so made may be the subject of protest by the property owner or aggrieved taxpayer, under the provisions of section 37 of Chapter 291, Acts of the 58th G. A. This section provides the following:

> "SEC. 37 Protest of assessment -- grounds. Any property owner or aggrieved taxpayer who is dissatisfied with his assessment 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. Said protest shall be in writing and signed by the one protesting or by his duly authorized agent. Taxpayer may have an oral hearing thereon if request therefor in writing is made at the time of filing the protest. Said protest must be confined to one (1) or more of the following grounds:
>
> "1. That said assessment is not equitable as compared with assessments of other like property in the taxing district. When this ground is relied upon as the basis of a protest the legal description and assessments of a representative number of comparable properties,

as described by the aggrieved taxpayer shall be listed on the protest, otherwise said protest shall not be considered on this ground.

"2. That his property is assessed for more than the value authorized by law, stating the specific amount which the protesting party believes his property to be overassessed, and the amount which he considers to be its actual value and the amount he considers a fair assessment.

"3. That his property is not assessable and stating the reasons therefor.

"4. That there is an error in the assessment and state the specific alleged error.

"5. That there is fraud in the assessment which shall be specifically stated.

"In addition to the above, the property owner may protest annually to the board of review under the provisions of section thirty-five (35) of this Act, but such protest shall be in the same manner and upon the same terms as heretofore prescribed in this section."

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:bl

CITIES AND TOWNS: Township Public disposal Grounds -- (Ch. 186, 59th G.A.). (1) The county board of supervisors cannot anticipate levy to obligate township for purchase of land for public disposal ground. (2) The one-quarter mill levy provided for in Ch. 186 is not affected by two mill limitation imposed by Ch. 54 (Ordinary County Revenue). (3) County equipment cannot be used in the creating and maintenance of public disposal grounds. (4) Townships can enter into contractual agreements with cities and towns for the use of public disposal grounds. (BUMP TO PERKINS, POLK CO. ATT'Y, 8/14/61) #61-8-20 August 14, 1961

Mr. Harry Perkins
Polk County Attorney
406 Court House
Des Moines, Iowa

Attention: Mr. C. L. Becker, Assistant County Attorney

Dear Mr. Becker:

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

> "1. Is it possible to obligate the Township for funds to purchase ground for a dump in this calendar year, or must we spread a levy and wait until the taxes are collected in 1962 before we can create a disposal ground? Will this quarter of a mill levy be in addition to our two mill limitation?"
>
> "2. Does this bill make it possible to create a Sanitary land fill or is it set up to create dumps only?"
>
> "3. Is it permissable to use county equipment in the creating and maintenance of said disposal ground?"
>
> "4. Can the Townships enter into a contract with cities and towns to use disposal grounds?"

Even though your first question involves two separate problems, it can be disposed of as one. The levy of one quarter mill provided for in Chapter 186, 59th G.A., relating to public disposal grounds in townships, is in addition to the two mill limitation imposed in Chapter 54, 59th G.A. (Ordinary County Revenue). Based upon the same reasoning employed in our earlier opinion on this question, Informal Opinion, #61-7-6, it was the intention of the legislature that the levy of Chapter 186 should not be nullified by Chapter 54. In answer to the second problem in question one,

#61-8-20

it has long been the rule that a governmental unit cannot anticipate its revenue even where it has the statutory authorization to levy a special assessment. Kingsor v. City of Des Moines, 110 Iowa 175 (1900) (setting forth certain exceptions to the rule); Informal Opinion, #50-3-27. Compare: §404.18, Iowa Code, 1958 (anticipation of revenue by municipal corporation); and §359.45 (anticipation of township levy for fire equipment). We find no statutory authorization for the anticipation of a township levy for the purchase of land for a public disposal ground.

We have been unable to find any legal discussion of the distinction, if any, between a "dump" and a "sanitary landfill." However, Chapter 186, §1 (59th G.A.) provides:

> "The board of supervisors of any county may determine that a public disposal ground is needed in their county and may make a finding as to where such disposal ground shall be located."

The explanation of Chapter 186 was "to permit the county board of supervisors to establish under certain circumstances, public disposal grounds and to operate and maintain them..." Nowhere in the chapter is there any reference to a "sanitary landfill." It thus appears that the legislature contemplated only a public disposal ground and not a sanitary landfill. The distinction between a disposal ground (dump) and a landfill would seem to be that the latter contemplates a transitory land reclamation project while the former contemplates only a fixed area where the public might dispose of its refuse.

In answer to question three, county equipment cannot be used in the creating and maintenance of township disposal grounds without express statutory authorization. We find no such authorization. Informal Opinion #59-5-9.

Question four is answered in Chapter 186, at §3 which provides:

> "The board of supervisors may make such rules and regulations for the use of such disposal grounds as it shall deem necessary, and may adopt and enter into contractual agreements with cities and towns for the use of such disposal grounds. Any funds derived from such agreements shall be placed in the township dump fund established for that purpose and none other."

Sincerely yours,

WILBUR N. BUMP
Solicitor General

WNB:hc

TAXATION: Personal Property Assessment: Laundromat units: Assessor required to assess units at actual value, and to use a method of valuation to reach this result which is, in his judgment, appropriate to the situation. Appeals to board of review and District Court are available for correction of incorrect assessments. (Sec. 441.21). (MURRAY TO LUCKEN, ST. SEN., 9/1/61)

#61-8-24

August 15, 1961

Honorable J. Henry Lucken
State Senator
Akron, Iowa

Dear Senator Lucken:

We acknowledge the receipt of your letter in which you set forth the following:

> "One laundromat operator installed thirty units in October, 1959. Another operator nstalled eighteen units in June, 1960. The former operator states the assessor granted no depreciation in valuation on the 1960 or 1961 assessments. However, depreciation was granted to the operator whose laundromat was installed in 1960, the reason given for the difference in arriving at the assessed valuation being that the first operator had a very successful business and the second failed to have a profitable business."
>
> Your question is : "Under the rules laid down for making assessments of this kind, was the field assessor following a reasonable course?"

According to the facts as you present them, it is our opinion that there is no basis for saying the assessor did not follow a reasonable course. The main legislative standard by which property is measured for assessment is Chapter 291, Section 21, Acts of the 58th General Assembly (repealing Section 441.13, Code 1958, and now appearing as Section 441.21 (24 I.C.A., Cum. Pocket Part, 1960):

> "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

#61-8-24

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."

It is to be noted that the result of the assessor's efforts is actual value of the property under consideration. If the value assigned to the item in question is, in the judgment of the assessor, the actual value, then the statute has been satisfied and there can be no cause for complaint. To aid the assessor and other officials involved in exercising uniform judgment in similar situations, there is available the "1961 Iowa Personal Property Price Guide". This guide is available through the Iowa State Tax Commission to assessors and covers specific types of personal property. We here quote from the fly leaf of this book:

"The use of the schedules, hereto attached, by assessors as a guide to the assessment of personal property is authorized by the State Tax Commission. These schedules are a GUIDE ONLY to the average value of the property listed. Assessors and fieldmen are instructed to exercise their judgment in determining valuations for assessment purposes, and to depart from these schedules where the actual value of the property varies from that indicated therein. Age and quality of the property assessed must be considered in determining assessment values, and the assessments of different property of the same class must reflect the differences in actual value between items either because of the age or quality of the property assessed.

IOWA STATE TAX COMMISSION"

"In order that there will be more uniformity in the assessment of personal property throughout the State, the attached schedules have been adopted as a Guide. The Committee preparing same feels that they are reasonably conservative and fair; variations in values from different sections of the State have been carefully noted and analyzed in preparing this new Guide wherein the valuations shown are considered as AVERAGE, based on what is considered "normal" for a period of years.

PRICE GUIDE COMMITTEE"

It is apparent that, as a general rule, similar or identical property will result in the same value for assessment purposes. But it should be noted that the actual value put on property is, in the final analysis, an exercise of the proper official's best judgment. In the case of Bankers Life Company v. Zirbel, 1948, 239 Iowa 275, 287; 31 N.W. 2d 368, the court says:

> "As has been said in many decisions, the science of assessment for taxation is far from being an exact science. Perfection is unattainble because there is no such thing as perfection. This is merely another way of saying that valuation, for assessment purposes, is in the realm of opinion and there is no absolute standard."

The mandate to the assessing official to exercise his judgment as to the method by which the correct value is reached does not grant unlimited discretion. The court in Pierce v. Green, 1940, 229 Iowa 22, 39, 40; 294 N.W. 237, 131 A.L.R. 335, said:

> " * * * The defendants have no discretion in the matter, with respect to obeying those commands. Since the statute requires that all property shall be assessed and taxed at its actual value, they have no right to disregard this legislative injunction, because they deem it unwise or inexpedient, or because others in their position in the past have so violated the law. Under the law and the facts they may be compelled by mandamus not only to act, but to so act as to bring about a certain result, that is, the valuation of property at its actual value. It is true they cannot be coerced in themethods or manner in which they arrive at that valuation, but they can be compelled to use their honest discretion and judgment in attempting to obtain that result. * ** ."

Should a property owner feel an assessor has not properly exercised his judgment, he may appeal to the board of review (Ch. 291, Sec. 37, Acts of the 58th G.A.) stating one or more grounds there set out, or if not satisfied there, then to the District Court (Ch. 291, Sec. 38, Acts of the 58th G. A.).

It is our opinion that the assessor is not bound to follow the same method in valuing similar property, but is bound to see that the net result in such an instance must meet the above requirement of "actual value".

Very truly yours,

George W. Murray
Special Assistant Attorney General

GWM:JMS:fs

TAXATION: Homestead Credit: Surviving spouse, divided ownership: (1) One electing to take dower interest in wife's estate is not "occupying as a surviving spouse", within section 425.11, Code of Iowa (1958), as amended. (2) One sharing interest in homestead property with stepchildren shares an interest with persons related to him by blood, marriage or adoption, as those terms are used in section 425.11, Code of Iowa (1958), as amended. (Sections 425.11, as amended, 561.11, 561.12 and 636.5, 636.6, Code of Iowa (1958).)

(MURPHY TO McDONALD, DALLAS CO. ATTY., 9/1/61)

#61-8-22

August 15, 1961

John C. McDonald
Dallas County Attorney
Dallas Center, Iowa

Dear Mr. McDonald:

This will acknowledge your letter of April 7, 1961, in which you request the opinion of this department on the following question:

> "X owned the property in question and died intestate a number of years ago having a widow and two children. Later, the widow became remarried to Y, and a short time thereafter she died intestate. Y continues to live on the property and expects to live on it for the remainder of his life. Y has elected to take his dower interest in the property rather than occupying the homestead pursuant to section 561.11, Code of Iowa (1958). Y has made application for the homestead tax credit, and the question arises as to whether under section 425.11, Code of Iowa (1958), he is entitled to receive it."

The relevant statutory provisions involved are sections 425.11, as amended, 561.11, 561.12, 636.5 and 636.6, Code of Iowa (1958), which are set out for reference:

> "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."

"561.11 Occupancy by surviving spouse. Upon the death of either husband or wife, the survivor may continue to possess and occupy the whole homestead until it is otherwise disposed of according to law, but the setting off of the distributive share of the husband or wife in the real estate of the deceased shall be such a disposal of the homestead as is herein contemplated."

"561.12 Life possession in lieu of dower. The survivor may elect to retain the homestead for life in lieu of such share in the real estate of the deceased."

"636.5 Dower. One-third in value of all the legal or equitable estates in real property possessed by the husband at any time during the marriagge, which have not been sold on execution or other judicial sale, and to which the wife had made no relinquishment of her right, shall be set apart as her property in fee simple, if she survive him. The same shall be set apart to the surviving husband."

"636.6 Coextensive right of husband. All provisions made in this chapter in regard to the widow of a deceased husband shall be applicable to the surviving husband of a deceased wife."

Under this state of facts by virtue of sections 636.5 and 636.6, Code, supra, Y has a one-ninth fee simple interest in the homestead property with the remaining interest therein owned by his two stepchildren.

This office has held previously that where the surviving spouse elected to occupy the property pursuant to section 561.11, supra, she was entitled to the homestead credit regardless of the fact that she shared the title in the property with persons

not by blood related to her, see 1958 A. G. O. 259. This opinion is based on the conclusion that the various definitions of "owner" contained in section 425.11, supra, are mutually exclusive, i.e., where one occupies the homestead property as a surviving spouse, it is not also necessary that he or she share the divided interest with persons related by blood, marriage or adoption.

The question presented here differs from that discussed in the 1958 opinion since the claimant here bases his rights not on section 561.11, but rather upon his statutory distributive share under sections 636.5 and 636.6, Code of Iowa (1958). We believe this to be significant in the determination of the issue herein, since the rights created by those statutes differ widely. Section 561.11 and section 56112, supra, give the surviving spouse the right, if he or she so chooses, to occupy the homestead for life, or for any lesser period. Under sections 636.5 and 636.6, supra, however, the surviving spouse is given a fee simple interest in one-third of all real property possessed by the husband or wife during the marriage which has not been relinquished or sold on execution or judicial sale. The one right is a life interest to the homestead property, whereas the other is a fee simple interest in a portion of the deceased spouse's estate. The distinction between these rights is pointed out in Stevens v. Stevens, 50 Iowa 491.

We are of the opinion that the legislature in allowing the homestead tax credit to the person "occupying as a surviving spouse" had reference to one electing to so occupy under section 561.11 and 561.12, supra, to the exclusion of one holding the homestead property by virtue of the dower right or deriving the title through another manner.

Although one electing to take his distributive share in his deceased wife's estate is without doubt a "surviving spouse" he is not "occupying the property as a surviving spouse", i.e., for life, under sections 561.11 and 561.12, but is rather occupying it as owner in fee simple pursuant to his rights under section 636.6, supra.

Our initial conclusion is, therefore, that Y is not "occupying as a surviving spouse" as those words are used in the exemption statute, but holds a divided interest in the property with his stepchildren. This raises the question of whether a stepfather, upon the death of the natural mother, is related either by blood, marriage or adoption to his stepchildren. It is clear that he is related neither by blood or adoption to his stepchildren. However, we believe that he is related to his stepchildren by marriage.

In the determination of this issue, it must be noted that we are construing a tax exemption statute, which under the well established rule, is subject to strict construction, Lamb v. Kroeger, 233 Iowa 730, 8 N.W. 2d 405; Readlyn Hospital v. Hoth, 223 Iowa 341, 272 N.W. 90. However, there should not be a strained construction, or one so narrow as to defeat the apparent legislative purpose. Johnson v. Board, 1946, 237 Iowa 1103, 24 N.W. 2d 449.

In Lawley v. Keyes (1915), 172 Iowa 575, 154 N.W. 940, where the dispute was over what interest the stepmother had on the death of her unmarried issueless stepsons, the court found that the stepmother takes, in her own right, as heir. At p. 577, 578, the court says:

> "I. The disposition of the estates of deceased persons is regulated solely by statute. Shick v. Howe, 137 Iowa 249. Where an intestate leaves no issue nor surviving spouse, the estate passes to the parents. Code Secs. 3379, 3380. Our decision depends on the construction to be given Sec. 3381 of the Code, which declares that: 'If both parents are dead, the portion which would have fallen to their share by the above rules shall be disposed

> of in the same manner as if they had outlived the intestate and died in the possession and ownership of the portion thus falling to their share, and so on, through ascending ancestors and their issue. (636.40, Code (1958), Heirs of parents.)
>
> "The argument of appellants proceeds on the theory that this statute casts the descent on the legal heirs of the deceased parents. Were this true, there would be some ground for saying that the widow of a deceased parent was not such heir and might not take. Will of Overdieck, 50 Iowa 244; Blackman v. Wadsworth, 65 Iowa 80. But those who are to take are not so nominated. The design of the statute is to lay down a rule by which the heirs of the intestate shall be ascertained. How? By learning who would have taken the estate if the parents of the intestate had outlived him and died in the possession and ownership of the property; and the persons who would thus have taken are, by this statute, declared the heirs of an estate of a person who has died without spouse or issue, and such persons take directly, and not through the parent. * * *."

Nor is the parent taking by the statute required to be in the blood line. Neeley v. Wise (1876), 44 Iowa 544.

In McAllister v. McAllister (1918), 183 Iowa 245, 167 N.W. 78, the court re-affirms the rule that the stepmother takes in her own right. At page 253, the court says:

> " * * * Here, the devise to Alexander H. McAllister did not lapse. It did not become intestate property. It passed under the will, and, as heir of said devisee, who departed this life before the decease of the testator, the plaintiff, as testator's widow, in asserting her right to take as such heir, is not claiming a share of intestate property, but under the will, precisely as she elected to do. There was no estoppel."

The aspect of the marriage relation affecting descent and distribution is discussed in Peet v. Monger (1953), 244 Iowa 247, 56 N.W. 2d 589, where the court held an antinuptial contract was sufficient to remove from existence the marriage relation for purposes of descent and distribution. At page 256, the court says:

> " * * * If the statement were 'shall descend to the legal heirs at law of the said Stella M. Heitchen', without continuing, it would be a different matter. But those words are qualified and limited by the words, 'the same as if said marriage relation had never been contracted.' Under the contract her property does not descend to her heirs, generally, or to all her heirs, but it descends only to those who would be her heirs had the marriage not been contracted. In other words it descends only to heirs of her--the Heitchen--bloodline, and eliminates all those who are her heirs because of her marriage, that is, it elminates the Snyder heirs, the appellants. * * *."

The removal of the marriage relation in this case resulted in an alteration of descent and distribution. The heirs created by the marriage itself were removed from their relation with the spouse not of their blood.

As the above referred to cases have shown, the marriage relationship creates heirs, and in the case of a stepmother and stepson, the stepmother is made the heir of the stepson merely by her marriage to the stepson's father. We conclude, therefrom that a stepmother is thereby related to a stepson, by virtue of being his heir, and that this relationship, not arising because of blood, comes about solely by virtue of marriage.

It is our opinion that although Y is not occupying as a surviving spouse, he is still entitled to the homestead credit because he shares the title with persons within the category required to be related by blood, marriage or adoption.

Very truly yours,

George W. Murray
Special Assistant Attorney General

GWM/JMS/bjf

TAXATION: Moneys and Credits: Section 429.2: Nonresident decedent's interest in Iowa land contract is not subject to moneys and credits tax in ancillary administration where it has not been shown that a situs for the intangible was established in Iowa. (MURRAY TO MATTHEWS, LOUISA CO. ATTY.)
8/15/61) #61-8-23

August 15, 1961

William L. Matthews
Louisa County Attorney
Wapello, Iowa

Dear Mr. Matthews:

We have your letter of May 24, 1961, wherein you request an opinion on the following matter:

> "A former resident of Iowa, who removed to California several years ago and established a residence and became domiciled there, died in California.
>
> "Ancillary administration was commenced in Louisa County, Iowa. Ancillary Administrator has requested Treasurer's certificate of payment of personal taxes to close the estate in Iowa. The probate inventory lists decedent's interest in a contract as Seller for sale of Iowa real estate, said contract having been entered into several years ago, being an installment contract and being of record in Louisa County, Iowa. The contract purchaser has paid the general real estate taxes for several years on the property. The Treasurer's problem is whether the decedent's interest in the contract should be taxed as money and credits in Iowa, and the tax paid before Treasurer's certificate issues."

Your subsequent correspondence set out the further following facts:

> "1. The Seller's copy of the contract is in the hands of the Ancillary Administrator, but it was mailed by the Domiciliary Administrator in California to him.
>
> "2. All contract payments were made by the Purchaser by mail sent directly to the Seller in California.

#61-8-23

"3. There has been no resident agent handling payments in Iowa.

"4. No moneys and credits taxes have been assessed and collected heretofore, and the Treasurer was proceeding under Section 443.17, before issuing certificate of payment of personal taxes to the Ancillary Administrator."

Reference is made by you to City of Davenport v. Mississippi and M. R. Company, 1861, 12 Iowa 539, In Re Millers Estate, 1902, 116 Iowa 446, 90 N.W. 89, and Dorris v. Miller, 1898, 105 Iowa 564, 75 N.W. 482. These cases are discussed below.

The Code provisions involved here are sections 428.1 Listing--by whom, 428.3 Agents personally liable, 429.1 "Credits" defined, and 429.2 Moneys-credits-annuities-bank notes-stock, (Code, 1958).

We are of the opinion that previous to the nonresident decedent's death, his contract interest, being intangible personal property, was not subject to taxation in Iowa as moneys and credits, and upon the event of death and subsequent ancillary administration, the interest remained nontaxable.

Since it is settled that an interest in a land contract is a credit (In Re Boyd 1908, 138 Iowa 583, 116 N.W. 700), and subject to a different tax than the land which is the subject matter of the contract, the question is whether an interest such as is described above is property subject to tax in Iowa.

The court in City of Davenport v. Mississippi and M. R. Company, above cited, was concerned with a property tax on mortgages owned by nonresidents. In holding that the mortgages were not subject, it said at page 547:

" * * * We can not concede, however, that it was the intention of the legislature to tax mortgages when owned by non-residents of the

> State. Section 3 of said act provides, that all other property real and personal within this State is subject to taxation, & c., and mortgages and other security are within the classes of property named. Is a mortgage owned by a nonresident property within this State, within the meaning of this section? A mortgage, so long as the right of redemption continues, is real estate. Both in law and equity the mortgagee has only a chattel interest. See Williard on Mortgages, vol. 1, page 163. It is true that the situs of the property mortgaged is within the jurisdiction of the State, but the mortgage itself being personal property, a chose in action, attaches to the person of the owner. See Story Confl. of Laws, §379. It is agreed by the parties that the owners and holders of the mortgages are nonresidents of the State. If so, and the property in the mortgage attaches to the person of the owner, it follows, that these mortgages are not property within the State, and if not, they are not the subject of taxation. * * *."

The possibility of these mortgages being brought into the state was left open however, for at page 549, the court said:

> "The cases cited by counsel do not tend to controvert the positions we have assumed in this case. When personal property is used by the owner within this State, it is the proper subject of taxation; * * * The owner in such cases has given to such property a situs, and it does not attach to the domicil of the owner, but is within the jurisdiction of the State."

To facilitate the listing for taxation of property owned outside the state but controlled and managed by agents within the state, a statute was enacted in 1860 being Section 15, Chapter 164, Acts of 1860. (Section 428.3, Code (1958)). This section was in aid of the moneys and credits tax (Section 429.2, Code (1958), first found in Code, 1851, Section 466. In order to prevent removal of mortgages and like intangible property from taxation by nonresident ownership, the statute made the active use of moneys and credits in the state by a party acting in behalf of the nonresident owner equivalent to situs within the state.

The case of Crane Co. v. City Counsel of Des Moines, 1929, 208 Iowa 164, 225 N.W. 344, involved the application of Section 428.3 to a business

situation. In determining that the credits in question did not come within the language of the section, the court considered situs within the taxing jurisdiction a requisite for taxation of intangibles either through the person of the owner, or usage in business. The court in recognizing that credits belonging to a nonresident may acquire a business situs so as to be taxable, had this to say at page 166:

> "Intangible personalty includes open accounts, credits, (whether or not evidenced by writing), promissory notes, mortgages, bonds, shares of stock, deposits in bank, judgments, etc., where the debt or obligation is the real thing which is sought to be taxed. The general rule is that the situs of intangible personal property for the purposes of taxation is the domicile of the owner. This rule is usually bottomed on the legal maxim 'mobilia sequuntur personam', i.e., 'movables follow the person;' or as sometimes stated, the situs of personal property is the domicile of the owner." (Cases cited)

It is apparent from the facts set out in your letter that no business situs for the decedent's intangibles has been established in that there was no resident agent handling the contract payments, nor was the contract itself even in Iowa prior to the ancillary administration. In the language of the above cases the debt or obligation that is sought to be taxed is the contract which never left the domicile of the owner in California prior to ancillary proceedings. The facts of this situation place it within the general rule. See 160 A.L.R. 788 (Annotation: Domicile of debtor within state, or location therein of real property securing debt, as giving debt to nonresident a situs within state for purpose of property taxation), and cases cited; see 51 Am. Jur., Taxation, § 463 to 474, 478, 483, and cases cited; see 84 C. J. S., Taxation, § 116 - Intangible personal property, and cases cited.

The alternative then remains that the ancillary administration proceeding has conferred jurisdiction for taxation on the intangibles. The general rule is that

in the absence of statutory provision, the mere domicile of the executor, administrator, or trustee of the estate will not give the property a situs for property taxation, if he receives his authority solely from the court of another state, and the property in question is not in his actual possession at his domicile, but is in another state. See Annotation, 67 A.L.R. 393, Situs for property taxation as between different states or countries, of personal property, or interests therein, held by trustees, executors, or administrators. An informal opinion (No. 22.60, A.G.O. 1958, p. 304, Iverson to Duhigg) on moneys and credits stated that a resident executor must report for moneys and credits taxation and pay such tax upon intangible personal property which he holds by virtue of his office when such executor is domiciled in the State of Iowa. However, that opinion had before it intangibles in the form of bank deposits as opposed to a contract interest which, by Section 427.13-4, are specifically referred to and made taxable. A situs for this property was thus already established by statute prior to the decedent's death which resulted in the taxing power of the state to be invoked.

The two cases of In Re Millers Estate, and Dorris v. Miller, above cited, concerned estate funds on which the money and credits tax was assessed in the hands of an ancillary administrator. The funds in question had a situs established within the state prior to their being transferred to the ancillary administrator, and this transfer of title did not change their taxable status.

It is our opinion, therefore, that prior to decedent's death in California and ancillary administration in Iowa, the contract interest in question was not subject to moneys and credits taxation in Iowa and the subsequent proceedings did not alter this status.

Very truly yours,

George W. Murray
Special Assistant Attorney General

GWM/JMS/bjf

COUNTIES AND COUNTY OFFICERS: Board of supervisors -- Power of approval vested in the board of supervisors, of approving appointments of deputies, assistants, etc. in county elective offices, does not include the power to disapprove because an employee may be more than 70 years of age. (STRAUSS TO PERKINS, Polk Co. Atty., 8/16/61) #61-8-26

August 16, 1961

Mr. Harry Perkins
Polk County Attorney
Polk County Courthouse
Des Moines, Iowa

Attention: Mr. C. L. Becker, Assistant County Attorney

Dear Mr. Becker:

This will acknowledge receipt of yours of the 1st inst., in which you submitted the following:

> "The Polk County Board of Supervisors has requested this office to obtain an Attorney General's Opinion based on the following facts.
>
> "Polk County Board of Supervisors on January 3, 1961, tentatively approved the appointment of employees more than seventy (70) years of age, submitted to said Board by the various department heads. On March 28, 1961, the Board of Supervisors approved the appointment of said persons over seventy (70) years of age for a period of six (6) months.
>
> "The Board now raises the question whether the Supervisors can dispense with the employment of said persons or whether the elected official who employed these several persons have the sole authority to determine whether or not they should be continued in County employ after the expiration of said six (6) months period; or, in other words, can the elected officials continue their services even though they are over the age of seventy (70) years until the first of the year, when all appointments are subject for approval by the Board of Supervisors."

In reply thereto, I advise as follows:

#61-8-26
26

Insofar as the relationship of the Board of Supervisors to the employment of deputies, clerks, etc. is concerned, section 341.1, Code 1958, which is amended by Chapter 258, paragraph 17, of the Acts of the 58th General Assembly, provides the following:

> "341.1 Appointment. Each county auditor, treasurer, recorder, sheriff, county attorney, clerk of the district court, may, with the approval of the board of supervisors, appoint one or more deputies or assistants, respectively, not holding a county office, for whose acts he shall be responsible. The number of deputies, assistants, and clerks for each office shall be determined by the board of supervisors, and such number together with the approval of each appointment shall be by resolution made of record in the proceedings of such board."

Other than fixing the number of employees, the power of the Board of Supervisors insofar as employment of county deputies, clerks, etc. is concerned is restricted to the approval of the appointments made by the several county officers named in the foregoing numbered section. The power of approval vested in public officials has been previously considered by this department in an opinion issued to the Executive Council of Iowa on the 6th day of July, 1961, where, insofar as pertinent, it was stated:

> "After making the appropriation of $1,406,442.43, it is, according to the Act, 'to be used, under the direction of the Iowa employment security commission, subject to the approval of the executive council of the state,'.
>
> "I am of the opinion that such language does not invest the executive council with original power to substitute its own judgment as opposed to that of the Iowa Employment Security Commission in the purchase of the boilers described in your letter. Their power, under the provisions of Senate File 447 heretofore quoted is described therein as 'an approval' of the expenditure

of the money under the direction of the Iowa Employment Security Commission. Such language "subject to the approval" has had consideration and judgment of the Supreme Court of Iowa in the case of State v. Rhein, Treasurer, 149 Iowa 76, 81, wherein it was stated:

"'It is a very common expedient in the making of Constitutions and statutes to vest power to appoint or designate in one officer or board subject to the approval of another officer or board, and, so far as we know, no single instance has ever arisen where it has been held that the officer or body which is given the power of approval only may assume or exercise the power of selection or appointment. To "approve" or give "approval" is in its essential and most obvious meaning to confirm, ratify, sanction, or consent to some act or thing done by another. See Webster's International Dictionary. Also, illustrating in some measure the meaning of "approval" as used in statutes, see State v. Smith, 23 Mont. 44 (57 Pac. 449); Cosner v. Supervisors, 58 Cal. 274; Thaw v. Ritchie, 5 Mackey (D.C.) 200; Board v. City, 5 Okla. 82 (48 Pac. 103). To arrive at any other conclusion than we have indicated requires a reading into the statute of much that is neither expressed nor necessarily implied, and to treat, as obscure and ambiguous language which seems to us to be reasonably clear and perspicuous.'

"The foregoing appears to be the general rule according to WORDS AND PHRASES, Volume 3A, page 505, where, on the authority of In re Rooney, 11 N. E. 2d 591, 592, 298 Mass. 430, it is said:

"'"Approval", when it appears in statutes, generally means affirmative sanction by one person or by a body of persons of precedent act of another person or body of persons.'"

Thus, the Board of Supervisors possesses no original power of employing such assistants, deputies, and clerks, and therefore is not an employer of the employees of the county offices referred to in section 341.1 heretofore quoted, nor is it the employer of such clerks and assistants of any other department or agency of the county unless it possesses its own power of employment of such assistants, clerks, etc.

Therefore, section 97B.46, Code 1958, providing as follows:

> "97B.46 Service after age seventy. A member may, on the request of the employer, remain in the active employ of the employer beyond the date he attains the age of seventy for such period or periods as the employer from time to time shall approve. The member shall retire from the employment of the employer at the end of the last approved period, on the first day of the month next following or coinciding with such date.",

being the authority to fix the terminal age at which county employment may cease, subject to the foregoing exceptions, does not vest in the Board of Supervisors such authority over the deputies, clerks, etc. of the elective county officials, and therefore the rule announced by the Board exceeds its authority and is without force and effect.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:bl

TAXATION: Liens: Section 428.4: A building erected on land owned by one other than the builder under a three year lease is assessed as personal property to the builder and is subject to a lien for taxes thereon which can be enforced by sale of the building.
(MURRAY TO McDONALD, CHEROKEE CO. ATTY.)
(8/16/61) #61-8-25
61-8-25

August 16, 1961

James L. McDonald
Cherokee County Attorney
Cherokee, Iowa

Dear Mr. McDonald:

We have your request for an opinion on the following situation:

"A. built a building on B.'s lot. At first there was no lease, and later a three year lease was executed. The building has been so situated for seven years. A sold the building to B at a time when there were two years taxes due on the building. The Assessor had assessed the building as real estate in the name of A. B then sold the building and lot to C, who claims he had no notice of the outstanding tax on the building. The County Treasurer has sold the building at tax sale and the present owner claims that the taxes are not enforcible under the circumstances.

"It would seem to me that anyone who buys a lot, knowing all of the circumstances, and that the building was recently owned by a third party, would be on notice of any taxes due on the building, even though the unpaid taxes would not show up in the chain of title. I would appreciate your opinion in this matter."

Pertinent provisions of the Code of Iowa applicable to the situation are:

"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. * * * but if such building s are erected by another than the owner of the real estate, they shall be listed and assessed to the owner as personal property, but buildings and fixtures erected on real estate held under a lease of longer than three years duration shall be assessed as real estate."

#61-8-25

"445.29 Lien of personal taxes.

"All poll taxes and taxes due from any person upon personal property shall, for a period of one year following December 31 of the year of levy, be a lien upon any and all real estate owned by such person or to which he may acquire title and situated in the county in which the tax is levied. From and after the expiration of said one year said taxes shall be a lien on all such real estate for an additional period of nine years provided said taxes are entered upon the delinquent personal tax list as provided by law. But in no instance shall said taxes be a lien after the expiration of ten years from December 31 of the year in which levied. This section shall apply to all poll taxes and to all taxes on personal property whether levied prior or subsequent to the time this section takes effect. Personal property taxes, together with any interest, penalty, or costs, shall be a lien in favor of the county upon all the taxable personal property and rights to property belonging to the taxpayer, such lien to relate back to and exist from the first day of January of the year in which such personal property is assessed. Such a lien shall not be effective or applicable, however, as against the rights of purchasers or mortgagees who acquired an interest in or lien against real estate owned by the resident against whom such tax is assessed before the date that the treasurer files notice of such lien."

"445.32 Lien follows building assessed as personalty. In all cases where buildings are assessed as personal property, the taxes shall be and remain a lien on said buildings from the date of levy until paid."

The general rule applicable to a building erected on land by a person who is not the owner of that land, is that, in the absence of an agreement to the contrary, the building remains the personal property of the builder and does not become a part of the real estate. Brown v. Turner, 20 S.W. 660 (Mo. 1892), Eisenzimmer v. Bell, 32 N.W. 2d 891 (N.D. 1948). Section 428.4 recognizes this rule by having such a building assessed as personal property in the name of the owner thereof, and goes on to say that in the event there is a lease of longer duration than three years, the property shall be assessed as real estate. Since the lease here was for exactly three years, we are of the opinion that the building is still in the assessment category of personal property. Also, in order to enforce collection of unpaid taxes on such a

building, Sections 445.29 and 445.32, above, provide for a lien thereon, and, if necessary, a lien on other real estate owned by the owner of the building. There is, however, no lien on the underlying real estate by virtue of the building being taxed.

Applying the above rules to your situation, the building above, and not the underlying land, can be sold at tax sale for taxes on the building. Also, any real estate of the owner of the building at the time the taxes were assessed can be sold for the taxes on the building. In the event the building is sold by the owner to a private party, the lien thereon follows and can be enforced by tax sale. Notice of the taxes on the building is not a problem to a purchaser of the building. Notice is only a problem where the real estate of the personal property owner is sold to an unknowing party, and this is covered by Section 445.29, requiring the treasurer to file notice of such lien.

We believe this answers your questions.

Very truly yours,

George W. Murray
Special Assistant Attorney General

GWM/JMS/bjf

Cities and Towns: (Const. Art 1, §21; §§489.8, 489.22 and 386.1, Iowa Code, 1958.) Annexation effect upon private utility franchise. Annexation of territory presently served by private electric utility does not invalidate franchise and annexing city does not have right to oust utility company but city can extend its own utility facilities along same highways in order to serve same patrons being served by prior utility company. After annexation private utility subject to control and regulation by both state and annexing city. (BUMP TO WATTS, ADAMS CO. ATTY., 7/17/61)

Mr. Lee R. Watts
Adams County Attorney
407 Seventh Street
Corning, Iowa

61-8-27

61-8-27

August 17, 1961

Dear Mr. Watts:

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

> "The city proposes to annex certain territory adjacent to its corporate limits. Some private utilities companies, including R.E.A. have heretofore secured franchises to maintain transmission lines along the public highways in such adjacent territory and are now furnishing electric service to the residents thereof."
>
> "1. After annexation, do these franchises granted by the Commerce Commission to the private companies continue to exist with respect to such annexed territory?"
>
> "2. Does the city have the right to oust them from this annexed territory?"
>
> "3. If they cannot be ousted either by the city or the commerce commission, does the city have the right to extend its municipal power plant facilities along the same public highways so as to serve the same patrons now being served by the private companies?"
>
> "4. In event the private franchises still exist after annexation, does the city or the commerce commission have the right and power to regulate and control them, after annexation and with respect to the annexed territory?"

61-8-27

Private utility franchises granted to private companies are not invalidated by a city's subsequent annexation of the territory in which the franchises are effective. Central States Co. v. Town of Randall, 230 Iowa 376 (1941) (incorporation of a town did not invalidate franchise); 37 CJS, Franchises § 26 (5). This rule is conditioned upon there being no express reservation of the right to revoke the franchise upon stated conditions. Iowa Telephone Co. v. City of Keokuk, 226 F 82 (D.C. Iowa 1915).

The annexing city does not have the right to oust private companies operating in the annexed territory under previously granted franchises. A franchise is in the nature of a contract between the state and the grantee and thus carries with it a property right subject to Constitutional provisions. Iowa Const. Art I, § 21 (impairment of obligation of contracts); Iowa Telephone Co. v City of Keokuk, supra; Lippencott v. Allender, 27 Iowa 460 (1869); 23 Am. Jur, Franchises, pages 717-720. But see: §§ 489.20 and 489.22 (forfeiture for non-use or violation by commerce commission).

Municipal utility facilities can be extended along the same public highways being used by the present utility companies in order to serve the same patrons now being served by other companies. (This answer assumes that the municipal utility franchise grants authority to serve the entire city.) Exclusive franchises are expressly prohibited by § 409.8 Iowa Code, 1958. Thompson-Houston Electric Co. v. City of Newton, (CCA, 1890) 42 F 723.

After annexation of the territory in which the franchises are presently effective the private utility companies will be subject to regulation and control by both the city and the commerce commission. This is subject to the qualification, however, that if the transmission lines in question were built prior to October 1, 1897, the grantee has acquired a perpetual right and is not subject to control by the municipality. City of Emmetsburg v. Central Iowa Tel. Co., 250 Iowa 768 (1959). (referring to §§ 386.1 and 386.3). Regardless of the date of the grant of the franchise or the installation of equipment, § 489.22 subjects the grantee to "further legislative control." The regulatory power of municipalities is set forth in § 386.1 where it is provided:

> "Cities and towns shall have the power to authorize and regulate telegraph, district telegraph, telephone, street railway, and other electric wires, and the poles and other supports thereof, by general and uniform regulation, and to provide the manner in which, and places where, the same shall be placed upon, along, or under the streets, roads, avenues, alleys, and public places of such city or town, and may divide the city into districts for that purpose."

The extent of municipal regulation under this section was commented upon in State v. Iowa Tel. Co., 175 Iowa 607 (1916) at page 625:

> "The intent of the law was manifestly to give the city power, not only to authorized companies having no franchises, but also those which did, to use the streets and alleys for poles, wires, etc., under general and uniform regulations, and this they might do by dividing the city into districts. This undoubtedly had reference to the placing of the poles, supports, and wires upon the property of the city, and doubtless included the right to compel telegraph and telephone companies already established to place their wires in underground conduits or in alleys, rather than in streets. The fact that the regulations must be uniform and general, at least by districts, is a clear intimation that they were not intended to apply to the granting of frachises or the right to occupy the streets and alleys."

Sincerely yours,

W.N. BUMP
Solicitor General

WNBimjs

STATE OFFICERS AND DEPARTMENTS: Iowa Board of Accountancy -- Board may hire investigators and pay them under section 116.4, which authorizes necessary and reasonable expenses incident to the discharge of the board's duties. (SNELL TO DENMAN, BD. OF ACCTCY., 8/18/61) #61-8-28

61-8-28

August 18, 1961

Mr. Donald R. Denman, Secretary-Treasurer
Iowa Board of Accountancy
924 Insurance Exchange Building
Des Moines 9, Iowa

Dear Mr. Denman:

This will acknowledge receipt of your recent letter requesting an opinion from this office, in which you state:

> "The Iowa Board of Accountancy is charged with the responsibility of administering the Iowa Regulatory Accountancy Law (Chapter 116 of the Code of Iowa). In the administration of this law, it is necessary for the Board to investigate and, in a sense, police the practice of accountancy in Iowa. Such investigations center around situations arising from the provisions of Section 116.14 Revocation, Section 116.17 Unlawful practice, Section 116.18 Penalties-Injunction, and other sections contained in the accountancy law.
>
> "The Board is made up of three uncompensated practitioners who find it most difficult to adequately investigate the aforementioned situations in addition to carrying out the other administrative duties of the accountancy law, as well as devoting the necessary attention to their own private practice.
>
> "The purpose of this letter is to request from you a written opinion as to whether or not the Board may hire an investigator, or investigators, to assist in carrying out its assigned duties and pay such person or persons from its fund balance on deposit with the Treasurer of the state of Iowa."

#61-8-28

Section 116.4 of the 1958 Code of Iowa provides the authority regarding compensation for expenses of the Iowa Board of Accountancy. That section provides as follows:

> "116.4 No compensation -- expenses. No compensation shall be paid to any member of the board for services as such, but the members thereof shall be allowed the necessary traveling, printing and other expenses incident to the discharge of their duties. Bills for the expense of the board or its members shall be audited and allowed by the state comptroller and shall be paid from the fees received under the provisions of this chapter."

The meaning of this statute was considered in an opinion of this department addressed to Mr. Edgar S. Gage, Secretary-Treasurer of the Iowa Board of Accountancy, dated June 28, 1957, copy of which is enclosed. In that opinion, it was stated that the phrase, "and other expenses incident to the discharge of their duties" was intended by the legislature to supply the Board with all of the necessary tools by which it can accomplish the object and purpose of the statute. The reasonable and necessary expenses of the Board to discharge its duties are thus included within this phrase, this opinion concluded.

The word "incident", used in Section 116.4, has been defined in cases from other jurisdictions as follows: In Wolf v. Mallinckrodt Chemical Works, 81 S. W. 2d 323, 330, 336 Mo. 746, the court defined incident as liable to happen; apt to occur; befalling; hence naturally happening or appertaining. In Security Nat. Ins. Co. v. Sequoyah Marina, Inc., 246 F. 2d 830, 833 (C. A. Okla.), the word "incident" was said to mean that which appertains to something else which is primary. "Incident" is defined in Webster's New International Dictionary 2nd Ed. Unabridged (1954) as "1. liable to happen; apt to occur; befalling; hence, naturally happening or appertaining, esp. as a subordinate or subsidiary feature." Also, this definition is given by Webster's:

> "5. Law. Dependent on, or appertaining to, another thing (the principal); directly and immediately pert. to, or involved in, something else, though not an essential part of it."

In the situation herein considered, the question is whether hiring an investigator is incident to the discharge of the Board's duties and is a reasonable and necessary expense.

The court, in Stokes v. Paschall, (Tex.), 243 S. W. 611, 614, held that where a commissioners' court finds it reasonably necessary to employ bond brokers to aid in the sale of bonds of a road district, they may lawfully pay a reasonable commission under the statute as an expense "incident to the issuance" of the bonds.

Similarly, it would seem that the employment of an investigator or investigators is an expense incident to the duties imposed on the Board by Chapter 116. Section 116.2(5) provides that the Board shall have power and it shall be its duty to require proof in all matters pertaining to the administration of this chapter. The proof required may well necessitate the services of an investigator as an expense incident to carrying out the Board's duty. These expenses are apt to occur or liable to happen in connection with the Boards duties regarding unlawful practice, revocations, examinations and other enumerated duties. Therefore, provided that these expenses are necessary and reasonable, which must be separately determined for each given situation, it is my opinion that the Board may hire an investigator or investigators to carry out the duties assigned to the Board by Chapter 116 and pay for these expenses from fees received under Chapter 116 as authorized by section 116.4, 1958 Code of Iowa.

Very truly yours,

BRUCE M. SNELL, JR.
Assistant Attorney General

BMS:bl

BANKS AND BANKING: Redemption of real estate mortgages; (Ch. 289, 59th G. A.) The shortened period of redemption available in real estate mortgages must be agreed upon in the mortgage instrument but it is not necessary that an election between the longer redemption period or the shortened redemption period with mortgagees' waiver of rights to deficiency judgment be made until time of foreclosure action. (BUMP TO O'MALLEY, ST. SEN., 8/24/61) 61-8-29 8-24-61

Honorable George E. O'Malley
State Senator
420 Royal Union Building
Des Moines, Iowa

Dear Senator O'Malley:

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

> "Apparently, there is some conflict in legal opinions as to where the waiver of the deficiency judgment has to appear, whether in the mortgage instrument or in the foreclosure proceedings. It appears that the Federal Housing Administration and other mortgage lenders do not know how to make up their mortgage papers. Therefore, as a public service, they have asked me to write for this opinion."
>
> "The question, therefore, is, if a mortgagee desires to take advantage of the six months' redemption, does that agreement have to appear in the mortgage instrument or can the mortgagee just waive the right to a deficiency in the foreclosure proceedings?"

Chapter 289, 59th General Assembly, provides as follows:

> "The mortgagor and the mortgagee of real property consisting of less than ten (10) acres in size may agree and provide in the mortgage instrument that the period of redemption after sale on foreclosure of said mortgage as set forth in section six hundred twenty-eight point three (628.3) be reduced to six (6) months, provided the mortgagee waives in the foreclosure action any rights to a deficiency judgment against the mortgagor which might arise out of the foreclosure proceedings. In such event the debtor will, in the meantime, be entitled to the possession of said real property; and if such redemption period is so reduced, for the first three (3)

61-8-29

> "months after sale such right of redemption shall be exclusive to the debtor, and the time periods in sections six hundred twenty-eight point five (628.5), six hundred twenty-eight point fifteen (628.15), and six hundred twenty-eight point sixteen (628.16), shall be reduced to four (4) months." (emphasis added)

It is the opinion of this department that the parties to a mortgage can contractually provide for the six months' redemption period, as authorized in Chapter 289, supra, without at that time, requiring forfeiture of the mortgagee's right to proceed at a later time for a deficiency judgment combined with the longer redemption period.

The proviso added to the authorized contractual agreement supplies the only indication of what the legislative intent was on this matter. Had the legislature intended that the election between redemption periods must be made at the time the mortgage instrument was executed, it would have provided that the parties "may agree and provide in the mortgage instrument that the period of redemption...shall be reduced to six (6) months and that the mortgagee shall waive in the foreclosure action any rights to a deficiency judgment..." The legislature has not so limited the use of this shortened redemption period, but rather has specified that: "...provided, the mortgagee waives in the foreclosure action any rights to a deficiency judgment..." The use of the word, "provided" is suggestive of the conclusion, from a reading of the act as a whole, that the election of the redemption period need not be made until the time of the foreclosure action. It is set forth at 34A Words and Phrases page 558:

> "Word 'provided' when used in a legislative enactment may create a condition, limitation, or exception to the act itself, or it may be used merely as a conjunction meaning 'and' or 'before' and in what sense word was used must be determined from context of act."

It is apparent that the legislature intended to provide a shorter redemption period that "might" be used by the mortgagee, subject to the parties contractually agreeing upon the matter, and upon the further condition that the mortgagee waive its right to a deficiency judgment at the time of the foreclosure action.

In order to implement this newly enacted provision in real estate mortgages, we would suggest that the clause set forth in your letter would be suitable. This clause provides as follows:

> "It is further agreed that in the event of the foreclosure of this mortgage and sale of the property by sheriff's sale in said foreclosure proceedings, the time of one year for redemption from said sale provided by the statutes of the State of Iowa shall be reduced to 6 months, provided the mortgagee waives in said foreclosure proceedings any rights to a deficiency judgment against the mortgagor which may arise out of the foreclosure proceedings."

Respectfully submitted,

W. N. BUMP
Solicitor General

WNB:mjs

STATE OFFICERS AND DEPARTMENTS: Comptroller -- Coding system directed by Ch. 68, Acts of the 58th G. A. to substitute for information required to be shown on warrants under the provisions of section 8.16, Code 1958, held to apply, notwithstanding the literal terms of such Ch. 68. (STRAUSS TO SELDEN, ST. COMP., 8/31/61) #61-8-31 August 31, 1961

Honorable Marvin R. Selden, Jr.
State Comptroller
L O C A L

Attention: Mr. H. D. Wicker, Asst. Comptroller

Dear Sir:

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

"Chapter 68, Acts of the 58th General Assembly, reads as follows:

"'Section 1. Section eight point sixteen (8.16), Code 1958, is amended by inserting at the end of line five (5) the words, "or in lieu thereof a coding system may be used.".'

"An amendment was requested of the 58th General Assembly in order that we could replace all descriptive information required by section eight point sixteen (8.16) with a coding, so that we might enter the data processing field. With the knowledge that the 58th General Assembly had passed an amendment, this office has at this date completed the coding system. However, before setting the coding in operation, a check was made of the amendment passed by the 58th General Assembly and it is noted that the amendment is inserted in the middle of the requirement of information in section eight point sixteen (8.16), instead of after the word 'whatsoever' in line eleven (11). This is in explanation of why we did not approach the 59th General Assembly, which has met in the interim, for corrective action.

"In view of the fact that the amendment as passed will not accomplish the desires of the 58th General Assembly, and also that the 59th General Assembly is

6-8-3

aware that this office will have delivered December 1, 1961, high speed equipment requiring the coding, I respectfully request an opinion as to whether we may proceed with the usage of the coding on state warrants."

In answer thereto, I advise that, taking into consideration the administrative nature of the subject matter involved, the inapplicability of the amendment if literally applied, its useless nature as enacted, and its purpose as stated in your letter, all to be considered in ascertaining the intention of the legislature in the enactment of the amendment (see Newgirg v. Black, 174 Iowa 636, 156 N. W. 708), I am of the opinion that the legislative intent in the enactment of the amendment was to direct the placing of the code symbol so as to embrace all the particulars mentioned in section 8.16, Code 1958, involved in the issuing of a warrant. In that view, the amendment should be viewed as inserting the words, "or in lieu thereof a coding system may be used" after the word "whatsoever" in line eleven of the foregoing-numbered section and not at the end of line five of that section.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:bl

COUNTIES AND COUNTY OFFICERS: Auditor -- Where a school bond issue has been authorized by vote of the electors and school district has certified resolution for assessment for annual levy to retire the bonds and filed the certified copy with the county auditor, the duty of the auditor is mandatory to include in the proposed budget the amount estimated to be realized from the sale of the bonds and also to make the levy certified by the school district to him, subject, however, to the limitation of certification to the provisions of section 298.18, Code 1958.
(STRAUSS TO AKERS, ST. AUD., 8/31/61) #61-8-30

61-8-30

August 31, 1961

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

Attention: Mr. Earl Holloway

Dear Mr. Holloway:

This will acknowledge receipt of yours of the 1st inst. in which you requested an opinion on the following situation presented to you by the Humboldt County Auditor:

> "The undersigned would appreciate receiving from your office if available your opinion on the following together with any pertinent past attorney general's opinions, or in the alternative, if necessary, a current attorney general's opinion covering the questions posed below.
>
> "The Humboldt Community School District, which includes land in Humboldt and Webster Counties, conducted a special election on the question of issuance of bonds for the purpose of constructing a new school on the 25th of January, 1961. The proposition carried authorizing the issuance of the bonds by slightly more than the required sixty per cent (60%). On the 19th of April, 1961, a petition in equity was filed by two representative taxpayers of the district attacking the legality of the election itself and the procedure leading up to the election. Trial of the cause was had commencing June 22, 1961 and resulted in a decree filed on the 7th of July, 1961 which in effect ruled that the alleged discrepancies were immaterial and that the election was valid and any bonds issued pursuant thereto would be valid and binding legal obligations of the district, and further holding that the board had authority to issue said bonds under the state of the record. Appeal to the Supreme Court of Iowa was taken by the representative taxpayers on the 28th of July, 1961 and is currently pending.

"To date, no 'stay' order or injunction has been requested or issued, to the knowledge of this writer.

"The board of the Community School District certified a copy of a resolution for an assessment of an annual levy to retire the bonds to be issued and filed the certified copy with the undersigned auditor of Humboldt County on the 16th day of March, 1961. So far as is known no bonds have been issued.

"Under these facts two questions occur:

"1. Must there be included in the amount of the proposed budget for publication of notice and for hearing an amount estimated to be realized from the sale of these bonds, since the matter has within the current year been submitted to both the taxpayers and the court?

"2. Must the undersigned auditor make a levy as provided by statute after the certification of a copy of the resolution of assessment, as provided by statute which states 'shall make' in view of the pending appeal and in the absence of any stay orders or injunctions, a condition to the issuance of which would require a bond to indemnify the school district to be proposed, as I am informed, and which amount would be prohibitive in amount in this type of case.

"Time is of the essence since the budget preparations are now in process and we would very much appreciate your immediate attention in assisting us with information on how we shall proceed. This matter will not only affect our office but Webster County as well in which a small amount of the land subject to assessment is located."

In reply thereto, I advise as follows:

I am of the opinion that section 24.4, Code 1958, requiring estimates of required taxes to be filed as part of the budget, and section 76.2, providing with respect to the levy made to service the principal and interest of bonds to be issued that:

"The governing authority of these political subdivisions before issuing bonds shall, by resolution, provide for the assessment of an annual levy upon all the taxable property in such public corporation

> sufficient to pay the interest and principal of such bonds within a period named not exceeding twenty years. A certified copy of this resolution shall be filed with the county auditor or auditors of the counties, as the case may be, in which such public corporation is located; and the filing thereof shall make it a duty of such officer or officers to enter annually this levy for collection until funds are realized to pay the bonds in full.
>
> "If the resolution is so filed prior to the first day of October, said annual levy shall begin with the tax levy of the year of filing. If the resolution is filed after the first day of October in any year, such levy shall begin with the levy of the calendar year succeeding the year of the filing of such resolution.",

require the county auditor to comply with the certification made by the school district. His duty in that respect is mandatory.

Section 23 of 43 Am. Jur., Public Securities and Obligations, speaking generally of restrictions upon political subdivisions, insofar as borrowing and issuing obligations therefor is concerned, states the following:

> "In most jurisdictions, the right given to political subdivisions to borrow, and to issue public securities and obligations as a consequence thereof, is not unrestricted, but is subject to various constitutional limitations, including the familiar debt limitation provisions, and provisions specifying the time limit of such obligations--the period within which they are required to mature. Such constitutional provisions are self-executing and mandatory, and require no supplemental legislation to make them effective.
>
> "In addition to constitutional limitations, general statutes and specific city charters may further limit, qualify, regulate, and define the borrowing power of a municipality and its issuance of public securities. In some jurisdictions there are statutory limitations requiring subdivisions to provide for the levy, or for the levy and collection, of taxes to pay the interest on, and provide for the retirement of the principal on maturity of, public obligations upon or before the issuance thereof. Such provisions are mandatory."

And more particularly, in interpreting the word "shall" as used in section 76.2, Code 1958, heretofore quoted, section 272 of 43 Am. Jur. states the following:

> "An important and practical question is often presented as to whether legislation relating to the payment of public securities and obligations is mandatory or permissive in character; although, of course, no universal rule can be stated because the determination in each instance depends upon the particular legislation, effort is usually made to construe the language as imperative. The words 'authorized and empowered,' as used in such legislation, have frequently been given a mandatory construction. Some authority, however, indicates at least a contrary result.
>
> "The word 'shall,' as used in constitutional and statutory provisions with respect to the creation of funds or levying of taxes for the payment of municipal or county bonds, is ordinarily construed as imposing a mandatory duty. A provision of a city ordinance that certain bonds 'shall be paid and discharged in numerical order, commencing with number one,' is mandatory, notwithstanding the owners of the higher numbered bonds may suffer loss in the event of the failure of the city to collect in full the assessments upon which the bonds were predicated.
>
> "The word 'may,' as used in statutes providing for payment of bonded indebtedness, has in some instances been construed as mandatory, and in other instances it has been construed as permissive only."

And see, for annotation thereof, 103 A. L. R. 814.

In view of the foregoing, the answers to both your questions are in the affirmative, in the performance of which attention is directed to the pertinent provisions of section 298.18, Code 1958, as follows:

> " * * * The amount estimated and certified to apply on principal and interest for any one year shall not exceed seven mills on the dollar of the assessed valuation of the taxable property of the school corporation. Provided that when because of reduced valuation

a seven-mill tax is not sufficient to produce the amount required to pay the interest and one-twentieth of the principal of the original issue of bonds legally issued prior to the year 1934, the board may certify such amount and the county auditor shall compute and apply such tax rate for such purposes as may be necessary to raise the amount so certified and the funds so raised shall be used only for the purpose of paying interest and principal on such bonds and shall not be subject to transfer."

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:bl

CRIMINAL LAW: Transfer of appeals from justice of the peace courts -- Section 769.32, 1958 Code of Iowa, does not authorize district court to transfer appeals from justice of the peace court to municipal court for trial. (ALLEN TO BALL, BLACK HAWK CO. ATTY., 9/5/61) September 5, 1961
#61-9-1

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

Dear Mr. Ball:

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

> "Section 762.48 of the 1958 Code of the State of Iowa sets forth the procedure that will be followed in the trial of an appeal of a non-indictable offense from a Justice of the Peace Court. Said Section provides that the appeal will be tried anew in the District Court.
>
> "Section 769.32 provides that the Judges of the District Court may be authorized to transfer to Municipal Court within the Judicial District, misdemeanor offenses for trial where either a County Attorney's information has been filed or indictment returned.
>
> "In view of these two Sections would it be possible for the District Court Judges to transfer appeals from a Justice of the Peace to a Municipal Court for trial as provided in the Section 762.48?"

Section 769.32, 1958 Code of Iowa, provides:

> "Transfer of misdemeanor cases. The judges of the district court shall have authority to transfer to the municipal court within their judicial district misdemeanor offenses for trial where either county attorney informations have been filed or indictments have been returned."

There does not appear to be any provision other than the above section for the transfer of misdemeanor cases from

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the district court to the municipal court. This section is limited by its own terms to those cases where "either county attorney informations have been filed or indictments have been returned." In order to include appeals from justice of the peace courts, words to that effect would have to be added to the statute. As stated in Dingman v. City of Council Bluffs, 249 Iowa 1121, 1126, 90 N. W. 2d 742,

> "If the language given its plain and rational meaning is precise and free from ambiguity, no more is necessary than to apply to the words used their natural and ordinary sense in connection with the subject considered. * * * 'We are not permitted to write into the statute words which are not there.'"

It is therefore our opinion that section 769.32, 1958 Code of Iowa, does not authorize the district court to transfer appeals from justice of the peace courts to the municipal court.

Very truly yours,

JOHN H. ALLEN
Assistant Attorney General

JHA:bl

CRIMINAL LAW: Suicide not criminal offense -- Suicide and attempted suicide are not criminal offenses within the meaning of section 147.111, 1958 Code of Iowa. (ALLEN TO BALL, BLACK HAWK CO. ATTY., 9/5/61) #61-9-1

September 5, 1961

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

Dear Mr. Ball:

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

> "Section 147.111 of the 1958 Code of Iowa provides for the report of treatment of wounds which appear to have been received in connection with the commission of a criminal offense. My question is, would a self-inflicted injury require a report to Section 147.111 of the 1958 Code of Iowa?"

Section 147.111, 1958 Code of Iowa, provides:

> "Report of treatment of wounds. Any person licensed under the provisions of this title, who shall administer any treatment to any person suffering an injury of violence, which appears to have been received in connection with the commission of a criminal offense, or to whom an application is made for treatment of any nature because of any such injury of violence, shall at once but not later than twelve hours thereafter, report said fact to the sheriff of the county in which said treatment was administered or an application therefor was made, stating therein the name of such person, his residence if ascertainable, and giving a brief description of the injury. Any provision of law or rule of evidence relative to confidential communications is suspended insofar as the provisions hereof are concerned."

Your question, then, is whether the acts of suicide or attempted suicide are criminal offenses for which a report by the attending physician is required under the terms of the above section.

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This question has apparently been resolved by the Supreme Court of Iowa in the case of State v. Campbell, 217 Iowa 848, 251 N. W. 717, 92 A. L. R. 1176. At pages 850-851 of the Iowa report, the Court stated:

> "It is true that at common law, under an act of Parliament, suicide was a felony, and the property of the felo de se was forfeited to the Crown, and he was ignominiously buried in the public highway and a stake driven through his body. Such a provision does not exist under the Code of Iowa. It is true that in some states the attempt to commit suicide is made a crime and is punishable as such, but unless so made by statute, suicide is not an unlawful act, and it is so held by the Supreme Court of New York in the case of Darrow v. Family Fund Society, 116 N. Y. 537, 22 N. E. 1093, 6 L. R. A. 495, 15 Am. St. Rep. 430. There being no statute in this state prohibiting suicide or the attempt to commit suicide, under the foregoing definitions it cannot be that the attempt to commit suicide, charged against the defendant in this instruction, was an unlawful act."

In view of the fact that there is yet no statute in this state prohibiting suicide or attempted suicide, it is our opinion that a self-inflicted injury would not require a report under section 147.111 of the 1958 Code of Iowa.

Very truly yours,

JOHN H. ALLEN
Assistant Attorney General

JHA:bl

CONSERVATION: Watercraft, fire extinguishers required -- Section 10(f)(7), Ch. 87, Acts 59th G. A. requires that every motor boat be equipped with fire extinguishers, and the State Conservation Commission cannot exempt by regulation any class or dasses of boats from the fire extinguisher requirement. (CREGER TO POWERS, CONS. COMM., 9/6/61) #61-9-4

September 6, 1961

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

Dear Mr. Powers:

We have your letter of August 14, 1961, in which you request the opinion of this office in regard to the following:

> "Pursuant with the request of the State Conservation Commissioners at their last meeting we would be pleased if you would give us an Attorney General's Opinion on Section f-7, page 11 of Senate File 451, Acts of the 59th General Assembly.
>
> "The staff of the State Conservation Commission have interpreted Section f-7, page 11 of Senate File 451, to mean that every motorboat on the waters under the jurisdiction of the State Conservation Commission shall have a fire extinguisher. It is a further interpretation of this section that the Commission shall determine the number of fire extinguishers greater than one, the size and type of fire extinguishers, which may be acceptable under this Act.
>
> "It has been suggested by legal council for a group of livery operators in the Iowa Great Lakes Area that the Commission could, under this section of the law, exempt the need of fire extinguishers on any boats which they desire to do so. The Commission would like an opinion by the Attorney General's office pertaining to this section and it is further agreed by the Commission that perhaps the number of fire extinguishers should be clarified for different sizes of boats which hasnot been done heretofore."

Section 10 (f)(7), Chapter 87, Acts of the 59th General Assembly (section f-7, page 11 of S. F. 451), provides as follows:

61.9.4

> "7. Every motorboat shall be provided with such number, size and type of fire extinguishers capable of promptly and effectually extinguishing burning gasoline, as may be prescribed by the regulations of the commission. Such fire extinguishers shall, at all times, be kept in condition for immediate and effective use and shall be so placed as to be readily accessible." (Italics supplied)

Therefore, by its own terms, the Act requires that every motorboat be equipped with a fire extinguisher. Since the word "every" manifests the intent of the legislature that all motorboats be equipped with fire extinguishers, the State Conservation Commission cannot, in our opinion, exempt by regulations any class or classes of boats from the fire extinguisher requirement.

Further, the above-quoted section places the duty upon the State Conservation Commission to establish by regulation the number, size and type of fire extinguishers to be required on the various classifications of motorboats.

Very truly yours,

JOHN M. CREGER
Assistant Attorney General

JMC:bl

INSTITUTIONS: Commitment of feeble-minded -- District courts have jurisdiction to commit feeble-minded persons to state institutions. Iowa Code sec. 222.18, 229.9 and 223.7 (1958). (CREGER TO ELWOOD, HOWARD CO. ATTY., 9/6/61)
#61-9-3

September 6, 1961

Mr. Henry L. Elwood
Howard County Attorney
P. O. Box 377
Cresco, Iowa

Dear Mr. Elwood:

We have your letter of June 27, 1961, in which you request the opinion of this office in regard to the following matters:

"Whether or not a District Court of the State of Iowa has the authority to commit a feeble-minded child to Woodward State Hospital located at Woodward, Iowa, or whether the commissioners of hospitalization have the authority to commit a feeble-minded child to Woodward State Hospital.

"Whether or not the Woodward State Hospital is obliged to accept the feeble-minded child who has been committed to the hospital for treatment, regardless of whether the child has been committed by order of the District Court or by the commissioners of hospitalization."

Your attention is directed to Iowa Code sections 222.18 and 229.9, which respectively provide:

"222.18 Guardianship or commitment. If it be found that said person is mentally retarded, and that it will be conducive to the welfare of such person and to the community to place such person under guardianship, or to commit such person to some proper institution for treatment, the court or judge shall, by proper order:

"1. Appoint a guardian of the person of such person, provided no such guardian has already been appointed.

"2. Commit such person to any state institution for the mentally retarded.

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"3. Commit such person to a private institution of this state, duly incorporated for the care of such persons, and approved by the board of control, provided such institution is willing to receive such person."

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

"No person shall be ordered committed or delivered to a state hospital until the commission has first communicated with the superintendent of such hospital, and has been advised that adequate facilities are available. A person ordered to screening center for observation and treatment shall have the same right to appeal from the order as from the order of commitment finding him mentally ill as provided in sections 229.17 to 229.19, inclusive."

Therefore, while the commission on hospitalization is vested with the power to commit mentally ill persons under Iowa Code Chapter 229 (1958), the power to commit feeble-minded persons is specifically granted to the district courts by Iowa Code Chapter 222 (1958). While Iowa Code section 223.7 (1958) provides that all laws relating to commitment of the mentally ill shall also apply to the commitment of epileptics, this section cannot, in our opinion, be enlarged to include feeble-minded persons as well as epileptics. Therefore, only the district courts may commit feeble-minded persons and the Woodward State Hospital is obliged to accept only those feeble-minded persons who have been committed by order of the district court.

Very truly yours,

JOHN M. CREGER
Assistant Attorney General

JMC:bl

BANKS AND BANKING: Blanket surety bond for examiners and employees -- The Banking Department can secure a corporate surety bond offering a blanket coverage for all bank examiners and employees as enumerated in Ch. 256 and 257, 59th G. A., and can pay the premium for a three-year term in a single payment. Sec. 524.8 and 524.9, as amended by Ch. 256 and 257 (59th G. A.). (BUMP TO STAFFORD, SUPT. OF BANKING, 9/12/61) #61-9-5

September 12, 1961

Mr. Clay W. Stafford, Superintendent
Department of Banking
500 Central National Building
Des Moines, Iowa

Dear Mr. Stafford:

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

> "1. Can the State Department of Banking purchase a blanket surety bond covering all employees and examiners of the Department under sections 524.8 and 524.9 (as amended by Chapters 256 and 257, 59th General Assembly); and
>
> "2. Can the premium for a three-year term be paid this year, in order that the Department might take advantage of the feature of automatic coverage of new employees (without additional cost or notification) and a saving of $615.82 over the annual payment basis?"

As you are aware, Chapter 256, 59th General Assembly, amended section 524.8 by substituting for the first sentence the following:

> "All examiners shall be bonded by a corporate surety bond in the kind and form and in the amount as determined by the state banking board and the premium thereof shall be paid out of the current or accumulated earnings of the banking department."

A similar change was made by Chapter 257, 59th General Assembly, repealing section 524.9 and enacting the following:

> "The deputy superintendent and all clerks, stenographers, special assistants and other employees shall be bonded by corporate surety bond in the kind

#61-9-5

> and form and in the amount as determined by the state banking board and the premium shall be paid out of the current or accumulated earnings of the banking department."

It is my opinion that these sections authorize all employees and examiners to be covered under a blanket surety bond. You will notice that in both of the acts set forth above the following language is used: " . . . shall be bonded by a corporate surety bond in the kind and form and in the amount as determined by the . . . board . . . ". This language leaves no question that only one bond was intended for each of the two classes of employees, and since the board is expressly authorized to determine the "kind and form" as well as the amount of the coverage, there is no objection to having both classes covered under the same bond. In this regard, see 1956 Op. Atty. Gen. 51 (no authority for "blanket bond" on county officers); and informal opinion #58-3-17 (stating that Conservation Commission could not purchase a "blanket bond" for employees). In neither of these cited opinions, however, did the statutory language authorize the purchase of "a corporate surety bond". Compare section 29.37 and comment of 1956 Op. Atty. Gen. at page 52 (a clear statement of authority for a blanket bond).

With respect to the payment for a three-year term bond in a single payment, we find that it has long been the rule that prospective claims against the State cannot be allowed. 1936 Op. Atty. Gen. 367. This opinion was based upon the statutory law then existing which was stated by the writer to be: "nowhere does the law contemplate that an alleged claimant can secure money from the State Treasury for services to be performed in the future or for things to be furnished the State of Iowa in the future." Id. at page 368. We find that the payment for a three-year term bond in a single payment, even though it be in payment for a service to be rendered to the State in the future, was contemplated by the legislature in enacting Chapters 256 and 257, 59th General Assembly. Any other construction of these acts would lead to the conclusion that not even a one-year premium could be paid on a surety contract, which would undoubtedly eliminate the State Banking Department from the commercial surety market.

In order that the legislative intent be given intelligent purpose, I am of the opinion that the Banking Department can secure a corporate surety bond offering a blanket coverage for all bank examiners and employees as enumerated in Chapters

256 and 257, 59th General Assembly, in the kind and form as determined by the State Banking Board, and that it can pay the premium for a three-year term in a single payment.

Respectfully submitted,

W. N. BUMP
Solicitor General

WNB:bl

BEER AND CIGARETTES: Illegal vending machine -- Under stated facts, a cigarette machine used within an industrial plant for the exclusive use of the employees, wherein the employee is given a key which is inserted before the machine will dispense cigarettes upon payment of price, is a wholly automatic type and prohibited under the provisions of Section 98.36 (6), Code of Iowa (1958). (Bianco To Samore, Woodbury Co. Atty., 9/13/61) #61-9-6

9-13-61

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

Dear Mr. Samore:

In reply to your favor of August 26, 1961, reading as follows:

> "Your opinion is respectfully requested concerning the legality of a cigarette dispensing machine used under the following conditions:
>
> A cigarette machine is for use within an industrial plant and for the exclusive use of the employees. Instead of a button being used by a person in charge, each employee is given a key which must be inserted before the machine will dispense cigarettes upon payment of price."

We beg to advise:

The question for determination, is whether or not the cigarette vending machine you describe, is being used in an illegal way and in contravention of Sec. 98.36 (6) Code of Iowa (1958) which provides:

> "6. It shall be unlawful to sell or vend cigarettes by means of a device known as a vending machine."

Two cases were filed in the District Court of Polk County, in which the Court enjoined certain State, County and City officials and restrained them from prosecuting the plaintiffs or any persons identically situated for any alleged violation of Section 98.36 (6) of the 1958 Code of Iowa, in the operation of cigarette dispensing machines which are composed of a cabinet used for the storage and display of cigarettes, and a separate unit described as a

#61-9-6

remote control device which is operated through an electric circuit, the closing of which requires the overt act of the cigarette dispensing licensee or his agent, to make the sale by activating the cabinet each time it delivers the customer's purchase, when thus used and operated on premises licensed for the sale of cigarettes at retail by plaintiffs and others identically situated, provided that said remote control unit is located in an area of a retail establishment completely segregated from the purchasing public and that said remote control unit is operated in its entirety by said licensee or an agent thereof or upon the premises of which the sale of cigarettes is legally permissable. (Emphasis ours)

The defendants appealed said cases to the Supreme Court, i.e., Continental Industries, Inc. et. al., v. Erbe, Attorney General of Iowa, et. al., ____ Iowa ____, 107 N.W. 2d 57, and Imperial Vendors, Inc., v. City of Des Moines, et. al., ____ Iowa ____, 107 N.W. 2d 61, wherein the injunction decrees of the trial court were affirmed by operation of law, the court standing four to four.

In the majority opinion for affirmance (107 N.W. 2d at p. 59) the court speaking through Justice Hays said:

> "We think the legislature by using the term "vending machine" clearly referred to the wholly automatic type of machine and that the machines in question do not violate either the letter or the intent of Section 98.36 (6)."

Justice Hays cited the case of McCaughn v. American Water Co., 3 Cir., 67 F. 2d 148, wherein we find this definition of the wholly automatic type of machine, to-wit:

> "The facts show that the device in question works automatically, that it is a machine, that it is a selling machine, a product delivery machine, and a price collecting machine; that it does away with human control, agency, work, and exercise of will power. What was meant and effective was a slot made sale."

We believe that the machine described in your letter falls within the above definition. The operation of said machine is completely automatic. The vendee is an employee of an industrial plant. Although not stated in the factual situation, it must be assumed said employee, as purchaser of the cigarettes, is required to deposit the necessary coins in the machine. He then uses his key to activate the machine and thus secures the cigarettes he has purchased from the machine, without the intervention of any person acting on behalf of the owner of the machine and/or the cigarettes.

This machine is not the identical type of machine involved in the injunction actions cited above.

The machine in question does not have a remote control device. No overt act of a cigarette dispensing licensee or his agent is required to activate the machine, whereas in this case, the vendee activates the machine by his own overt act of inserting his key into the machine. Furthermore, the machine is not located in a retail establishment as set out in the injunction decree issued by Judge Switzer in the District Court of Polk County as affirmed by our Supreme Court.

Therefore, it is our considered opinion that, since this machine is a wholly automatic type as described by Justice Hays in the Continental Industries case, supra, it is within the prescription of the statute, Section 98.36 (6) and an illegal cigarette vending machine.

Respectfully submitted,

FRANK D. BIANCO
Assistant Attorney General

FDB:ho

TOWNSHIPS; INVESTMENT OF FUNDS--

Township funds arising from authority of an election may be invested in time certificates as authorized by Section 453.10.

(STRAUSS TO CHARLTON, DELAWARE CO. ATTY.,
9/15/61) #61-9-8

September 15, 1961

Mr. William Stuart Charlton
Delaware County Attorney
Manchester, Iowa

Dear Mr. Charlton:

This will acknowledge receipt of yours of the 29th ult. in which you submitted the following:

> "May the Township Trustee as custodian of funds belonging to his Township arising from a 8 July, 1957, election and levy pursuant to Sections 359.42 through 359.45 of the 1954 Code, invest same in time certificates with a local bank, thus earning interest on such funds?"

In reply thereto I would advise you that authority to invest the foregoing funds are found in the provisions of Section 453.10, Code 1958, providing as follows:

> "Investment of funds created by election. The governing council or board, who by the law have control of any fund created by direct vote of the people, may invest any portion thereof not currently needed, in United States government bonds or make time deposits of such funds as provided in this chapter and receive time certificates of deposit therefor. Interest or earnings on such funds shall be credited as provided in subsection 2 of section 453.7."

Sincerely yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:ms

#61-9-8

COURTS: Clerk, marriage license.

In performing the duty of issuing marriage licenses where one or both of the applicants are minors, under provisions of Section 595.2 as amended by Chapter 276, 59th G.A., the Clerk's authority is conditioned by an Order of Court of the county the Clerk is serving. (STRAUSS TO O'CONNOR, CHICKASAW CO. ATTY., 9/15/61)

#61-9-9

September 15, 1961

Mr. James D. O'Connor
Chickasaw County Attorney
New Hampton, Iowa

Dear Mr. O'Connor:

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

> "The amendment to Section 592.2, Code of Iowa, 1958, (House File No. 269, 59th General Assembly) raises the minimum age for marriage in Iowa; and in addition, provides 'Notwithstanding the foregoing, the District Court may, when application is made by parties, one or both of whom are under the age thus fixed and the female of whom is pregnant, grant an order authorizing issuance of a marriage license by the clerk of the district court to said applicants and the marriage under such license shall be valid.'
>
> "The question, therefore, is this: Must a judge of the Judicial District of which this county is a part sign the order contemplated in the amendment to 595.2 whenever application is filed here, or may it be signed by any District Judge in this state?"

In reply thereto, I advise as follows:

The statute under which the question arises is Chapter 276, Laws of the 59th General Assembly; section 1, subsection 3 thereof providing as follows:

> "SECTION 1. Section five hundred ninety-five point two (595.2), Code 1958, is hereby amended as follows: ***
>
> "3. By adding to said section the following paragraph:

#61-9-9

> "'Notwithstanding the foregoing, the district court may, when application is made by parties, one or both of whom are under the age thus fixed and the female of whom is pregnant, grant an order authorizing issuance of a marriage license by the clerk of the district court to said applicants and the marriage under such license shall be valid. The records of the court which pertain to such condition of pregnancy shall be sealed and available only to the contracting parties or to any interested party securing an order of court."

The foregoing statute involves the making of an application to the Court and the entering of an order by the Court upon the application. This order of the Court is a part of the proceedings thereof which the clerk, under the provisions of section 604.38, Code 1958, is required to make a record of and which, when correct, shall be signed by the Judge. This duty of the clerk is correlated and confirmed by section 606.1, Code 1958, which provides the following:

> "General duties. The clerk of the district court shall keep his office at the county seat, attend the sessions of the district court himself or by deputy, keep the records, papers, and seal, and record the proceedings of the court as hereinafter directed, under the direction of the judge.",

and subsection 1 of section 606.7, Code 1958, which provides the following:

> "Records and books. The records of said court shall consist of the original papers filed in all proceedings, and the books to be kept by the clerk thereof as follows:
>
> "1. Record book. One containing the entries of the proceedings of the court, which may be known as the 'record book', and which is to have an index referring to each proceeding in each cause under the names of the parties, both plaintiff and defendant, and under the name of each person named in either party."

Such clerk of the court is a county officer (see section 39.21, Code 1958), invested generally with ministerial duties. See the case of Abram v. Grimm, 9 Iowa 37. In accordance with the foregoing statutes, the clerk has his official office at the county seat and serves the Court in the county in which he is a county officer. This is an inevitable conclusion from the fact that there are 99 clerks, each by statute serving the Court in the county in which he is a county official.

Thus, in performing his duty of recording the court proceedings, the application made under the provisions of Chapter 276, Acts of the 59th General Assembly, is made to the Court in which the clerk exercises his power and performs his duty. It follows, therefore, that the clerk's authority to issue the license provided for in the quoted statute, being Chapter 276, Acts of the 59th General Assembly, arises from an order by the Court of the county in which the clerk is an elected official. This conclusion has confirmation in the fact that no provision is made investing the clerkof the Court issuing the license with notice of the order made by the Court in another county, nor providing otherwise the method by which such order may come to his notice and be bound thereby.

In view of the foregoing, I am of the opinion that the order referred to in the foregoing Chapter 276, Acts of the

59th General Assembly, must be signed by the Judge acting in the same county in which the clerk of the court has his official duty.

Yours truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:bl

TAXATION: County Soil Conservation District: Tax Status of Property: 1) Real estate owned by district is tax exempt. (Section 427.1) 2) District is entitled to a sales tax refund on materials used in construction of a building by and for the use of the district (Section 422.45). (MURRAY TO MILANI, APPANOOSE CO. ATTY., 9/15/61.) #61-9-7

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

September 15, 1961

James G. Milani
Appanoose County Attorney
107 1/2 West Van Buren Street
Centerville, Iowa

Dear Mr. Milani:

We acknowledge the receipt of your letter of June 27, 1961, in which you ask for an opinion on the following:

> "The Appanoose County Soil Conservation District, contemplates purchasing some real estate and erecting a building thereon to house the offices for said District. Also, there is the possibility of the Appanoose County Soil Conservation District renting space in the contemplated building, to various governmental Agricultural Agencies. Before moving ahead with the building proposal, the District has requested that the following two questions be resolved:
>
> > "1. Is the real estate owned by the Appanoose County Soil Conservation District, exempt from real estate tax under the provisions of Iowa Code Section 427.1, or any other section?
> >
> > "2. Is the Appanoose County Soil Conservation District entitled to the sales tax refund on materials used in building their proposed structure? The refund referred to is provided by Section 422.45 of the Iowa Code.
>
> "The Soil Conservation District, is formed under Section 467a of the Iowa Code. The District, in the proposed building, would use funds it now has on hand, and borrowed capital to finance the project. The full time agent is paid by the Federal Government. The District operates under Memorandum Agreements with the Iowa Agricultural Extension Service, and the U. S. Department of Agriculture."

#61-9-7

It is our opinion that the district you describe is a subdivision of the government of the State and its property is thereby entitled to the tax exemption allowable to State property. The district also comes within the provision to allow a refund of sales tax on materials used in construction of public property.

The pertinent provisions of the Iowa Code are as follows:

Chapter 427, Property Exempt and Taxable.

"427.1 Exemptions. The following classes of property shall not be taxed:

"1. Federal and state property. The property of the United States and this state * * *."

Chapter 467A, Soil Conservation.

"467A.3 Definitions. Wherever used or referred to in this chapter, unless a different meaning clearly appears from the context:

"1. 'District' or 'soil conservation district' means a governmental subdivision of this state, and a public body corporate and politic, organized in accordance with the provisions of this chapter, for the purposes, with the powers, and subject to the restrictions hereinafter set forth.

" * * *.

"6. 'State' means the state of Iowa.

"7. 'Agency of this state' includes the government of this state and any subidivision, agency, or instrumentality, corporate or otherwise, of the government of this state."

"467A.4 State soil conservation committee.

"1. There is hereby established, to serve as an agency of the state and to perform the functions conferred upon it in this chapter (together with such other functions as may be hereafter assigned to it from time to time by act of the legislature), the state soil conservation committee. * * *."

"467A.5 Creation of soil conservation districts."

(Procedures used to set up districts; approval of state soil conservation committee required.)

"467A.6 Appointment, qualifications and tenure of commissioners."

(Enables the commissioners to call on the Attorney General of the State for such legal services as they may require.)

"467A.7 Powers of districts and commissioners. * * *.

"7. To construct, improve, and maintain such structures as may be necessary or convenient for the performance of any of the operations authorized in this chapter. The approval of the Iowa natural resources council shall be required on any project which relates to or in any manner affects flood control."

"467A.12 Statement to comptroller. On or before September 1 next preceding each biennial legislative session, the state soil conservation committee shall submit to the state comptroller, on official estimate blanks furnished for such purposes, statements and estimates of the expenditure requirements for each fiscal year of the ensuing biennium, and a statement of the balance of funds, if any, available to the committee, and the estimates of the committee as to the sums needed for its administrative and other expenses."

Chapter 422, Income, Corporation and Sales Tax.

"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:

" * * *.

"6. Any tax certifying or tax levying body of the state of Iowa or governmental subdivision thereof may make application to the state tax commission for the refund of any sales or use tax upon the gross receipts of all sales of goods, wares or merchandise to any contractor, used in the fulfillment of any written contract with the state of Iowa or any political subdivision thereof, which property becomes an integral part of the project under contract and at the completion thereof becomes public property, except good, wares or merchandise used in the performance of any contract in connection with the operation of any municipal utility engaged in selling gas, electricity, or heat to the general public."

Since the soil conservation districts are governmental subdivisions, property owned by them becomes state property. As such, it is exempted by Section 427.1 (1) from tax. A governmental subdivision is also entitled to a refund of sales tax by Section 422.45 (6), upon proper application.

See also in this area the following Attorney General opinions: 1934 A.G.O. 686, 1948 A.G.O. 192, 1948 A.G.O. 219, 1956 A.G.O. 93, and 1956 A.G.O. 203.

Very truly yours,

George W. Murray
Special Assistant Attorney General

GWM/JMS/bjf

Highway 375:

SECONDARY ROADS - Chapter 306.15, Iowa Code of 1958, as amended by Chapter 167, 59th G.A. - Chapter 167 requiring approval by city engineer or council of road plats or rural sub-division within one mile of the city or town does not provide that by such approval the city assumes any responsibility for construction or maintenance of such roads. (KEYES TO CLAUSON, Hwy. Comm., 9/18/61.) #61 9-11

Sept 18, 1961

Mr. L. M. Clauson
Chief Engineer
Iowa State Highway Commission
Ames, Iowa

Dear Mr. Clauson:

You have requested an opinion on Chapter 167 of the Laws of the 59th General Assembly (Senate File 464) which repealed Section 306.15, Iowa Code of 1958, and enacted in lieu thereof the following:

> "All road plans, plats and field notes for rural sub-divisions shall be filed with and recorded by the county auditor and approved by the board of supervisors and the county engineer before the sub-division is laid out and platted, and if any proposed rural sub-division is within one mile of the corporate limits of any city or town such road plans shall also be approved by the city engineer or council of the adjoining municipality. In the event such road plans are not approved as herein provided such roads shall not become the part of any road system as defined in Chapter 306, Code of 1958."

Your request was as follows:

> "In a meeting with the district engineers a question was asked in regard to the application of the above law which was passed by the 59th General Assembly.

#61-9-11

> This act requires all road plans for local sub-divisions to be approved by the county board of supervisors and county engineer before the sub-division plan is filed with the county auditor. If the plat is within one mile of a city or town the plan must be approved by the city engineer or council.
>
> Does the city assume any responsibility for the construction and maintenance of these local sub-divisions which are within one mile of the city or town? If they do, how will this be handled as far as their budget is concerned?"

As a general rule the power of a municipal corporation to construct works of internal improvement is limited to its own territory. 38 Am. Jur. Municipal Corporations, Section 559, page 246. The exception to this general rule sometimes exists regarding internal improvements leading to, extending from or passing through the boundaries of the municipal corporation, although part within and part without the territorial limits of the city. See also Pritchard v. Magoun, 109 Iowa 364.

Where the authority to keep and maintain highways outside of a municipality is lodged elsewhere by the legislature, the power of the town to lay out and to maintain highways is necessarily confined to its limits. In re Wooley, 75 Wash. 206, 134 Atlantic 825, cited in 63 C. J. S. Municipal Corporations, Section 1059(b), page 692.

The legislature may authorise a municipality to improve or extend roads beyond its boundaries. Tacoma v. Titlow, 53 Wash. 217, 191 Pac. 827, cited in 63 C. J. S., supra. It has also been held that such a power may be implied

from necessity. Ketchikan v. Zimmerman, 4 Alaska 336; 63 C. J. S., supra; 44 C. J. Municipal Corporations 184, note 25 (a) and page 187, note 85.

Regarding the powers of the municipal corporation the Iowa court has consistently held that it has only such powers as are conferred upon it by the legislature. Central States Company v. Town of Randall, 230 Iowa 376 (1941). The Randall case at page 379 cited with approval and followed the declaration of Van Eaton v. Town of Sidney, 211 Iowa 986, 989:

> "A municipality is wholly a creature of the legislature and possesses only such powers as are conferred upon it by the legislature. That is (1) such powers as are granted in express words; or (2) those necessarily or fairly implied or incident to the powers expressly conferred; or (3) those necessarily essential to the identical objects and purposes of the corporation as by statute provided and not those which are simply convenient. Clark v. City of Des Moines, 19 Iowa 199; City of Clinton v. Cedar Rapids and M. R. R. Company, 24 Iowa 455; Heins v. Lincoln, 102 Iowa 69; State, ex rel White, v. Barker, 116 Iowa 96; State, ex rel County Attorney, v. Des Moines C. R. Company, 159 Iowa 259; Merrill v. Monticello, 138 U. S. 673; (34 L. Ed. 1069)."

When the legislature attempts to make a grant of power to a municipality and the same is doubtful or uncertain, all doubts and iuncertainties are resolved against the municipality. All powers conferred are to be strictly construed and in case of reasonable doubt the power should be denied. Van Eaton v. Town of Sidney, 211 Iowa 986, 990.

Mr. L. M. Clauson

The Code of Iowa defines secondary roads as "all public highways, outside of cities and towns, except primary roads and state park and institutional roads". Iowa Code Section 306.2, subsection 3, 1958. The jurisdiction and control of the secondary roads is vested in and imposed upon the county board of supervisors within their respective counties. Iowa Code Section 306.3, 1958.

Cities and towns are delegated certain powers by virtue of Iowa Code Section 391.2. Code Section 389.14 indicates, too, that a city has authority and responsibility only for such roads or streets as are within its boundary. Outside the boundaries of cities the jurisdiction and control of highways falls to the county under Code Section 306.3.

That "highways" includes "streets" see Iowa Telephone Company v. City of Keokuk, D.C. Iowa 226 F. 82, 87, and Goben v. Akin, 208 Iowa 1354. That the term "highway" includes "road" see City of Newton v. Board of Supervisors of Jasper County, 135 Iowa 27.

It is our opinion that under Chapter 167, 59th G.A. (S.F. 464) the city assumes no responsibility for construction or maintenance of the roads of rural subdivisions located within one mile of the corporate limits of the city.

Very truly yours,

HMK:lld

HIGHWAYS:

Secondary Roads - Section 306.15 of the Iowa Code of 1958, as amended, by Chapter 167, Section 1, 59th G.A. - Plat and field notes - Approval of Rural Sub-Division Plats by County Board of Supervisors and the County Engineer is not an acceptance of such platted roads as part of the Secondary Road System.

(KEYES TO LARSEN, HWY. COMM., 9/18/61) #61-9-12

Sept 18, 1961

Mr. Melvin Larsen
Secondary Roads Engineer
Iowa State Highway Commission
Ames, Iowa

Dear Mr. Larsen:

You submitted the following question regarding the effect of Chapter 167 (Senate File 464) of the Laws of the 59th General Assembly:

> **"The recent legislature passed an act calling for the filing of road plans, plats and field notes for rural sub-divisions and the approval of these plats before the sub-division is laid out and platted.**
>
> **The last sentence in this act states 'In the event such road plans are not approved as herein provided such roads shall not become a part of any road system as defined in Chapter 306, Code of 1958'.**
>
> **These questions have arisen: Is approval of the sub-division plat which includes the roads therein an approval or acceptance of such roads into the secondary road system, thereby requiring maintenance by the county? Does this act provide for the approval of the plat of the sub-division in one action and the subsequent approval of and acceptance of the roads in such sub-division after they meet the requirements set down by the Board, into the secondary road system as a separate action?"**

#61-9-12

Mr. Melvin Larsen

Chapter 167, 59th General Assembly (Senate File 464) provides as follows:

> "All road plans, plats and field notes for rural subdivisions shall be filed with and recorded by the county auditor and approved by the board of supervisors and the county engineer before the subdivision is laid out and platted, and if any proposed rural subdivision is within one mile of the corporate limits of any city or town such road plans shall also be approved by the city engineer or council of the adjoining municipality. In the event such road plans are not approved as herein provided such roads shall not become the part of any road system as defined in chapter three hundred six (306, Code 1958."

In an Attorney General's opinion of May 23, 1961, on a related subject, we have stated that the county board of supervisors is given jurisdiction and control over secondary roads by Section 306.3(2), Code of Iowa, 1958, which provides, "Jurisdiction and control over the highways of this state are hereby vested in and imposed on...the county board of supervisors as to secondary roads within their respective counties..." Subsection 3 of Section 306.2 of the Code of Iowa, 1958, defines secondary roads as "...all public highways, outside cities and towns, except primary roads and state park and institutional roads."

It is necessary to determine whether the roads platted as part of a rural sub-division would be "public highways" as referred to in Subsection 3 of Section 306.2. A "highway" is defined in 25 Am. Jur. 339, Highways, Section 2, as:

> "...a way open to the public at large for travel or transportation without distinction,

> discrimination or restriction except as is incident to regulations calculated to secure to the general public the largest practical benefit therefrom and enjoyment thereof. Its prime essentials are the right of common enjoyment on the one hand and the duty of public maintenance on the other. It is the right of travel by all the world and not the exercise of the right which constitutes a way a public highway, and the actual amount of travel upon it is not material. If it is open to all who desire to use it it is a public highway although it may accommodate only a limited portion of the public or even a single family or, although it accommodates some individuals more than others."

The method by which public highway may be established is of importance here. In 25 Am. Jur. 344, Highways, Section 9 states:

> "Highways may be established by dedication, by prescription, or by the direct action of the public authorities. The owner of land cannot create a highway over it without the cooperation of the public. Giving a private way a name does not make it a public highway or thoroughfare."

The landowners having consented to the establishment of roadways in a rural sub-division, Chapter 167, 59th General Assembly, involves no question of prescription. Statutory authority for establishment of highways by action of public authorities is provided by Section 306.4 of the 1958 Code of Iowa. If the statutory procedure is not followed then no highway can be established unless there has been a dedication and acceptance.

In the opinion of May 23, 1961, it was further stated that a mere dedication alone will not create a public way. 25 Am. Jur. 344, Highways, Section 9. An acceptance is necessary to create a public highway. State v. Burmingham, 74 Iowa 407 (1888); Manderschid v. City of Dubuque, 29 Iowa 73 (1870); Bowersox v. Board, 183 Iowa 645 (1918); Iowa Loan and Trust Company v. Board of Supervisors, 187 Iowa 160 (1919). It is established law in the state of Iowa that a highway cannot be established by dedication without an acceptance by the public. It need not be a formal acceptance by official action. There is authority to the effect that expenditure of public funds on a road constitutes an acceptance. 25 Am. Jur. 344, Highways, Section 10. There may also be an acceptance by public user, characterized by 25 Am. Jur. 347, Highways, Section 12 as "adverse, continuous and exclusive". In any case, an acceptance is necessary to raise a road to the status of a public highway.

Dedication is defined as "an appropriation of realty by the owner to the use of the public and the adoption thereof by the public having respect to the possession of the land and not the permanent estate..." 16 Am. Jur. 348, Dedication, Section 2. The owner must be excluded and can reserve to himself no rights incompatible with full use by the public, 16 Am. Jur. 348, supra.

It is our opinion that county approval of sub-division plats and road plans under the Chapter 167, 59th General Assembly, is not an acceptance of the platted roads into the secondary road system, and does not require maintenance of such roads by the county. It is further our opinion that an acceptance by the county is necessary to take the platted roads into the secondary road system and to place upon the county the responsibility of maintenance.

Very truly yours,

HMK:lle

TAXATION: Taxability of Stock: Administrative procedures require submission of question of taxability of a list of stocks to the assessor initially, as he is advised by the Property Tax Department of the State Tax Commission, with any grant or denial of exemption then subject to review by board of review, or appeal to District Court.
(MURRAY TO McDONALD, DALLAS CO. ATTY., 9/18/61)
61-9-13

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

September 18, 1961

John C. McDonald
Dallas County Attorney
Dallas Center, Iowa

Dear Mr. McDonald:

We have your request for an opinion which is as follows:

"I would like to have your opinion as to the taxability for monies and credits tax of the following stock:

American Investment Company
Columbia Gas System
Life Investors of Iowa
Adel Abstract Company, Adel, Iowa
American Telephone and Telegraph
Commonwealth and Edison Company
Northern Illinois Gas Company
Standard Oil Company of Indiana"

Your question of taxability requires the determination of whether or not such stocks fit within the categories of tax exempt property set out in Chapter 427, Code of Iowa (1958), in particular Section 427.1 (20), Capital Stock Companies. Previous to making this determination, however, it must be considered whether this is properly a question for this office, inasmuch as the granting of an exemption is so closely tied to the facts thereof. The statutes which govern the situation are as follows:

61-9-13

Chapter 13 Attorney General

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

" * * *.

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

" * * *.

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

Chapter 421 State Tax Commission

"421.17 Powers and duties. In addition to the powers and duties transferred to the state tax commission, said commission shall have and assume the following powers and duties;

"1. To have and exercise general supervision over the administration of the assessment and tax laws of the state, over boards of supervisors and all other officers or boards of assessment and levy in the performance of their official duties, in all matters relating to assessments and taxation, to the end that all assessments of property and taxes levied thereon be made relatively just and uniform in substantial compliance with the law.

"2. To supervise the activity of all assessors and boards of review in the state of Iowa; to co-operate with them in bringing about a uniform and legal assessment of property as prescribed by law.

"The state tax commission shall have the power to order the reassessment of all or part of the property in any taxing district in any year. Such reassessment shall be made by the local assessor according to law under the direction of the state tax commission and the cost thereof shall be paid in the same manner as the cost of making an original assessment.

"The state tax commission shall determine the degree of uniformity of valuation as between the various taxing districts of the state and shall have the authority to employ competent personnel for the purpose of performing this duty.

"For the purpose of bringing about uniformity and equalization of assessment throughout the state of Iowa, the state tax commission shall

prescribe rules and regulations relating to the standards of value to be used by assessing authorities in the determination, assessment and equalization of actual value for assessment purposes of all property subject to taxation in the state, and such rules shall be adhered to and followed by all assessing authorities.

"3. To prescribe and promulgate all forms of books and forms to be used in the listing and assessment of property, and on or before November 1 of each year shall furnish to the county auditor of each county such prescribed forms of assessment rolls and other forms to properly list and assess all property subject to taxation in each county. It shall also from time to time prepare and furnish in like manner forms for any and all other blanks, memoranda or instructions which it deems necessary to expedient for the use or guidance of any of the officers over which it is authorized by law to exercise supervision.

"4. To confer with, advise, and direct boards of supervisors, boards of review and others obligated by law to make levies and assessments, as to their duties under the laws.

" * * * ."

Chapter 441 County Assessor (24 I.C.A. Cum. Pocket Part 1960)

"441.17 Duties of assessor The assessor shall:

"1. Devote his entire time to the duties of his office and shall not engage in any occupation or business interfering or inconsistent with such duties.

"2. Cause to be assessed, in accordance with section 441.21 of this Act, all the property, personal and real, in his county or city as the case may be, except such as is exempt from taxation, or the assessment of which is otherwise provided for by law.

"3. Have access to all public records of the county and so far as practicable, make or cause to be made a careful examination of all such records and files in order to obtain all available information which may contribute to the accurate listing at its taxable value, and to the proper persons, of all property subject to assessment by him.

"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.

" * * * ."

The procedure thus indicated by the legislature requires the initiation of the allowance or disallowance of an exemption by the assessor, as he is advised and supervised by the State Tax Commission through its rules and regulations, and by the Attorney General through his opinions on questions of law. Review of these acts is provided by appeal to the board of review, and the District Court (Sec. 441.37 and Section 441.38, 24 I.C.A. Cum. Pocket Part, 1960). A summary of this procedure is set out in an Attorney General's Opinion (1948) A.G.O. 196) dealing with the authority of the board of supervisors to pass on tax exemptions. The following is set forth on page 199:

> "The right to an exemption must be determined by the assessor and the board of review from the information contained in application for such exemption and in passing on the same the assessor and the board of review are performing some act in the process of the assessment of the property for taxation."

While the present question of the exemption of stocks from the moneys and credits tax does not require an application, it is necessary to proceed on information obtained from some source. Of necessity, the preliminary determination of the exemption based on the facts must be made by the assessor. In an opinion by the Attorney General, 1960 A.G.O. 220, at page 225, we said:

> "Applying these considerations to the information presented in the letter quoted above, where in Standard Oil Company of Indiana requests that their shares of capital stock be declared exempt from the moneys and credits tax in the hands of Iowa residents, it immediately becomes apparent that such a determination cannot be made from the information provided. Whereas the statement is made that 'most of the petroleum products sold by it are manufactured at its own refineries all located in other states,' no figures are presented which show a comparison of sales of products within Iowa manufactured by the corporation as opposed to sales of products within Iowa purchased by the corporation for resale. The status of capital stock for purposes of taxation is determined by the assessor. It is not the function of this office to determine questions of fact."

To insure uniformity in the exempting of property by assessors, the Property Tax Department will advise assessors on request, and, based on its knowledge of past practices, and interpretations of law pertaining to this field, can generally handle administratively the bulk of the questions. In an instance where the facts have been presented in full, and there appears no clearcut answer in the law, then there does exist a legal question which this office is bound to answer. However, it is our opinion that to commit this office to resolving questions that can be administratively disposed of elsewhere by a department intimate with the field is to burden it unnecessarily in the discharge of its proper duties. It is, therefore, our opinion that this renders it inappropriate to answer the specifics of your request.

Very truly yours,

George W. Murray
Special Assistant Attorney General

GWM/JMS/bjf

ELECTIONS: School - residence qualification -- a person is ineligible to vote at a school election unless he is a resident of the School District, and has been an actual resident thereof for ten days prior to the election. (STRAUS TO COFFMAN, ST. REP., 9/27/61) #61-9-16

September 27, 1961

The Honorable William J. Coffman
North English
Iowa

My dear Mr. Coffman:

This will acknowledge receipt of yours of the 20th inst., in which you submitted the following:

> "We are having a special school election and I would like to know if a person has moved from our district but has never voted in any other election at any place but North English, is he still qualified to vote here.
>
> "I would like to have the Attorney General's opinion on this immediately along with any comments he has to make concerning this."

In reply thereto, I would advise you that the qualification of a voter at a school election, as far as residence is concerned, is provided in Section 277.12, Code of Iowa 1958, as amended by Chapter 160, Acts of the 59th General Assembly, as follows:

> "277.12 Right to vote. To have the right to vote at a school election a person shall

#61-9-16

> have the same qualifications as for voting at a general election and must have been for ten days prior to such school election an actual resident of the corporation and precinct or sub-district in which he offers to vote.
>
> "In school districts embracing areas in more than one (1) county, the county residence requirement respecting electors' qualification shall be considered to have been met if the elector or electors have resided in the school district for a period of sixty (60) days next preceding the election, even though such sixty (60) days of residence may not have been established in the county where such elector or electors reside at the time of the election."

In addition to the foregoing, this specific qualification of an elector for voting in a general election is provided by Section 49.9 of the Code of Iowa, 1958, in terms as follows:

> "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."

In view of the foregoing voting requirements at school elections, it is clear that the person you refer to in your letter, being no longer a resident of North English School District, is ineligible to vote at a special school election

in that district.

Yours very truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:la

STATE OFFICERS AND DEPARTMENTS: Apportionment of Funds-- Apportionment of funds out of money from the fund established by Section 422.62 for the purpose of purchasing supplies, materials and the cost of manufacture of motor vehicle registration plates, as directed by Chapters 229 and 230, Acts of the 59th General Assembly, explained and detailed. (STRAUSS TO ABRAHAMSON, ST. TREAS., 9/27/61.) #61-9-15

September 27, 1961

Honorable M. L. Abrahamson
Treasurer of State
L O C A L

Attention: Charles R. Dayton
Deputy Treasurer

Dear Sir:

This will acknowledge receipt of yours of the 6th inst., in which you submitted the following:

> "We respectfully ask clarification of Chapters 229 and 230 of the Acts of the Regular Session of the 59th General Assembly in order to assist us in the proper procedure to follow in apportioning the road use tax fund each month of this particular biennium.
>
> "More specifically, we request the clarification of Section 2 of Chapter 230, which is actually an amendment of Section 2 of Chapter 229.
>
> "In explanation, the writer has already made the apportionment of $375,000 set out in Section 1 of Chapter 230. Our question - 'Is the Office of the Treasurer of State to make the apportionment November 1, 1961 and each November 1 thereafter, in the amount of $425,000 and nothing more, or is the Treasurer of State to make the apportionment November 1, 1961 and each November 1 thereafter of $425,000 plus the procedure set out in Section 2 of Chapter 229?'
>
> "Will you please give this matter your usual prompt consideration."

#61-9-15

In reply thereto, I am of the opinion that the fund being established is allocated as follows:

1. Apportionment of $375,000 as provided in Section 1 of Chapter 230, as you state, has been made.

2. On each November 1, beginning in 1961, and each November 1 thereafter, allocation of $425,000 should be made covering the cost of purchasing supplies and materials and the manufacture of motor vehicle registration plates.

3. In the first three quarters of each fiscal year, the proceeds of the fees, taxes, interest and penalties collected under Chapter 422, Code of 1958, as amended, shall be credited monthly to the general fund.

4. In the last quarter of each fiscal year, an amount equal to 10 per cent of the net receipts collected under the provisions of Section 422.62, less the sum of $425,000 expended for supplies and materials and the manufacture of registration plates, shall be credited to the road use tax fund.

5. The remainder in such fund shall be credited to the general fund.

Yours truly,

OSCAR STRAUSS
First Assistant Attorney General

OS:la

STATE OFFICERS and DEPARTMENTS: Apportionment of Road Use Tax -- Apportionment of road use tax, under Section 13, Ch. 168, Acts of the 59th G.A., is to be made February 1, 1962 for road use tax collected during the month of January, 1962. (STRAUSS to ABRAHAMSON, ST. TREAS., 9/27/61.) #61-9-17

September 27, 1961

Honorable M. L. Abrahamson
Treasurer of State
L O C A L

Attention: Charles R. Dayton
Deputy Treasurer

Dear Mr. Abrahamson:

This will acknowledge receipt of yours of August 15, 1961, in which you submitted the following:

> "It is understood that the Treasurer of State is responsible for the apportionment of the Road Use Tax Fund monthly. The 59th G.A. passed a new Road Use Tax Fund law relating to the amount of apportionments to be made to the Primary Road, Secondary Road, Farm-to-Market Road and Street Construction Fund.
>
> "We respectfully ask clarification of Section 13, Chapter 168 of the Acts of the Regular Session of the 59th G.A., which reads as follows:
>
> 'The provisions of this Act shall become effective on January 1, 1962.'
>
> "In the past, by law, we have made apportionments of the Road Use Tax Fund of the previous month, on the first of the month following. Our question is - under the new law, will we be required to apportion the amount of the Road Use Tax Fund collected for the month of December 1961 as of

#61-9-17

> January 1, 1962 or are we to make our first apportionment under the new law as of February 1, 1962 for the Road Use Tax Fund collected in the month of January 1962.
>
> "Will you please give this matter your usual prompt consideration."

In reply thereto, I would advise you that under the plain terms of Section 13, Chapter 168, Acts of the 59th General Assembly, quoted by you, I am of the opinion that the first apportionment to be made under the new law is to be made as of February 1, 1962 for the road use tax collected in the month of January 1962. Any interpretations making the 1st of January, 1962 as the date of making allocations to the road use tax fund would be writing into the law a provision not contained therein. This statute, as are statutes generally, operates in the future and under that rule, while the effective date of the law is January 1, 1962, the allocation to be made thereunder is operative after that date. Distribution on January 1, under any other interpretation, would obviously be made under provisions for allocation under a law that operated prior to January 1, 1962.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:la

STATE OFFICERS & DEPTS; TREASURER OF LANDS --

Money paid to the Board of Regents by the Highway Commission for transfer of jurisdiction of certain state property to that of the commission, shall be distributed in part to the Board of Regents and in part to the general fund of the State. (STRAUSS TO DANCER, BD. OF REG., 9/27/61) #61-9-14

September 27, 1961

Mr. David A. Dancer
Secretary
Board of Regents
LOCAL

Dear Dave:

This will note receipt of yours of the 7th inst., in which you submitted the following:

> "The following is a memo of an item which I discussed with Oscar Strauss on September 6.
>
> "In 1959 the State Board of Regents entered into a contract with the Iowa State Highway Commission, which involves some state-owned land, being part of the Iowa Braille and Sight Saving School holdings at Vinton. The contract provided for:
>
> "Paragraph One. A transfer of jurisdiction of .98 acres from the State Board of Regents to the Highway Commission for which the Commission paid us $588.00.
>
> "Paragraph Two. A grant of permission to the Highway Commission to borrow top soil from 5.48 acres which the Board retained but for which a damage payment of $1918.00 was paid to the Board by the Highway Commission.
>
> "Paragraph Three. A reimbursement of $54.00 to the Board for moving an old fence.
>
> "This is all in connection with the relocation of U.S. Highway No. 218 along the west side of Vinton.
>
> "Payment for the above three items has been received. I would like to know what part of these funds, in your opinion, can be retained by the Board for the use of the Braille and Sight Saving School and what part, if any, should be sent to the State Treasurer as a general fund

#61-9-14

receipt. The area from which the top soil was taken, has been used for crop purposes. It will take a considerable amount of money to rehabilitate the soil before it will be useful for farming.

"I will appreciate your advice."

In reply thereto, I am of the opinion:

1. That the money described in paragraphs one and three of your letter may properly be retained by the Board of Regents.

2. The money described in paragraph two of your letter should properly be accounted for to the General Fund of the State in the hands of the Treasurer.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:la

HEALTH: Cosmetologists, age limits -- Section 147.3 is not in conflict with Chapter 157, Code 1958, and is not within the purview of section 157.10. An apprentice under 18 years of age cannot receive a permit to work as a cosmetologist before qualifying for a license, under the provisions of section 157.11. (Blanco to Zimmerer, Com'r. Public Health, 9/29/61)

#61-9-18

September 29, 1961

Edmund G. Zimmerer, M. D.,
Commissioner of Public Health
State Office Building
L O C A L

Attention Mildred V. Bittinger, Executive Secretary
Division of Cosmetology

Dear Sir:

Reference is made to letter under date of September 19, 1961 from Mildred V. Bittinger, Executive Secretary, Division of Cosmetology, which reads as follows:

"Section 147.3, Code of Iowa, 1958, reads as follows:

'Qualifications. No person shall be licensed to practice a profession under this title until he shall have furnished satisfactory evidence to the department that he has attained the age of twenty-one years and is of good moral character, except that women may be licensed as dental hygienists, or men or women may be licensed as barbers or as cosmetologists, upon attaining the age of eighteen years.'

"Section 157.4, Code of Iowa, 1958, reads as follows:

'Examinations. No person shall be eligible to take the examination prescribed by the cosmetology examiners unless and until said person presents a diploma, or other like evidence, issued to the applicant by any school of cosmetology approved by the cosmetology examiners and licensed by the department, showing that said applicant has completed the course of study in said school prescribed by the board of cosmetology examiners.'

"Section 157.10, Code of Iowa, 1958, reads as follows:

'Conflicting statutes. No provision of law in conflict with any provision of this chapter shall have any effect thereon or upon the rights of any person licensed hereunder.'

#61-9-18

"Section 157.11, Code of Iowa, 1958, reads as follows:

'Temporary permits. Any person having completed the prescribed course in, and having obtained a diploma from a school of cosmetology approved by the board of cosmetology examiners and licensed by the department, and having made application to take the next succeeding examination in cosmetology, shall be known as an apprentice and upon payment of the required fee to the department and the submission of evidence of his eligibility to the board of cosmetology examiners, shall be issued a permit by the department which shall entitle such person to work as a cosmetology operator from the date of such graduation to the date of the next succeeding state examination in cosmetology. Only one permit may be issued to any person.'

"Your opinion is requested relative to the following questions:

"1. Does Section 157.10 relieve the requirements of Section 147.3, relative to attaining the age of eighteen years, to be issued a license?

"2. May a person be issued a temporary permit (under 157.11) prior to his attaining the age of eighteen years?

"3. If the answers to the foregoing questions are in the affirmative, then, must the apprentice surrender his permit following examination?

"4. If the permit has to be surrendered, may the Division issue a letter of authority for the person to continue work as an apprentice until he attains the age of eighteen at which time the certificate of license may be issued?"

In reply thereto, we advise:

The rules of construction applicable herein in answering the questions have been stated by our Supreme Court in two cases cited herewith;

> It is a cardinal principle of statutory construction that intent is to be gleaned from whole statute or statutes relating to the matter, and not from any particular part, with due consideration for the object to be attained. (City of Nevada v. Slemmons, 244 Iowa 1068, 59 N. W. 2d 793)
>
> Court in seeking meaning of a statute should consider the entire act and other related statutes. (Davis v. Davis, 246 Iowa 262, 67 N. W. 2d 566)

You will note that under the provisions of section 147.3 "No person shall be licensed to practice a profession under this title * * * except * * men or women may be licensed as * * * cosmetologists, upon attaining the age of eighteen years."

This title refers to Title VIII of the Code, which governs the practice of certain professions affecting the public health. All of the statutes under this title are in pari materia insofar as the licensing provisions are concerned, and section 147.3 is not in conflict with the provisions of Chapter 157, nor within the purview of section 157.10, supra.

Therefore the answer to question one is negative.

The answer to question two is also negative since it stands to reason that if a person must attain the age of eighteen years to be licensed to practice cosmetology, an apprentice who will be engaged in the same work as a licensed cosmetologist must also have attained the minimum age of eighteen years.

Answering question three, if a permit has been issued to an applicant under eighteen years of age, it is void and should be rescinded and recalled.

In answer to question four, the Division is without authority, by letter or otherwise, to authorize any person under the age of eighteen years to continue work as an apprentice until he or she attains the age of eighteen.

Yours truly,

FRANK D. BIANCO
Assistant Attorney General

FDB:bl

STATE OFFICERS AND DEPARTMENTS: Civil defense administration -- Iowa civil defense administration has no responsibility to pay the cost of administering the Iowa Merit System for the benefit of county and municipal employees. (CREGER TO FOWLER, DIR., CIV. DEF. ADM., 10/4/61) #61-10-4

October 4, 1961

Mr. C. E. Fowler, State Director
Iowa Civil Defense Administration
East 7th and Court
L O C A L

Dear Mr. Fowler:

We have your letter of July 10, 1961, in which you request the opinion of this office as to whether it is the responsibility of the Iowa Civil Defense Administration to pay the cost of administering the Iowa Merit System to counties and municipalities in Iowa and make payment therefor from appropriation.

Section 14, Chapter 82, Laws of the 58th General Assembly, provides:

> "The employees of the administration, upon passing examination, will become members of the Iowa merit system." (italics supplied)

In addition, your attention is directed to Iowa Code section 8.5(6)(d) (1958), which provides as follows:

> "The present joint merit system now effective . . . in state agencies expending federal funds . . . "

In our opinion, the above-quoted statutes limit the operation of the merit system to employees of the State of Iowa, and your inquiry is therefore answered in the negative.

Very truly yours,

JOHN M. CREGER
Assistant Attorney General

JMC:bl

#61-10-4

ELECTIONS: Election Boards -- In township precincts having only one voting machine, if the township trustees are all of the same political party, the Board of Supervisors shall determine the completion of the election board, based upon the precinct vote. (STEGNESS TO MADDOCKS, WRIGHT CO. ATTY., 10/4/61) #61-10-6

October 4, 1961

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

Dear Mr. Maddocks:

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

> "Please be advised that I would like an Attorney General's Opinion regarding the following problem.
>
> PROBLEM
>
> "Wright County has a number of precincts that will have only one voting machine at the next regular general election. The trustees that were elected at the last regular general election in one precinct were Republicans even though the precinct vote carried for the Democrats.
>
> QUESTIONS
>
> "1. Do the elected trustees act on the election board because of their elected office or does the precinct vote determine which party will have a majority of the three judges?

#61-10-6

"2. What elective office vote do the supervisors use as the guage in determining which political party had the largest votes in said precinct?

RESEARCH

"Iowa Code Annotated Section 49.14; Section 49.15 and Section 49.17.

"Please advise."

In reply thereto, assuming that your problem involves only township precincts, I would advise as follows.

It appears from the provisions of Section 49.17 that in precincts where only one voting machine is used that the board shall be composed of three judges, only two of whom shall be of the same political party. Such section specifically provides the following:

"49.17 Boards with only one voting machine. The election board in precincts using only one voting machine shall consist of three judges, only two of whom shall be of the same political party, and two of whom shall also act as clerks."

It appears, however, that all of the trustees who normally would be the judges of election, according to your letter, are members of the same political party. Thus, this statute, Section 49.17, cannot be complied with and, therefore, resort must be had, as to the method of selecting judges, to the

provisions of Section 49.15, which as amended by Chapter 73, Section 1 of the Acts of the 59th General Assembly, provides the following:

> "49.15 Supervisors to choose members--chairman. The membership of such election board shall be made up or completed by the board of supervisors from the parties which cast the largest and next largest number of votes in said precinct at the last general election, or that one which is unrepresented. The board of supervisors shall select said members from a list of persons submitted by the official county chairman of each of aforesaid parties, filed with the said board not more than forty-five days nor less than thirty days prior to each primary and general election. In the event such lists are not timely filed, the said board shall make the selection thereof in the manner prescribed herein without such lists, or, if said lists are incomplete, the said board shall complete the selection thereof in the same prescribed manner. The board of supervisors shall also designate one member of said election board to be the chairman of that board, and of the counting board, if any, with authority over the mechanics of the work of said boards."

Prior to the amendment of the 59th General Assembly, this section has been interpreted in the following way by opinion of this department, appearing in Report of Attorney General of 1938 at page 759 as follows:

> "Where, by reason of the political complexion of a city or town council or board of township trustees (no more than two judges nor

> one clerk may be of the same political party), it becomes necessary to complete or make up in its entirety the election board for a given precinct, it is incumbent, under the law, upon the county boards of supervisors to complete or make up the election board from the membership of those parties casting the largest and next largest number of votes in the precinct at the last general election, providing, however, that no more than two judges and no more than one clerk of any election board can be members of the same political party."

And for determining how the largest number of votes of a political party are cast in the precinct, it is said in an opinion of this department appearing in the Report of 1934 at page 507, the following:

> "There is no question but that, under Chapter 40 of the Code of 1931, the single election board is to be made up or completed according to the vote in the particular precinct, and we are constrained to the opinion that, under Chapter 42, relative to double election boards, the counting board should also be made up by the appointment of two judges and one clerk from the political party casting the largest number of votes in that precinct and one judge and one clerk from the party casting the next highest number of votes in said precinct.
>
> "In so far as determining what is meant by the largest vote, we will say that it means the largest vote cast for the head of the ticket, which in the fall of 1932 would have been the largest vote cast for President of

> the United States. You may wonder why we say the largest vote cast for the President of the United States, rather than Governor of the State of Iowa, in view of the last paragraph of Section 546 of the Code of 1931. It will be noted, however, that Section 546 applies only to the number of signatures on nomination papers, and has nothing to do with judges and clerks of election. For that reason, we are of the opinion that the only proper method of determining which party had the largest number of votes is by ascertaining the vote for the head of the ticket."

And, therefore, the answers to your questions are these.

1. The precinct vote will determine which party will have the majority of the judges.

2. The vote for the office of President of the United States in the precinct at the 1960 election will determine which political party cast the largest and the next largest vote at the last general election in the precinct.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:la

CRIMINAL LAW: Sentence for Escape -- Under section 745.1, 1958 Code of Iowa, sentence for escape should not commence until the expiration of the last sentence entered prior to the sentence for escape. (ALLEN TO JOHNSON, LEE CO. ATTY., 10/4/61) #61-10-3 October 4, 1961

Mr. Robert N. Johnson
Lee County Attorney
516 Seventh Street
Fort Madison, Iowa

Dear Mr. Johnson:

This will acknowledge receipt of your recent letter, in which you state as follows:

> "At the time of this dictation this office is engaged in taking the plea of two escaped convicts to the crime of escape in violation of Section 745.1 of the Iowa Code. These escapees stole a motor vehicle after escaping in another Iowa County. They pleaded guilty in that county to that crime and were sentenced to the Iowa State Penitentiary at Fort Madison, Iowa. They will now be sentenced by the district court of Lee County at Fort Madison to a term of not to exceed 5 years to commence from and after the expiration of the term of their previous sentences. The record clerk at the Iowa State Penitentiary in a previous case such as this and in these cases will enter the defendants in the prison records with a sentence of five years commencing at the expiration of their sentence received for a crime committed subsequent to the escape.
>
> "The question arises as to whether or not these defendants' escape sentences should commence at the expiration of their sentence previous to the act of escape or whether their escape sentence should commence at the expiration of their sentence received subsequent to the act of escape."

Section 745.1 of the 1958 Code of Iowa provides:

> "Prison breach -- escape -- punishment. If any person committed to the penitentiary or to the men's

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> or women's reformatory shall break such prison and escape therefrom or shall escape from or leave without due authority any building, camp, farm, garden, city, town, road, street, or any place whatsoever in which he is placed or to which he is directed to go or in which he is allowed to be by the warden or any officer or employee of the prison whether inside or outside of the prison walls, he shall be deemed guilty of an escape from said penitentiary or reformatory and shall be punished by imprisonment in said penitentiary or reformatory for a term not to exceed five years, to commence from and after the expiration of the term of his previous sentence."

The question presented by your request, therefore, is whether the words "previous sentence" in the above section would include the sentence for a crime committed subsequent to the act of escape when such sentence is entered prior to the sentence for the crime of escape.

When the words of the statute are given their plain and ordinary meaning, "previous sentence" would appear to relate to the last sentence entered prior to the sentence for escape. As stated in Dingman v. City of Council Bluffs, 249 Iowa 1121, 1126, 90 N. W. 2d 742,

> "A statute is not to be read as though open to construction as a matter of course. Statutory construction may be properly involved only when the legislative Acts contain such ambiguities or obscurities that reasonable minds may disagree or be uncertain as to their meaning. * * * If the language given its plain and rational meaning is precise and free from ambiguity, no more is necessary than to apply to the words used their natural and ordinary sense in connection with the subject considered. * * * 'We are not permitted to write into the statute words which are not there.'"

In order for the words in question to refer only to the sentence being served at the time of the escape, it would be necessary to add words to that effect to the statute. This, of course, we cannot do.

It is therefore our opinion that the escape sentence should not commence until the expiration of the last sentence entered prior thereto, whether or not such sentence is for a crime committed subsequent to the act of escape.

Very truly yours,

JOHN H. ALLEN
Assistant Attorney General

JHA:bl

CRIMINAL LAW: Operating motor vehicle while intoxicated on public highway and elsewhere throughout the State -- Section 321.228, 1958 Code of Iowa, extends prohibition of section 321.281, 1958 Code of Iowa, on operating motor vehicle while intoxicated, to highways and elsewhere throughout the State of Iowa. (ALLEN TO BUTLER, CERRO GORDO CO. ATTY., 10/4/61) October 4, 1961 #61-10-5

Mr. David J. Butler
Cerro Gordo County Attorney
P. O. Box 1166
Mason City, Iowa

Dear Mr. Butler:

This will acknowledge receipt of your recent letter in which you state:

> "The question has arisen as to whether or not Section 321.228 of the 1958 Code of Iowa can validly enlarge the scope of Section 321.281 involving operating a motor vehicle while intoxicated upon the public highways of the State of Iowa so that a person can be charged with operating a motor vehicle while intoxicated anyplace in the State of Iowa regardless of whether or not the operation is on a public highway. One of the essentials for proving a case under 321.281 is to prove that the intoxicated driver drove his car on a public highway in the State of Iowa. Section 321.228 purports to broaden this by stating that this Section applies upon public highways and elsewhere throughout the State. Would you please give me an opinion as to whether or not you feel a driver of a motor vehicle while intoxicated can be prosecuted under one or both of these sections while he might be driving his automobile someplace other than on a public highway."

Section 321.281, 1958 Code of Iowa, in pertinent part, provides:

> "Whoever, while in an intoxicated condition or under influence of narcotic and/or hypnotic drugs or a combination of such drugs and alcohol, operates a motor vehicle upon the public highways of this state, shall, upon conviction or a plea of guilty, be punished . . . "

Section 321.228, 1958 Code of Iowa, provides:

> "The provisions of this chapter relating to the operation of vehicles refer exclusively to the operation

#61-10-5

of vehicles upon highways except:

"1.* * *

"2. The provisions of sections 321.261 to 321.274, inclusive, and sections 321.280 to 321.284, inclusive, shall apply upon highways and elsewhere throughout the state."

"Elsewhere" is defined in Black's Law Dictionary, 4th Edition, as "In another place; in any other place." In Webster's International Dictionary, 2nd edition, it is defined as "In or to some or any other place." It seems apparent, therefore, that the Legislature intended, by enacting section 321.228, to make section 321.281 applicable to highways and to any other place throughout the State of Iowa.

It is true that a criminal statute must inform citizens with reasonable precision what acts it seeks to prohibit and that it cannot be extended by intendment or established by implication. State v. Brighi, 232 Iowa 1087, 7 N. W. 2d 9. It seems clear, however, that section 321.228 does not extend section 321.281 by intendment, nor does it establish a crime by implication. By its terms, it is made expressly applicable to the latter section and clearly states that section 321.281 shall be applied on highways and elsewhere throughout the state.

It is to be noted that the two sections in question are found within the same chapter and were, in fact, part of the same Act passed by the 47th General Assembly. Sections 259, 312, Chapter 134, Laws of the Forty-Seventh General Assembly. A basic rule of statutory construction is that all provisions or sections of a statute must be considered together and each must be considered in the light of all the other provisions or sections. City of Dubuque v. Meuser, 239 Iowa 446, 31 N. W. 2d 882; 82 C.J.S. Statutes, § 345a. To declare that the crime of operating a motor vehicle while intoxicated must occur upon a public highway would be to consider merely the wording of section 321.281 and to completely disregard section 321.228. To ignore the words, "and elsewhere throughout the state" would also violate the rule of construction which prohibits the reading of a statute so as to render part of it nugatory or superfluous. As stated in In re Guardianship of Wiley, 239 Iowa 1225, 1228, 34 N. W. 2d 593:

"If fairly possible a statute will not be construed so part of it is rendered superfluous. Effect should ordinarily be given to every provision. * * * We think the guardian ad litem is asking us

> either to read out of the statute the clause we have italicized or to add a provision which greatly limits its meaning and that the construction for which he contends conflicts therewith. Of course we have no power to read the italicized language out of the statute nor to add thereto."

It is therefore our opinion that sections 321.228 and 321.281, 1958 Code of Iowa, should be considered together as prohibiting the operation of a motor vehicle while in an intoxicated condition or under influence of narcotic and/or hypnotic drugs or a combination of such drugs and alcohol upon the public highways and at any other place within the State of Iowa.

Very truly yours,

JOHN H. ALLEN
Assistant Attorney General

JHA:bl

HEALTH: Printing of reports -- Publication and distribution of reports within the provisions of Section 17.27, Code of Iowa 1958, and Section 53, Chapter 1, Laws of the 58th General Assembly must have approval of the state printing board and the budget and financial control committee.

(BIANCO TO ZIMMERER, COM'R. PUBLIC HEALTH, 10/4/61) #61-10-1

October 4, 1961

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

Dear Dr. Zimmerer:

Reference is made to your favor of September 27, 1961 reading as follows:

"We are about to issue the 'Morbidity Report' for the decade 1950-1959 as has been our custom. It is now ready for printing and we should like an official opinion as to whether we require the permission of the Interim Committee.

"Section 135.11 enumerating the powers and duties of the Commissioner of Health says '3. Issue monthly health bulletins containing fundamental health principles and other health data deemed of public interest'."(emphasis mine).

In reply thereto we advise:

A sample of said report has been supplied, and we note it is entitled "Iowa Morbidity Report 1951 - 1959 ". It consists of a compilation of statistics of the incidents of certain diseases by counties, with explanatory footnotes, for the decade indicated.

We invite your attention to the following pertinent statutory provisions bearing upon your question, to-wit; of the 1958 Code;

Section 17.27 "There may be published other miscellaneous documents, reports, bulletins, books, and booklets that are needed for the use of the various officials and departments of state, or of value for the information of the general assembly or the public in form and number most useful and convenient to be determined by the printing board. * * * (emphasis ours)

and the following provision; Section 53, Chapter 1, Laws of the 58th General Assembly:

"No department or commission of state located in the city of Des Moines shall expend any funds for the publication or distribution of books or pamphlets or reports unless the publication thereof be expressly required by law or approved by the budget and financial control committee and the state printing board. A violation of this section shall constitute misfeasance in office." (emphasis ours).

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We note in your letter that you cite Section 135.11 (3) as authority to publish and distribute the report, within the exception stated above, i.e. "unless the publication thereof be expressly required by law -".

We do not believe that Section 135.11 (3) provides the necessary authority, for the reason that said section refers to "monthly health bulletins", whereas, the report in question consists of statistical data covering a period of ten years.

Therefore it is our opinion that the contemplated "Morbidity Report 1951-1959" will require the approval of the budget and financial control committee and the state printing board prior to publication and distribution.

Yours truly,

FRANK D. BIANCO
Assistant Attorney General

FDB:rm

STATE OFFICERS and DEPARTMENTS: Compromise and settlement--The Executive Council is without power to approve release of lien upon certain property of the debtor of the Iowa Employment Security Commission since the release of such property is neither a settlement nor a compromise under the provisions of Section 19.9, Code of 1958. (STRAUSS TO GILL, SEC'Y. EXEC. COUNCIL, 10/4/61) #61-10-V

October 4, 1961

Mr. Gary Gill, Secretary
Executive Council
L O C A L

Dear Mr. Gill:

Reference herein made to your letter of September 20 inst. from the Iowa Employment Commission by Don Allen asking approval of release of the tax lien of the State from certain property owned by one of the debtors of the Employment Security Commission.

The power of the Council, in respect to compromise and settlement, of doubtful claims in favor of the State, is provided for in Section 19.9, Code of 1958, as follows:

> "19.9 Compromise of claims. The executive council, on a written report to it by the attorney general together with his opinion as to the legal effect of the facts, may determine by resolution to be duly entered in its official records, the terms on which claims of doubtful equity or collectibility, and in favor of the state, may be compromised and settled with all or any of the parties thereto. Such terms may be withdrawn prior to acceptance, or in case the debtor fails to comply therewith within a reasonable time. The attorney general shall have full authority to execute all papers necessary to effect any such settlement."

#61-10-V

I am of the opinion that releasing certain properties from a lien of State is neither a compromise nor a settlement of the State's claim.

All that is involved herein is a question of whether the claim can be collected from the property upon which the lien has been impressed, and the judgment of the Employment Security Commission that it cannot be collected from this property. This obviously is neither a compromise nor a settlement of the claim itself. Even if the Council approves the release of the lien, the debt to the Employment Security Commission remains unpaid, uncompromised and unsettled.

In view of the foregoing, I find no authority in the Council to approve and confirm the release of the lien.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:la

TAXATION: County board of review -- reassessment -- In view of provisions of sec. 442.2, Code 1958 and consideration thereof by 1938 O.A.G, p. 730 and opinion of May 7, 1958, In any year after assessment has been made, the board of review may, without complaint of an individual taxpayer, reassess or revalue the real estate in a taxing district if it finds there has been a change in value of all the property within the taxing district. (STRAUSS TO HOOVER, CLAY CO. ATTY., 10/4/61) #61-10-7

October 4, 1961

Mr. Earl Hoover
Clay County Attorney
Spencer, Iowa

Dear Sir:

This will acknowledge receipt of yours of the 27th ult. in which you submitted the following:

> "I request an official opinion with respect to Sections 35, 36 and 37, Chapter 291, Laws of the 58th General Assembly, State of Iowa, with respect to the following point:
>
> "Does a County Board of Review, under the above named sections, have the power and right to raise or lower assessments on its own initiative without having a filed protest duly and timely filed before the Board by the taxpayer?"

In reply thereto, I would advise as follows:

I am of the opinion that your question is answered by an interpretation of the following portion of section 35, subsection 2, Chapter 291, Acts of the 58th General Assembly, to wit:

> "In any year after the year in which an assessment has been made, all of the real estate in any taxing district, it shall be the duty of the board of review to meet as provided in section thirty-three (33) of this act, and where it finds the same has changed in value, to revalue and reassess any part or all of the real estate contained in such taxing district, and in such case, it shall determine the

#61-10-7

> actual value and compute the taxable value thereof, and any aggrieved taxpayer may petition for a revaluation of his property, but no reduction or increase shall be made for prior years. If the assessment of any such property is raised, or any property is added to the tax list by the board, the clerk shall give notice in the manner provided in section thirty-six (36) of this Act, provided, however, that if the assessment of all property in any taxing district is raised the board may instruct the clerk to give immediate notice by one (1) publication in one (1) of the official newspapers located in the taxing district, and such published notice shall take the place of the mailed notice provided for in section thirty-six (36) of this Act, but all other provisions of said section shall apply. The decision of the board as to the foregoing matters shall be subject to appeal to the district court within the same time and in the same manner as provided in section thirty-eight (38) of this Act."

The foregoing is substantially a re-enactment of section 442.2, Code 1958, and has had interpretation thereof by opinion of this department, appearing in the Report for 1938 at page 730, where it was said:

> "It is to be observed that supra statute makes it the duty of the Board, where it finds that all of the real estate within the taxing district assessed in some previous year has changed in value, to revalue and reassess such real estate at its true value. It follows of course that the Board must find that there has been a change in the value of all of the real estate since it was previously assessed, or it will have no right to revalue or reassess the same.
>
> "It is therefore the opinion of this Department that even thoughit is not the year for assessing property, local Boards of Review have the authority to revalue property upon which complaint has been made if proper showing is made.
>
> "It is further the opinion of this department that local Boards of Review, where they find that there has been a change in the value of all of the real estate within the taxing district since it was previously assessed, have a right to revalue or

reassess the same even though no complaint has been made, but that unless complaint has been made by the individual taxpayer, the Boards have no authority to revalue or reassess real property within the taxing district unless they find that there has been a change in the valuation of all of the property since it was previously assessed.

"In the event that the valuation is increased, notice thereof should be given in compliance with Section 7131 of the 1935 Code."

The question was considered again in a letter opinion to the State Tax Commission dated May 7, 1958, where the same conclusion was reached in the following terms:

"It is felt that the answer to your first inquiry is contained in two opinions of the Attorney General of Iowa rendered in the year 1938, one of which is dated April 11th and the other April 22nd of such year. Both of these opinions construe Section 442.2, supra. Without setting forth these opinions in full, it is sufficient to say that they conclude that (1) ' * * * irrespective of whether or not it is a year for assessing real property, the board of review has the authority, under the statute, to act upon the proper complaint of an aggrieved taxpayer and within the limits of the statute, change the value of real property'; and (2) ' * * * local Boards of Review, where they find that there has been a change in the value of all of the real estate within the taxing district since it was previously assessed, have a right to revalue or reassess the same even though no complaint has been made, but that unless complaint has been made by the individual taxpayer, the Boards have no authority to revalue or reassess real property within the taxing district unless they find that there has been a change in the valuation of all of the property since it was previously assessed.' It is realized, of course, that Section 442.2, supra, has been amended in certain minor respects since the rendition of the foregoing opinions. It is not felt, however, that these changes alter the conclusions set forth above.

"In view of the foregoing, it is evident that Section 442.2, supra, anticipates that the board of review will, in interim years, not only take the initiative in determining whether or not all of the property in a particular taxing district has 'changed

> in value, but will also act upon the proper complaint of an aggrieved taxpayer and will, within the limits of the statute, change the valuation of individually owned real property regardless of whether or not it had previously, on its own volition, determined the particular property had changed in value.
>
> "Whether or not property has in reality changed in value is, of course, a question of fact, the determination of which is addressed to the sound administrative discretion of the board of review acting pursuant to the provisions of Section 442.2, supra."

In view of the foregoing, I am of the opinion that, in the year after assessment has been made, the board of review may, without complaint of an individual taxpayer, reassess or revalue the real estate in a taxing district if it finds there has been a change in value of all the property within the taxing district.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:bl

STATE OFFICERS AND DEPARTMENTS: Powers of Attorney General -- The Attorney General has neither the power nor the duty to pass upon the validity or invalidity of the contract between the executive board of the Iowa League of Municipalities and Max Conrad. The powers of the Attorney General would be only voluntary and not binding upon the parties.

October 18, 1961

Honorable Chet B. Akers
Auditor of State
ATT: C. W. WARD
L O C A L

Dear Mr. Ward:

This is to acknowledge receipt of yours of the 6th ult. in which you submitted the following:

> "We would appreciate an official opinion on the enclosed agreement between the Executive Board of the Iowa League of Municipalities and Max A. Conrad, Executive Director.
>
> Is the Executive Board of the League vested with the power to deposit the sum of $29,166.00 in said Trust Account or pay for legal fees in advance of services rendered, thereby obligating future boards?
>
> A state audit was made as provided for in Chapter 363, Section 363.43, and Chapter 11 of the 1958 Code. This opinion is needed in behalf of said audit report. Therefore, an early reply would be appreciated.

Accompanying your letter is a copy of Resolution of the Executive Board of the Iowa League of Municipalities appointing an Executive Director dated June 12, 1959. Also accompanying your letter is a copy of Agreement between the Executive Board of the Municipalities League and Max A. Conrad, its Executive Director, entered into on the first day of July, 1961.

In reply thereto as pertinent to the situation existing by reason of the foregoing described instruments, that while the Auditor of State has his specific duty of examining the financial transactions of the League of Municipalities under the provision of Section 363.43, Code 1958, providing as follows:

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> "Accounting--reports. The league shall keep and make such accounts and reports as shall be required by the state municipal accounting department, and the same shall be annually checked by said department and published in the volume of municipal accounts."

However, the Auditor has no authority under the terms of Chapter 11, Code of 1958, in respect to examination of League of Municipalities' accounts. The authority of examination conferred upon the Auditor is restricted to the provisions of Section 363.43, supra. Upon information it appears that the League of Municipalities is a voluntary unincorporated association and is not a City or Town nor is it an agency or a department of either and therefor examination of such League is not within the authority of the Auditor under Chapter 11. However, we make no comment upon the extent of the Auditor's examination under Section 363.43.

In the view therefor that the Attorney General has no statutory power nor duty arising out of the delegation of authority to the Auditor under Section 363.43 heretofore quoted, any comment of the Attorney General addressed to the validity or invalidity of the arrangements described in your letter would be the mere voluntary views of this Department not binding upon any of the parties to the transaction and in excess of both the power and the duty of the Attorney General.

Very truly,

OSCAR STRAUSS
First Assistant Attorney General

gh

STATE OFFICERS AND DEPARTMENTS: Use of contingent fund under Section 19.7 -- The use of the contingent fund set up by Section 19.7, Code of 1958, for the purpose therein detailed, is discretionary with the Executive Council. Its use for the purpose of reimbursement to a state agency for losses within the terms of Section 19.7 is not authorized. (STRAUSS TO GILL, SEC'y EXEC. COUNCIL, 10/27/61) #61-10-10

October 27, 1961

Mr. Gary Gill, Secretary
Executive Council
L O C A L

Dear Mr. Gill:

This will acknowledge receipt of yours of the 4th inst. in which you submitted the following:

> "Attached herewith are two (2) requests from the Board of Control in connection with damage caused by lightning and wind to two state institutions, as follows:
>
> "1. Lightning struck on the grounds of the Mental Health Institute at Cherokee and burned out a transformer located in an underground tunnel - with damages of $325.00.
>
> "2. Windstorm struck at the Glenwood State School and did damage to a large hog house - cost of replacement - $4,635.00.
>
> "We would appreciate an opinion in connection with the above matters."

Attached thereto is letter from the Board of Control to the Executive Council dated September 22, 1961, respecting loss by lightning, a copy of which is exhibited as follows:

> "It has been called to our attention that based on Sections 19.7 and 19.29, dealing with the powers of the Executive Council, and the acts of

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the 59th G.A. Chapter 51, departments should apply to the Executive Council for reimbursement for losses caused by act of God, fire, etc.

"On August 2, 1961, a lightning bolt struck on the grounds of the Mental Health Institute at Cherokee and burned out a transformer located in an underground tunnel serving the Employees' Residence Hall.

"We prepared specifications and our purchasing department has received proposals for the replacement of this transformer as follows:

"Electric Supply Company, Des Moines--$325.00
Crescent Electric Supply Co, Des Moines 355.00
General Electric Supply Co, " " 368.94
Westinghouse Electric Supply Co, " no bid
Stitler Electric Co, Washington, Iowa no bid

"This being a providential loss, we request that you authorize payment to the Mental Health Institute at Cherokee, Iowa, in the amount of $325.00, as reimbursement for this loss.

"It is to be understood that the replacement transformer will be purchased from the lowest bidder, The Electric Supply Company."

And also attached is a letter of September 29, 1961, from the Board of Control to the Executive Council asking payment from the Council for loss by a windstorm at the Glenwood State School in the amount of $4,635.00.

In reply thereto, I would advise you that in my opinion the foregoing requests may be denied under the terms of an opinion issued this date to the Executive Council, a copy of which is hereto attached.

I would advise you further that Chapter 51, Acts of the 59th General Assembly, referred to in the foregoing described letters from the Board of Control, has no bearing upon the powers of the Executive Council, as interpreted in the attached opinion.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:la

Enclosure

COURTS: Age requirement of deputy clerk--The minimum age requirement for the holding of office of deputy clerk of the Municipal Court is twenty-one years for the reason that a minor may not execute a bond, as is required by Section 602.9. (STRAUSS TO SAMORE, WOODBURY CO. ATTY., 10/27/61.) #61-10-12

October 27, 1961

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

Dear Mr. Samore:

This will acknowledge receipt of yours of the 2nd, inst, in which you submitted the following:

> "An attorney general's opinion is respectfully requested as to the minimum age requirement of a person who holds the office of Deputy Clerk in Municipal Court.
>
> "Thank you."

Assuming that your question concerns the eligibility of a minor to hold the office of Deputy Clerk in the Municipal Court, I would advise as follows.

While the ineligibility to holding the office of such Deputy Clerk by reason of infancy is not expressly provided, it appears from the provisions of the statute incident to the creation of the deputy clerk and qualification therefor, that a minor is not eligible to the holding of such office. While the statute creating the office, being Section 602.8, Code 1958, providing as follows:

> "602.8 Deputy clerks and bailiffs. The clerk and bailiff, with the approval of the city council, shall each have power to appoint such deputies as may be necessary

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> to transact the business of the court, whose salaries shall be fixed by the city council."

does not prescribe the qualifications of such deputy, specific eligibility to the holding thereof is provided by Section 602.9, Code 1958, in terms as follows:

> "602.9 Bonds. The clerk of the court, the deputy clerks, the bailiff, and the deputy bailiffs shall give such bonds as may be required by the city council, which bonds shall be filed with and approved by the city clerk."

The incapacity of a minor to provide an official bond is stated in an opinion of this Department appearing in the Reports for 1940 at page 476, where in denying the eligibility of a minor to the office of Deputy Clerk of the District Court, it was said:

> "It is clear under the above decisions that a minor would be ineligible to hold the office of clerk of the district court and we are of the opinion that, inasmuch as under Section 5242, the deputy, in the absence of his principal, performs all the duties of such principal, the qualifications of the deputy must be the same as the clerk.
>
> "We suggest also another reason why the deputy clerk may not be a minor. Section 5241 provides that each deputy shall give a bond in an amount to be fixed by the officer having the approval of the bond of his principal. A minor could not generally enter into a valid contract for this bond. He could repudiate the same at any time during his minority or within a reasonable time after becoming of age.
>
> "We reach the conclusion, therefore, that a minor is disqualified for appointment as deputy clerk

of the district court."

There being no statute expressly permitting a minor to execute a bond, generally or of this specific type, nor is it a contract which it is his legal duty to execute or which he could be compelled to execute as a minor by suit at law or in equity, (See 27 AmJur, Title Infants, page 757) I am of the opinion that the minimum age requirement for the holding of office of deputy clerk of the Municipal Court is twenty-one years.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:la

COUNTIES AND COUNTY OFFICERS: Medical Examiner -- confidentiality of records -- Under the provisions of Chapter 258, Laws of the 58th General Assembly, reports and records, compiled and filed by the county medical examiner are public records and may not be treated as confidential or privileged communications.

October 27, 1961

STAFF OPINION

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

Dear Dr. Zimmerer:

We have your favor of October 2, 1961, reading as follows:

> "A question has arisen as to the confidentiality of the findings and opinion of the medical examiners. The law says that he must file a report with the county attorney and the State Department of Public Safety.
>
> "May he, (the medical examiner), give the attending physician his opinion of the cause of death?
>
> "How much information may be given surviving members of the family? To the legal representative of the surviving family, and to the sheriff or other peace officers at the scene of the accident?
>
> "May he reveal information discovered at autopsy?
>
> "Is there a confidential relationship such as exists between doctor and patient?
>
> "Please give me an opinion in this matter."

In reply thereto, we advise:

Chapter 258, Laws of the 58th G. A. as amended, requires that the county medical examiner shall take charge of the dead body, made inquiry regarding the cause and manner of death, reduce his findings to writing, deliver the original to the county attorney, retaining one copy for his own use and forward one copy to the criminal investigation division of the State Department of Public Safety.

If necessary, an autopsy may be held and the findings filed with the county medical examiner and in the office of the county

attorney, and pertinent information shall be furnished the appropriate state department or agency.

The law further provides that the reports, records and reports of autopsies shall be received as evidence in any court or other proceedings, and the persons preparing a report or record may be subpoenaed as a witness.

In addition thereto, Section 622.43 of the Code, provides that certified copies of such records, entries or papers shall be evidence in all cases of equal credibility with the original record or papers filed. Section 622.46 states that every officer having the custody of a public record or writing shall furnish any person, upon demand and payment of the legal fees therefor, a certified copy thereof.

It appears to be universally held, that a "public record" is a written memorial made by a public officer authorized by law to perform that function, and intended to serve as evidence of something written, said or done. (See Words and Phrases, Vol. 35, Public Record, pp. 315 et. seq. and pocket part).

In view of the stautory provisions referred to and the general authorities cited, it is quite clear that the reports and records compiled and filed by the county medical examiner are "public records."

As such, they are subject to inspection by anyone having an interest therein. Particularly so, in view of the fact that I find no provision in the law, Chapter 258, Acts 58th G. A. which states that such records shall be maintained as "confidential" records.

The common-law doctrine with reference thereto is stated in 45 Am. Jur. 427, Section 17, in the following language:

> ". . . Every person is entitled to the inspection, either personally or by his agent, of public records, including legislative, executive and judicial records, provided he has an interest therein which is such as would enable him to maintain or defend an action for which the document or record sought can furnish evidence or necessary information. . . .
>
> "In this country, the person asking inspection must have an interest in record or paper of which inspection is sought and the inspection must be for a legitimate purpose, but interest as a citizen and taxpayer is sufficient in some instances. . . ."

Therefore, it is our opinion, that any information that would be embodied in the reports or records of the county medical examiner can be lawfully revealed to an interested party or parties as enumerated in your letter.

As to that portion of your letter with reference to a confidential relationship (privileged communications) we quote from the case of State v. Flory, 198 Iowa, at page 79, which we believe fully answers your question, to-wit:

> "The rule which protects privileged communications has no application to public records. The requirements of the law that a public record be kept could not be complied with if the privilege were extended thereto, and statutes authorizing the introduction of certified copies thereof in evidence would be a nullity. Upon this question, see Bozicevich v. Kenilworth Merc. Co., 58 Utah 458 (17 A. L. R. 346, and note appended thereto): 5 Wigmore on Evidence (2d Ed.), Section 2385-a."

Respectfully submitted,

EVAN HULTMAN
Attorney General

EH:FDB:rm

HEALTH: Local boards - powers and duties--(1) Individual members of local boards of health cannot be held personally liable while engaged in performing a governmental function, provided there is no malice or wrong motive present. (2) A local board of health cannot exercise jurisdiction outside its own territory in carrying out its police powers. (3) A county local board of health is authorized to employ health experts to assist the board in the performance of its duties, regulate and fix reasonable fees and charges therefor, and present the same to the county board of supervisors for preaudit and payment from the general fund. (BIANCO TO HILL, ST. SEN.) 10/27/61) #61-10-11

October 27, 1961

Honorable Eugene N. Hill
State Senator, 29th District
Newton, Iowa

Dear Sir:

I have your favor of September 11, 1961 reading as follows:

> "There are several questions related to the functioning of local boards of health authorized under Chapter 137, Code of Iowa 1958, that need to be resolved.
>
> "First, there is great reluctance on the part of members of local boards of health to carry out their duties as outlined in Chapter 137. This reluctance stems from a fear of incurring personal financial liability for official acts. It is felt that, if board action were challenged in the courts and overruled, the individual members of the board would then become defendants in damage suits, the outcome of which would be assured in favor of the plaintiff by the earlier court action. The determination of what constitutes a health hazard is something experts can argue over; so the apprehension of board members is understandable. However, this concern and resultant inactivity on the part of local boards of health is seriously impairing their usefulness. An official opinion is requested as to the extent of personal liability of board members for official acts of the board.
>
> "Second, a situation has arisen in this area where a municipality is the offender, responsible, that is, for causing the health hazard or nuisance. The local board of health feels that it has no authority to compel another governing body to abate a nuisance, that a remedy must be sought

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through the State Department of Health. An official opinion is requested as to whether or not local boards of health do in fact have authority to deal with municipalities.

"Third, from Chapter 137 it appears that regular expenses incurred by the local board of health, including the salary of a health officer, can be budgeted and paid from the county general fund. Provision is also made for the recovery of some special costs by special tax levies against property. However, it appears that no provision is made for special expenses incurred by the board such as the occasional employment of a physician or sanitary engineer in situations where a full-time health officer is not employed. An official opinion is requested as to legality of such occasional employment of health experts and the method of payment, by what authority and from what fund."

With reference to your first question, it is the duty of the state to guard the public health. (See Duncan v. City of Des Moines, 222 Iowa 216, 268 N.W. 547) Health measures are within police power. (See State v. Strayer, 230 Iowa 1027, 299 N.W. 912; Loftus v. Dept. of Agriculture of Iowa, 211 Iowa 566, 232 N.W. 412, appeal dismissed, 283 U.S. 809.)

Your attention is invited to the case of Beeks v. Dickinson County, 131 Iowa 244, 108 N.W. 311, in which the Court held as follows, as set forth in the headnotes to said case:

"A county is not liable for the negligence of health officers in the enforcement of quarantine regulations.

"Local boards of health in the enforcement of quarantine regulations have no power to fix upon the county a liability for loss or damage suffered by reason of the quarantine, which is not expressly authorized by statute even though directed by the board of supervisors to do so.

"Health officers act in a quasi judicial capacity, and, in the absence of malice, are not personally liable for any injury resulting from the enforcement of a quarantine though mistaken as to the necessity therefor."

The Court in the above case, speaking through Justice Sherwin, said:

> "It is the settled law of this state, as well as the general rule, that municipal corporations are not liable for the negligence of their officers or agents in executing health regulations adopted for the purpose of preventing the spread of contagious diseases. In so far as a municipality undertakes the duty of making and enforcing quarantine regulations and other laws for the preemption of the public health, it is performing governmental functions, and its officers are not agents for whose action or inaction it is liable unless such liability is imposed by its charter, or by the laws of the state under which it exists." (citing cases) (emphasis ours)

Then speaking further with reference to the individual or personal liability of the members of a local board of health, the Court said at page 247:

> "They were therefore acting judicially, and it is the general rule that officers so acting are not liable for injuries which may result from such acts performed in the honest exercise of their judgment, however erroneous or mistaken the action may be, provided there is no malice or wrong motive present." (citing cases) (See also the case of Hibbs v. Independent School District, 218 Iowa 841, affirming the above principle, and citing numerous authorities, and Gau v. City of Lansing, 35 Ia 493.)

Therefore, under the authorities exhibited, individual members of the local board cannot be held personally liable while engaged in performing a governmental function for and on behalf of the municipality, provided there is no malice or wrong motive present.

Addressing ourselves to your second question, we note under the provisions of Chapter 137, there are three types of local boards. In cities and towns they are composed of the mayor, health physician and members of the city or town council. In counties the chairman of the board of supervisors, the county auditor, and county superintendent of schools, having jurisdiction outside the territorial limits of cities and towns. Townships may have a local board composed of township trustees.

Under Chapter 136 these boards can combine and adopt a county health unit plan, composed of eleven members appointed by the county board of supervisors.

The basic provisions of Chapter 137 as to jurisdiction of local boards were construed in the early case of Warner et al. v. Stebbens, et al., 111 Iowa 86. The Court, speaking through Justice Sherwin, at page 87 stated:

> "This statute specifically defines the territorial limits within which a local board of health may act. Within the limits defined, it is by law made the guardian of public health, and it is its duty to stand as a wall between the inhabitants of the territory over which it has jurisdiction and dangerous contagious diseases. Beyond its prescribed boundaries we think it has no power or authority." (emphasis ours)

This same rule was followed in an opinion issued by the attorney general, Reports of Attorney General, 1930, page 213, involving county health units, chapter 138, wherein it was held county health units can only supervise and direct local boards of health, the police powers being retained by the local board.

Therefore, in answer to your second question, it is our opinion that a local board cannot exercise jurisdiction outside its own territory in carrying out its police powers.

The solution to the problem stated in your second question appears to require the intervention of the State Department of Health under the powers granted to the Commissioner of Public Health, assuming that the responsible local board of health fails or refuses to act, under the provisions of Section 135.11(6), which reads:

> "Make inspections of the sanitary conditions in any locality of the state upon written petition of five or more citizens from said locality, and issue directions for the improvement of the same, which shall be executed by the local board." (emphasis ours)

It is the duty of the local board to obey and enforce the rules and lawful orders of the State Department. (Section 137.7, Code 1958)

If the local board fails or refuses to act, then the State Department may exercise its powers under the provisions of Section 137.33. This section of the law was construed by the attorney general in a ruling found in Reports of 1940, at page 298, wherein it was stated:

> "The statutes grant to the local boards of health broad and extensive powers. These, however, are vested solely in the local board unless and until such local board fails or refuses to

> act, after which the State Department of Health becomes, for that particular jurisdiction, vested with all the powers of the local board. It would seem to be the intent of the legislature that the local board of health should first solve the problem of local nuisance. This is apparently for the purpose of allowing local authorities to care for their own public health troubles. Nevertheless the legislature seemed to recognize that for various reasons the local board might either fail or refuse to act and in such a situation the State Department of Health might thereupon proceed with all the powers of the local board of health.
>
> "This being true, it is our opinion that if a local board of health had acted upon a local matter over which they have jurisdiction and providing they acted in accordance with law, the State Department has no duty in connection with the case."

In conclusion on this question we call your attention to OAG 1898, page 295, wherein it was held:

> "It is the county attorney's duty to give advice and counsel to local board of health and to prosecute persons for violating the rules and orders of the board." (emphasis ours)

Referring next to your third question, we find in Section 137.7 the following provision with reference to the duties of the local board, to-wit:

> "Section 137.7 (6) Regulate all fees and charges of persons employed by it in the execution of health laws, its own rules, and those of the state department."

This provision of the law was construed in an opinion issued by the Attorney General, Reports of 1918, at page 496, in the following language:

> "There can be no question after a careful reading of this section, that other persons are to be employed if necessary by local boards to carry into execution any orders or rules which they may make

> to carry out the purposes of the board. If this were not true, then there would be no use to have such a board, for it would be powerless to do the very thing for which it is constituted, namely: protect the health of the people.
>
> "Any other construction of this statute would nullify the same and any matters affecting the general health and the general public welfare. It is necessary that there shall be such construction given to the statute as will effectuate the purpose for which such a board, as a local board of health, is created.
>
> "The cantonment will bring together many thousands of men, and it is matter of common knowledge that it will require the greatest care upon the part of the local authorities to keep the conditions surrounding the camp sanitary.
>
> "The local boards have authority to employ whatever officers or assistants are necessary to properly accomplish the purpose of the local health organization, but the number should be such as will enable the officers to properly carry out the orders and effectuate the purposes of the local board of health as above stated."

If the local board has the power to employ persons, regulate all fees and charges, it follows, therefore, that local boards can bind county for any reasonable expense in carrying out their duties, but claims therefor must be presented by board of supervisors and all warrants issued by county must be made payable to persons performing the services and state the purposes thereof. (see OAG 1948, p. 6) And the county general fund is the only fund from which such claim payments may be allowed. (OAG 1940, p.46)

Furthermore, the liability of a county becomes absolute, if reasonable and allowed by the board of health, as was held in the case of Kenner v. Carroll County, 136 Ia. 423, wherein the Court said on page 425 the following:

> "And under the statute as it then stood the power to fix the fees or charges--those of the physician, for instance--was in the local board of health. The county board had no right to regulate such fees or charges. Its duty was to order the same paid as audited and approved by the local board. Tweedy v. Fremont County, 99 Iowa 721."

See also as bearing on this proposition and in support thereof, Burrow v. County of Woodbury, 200 Ia. 787, 790; Broyles v. Mahaska County, 213 Ia. 345, 351; and Smith v. Cherokee County, 219 Iowa 475, 477.

Therefore, in answer to your third question, local boards of health are authorized to occasionally employ health experts to assist in performance of the duties of the local board, as prescribed by law, regulate and fix reasonable fees and charges therefor, and present the same to the county board of supervisors for preaudit and payment from the general fund.

Yours truly,

Frank D. Blanco
Assistant Attorney General

FDB:la

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

October 27, 1961

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

STAFF

TAXATION: Mobile Homes: Nonresident Servicemen: Nonresidents stationed in Iowa are not subjected to property taxation for Mobile Homes. Section 135D.9, Code of Iowa (1958), as amended by 59th General Assembly.

Dear Mr. Samore:

Your opinion request dated September 12, 1961, has come to my attention. It stated as follows:

> "Your opinion is respectfully requested concerning the application of the tax leveled under the provisions of the Mobile Home Trailer Law. These provisions require the payment of taxes on Mobile Homes, commencing with $3.00 per month and graduated thereafter on a schedule dependent on the length of the trailer. Our question is, does this law apply to non-resident U.S. military personnel who own such trailers, use them as homes, and which trailers are located within Iowa, but not on a military reservation."

Code Section 135D.9 as amended by 59th General Assembly.

> "135D.9 Monthly fees. In addition to the primary and annual license fee provided for in section 135D.5, each licensee is hereby required to pay for each occupied mobile home occupying space within such licensed mobile home park a monthly fee as follows: For trailers up to thirty feet in length, three dollars per month or major fraction thereof; for trailers from thirty to thirty-five feet in length, four dollars per month or major fraction thereof; and for all trailers over thirty-five feet in length, five dollars per month or major fraction thereof which monthly fee shall be paid by the licensee on or before the tenth day of the month, following the month for which such additional fee is due,

in the manner herein prescribed. In computing the length herein above described, the total length therein set out shall expressly include the trailer hitch or such other permanent extensions as may be attached to said trailer used or designed for use as a trailer hitch. Provided, however, that the licensee of a mobile home park shall not be required to collect or pay a monthly fee, as herein provided, for any space occupied by a mobile home accompanied by an automobile, if such mobile home and automobile bear license plates issued by any other state other than the state of Iowa, for an accumulated period not to exceed ninety days in any twelve-month period; provided, further, that all occupants of the said mobile home with accompanying automobile are tourists or vacationists. When one or more persons occupying a mobile home bearing a foreign license are employed within the state of Iowa, there shall be no exemption for monthly fees. In the event that an occupied mobile home is not harbored in a mobile home park the owner of said mobile home shall pay the fee provided in this section. Such fee shall be paid semi-annually. The fee due for April through September shall be paid by the tenth day of April. The fee due for October through March shall be paid by the tenth day of October. On the tenth day of May and on the tenth day of November said semi-annual fees become delinquent and on the tenth day of each month thereafter that the fee remains unpaid a ten percent penalty shall be added and the county treasurer shall not renew the motor vehicle registration until such delinquent fees and penalties, if any, have been paid. If any mobile home is moved during the six-month period for which a fee has been paid, the county treasurer shall, upon request of the owner, refund his pro rata share of the fee paid. If said fee is not paid, the amount of the unpaid fee shall become a tax and the tax shall be assessed against the land from which the mobile home was removed. Each mobile home park licensee is hereby required to keep an accurate and complete record of the number of units of mobile homes harbored in his park and to report such information on or before the tenth day of each month to the county assessor and the records of every such licensee shall be open to inspection by the county assessor."

It was established in an earlier Attorney General's opinion written in 1960 A.G.O. that the monthly fee, as provided in 135D.9, must be classified as a tax as opposed to a license. Thus, we may conclude that the monthly fee would be collected in lieu of property tax.

With the determination that the monthly fee was a tax, the question arose, as in your case, whether it applied to nonresident servicemen. The earlier

opinion refers to the Soldiers' & Sailors' Relief Act of 1940, 50 U.S.C.A. App. § 574, which is set forth below:

> " (l) For the purposes of taxation in respect of any person, or of his personal property, income, or gross income, by any State, Territory, possession, or political subdivision of any of the foregoing, or by the District of Columbia, such person shall not be deemed to have lost a residence or domicile in any State, Territory, possession, or political subdivision of any of the foregoing, or in the District of Columbia, solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become resident in or a resident of, any other State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, while, and solely by reason of being, so absent. For the purposes of taxation in respect of the personal property, income, or gross income of any such person by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, of which such person is not a resident or in which he is not domiciled, compensation for military or naval service shall not be deemed income for services performed within, or from sources within, such State, Territory, possession, political subdivision, or District, and personal property shall not be deemed to be located or present in or to have a situs for taxation in such State, Territory, possession, or political subdivision, or district; * * *."

In the case of Dameron v. Brodhead, 345 U.S. 322, 97 L. ed. 1041, 73 S.Ct. 721, 32 A.L.R.2d 612 (1953), the constitutionality of § 574 was upheld. That case involved an Air Force officer, a resident of Louisiana, who was assessed on personal property that he kept in his apartment in Denver, Colorado. The Court stated:

> "In fact, though the evils of potential multiple taxation may have given rise to this provision, Congress appears to have chosen the broader technique of the statute carefully, freeing servicemen from both income and property taxes imposed by any state by virtue of their presence there as a result of military orders. It saved the sole right of taxation to the state of original residence whether or not that state exercised the right. Congress, manifestly, thought that compulsory presence in a state should not alter the benefits and burdens of our system of dual federalism during service with the armed forces."

In conclusion, since the monthly fee is a property tax, it cannot be collected from a nonresident serviceman on active duty stationed in Iowa.

Very truly yours,

EVAN HULTMAN
Attorney General of Iowa

EH/GWM/MSB/fs

CONSERVATION: Use of sea planes -- Conservation Commission has power to regulate the use of sea planes upon waters under the jurisdiction of the Commission. Iowa Code sections 106.15, 111.35 (1958).
(CREGER TO CONS. COMM., 11/1/61) #61-11-4

November 1, 1961

State Conservation Commission
East 7th and Court
L O C A L

Attention Mr. Raymond R. Mitchell
Superintendent of Parks

Gentlemen:

We have your letter of July 31, 1961, in which you request the opinion of this office as to whether or not the State Conservation Commission has power to regulate the use of sea planes upon state-owned artificial lakes in state parks.

Your attention is directed to Iowa Code section 106.15 (1958), which provides in part as follows:

> "It shall be unlawful for any aircraft to make use of the inland lakes of the state except in the transportation of persons or property between points separated by a distance of thirty miles or more. Nothing herein shall prohibit the use of such waters by any aircraft in danger or distress or the use of such waters by the operators of private aircraft, not operated for hire. The foregoing provisions notwithstanding, the state conservation commission may, on the recommendation of the aeronautics commission, designate certain areas on inland lakes of the state where seaplane flight instruction may be conducted under such conditions as may be adopted by the conservation commission and approved by the aeronautics commission."

This section would seem to authorize the use of inland lakes of the state by private aircraft. Also, in Witke v. State Conservation Commission, 244 Iowa 261, 56 N. W. 2d 582 (1953), the Court recognizes the rule that all persons have a right to use the navigable waters of the state so long as they do not interfere

#61-11-4

with the use thereof by other citizens; subject, of course, to regulations by the state under its police powers. Thus, while the use of waters within the state is not prohibited by statute, this does not mean that the State Conservation Commission may not regulate the use of aircraft upon state-owned artificial lakes in state park areas.

Iowa Code section 111.35 (1958) provides as follows:

> "Prohibited destructive acts. It shall be unlawful for any person to use, enjoy the privileges of, destroy, injure or deface plant life, trees, buildings, or other natural or material property, or to construct or operate for private or commercial purposes any structure, or to remove any plant life, trees, buildings, sand, gravel, ice, earth, stone, wood or other natural material, or to operate vehicles, within the boundaries of any state park, preserve, or stream or any other lands and/or waters under the jurisdiction of the conservation commission for any purpose whatsoever, except upon the terms, conditions, limitations and restrictions as set forth by the conservation commission."

In our opinion, the activities in regard to which our opinion is requested constitute a use of natural property and therefore such use is under the jurisdiction of the State Conservation Commission and may be engaged in only upon the terms, conditions, limitations and restrictions set forth by the Conservation Commission. The Commission may therefore regulate the use of aircraft upon state-owned lakes under the jurisdiction of the State Conservation Commission, so that such use will not interfere with or endanger the use of such facilities by other individuals.

Very truly yours,

JOHN M. CREGER
Assistant Attorney General

JMC:bl

CONSERVATION: Operation of airport in state park -- State Conservation Commission cannot enter into a management agreement authorizing a municipality to operate an airport on a portion of a state park. Iowa Code section 107.24 (1958); Ch. 99, Acts 59th G. A.
(CREGER TO CONS. COMM., 11/1/61) #61-11-3

November 1, 1961

State Conservation Commission
East 7th and Court
L O C A L

Attention Mr. Raymond R. Mitchell
Superintendent of Parks

Gentlemen:

We have your letter of October 12, 1961, in which you request the opinion of this office in regard to the following:

> "We would appreciate it very much if your office would render us an opinion as to whether the State Conservation Commission can enter into a management agreement with the Town of Paullina, Iowa, whereby the town would develop, manage, and maintain an airstrip on a portion of Mill Creek State Park property."

An examination of the express powers of the State Conservation Commission contained in Iowa Code section 107.24 (1958) fails to disclose any authorization for entering into a management agreement with political subdivisions for the operation of a state-owned real property for purposes other than conservation purposes, nor in our opinion can such authority fairly be implied.

While Chapter 99, Acts of the 59th General Assembly, provides for conveyance of such real estate by the Executive Council upon recommendation of the State Conservation Commission to any city, town or county for park purposes, this Chapter does not, in our opinion, authorize a management agreement such as that referred to in your letter. Your inquiry is therefore answered in the negative.

Very truly yours,

JOHN M. CREGER
Assistant Attorney General

JMC:bl

#61.11.3

[redacted], Section 410.19, regulations requiring off-duty firemen to be available for call to duty are reasonable and not in conflict with §410.19. Firemen are not entitled to overtime pay while on call under said regulations.
(BUMP TO PRINE, ST. REP.; 11/1/61) #61-11-1

November 1, 1961

Honorable Dan Prine
State Representative
Oskaloosa, Iowa

Dear Mr. Prine:

This is in response to your letter of September 7, 1961 in which you set forth the following:

> "Are the following rules under Chapter 410.19, as amended by the 1957 session, legal regarding firemen on off-duty.
>
> 1. Certain members designated on off-duty shift are required to be available on designated days; any member violating this rule is subject to ten day suspension without pay.
>
> 2. Members are required to get permission to leave town on off-duty days and in some instances members have been refused permission to leave the city.
>
> These are both old rules and as such, if they are to be used, then are off-duty firemen who are required to stay in town and near a telephone entitled to overtime payment for these periods?"

As you are aware Section 410.19, Iowa Code 1958, provides as follows:

> "Hours on duty limited. Firemen employed in the fire department of cities of ten thousand population or more, or under civil service, shall not be required to remain on duty for periods of time which will aggregate in each month more than an average of sixty-eight hours per week and no single period of time,

#61-11-1

> "or shift, shall exceed twenty-four hours in length, provided that in cases of serious emergencies such firemen may be required to remain on duty until such emergency has passed, when so ordered by the chief of the department or person acting in his place. Firemen called back to duty under this provision shall be duly compensated in accordance with their regular hourly wage."

It is the opinion of this Department that regulations pertaining to "off-duty" firemen requiring them to be available for call as suggested in your letter are reasonable, and are not violative of the provisions of Section 410.19, supra. You will note that said section uses the language "on duty" and it is apparent in the statement of the problem that these firemen are off duty even though subject to restrictions. U. S. v. Chicago M & PSR Co. 195 F 783. In a similar situation where outside employment of firemen was in question the Massachusetts Court in Bell v. Dist. Ct. of Holyoke 51 NE2nd 328 (Mass. 1943) stated:

> "the nature of the duties assumed by a member of a fire department is such that it cannot be anticipated when he will be called upon to assist in the extinguishment of fires. He is actually on duty at certain hours, but he is potentially on duty whenever the emergency arises that calls for his services."

Consequently, it is our opinion that firemen are not on duty within the meaning of Section 410.19, supra, and are not entitled to overtime pay even though certain of their off-duty hours are subject to reasonable regulations.

Sincerely,

W. N. BUMP
Solicitor General

gh

COUNTIES AND COUNTY OFFICERS: Liens for institutional care -- County cannot garnish, attach or levy upon funds received by persons as benefits from social security or disability insurance in order to obtain rebate for moneys expended for institutional care of such persons, but the same rule does not apply to Railroad Retirement benefits. Iowa Code sec. 627.8, 511.37, 509.12 (1958); 45 U.S.C.A. § 228(1) as amended 12 Aug. 1955, 69 Stat. 716.

INSURANCE: Railway Retirement benefits are not exempt from execution as proceeds received from policies of group insurance. Iowa Code sec. 509.12 (1958).

November 1, 1961

(CREGER TO MADDOCKS, WRIGHT CO. ATTY., 11/1/61) #61-11-2

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

Dear Mr. Maddocks:

We have your letter of September 15, 1961, in which you request the opinion of this office in regard to the following:

> "May the proceeds from Railroad Retirement Benefits, Disability Clauses in Life Insurance Policies or Social Security which have been deposited in a bank and have accumulated to a substantial figure be garnished, attached or levied on by the county in order to obtain remuneration for money advanced for persons that have been committed to a mental health institute but are now living in a nursing home.
>
> "May the proceeds from Social Security, Railroad Retirement or Disability Insurance be garnished, levied or attached as they are received by the persons from whom judgment is obtained by the county for funds advanced for a person's maintenance while committed to a mental health institute but who is now living in a nursing home."

In regard to Social Security, your attention is directed to section 627.8 (1958) Code of Iowa, which provides as follows:

> "Pension money. All money received by any person, a resident of the state, as a pension from the United States government, whether the same shall be in the actual possession of such pensioner, or deposited, loaned, or invested by him, shall be exempt from execution, whether such pensioner shall be the head of a family or not."

Therefore, as to Social Security payments actually received by an individual, your inquiries are answered in the negative.

#61-11-2

As to proceeds of disability insurance, Iowa Code section 511.37 (1958) provides in part as follows:

> "Any benefit or indemnity paid under an accident, health or disability policy shall be exempt to the assured, or in case of his death to the husband or wife and children of the assured, from his debts."

Thus, as to proceeds of disability insurance, your inquiries are also answered in the negative.

The nature of railroad retirement benefits, however, raises a number of questions. 45 U.S.C.A. § 228 l., as amended 12 Aug. 1955, 69 Stat. 716, provides as follows:

> "Notwithstanding any other law of the United States, or of any state, territory or the District of Columbia, no annuity or pension payments shall be assignable or be subject to any tax or to garnishment, attachment or to any other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated."

There is authority for the proposition that this section was intended solely to relieve the Federal authorities, as administrators of the Railroad Retirement Fund, from the annoyance of attachments of pensions or annuities in their hands payable to railroad employees after retirement. See Commonwealth v. Berfield, 160 Pa. Super, 438, 51 Atl. 2d 523. There is also authority for the proposition that this section does not prevent the attachment of railroad retirement benefits in the hands of the beneficiary by a wife entitled to alimony payments. See Commonwealth v. Berfield, supra. Thus, it appears that this section is applicable only to railroad retirement funds in the hands of Federal administrators, and does not apply to these funds once they are released into the hands of the beneficiaries.

The question remaining, then, is whether anything in Iowa law exempts such funds once paid into the hands of beneficiaries from execution and other process. Iowa Code section 509.12 (1958) provides as follows:

> "Proceeds exempt from execution. No policy of group insurance, nor the proceeds thereof, when payable to any person insured thereunder, or any beneficiary, shall be liable to attachment, garnishment, or other process, or to be seized, taken, appropriated, or applied by any legal or equitable process or operation of law, to pay any debt or liability of such insured

person, or beneficiary, or any other person who may have a right thereunder, either before or after payment; nor shall the proceeds thereof, when not made payable to a named beneficiary, constitute a part of the estate of the person insured for the payment of his debts."

In our opinion, railroad retirement benefits are not proceeds of group insurance within the meaning of section 509.12, and these funds are therefore liable to attachment, garnishment, or other process. Under the Act of Congress creating the Railroad Retirement System, funds supplied by railroads and their employees are paid into the United States Treasury. Through an administrative agency of the United States Government, a railroad employee on retirement is entitled to receive from the Treasury an annuity. In this system, there is no insurer, in the ordinary sense of the word, but merely contributors, a fund, and a trustee of that fund, which administers it and pays benefits therefrom to persons who have contributed thereto.

Therefore, your questions are answered in the affirmative as to railroad retirement benefits.

Very truly yours,

JOHN M. CREGER
Assistant Attorney General

JMC:bl

STATE OFFICERS AND DEPARTMENTS: Legislator may serve as trustee for municipal auditorium. There is neither statutory nor constitutional provision barring a member of the Legislature from occupying at the same time the position of member of the Board of Trustees of a municipal auditorium.
(STRAUSS TO VAN EATON, ST. SEN., 11/6/61) #61-11-5

November 6, 1961

Honorable Charles S. VanEaton
State Senator
418 Insurance Exchange Building
Sioux City, Iowa

Dear Senator:

Your letter of the 24th, inst., to the Attorney General has been handed to me for answer. You submitted to him the following:

> "I have a question.
>
> "I have been Chairman of the Board of Directors of the Sioux City Municipal Auditorium for the past ten years. My term ran out last July 1st. The city attorney here has suggested to the City Council that I not be reappointed because I am a Senator. Board members receive no salary.
>
> "Is there any thing illegal about my being reappointed?"

In reply thereto, I would advise you that I find neither ineligibility nor disqualification to your being reappointed to the foregoing designated office, authorized by Chapter 374A, Code of 1958. Such ineligibility or disqualification, if any, arises out of Article III, Sections 21 and 22, of the Constitution. Under both of which a member of the Legislature is barred

#61-11-5

of occupancy of an office created during the term of service of the member or the emoluments of which have been increased during such term, and disqualification is based upon the already occupancy by the member of the Legislature of a lucrative office under the State of Iowa or the United States or any other power.

The office of member of the Auditorium Trustees would be neither lucrative nor for profit, because under the provisions of Section 374A.5, Code of 1958,

> "The members of the board of auditorium trustees shall serve without compensation."

By reason of the foregoing I find no statutory nor constitutional reason that would bar your reappointment.

The Attorney General joins me in the assurance of our respect and regard.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:la

ELECTIONS: Return of ballots--Failure of election judges in an election for the purpose of electing members to the county board of education to return the ballots cast at the election within the statutory forty hours after the closing of the polls is deemed an irregularity, and such ballots should be included in the official canvass.
(STRAUSS TO MAULE, ST. REP., 11/8/61) #61-11-8

November 8, 1961

Honorable Elroy Maule
Onawa
Iowa

My Dear Mr. Maule:

Reference herein made to your recent oral request for an opinion regarding the failure of the judge of election at an election held for the purpose of electing members of the county board of education to return the ballots cast at the election within forty hours after the closing of the polls according to the Code.

The statute in question is Section 273.7, Code of 1958, as amended by Chapter 155, Section 1, of the Acts of the 59th General Assembly, which provides the following:

> "273.7 Canvass. The ballots cast at any election for membership on the board shall be counted by the judges of election and return thereof shall be made by the judges on forms provided therefor to the secretary of the school district within forty hours after the closing of the polls. Within five days following the election, the secretary of each school district shall make return of the votes cast in said district to the county board of education on forms provided therefor, which board shall meet at ten o'clock a.m.

> on the last Monday in September, and canvass the vote and issue certificates of election."

Assuming that these ballots in question were returned by the Judges of Election, but not within the specified time of forty hours after the closing of the polls, and no other facts appearing relative to the delay in such delivery, I am of the opinion that this failure to deliver the ballots within the time specified is an irregularity, and such delay not shown in any way to have effected the results or to have prejudiced anyone, such ballots should be included in the canvass. The rule is stated in the case of State of Iowa ex rel. Frank N. Dusey et al. v. Creston Mutual Telephone Company, 195 Iowa 1366, 191 N.W. 965, as follows:

> "Every intendment of the legislature and every safeguard provided thereby for the securing of a fair election and the preservation of the ballots should be observed by election officers, and must be upheld by the court; but the clearly expressed will of the voters should not be thwarted or set aside by the courts because of irregularities and even illegalities which are not shown to have in any way affected the result or to have prejudiced anyone."

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:la

HEALTH: Cosmetology shop in trailer or mobile home -- Within the provisions of Section 157.6, if a trailer or mobile home, comes within the common definition of a "home" or dwelling place of a person, such a home could be the location for a cosmetology shop, provided it met all other requirements of the law and the rules regulating such shops.
(BIANCO TO ZIMMERER, COM'R. HEALTH, 11/8/61) #61-11-6

November 8, 1961

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

Dear Dr. Zimmerer:

Reference is made to your favor of October 17, 1961 in which you state:

> "Under Rules and Regulations governing sanitary conditions of cosmetology shops and schools in Iowa, Iowa Departmental Rules, 1950, Section 3, sub-section 'a', reads as follows:
>
> > 'Proper Quarters. Every cosmetology establishment shall be well lighted, well ventilated, and kept in a clean, orderly and sanitary condition at all times. All cosmetology work shall be practiced only in quarters especially equipped for such service.
> >
> > 'a. RESIDENTIAL SHOPS. No cosmetology establishment shall be maintained in a home unless a separate room is provided for that purpose. Such shops shall have an outside, separate entrance leading directly to the shop and any inside doors of said shop leading to living quarters must be closed at all times during the business day.'
>
> "Under the above Rule, is a trailer or mobile home considered proper quarters for operating a cosmetology shop?"

In reply thereto we beg to advise:

Section 157.6, Code of Iowa, 1958 provides in pertinent part as follows:

> ". . . Cosmetology may be practiced <u>in the home</u> providing a room, other than the living rooms, be fitted up for that purpose. . ."

By reason of the rule quoted in your letter and the provisions of the statute above, your question can be rephrased to read: Is a trailer or mobile home, a "home" or dwelling within the terms of the statute.

#61-11-6

Webster's New International Dictionary (2nd Ed.) defines "home" as - "One's own dwelling place; the house in which one lives; esp., the house in which one lives with his family; the habitual abode of one's family; also a dwelling house." (See Words and Phrases Vol. 19 for other definitions.)

In a very recent case "home" was defined:

> "Home" means a dwelling house or place, a household, the home in which one lives, especially the home in which one lives with his family, habitual abode of one's family, place of constant or permanent residence, the place where one permanently resides and to which he intends to return when away from it. In re: Scheyer's Estate, 59 N. W. 2d 33,36, 336 Mich. 645, 38 A. L. R. 2d 835.

The word "home" is not defined in the statute, and therefore it - "shall be construed according to the context and the approved usage of the language; . . " (Section 4.1 (2) Code of Iowa).

Section 157.6 states that - "Cosmetology may be practiced in the home providing a room, other than the living rooms, be fitted up for that purpose."

If a trailer or mobile home is the dwelling place of the person who contemplates operating a cosmetology shop, within the definitions set out above, it is our opinion that such a "home" could be the location for a cosmetology shop, provided it met all other requirements of the law and the rules regulating such shops.

Yours truly,

FRANK D. DIANCO
Assistant Attorney General

FDD:rm

STATE OFFICERS AND DEPARTMENTS: State Fair Board - voting members--The Governor, Secretary of Agriculture, President of State University of Iowa, Secretary and Treasurer of the Fair Board constitute a portion of the membership in the State Fair Board and are entitled vote, the same as other members defined in 1958 Code, Section 173.1(2).
(YOST TO CORY, PRES. FAIR BD., 11/8/61) #61-11-7

November 8, 1961

Mr. J. E. Cory, Jr., President
State Fair Board
L O C A L

Dear Mr. Cory:

This will acknowledge receipt of yours of September 28, 1961, in which you submitted the following:

> "Under Chapter 173 of the Code of Iowa of 1958, and amendments thereto relative to the Iowa State Fair and Exposition, will you please advise if under said chapter the governor of the state, the state secretary of agriculture, and the president of Iowa State University, together with the secretary and treasurer of said board, are entitled to vote at meetings of the said board and at the annual convention."

In reply thereto, I would advise as follows:

Section 173.1, 1958 Code, as amended by Section 12, Chapter 74, 58th General Assembly, provides:

> "The Iowa state fair board shall consist of:
>
> "1. The governor of the State, the state secretary of agriculture, and the president of the university of science and technology.
>
> "2. A president and vice-president, and one director from each congressional district to be elected at a convention as hereinafter provided.

#61-11-7

"3. A secretary and treasurer to be elected by the State fair board."

Section 173.2, Code of 1958, provides in part,

"The convention shall be composed of:

"1. The members of the State Fair Board as then organized",

and Section 173.4, Code of 1958, provides,

"On all questions arising for determination by the convention, each member present shall be entitled to but one vote, and no proxies shall be recognized by the convention."

The language employed by the Legislature in Section 173.1 plainly provides that those individuals defined in subsections (1), (2) and (3) shall constitute the fair board.

Section 173.2 provides that the composition of the convention membership will include,

"the members of the state fair board as then organized" (italics supplies)

and authorization to vote at the annual convention is clearly granted to the members of the convention by Section 173.4.

It is a well recognized rule of construction that the legislative intention is to be deduced from the language used and the language is to be construed according to its plain and ordinary meaning. Meredith Pub. Co. v. Iowa Emp. Sec. Comm., 232 Iowa 666. We must necessarily conclude that the only logical, as well as plain, meaning that could attach is that the individuals defined in subsections (1), (2) and (3) of Section 173.1 constitute the membership of the fair board and are therefore entitled to vote at the convention. We find no statutory language in Chapter 173, or amendments thereto, which would permit us to draw a distinction concerning voting powers between the members of the fair board as defined in subsection (2), Section 173.1 and those members as defined in subsections (1) and (3) of Section 173.1. To hold that the members as defined in subsections (1) and (3) could not vote as a member of the fair board in its meetings would not only be contrary to

to the plain and ordinary meaning of the language adopted by the Legislature, but would require us to hold that those individuals defined in subsection (2) of Section 173.1 are also precluded from voting in their own meetings.

In conclusion, it is the opinion of this department that the individuals defined in subsections (1), (2) and (3) of Section 173.1 are entitled to vote in the annual convention and state fair board meetings.

Very truly yours,

WILLIAM J. VOST
Assistant Attorney General

WJV:la

WELFARE: ASSIGNMENT OF LIENS: SECTION 249.20

The State Board of Social Welfare does not have authority to assign its statutory lien against real estate of an old age assistance recipient.
(REHMANN TO PUTNEY, CHMN. SOC. WELFARE, 11/9/61) #61-11-9

November 9, 1961.

Mr. Lawrence Putney, Chairman
State Board of Social Welfare
State Office Building
Des Moines, Iowa

Dear Mr. Putney:

This will acknowledge receipt of your letter dated August 18, 1961, wherein you state:

> "The State Board * * * hereby requests from the office of the Attorney General an opinion as to whether or not the State Board of Social Welfare, under the provisions of Chapter 249, with particular regard to Section 249.20, has authority to assign the old age assistance lien which is established under Section 249.20."

In reply thereto, we advise as follows:

Section 249.20 provides:

> "In any event, the assistance furnished under this chapter shall be and constitute a lien on any real estate owned either by the husband or wife for assistance and funeral benefit furnished to either of such persons * * *.
>
> "The State Board shall release liens created or existing under this chapter when the amount thereof is fully paid, or when an estate, of which real estate affected by this chapter is a part, has been probated and the proceeds allowable through such probate have been applied on such liens. The board may also, in its discretion, at any time, order the release of any lien in full, or the release of any specific parcel of land

> from the lien, upon such compromise, settlement, substtution of other security, or other consideration as the board shall determine to be fair and adequate under the peculiar circumstances affecting the property subject to the lien on its ownership. * * "

It is stated in 42 Am. Jur., PUBLIC ADMINISTRATIVE LAW, Section 26, pages 316 and 317:

> "Administrative boards and commissioners and officers have no common law powers. Their powers are limited by the statute creating them to those conferred expressly or by necessary or fair implication. General language describing the powers and functions of an administrative body may be construed to extend no further than the specific duties and powers conferred in the same statute."

In 43 Am. Jur., PUBLIC OFFICERS, Section 249, pages 68 and 69, it states:

> "In general, the powers and duties of officers are prescribed by the constitution or by statute, or both, and they are measured by the terms and necessary implications of the grant. * * * If broader powers are desirable, they must be conferred by proper authority."

The Supreme Court of Iowa has quoted this statement with approval. HOWELL SCHOOL BOARD DISTRICT NO. 9 vs. HUBBARTT, 246 Iowa 1265, 70 N.W. 2d 531.

Section 249.20 establishes the lien as security for any amount furnished as old age assistance. This section also provides for the release of that lien. However, an assignment of that lien is not mentioned either in Section 249.20 or in Chapter 249. Therefore, it is quite clear that the power to assign the old age assistance lien is not granted by the express terms of the statute.

Furthermore, it does not appear that the power to assign the old age assistance lien should be implied. Such a power is not a necessary or fair implication from the grant of authority to administer the old age assistance program.

Therefore, it is the conclusion of this office that the State Board of Social Welfare has no authority to assign the old age assistance lien created under the provisions of Section 249.20.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR/LMF/sp

TAXATION: Mobile Homes -- Homestead and Military Service Tax Credit -- A mobile home on a permanent structure, if determined as such by the local county assessor, shall be treated as real estate and shall qualify for the Homestead and Military Service Tax Credit if the specific statutory requirements are satisfied. Sections 135D.1(1), 135D.21, 425.2, 425.11(1)(3), 427.3, Code of Iowa 1958; 321.1, 425.11(2), as amended by the 58th General Assembly; 441.17(2), 441.18, 441.21, as presented by Chapter 291, Acts of the 58th General Assembly; 135D.9, 321.123, 321.130, as amended by the 59th General Assembly.
(STAFF TO SCHILL, ASST. WEBSTER CO. ATTY., 11/9/61)
November 9, 1961

S T A F F

H. Andrew Schill
Assistant County Attorney
Webster County
220-222 Snell Building
Fort Dodge, Iowa

Dear Mr. Schill:

This will acknowledge your recent request in which you stated:

"House File No. 402 does not define 'Mobil Home' as pertaining to property taxation. We would appreciate, therefore, your opinion in regard to the following queries.

"1. If a 'Mobil Home' is set up as a permanent home on the owners property and installed on a permanent foundation with possible additions such as porches, additional rooms or a garage on the property does HF 402 still apply or is it subject only to a real estate assessment along with the land it is located on?

"2. If the 'Mobil Home' is assessed as real estate on the owners property does the assessment qualify for homestead credit and veteran's exemptions."

Sections 441.17(2), 441.18 and 441.21, as presented by Chapter 291 of the Acts of the 58th General Assembly:

"441.17 Duties of assessor. The assessor shall:

" * * *.

"2. Cause to be assessed, in accordance with section 441.21 of this Act, all the property, personal and real, in his county or city as the case may be, except such as is exempt from taxation, or the assessment of which is otherwise provided for by law."

"441.18 Listing and valuation.

"Each assessor shall, with the assistance of each person assessed, or who may be required by law to list property belonging to another, enter upon the assessment rolls the several items of property required to be entered for assessment.

He shall personally affix values to all property assessed by him. Acts 1959 (58 G.A.) ch. 291, § 18."

"441.21 Actual, assessed, and taxable value.

"All property subject to taxation shall be valued at its actual value which shall be entered opposite each item, and shall be assessed at sixty (60) percent of such actual value. Such assessed value shall be taken and considered as the taxable value of such property upon which the levy shall be made. The actual value in such cases shall be one and two-thirds (1 2/3) times the assessed value as shown by the assessment rolls and may be so determined and ascertained.

"In arriving at said actual value the assessor shall take into consideration its productive and earning capacity, if any, past, present, and prospective, its market value, if any, and all other matters that affect the actual value of the property; and the burden of proof shall be upon any complainant attacking such valuation as excessive, inadequate or inequitable. Acts 1959 (58 G. A.) ch. 291 § 21."

From the statute, it is the duty of the local assessor to determine what property is to be taxed and the specific nature of such property and its evaluation. Therefore, it must be concluded that the local assessor must decide and distinguish realty from personalty. There are many criteria which may be established as basing points to determine whether or not the structure has added the necessary degree of permanency.

It must be remembered that in dealing with mobile homes in the present situation, we are only considering the situation where the mobile home owner is also the land owner. We do not intend to include the mobile home which is located in a mobile home park. This is a distinct and separate area which must be dealt with on a different basis. We are only considering mobile homes and the structure upon which they sit. Generally, it must be stated that a mobile home located in a mobile home park is personalty to its owner and subject to the monthly fee as set out in the statute.

In a recent case, Jones vs. Beiber, 251 Iowa 969, 103 N.W. 2d 364, the court discussed the establishment of a permanent foundation by the removal of the wheels and the structure of cement blocks as a foundation for the mobile home. The court said, "It may be conceded that as this trailer now stands itmay be classed as a building and probably could be so classed even though the wheels had not been removed and the cement blocks placed thereunder." In that situation, electricity had been run into the trailer, and there was also water and a septic tank used by the inhabitants. That case, dealing with restrictive covenants, held that the trailer was in violation of the covenant because of its size and that it still was a trailer in that "it still retains its basic characteristic of 'being designed to be hauled'." Therefore, the Supreme Court has not defined a "house trailer".

The distinction between a trailer and a building is a matter of factual determination. The local assessor is the person with the responsibility to establish the individual facts of each situation and decide how each separate piece of property should be treated.

135D.1(1), Code of Iowa, 1958.

"135D.1 Definitions. The following definitions shall apply to this chapter:

"1. 'Mobile home' shall mean any vehicle used or so constructed as to permit its being used as a conveyance upon the public streets or highways and duly licenseable as such, and shall include self-propelled or nonself-propelled vehicles, so designed, constructed, reconstructed or added to by means of an enclosed addition or room in such manner as will permit the occupancy thereof as a dwelling or sleeping place for one or more persons, having no permanent foundation and supported by wheels, jacks or similar supports."

135D.9, Code of Iowa 1958, as amended by the 59th General Assembly.

"135D.9 Monthly fees. In addition to the primary and annual license fee provided for in section 135D.5, each licensee is hereby required to pay for each occupied mobile home occupying space within such licensed mobile home park a monthly fee as follows: For trailers up to thirty feet in length, three dollars per month or major fraction thereof; for trailers from thirty to thirty-five feet in length, four dollars per month or major fraction thereof; and for all trailers over thirty-five feet in length, five dollars per month or major fraction thereof which monthly fee shall be paid by the licensee on or before the tenth day of the month, following the month for which such additional fee is due, in the manner herein prescribed. In computing the length herein above described, the total length therein set out shall expressly include the trailer hitch or such other permanent extensions as may be attached to said trailer used or designed for use as a trailer hitch. Provided, however, that the licensee of a mobile home park shall not be required to collect or pay a monthly fee, as herein provided, for any space occupied by a mobile home accompanied by an automobile, if such mobile home and automobile bear license plates issued by any other state other than the state of Iowa, for an accumulated period not to exceed ninety days in any twelve-month period; provided, further, that all occupants of the said mobile home with accompanying automobile are tourists or vacationists. When one or more persons occupying a mobile home bearing a foreign license are employed within the state of Iowa, there shall be no exemption for monthly fees. In the event that an occupied mobile home is not harbored in a mobile home park the owner of said mobile home shall pay the fee provided in this section. Such fee shall be paid semi-annually. The fee due for April through September shall

be paid by the tenth day of April. The fee due for October through March shall be paid by the tenth day of October. On the tenth day of May and on the tenth day of November said semiannual fees become delinquent and on the tenth day of each month thereafter that the fee remains unpaid a ten percent penalty shall be added and the county treasurer shall not renew the motor vehicle registration until such delinquent fees and penalties, if any, have been paid. If any mobile home is moved during the six-month period for which a fee has been paid, the county treasurer shall, upon request of the owner, refund his pro rata share of the fee paid. If said fee is not paid, the amount of the unpaid fee shall become a tax and the tax shall be assessed against the land from which the mobile home was removed. Each mobile home park licensee is hereby required to keep an accurate and complete record of the number of units of mobile homes harbored in his park and to report such information on or before the tenth day of each month to the county assessor and the records of every such licensee shall be open to inspection by the county assessor."

135D.21, Code of Iowa, 1958.

"135D.21 Fee in lieu of property tax. All mobile homes for which a monthly fee is collected under the provisions of this chapter shall not be assessed for property tax but this exemption shall not apply to the property contained in any mobile home."

It must, therefore, be concluded that if the definition of a mobile home is satisfied then the monthly fee is collectible. "Dwelling place" has been defined in Restatement, Conflict of Laws, Section 13b, thusly:

"b. Meaning of 'dwelling place'. The word 'dwelling-place' is used as the most colorless word that can be employed; a word which has no legal connotation, and is not confined to any physical sort of living quarters. The dwelling-place may be fixed in a single room or apartment, or in a house or other building; or it may be no more definitely fixed than in a city or county or state. Thus, if a man's dwelling-place has been in a house, but the house has been burned, he may still have a dwelling-place in the city in which the house stood."

321.1, Code of Iowa, 1958, as amended by the 58th General Assembly:

"SECTION 1. Section three hundred twenty-one point one (321.1), Code 1958, is hereby amended by adding thereto the following subsection:

"'House trailer and mobile home' means a trailer or semi-trailer which is designed, constructed and equipped as a dwelling place, living abode or sleeping place, either permanently or temporarily, and is equipped for use as a

conveyance on streets and highways."

321.123, Code of Iowa, 1958, as amended by the 59th General Assembly. (New subsection added to the present section.)

"House trailers and mobile homes, regardless of whether or not they are used on the highways, five dollars."

321.130, Code of Iowa, 1958, as amended by the 59th General Assembly. (The words "or house trailers" have been deleted from the following.)

"Fees in lieu of taxes. The registration fees imposed by this chapter upon private passenger motor vehicles or semi-trailers shall be in lieu of all taxes, general or local, to which motor vehicles or semi-trailers may be subject, and if a motor vehicle or semitrailer shall have been registered at any time under this chapter it shall not thereafter be subject to a personal property tax unless such motor vehicle or semitrailer shall have been in storage continuously as an unregistered motor vehicle or semitrailer during the preceding registration year."

Due to the inherent nature of a mobile home, it cannot lose its identity as a trailer. Under the definition in the statute, we find the words, "equipped for use on the highways" as the determining factor. Since a mobile home which is demobilized can be remobilized within a short period of time, we must, therefore, conclude that it is still "equipped for use on the highway" and thus, a registration fee must be paid. It must be remembered that under the new section of the Iowa Code, a registration fee does not preclude the collection of a monthly fee. "House trailers" was removed from the provision dealing with fees in lieu of taxes under Section 321.130 of the Code of Iowa (1958). Therefore, a registration fee and a monthly fee are both collectible on a mobile home if, under the statute, the mobile home meets the definition. In this situation, we must remember that the mobile home is treated as personalty and not as realty. If the assessor did treat the property as realty, there would be no collectibility of a monthly fee, but it would be subject to a realty assessment. It must be further mentioned that even with a realty classification, a registration fee is still collectible due to the inherent nature of a mobile home.

"425.2 Qualifying for credit. Any person who desires to avail himself of the benefits provided hereunder shall each year on or before July 1 deliver to the assessor, on blank forms to be furnished by the assessor, a verified statement and designation of homestead as claimed by him, and the assessor shall return said statement and designation of homestead on July 2 of each year to the county auditor with his recommendation for allowance or disallowance indorsed thereon. * * * "

"425.11 Definitions. For the purpose of this chapter and wherever used in this chapter:

"1. The word, 'homestead', shall have the following meaning:

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

" * * *.

"f. The words 'dwelling house' shall embrace any building occupied wholly or in part by the claimant as a home.

"2. The word, 'owner', shall mean the person who holds the fee simple title to the homestead, and in addition shall mean the person occupying as a surviving spouse or the person occupying under a contract of purchase where it is shown that not less than one-tenth of the purchase price named in the contract actually has been paid and which contract has been recorded in the office of the county recorder of the county in which the property is located, or the person occupying the homestead under devise or by operation of the inheritance laws where the whole interest passes or, where the divided interest is shared only by persons related or formally related to each other by blood, marriage or adoption, or the person occupying the homestead under a deed which conveys a divided interest where the divided interest is shared only by persons related or formerly related to each other by blood, marriage or adoption." (As amended by the 58th G.A.).

"3. The words 'assessed valuation' shall mean the taxable valuation of the homestead as fixed by the assessor, or by the board of review, under the provisions of section 441.13, without deducting therefrom the exemptions authorized in section 427.3.

"Where not in conflict with the terms of the definitions above set out, the provisions of chapter 561 shall control."

"427.3 Military service -- exemptions. The following exemptions from taxation shall be allowed:

"1. The property, not to exceed three thousand dollars in taxable value, and poll tax of any honorably discharged union soldier, sailor, or marine of the Mexican war or the war of the rebellion.

"2. The property, not to exceed eighteen hundred dollars in taxable value, and poll tax of any honorably discharged soldier, sailor, marine or nurse of the war with Spain, Tyler Rangers, Colorado volunteers in the war of the rebellion, 1861 to 1865, Indian wars, Chinese relief expedition or the Philippine insurrection.

"3. The property, not to exceed seven hundred fifty dollars in taxable value of any honorably discharged soldier, sailor, marine, or nurse of the first World War.

"4. The property, not to exceed five hundred dollars in taxable value of any honorably separated, retired, furloughed to a reserve, placed on inactive status, or discharged soldier, sailor, marine, or nurse of the second World War, army of occupation in Germany November 12, 1918 to July 11, 1923, American expeditionary forces in Siberia November 12, 1918 to April 30, 1920, second Nicaraguan campaign with the navy or marines in Nicaragua or on combatant ships 1926-1933, second Haitian suppressions of insurrections 1919-1920, navy and marine operations in China 1937-1939 and Yangtze service with navy and marines in Shanghai or in the Yangtze Valley 1926-1927 and 1930-1932 or of the Korean Conflict at any time between June 27, 1950 and July 27, 1953, both dates inclusive.

"For the purposes of this section, the second World War shall be from December 7, 1941, to September 2, 1945, both dates inclusive.

"5. The provisions of this section shall apply to personal property held in partnership but not in excess of the value of the veteran's share actually held."

In the 1958 Opinions of the Attorney General, page 261, it stated that the monthly fees under the old 135D.9 were not subject to the Homestead and Military Service Tax Credit. This is also true under the new provision for monthly fees. In effect, the monthly fee covers the mobile home that is considered personalty and the monthly fee is paid in lieu of a personal property tax where the mobile home is being used as a dwelling place. (See Staff to Shafer and Perkins, 11-9-61). The present consideration must be where the property is treated as realty and taxed not according to the monthly fee but the realty assessment.

It is, therefore, concluded that if the mobile home meets the standards for a permanent structure as determined by the local assessor, the property will be treated as realty and if all of the specific requirements of the exemption statute are satisfied, then the claimant will be entitled to the Homestead and Military Service Tax Credits.

Very truly yours,

EVAN HULTMAN
Attorney General

EH:bjf

STATE OFFICERS AND DEPARTMENTS: State Conservation Commission -- Commission has no power to convey real estate to private institutions. Iowa Code sec. 107.24 (1958); Ch. 99, Acts 59th G. A.
(CREGER TO CONS. COMM., 11/10/61) #61-11-10

November 10, 1961

State Conservation Commission
East 7th and Court
Des Moines 8, Iowa

Attention Mr. D. M. Hill,
Superintendent of Engineering Construction

Gentlemen:

We have your letter of August 7, 1961 in which you request the opinion of this office in regard to the following:

"Your opinion is requested by the State Conservation Commission regarding the placement of dredge material (silts) on the lake bed of Storm Lake in an area adjacent to land now owned by Buena Vista College and Methodist Manor, both located in Storm Lake, Iowa. See attached map.

"A formal written request was not submitted by either party at the Commission meeting held on August 2, 1961.

"Their verbal request can be interpreted as follows:

1. Dredge fill material into an area of 19+ acres.
2. Upon completion of this fill, ownership of that portion of the State owned lake bed would revert to the requesting parties.
3. The fill area to be used as a building site (athletic field) by the College and as a general land expansion program by the Methodist Manor."

The substance of your request appears to be whether or not the State may convey State-owned real estate to privately operated agencies without consideration when said agencies do not intend to use the real estate for conservation or park purposes.

Examination of Iowa Code section 107.24 (1958) which contains the specific powers of the State Conservation Commission fails to disclose any express power to convey real estate, nor

In our opinion can such power be fairly implied. Further, your attention is directed to Chapter 99, Acts of the 59th G. A., which provides for conveyance of real estate by the Executive Council without consideration upon majority recommendation of the State Conservation Commission to cities, towns, counties and agencies thereof for use as city, town or county parks. This section does not, of course, authorize conveyance to private agencies.

Your inquiry is therefore answered in the negative.

Very truly yours,

JOHN M. CREGER
Assistant Attorney General

JMC:bl

HEALTH: License certificates -- change of name -- Under the provisions of Chapter 147, sections 147.2 to 147.11 inclusive, where a legal change of name has occurred, the name under which original license was issued cannot be changed. However, the annual renewal certificates may be issued under the new name which must be displayed with the original certificate and proper notation made thereof in the registry book.

(BIANCO TO ZIMMERER, COM'R. PUB. HEALTH., 11/10/61) #61-11-11

November 10, 1961

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

Dear Dr. Zimmerer:

Reference is made to your favor of August 9, 1961 requesting an opinion as follows:

> "We are frequently asked, particularly by cosmetologists and dental hygienists who have married subsequent to the issuance of an original certificate, to issue a new certificate under the married name.
>
> "May any change be made in the certificate of license in such cases?
>
> "When a name is changed by court action, may we issue a certificate under the new name?
>
> "If such certificates may be issued, can the original record be corrected or must a new entry be made?
>
> "Your opinion is respectfully requested."

In answer thereto, we advise:

We shall first set out the legal aspects which we believe pertinent to your several questions, in view of the fact that there appears to be no statute within the licensure laws, Chapter 147 of the Code, which would specifically govern the matters of which you inquire.

The methods by which one may legally change his name is discussed in the following authorities.

61-11-11

In 1 Iowa Law Bulletin, at page 156, there appears this discussion:

> "Though it was customary for persons to bear the surname of the parents it was by no means obligatory at common law. There is abundance of authority to the effect that in the absence of statute a man might lawfully change his name without recourse to legal proceedings, and for all purposes the name thus assumed constituted his legal name, if he took it in good faith and without an intent to defraud. Linton v. First Nat. Bank of Kittaning, 10 Fed. 894; Loser v. Savings Bank, 149 Iowa 672, 128 N. W. 1101. There seems to be no doubt that the above applied either to the Christian name, or to the surname, or to both. Holmen v. Walden, 1 Salk 7; Frank v. Luce, 5 Rob. (N.Y.) 599. Many states now have statutes which provide for a legal proceeding by which names may be changed. Practically all the authorities, however, agree that the common law is not abrogated thereby and that the statutory proceedings merely make definite the time at which the change of name becomes legally effective. This supplements the common law under which it was usually doubtful as to just when the change became satisfactory to the law, the new name being acquired there by user. Smith v. U. S. Casualty Co., 197 N. Y. 420, 90 N. E. 947, 26 L. R. A. 1167, Laflin & R. Powder Co. v. Steyther, 146 Pa. 434, 23 Atl. 215, 14 L. R. A. 690, and cases therein cited."

In Loser v. Savings Bank, 149 Iowa, at page 677, it was stated:

> " * * * there is no such thing as a 'legal name' of an individual in the sense that he may not lawfully adopt or acquire another, and lawfully do business under the substituted appelation. In the absence of any restrictive statute, it is the common law right of a person to change his name, or he may by general usage or habit acquire a name notwithstanding it differs from the one given him in infancy. * * * (citing cases) 'A man's name is the designation by which he is distinctively known in the community.' (Laflin v. Steytler, 146 Pa. 434 (23 Atl. 215, 14 L. R. A. 690)"

Marriage, of course, operates to change a woman's name, and in law consists of her Christian name and her husband's surname, as is stated in 38 Am. Jur. 600, section 10, as follows:

> "A married woman's name consists, in law, of her own Christian name and her husband's surname, marriage conferring on her the surname of the husband. Her correct first name is her maiden Christian name, and not the Christian name of her husband."

In addition to the common law method by which a person may legally assume a new name, by statute, Chapter 674, Code of Iowa 1958, provision is made for a legal proceeding by which names may be changed. This procedure, if used, does not abrogate the common law method. It serves to supplement the common law method and serves to make definite the time at which the change of name becomes legally effective.

With reference to your questions, the licensure law provides that when one is licensed to practice a profession, section 147.1(3), a certificate is issued to the licensee, section 147.5, which must be displayed in the place where one practices, section 147.7.

A record must be kept in the office of the department in what is known as the "registry book".

It has been the practice of the department for many years to issue an annual card certificate of renewal to each licensee, which said renewal certificate must be displayed in connection with the <u>original license</u>, section 147.10.

In 65 C.J.S., page 23, section 11, we find this statement:

> "One who has changed his name by proper legal procedure is entitled to all the rights which were his under his former name since the law looks only to the identity of the individual. In re Billings' Case, 5 Pa. Dist. & Co., 66, 45 C. J., p. 382, note 90."

Since the law looks only to the identity of the individual, where a change of name occurs, the original records must of necessity be preserved in order to preserve the identity of the individual, and the rights secured by that individual under any original certificate of license.

Therefore, it is our considered opinion, in answer to your questions, where there has been a legal change of name, either by marriage or court procedure, that the name on the original certificate cannot be changed nor can the original record be corrected.

However, since by long established administrative procedure, it has been the practice of the department to issue annual card certificates of renewal in the married name of a licensee, or other legally adopted name, it is our further opinion that the renewal card certificate of a annual license renewal may be issued under the new name, to wit: "Mary Jones, formerly known as Mary Smith" as an example, which must be displayed in connection with the original license, thus preserving the true identity of the individual originally licensed; and at the same time a notation to that effect, of the change of name, should be made in the registry book opposite the original entry therefore made of the individual involved.

Respectfully submitted,

FRANK D. BIANCO
Assistant Attorney General

FDB:bl

COUNTIES and COUNTY OFFICERS: Inter-County Levee District -- An inter-county levee district is not a political or a municipal corporation within the terms of Article ~~XL~~ XI, Section 3, of the Constitution of Iowa.
(STRAUSS TO MATTHEWS, LOUISA CO. ATTY., 11/13/61) #61-11-14

November 13, 1961

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

Dear Mr. Matthews:

This will acknowledge receipt of yours of the 23rd, inst., in which you submitted the following:

> "I respectfully request your opinion on the following matter:
>
> "Article XL Sec. 3 of the Constitution of the State of Iowa, and Sections 407.1 and 407.2 of the 1958 Code, set forth the statutory debt limits for County, or other political or municipal corporations.
>
> "1. A large inter-county levee district in Louisa and Des Moines Counties, through its Board of Trustees, has adopted a plan of improvements in conjunction with the Federal Government, under Sections 455.201 et seq. of the 1958 Code. This improvement will be very extensive, and will constitute the expenditure of a very large sum of money, part of said expenditure to be borne by the Federal Government under the existing plan, but a considerable amount to be borne by the local levee district. Therefore, my question is are levee and/or drainage districts within the purview of "County or other political or municipal corporations" in Article XI Sec. 3 of the Constitution of the State of Iowa and Sections 407.1 and 407.2 of the 1958 Code so as to be

#61-11-14

> barred by either of said Constitutional Section or Code Sections from incurring indebtedness in excess of certain defined statutory limits?
>
> "2. If a drainage and/or levee districts are in the purview of Section 407.1, does a general levee improvement amount to a 'general or ordinary purpose' so as to fall within the limits of Section 407.1.
>
> "The Corps of Engineers, U.S. Army, is preparing to begin working on this project, and I would appreciate an opinion from your office on this matter at your earliest convenience, and if previous opinions on this matter have been rendered, I would also appreciate your citation to them."

In reply thereto, I am of the opinion that such inter-county levee district is not within the purview of Section 3, Article XI of the Constitution of Iowa, providing as follows:

> "Indebtedness of political or municipal corporations. Sec. 3. No county, or other political or municipal corporation shall be allowed to become indebted in any manner, or for any purpose, to an amount, in the aggregate, exceeding five per centum on the value of the taxable property within such county or corporation--to be ascertained by the last State and county tax lists, previous to the incurring of such indebtedness."

nor of Sections 407.1 and 407.2, Code of 1958, providing as follows:

> "407.1 Limitation. No county or other political or municipal corporation shall become indebted in any manner for its general or ordinary purposes to an amount exceeding in the aggregate one and one-fourth percent of the actual value of the taxable property within such corporation. The value of such property shall be ascertained by the last tax list previous to the incurring of the indebtedness. Indebtedness heretofore or hereafter

> incurred by a county for poor relief purposes shall not be construed or regarded as having been incurred for its general or ordinary purposes insofar as said indebtedness may be incurred solely for poor relief purposes."
>
> "407.2 Limitation. No county, or other political or municipal corporation, shall become indebted in any manner, or for any purpose to an amount, in the aggregate, exceeding five percent of the actual value of the property within such county or corporation, to be ascertained by the last state and county tax lists previous to the incurring of such indebtedness."

each of which, so far as the power of incurring indebtedness is concerned, is couched in the same language.

The meaning of the term "political or municipal corporation," as used in the foregoing constitutional provision and the designated statutory provisions, apparently has not been judicially determined by our Supreme Court. Definition of such terms generally has been made and, undoubtedly, is applicable to such terms as used constitutionally or by statute.

In the case of Curry v. The District Township of Sioux City, 62 Iowa 102, 17 N.W. 191, where the power of a township school district to issue bonds was in question, it was there said:

> "The question we are required to determine is, whether or not the defendant had the lawful authority to issue the bond. The statute enacts that a 'municipal corporation,' may issue bonds as provided therein, and the whole controversy turns upon the question whether, within the meaning of the statute, a school district township

> may properly be called a municipal corporation. The word 'municipal,' as originally used in its strictness, applied to cities only. But the word now has a much more extended meaning, and when applied to corporations the words 'political,' 'municipal,' and 'public,' are used interchangeably. A municipal corporation is defined to be 'a public corporation created by government for political purposes, and having subordinate and local powers of legislation; e.g. a county, town, city, etc.' Bouvier's Law Dic.; and see Winspear v. The District Township of Holman, 37 Iowa, 542, and Iowa Railroad Land Co. v. Carroll County, 39 Id., 151. We think the statute in question empowered district townships to issue bonds."

In an opinion of this Department appearing in the Report for 1934 at page 547 where it was questioned whether the words "municipal corporation" include the State of Iowa, it was said, quoting from the case of Winspear vs The District Township of Holman, 37 Iowa, 542, the following:

> "'A school district township is a political or municipal corporation within the meaning of Article 2, Section 3 of the constitution, inhibiting such corporations from incurring indebtedness to any amount exceeding five per cent on the taxable property of the corporation.'
>
> "In the case of Iowa Railroad Land Company v. Carroll County, 39 Iowa, 151, at page 166, the court states:
>
> "'That "municipal corporations' includes and especially refers to counties, school districts and cities, etc.'
>
> and cites:
>
> "Bouvier's Law Dictionary, title Municipal Corporations.
> 2 Kent's Com., 275.
> Jefferson vs. Ford, 4 G. Greene, 367, at page 370.

Hull, et al., vs. Marshall Company, 12 Iowa, 142, at page 154.
The State, etc., vs. The County of Wapello, 13 Iowa, 389, at page 404.
Bell vs. The Railroad Company, 4 Wall., 598.
Pendleton Company vs. Arny, 13 Wall., 297, at page 304.

"For an extended discussion of the term 'municipal' as used in defining the word 'corporation,' see Hanson vs. City of Cresco, 132 Iowa, 533, at page 540:

"'The term "municipal" as used in defining a corporation, indicates by its historical meaning a corporation proper, as distinguished from a quasi-corporation, and designates only cities and incorporated towns which have powers of local self-government, and, in strictness of meaning, would not include counties and school districts, although they are expressly declared by statute to be bodies corporate. But, in common speech, the term municipal corporations is used to include all public or political corporations having corporate powers.'

"which cites the following:

"Winspear vs. District Township, 37 Iowa, 542.
Curry vs. District Township, 62 Iowa, 102.
Iowa Railroad Land Company vs. Carroll County, 39 Iowa, 151, at page 166.
Powder River Cattle Company vs. Board of County Commissioners, 3 Wyo., 597 (29 Pac., 361).
State, ex rel., vs. Loefingwell, 54 Mo., 458, at page 465.
Anderson Law Dictionary, 363.
2 Bouvier, Law Dictionary (Rawle's Ed.), 453. (See cases collected in 5 Words and Phrases Judicially Defined, 4620.)

"Also at page 541 (132 Iowa, Hanson vs. City of Cresco) it is stated:

"'It is apparent, therefore, that in determining the meaning to be given to the word "municipality" as used in the statute for the purpose of applying it to this case, we need not be limited to its historical meaning, but may take into account the

> intention of the Legislature for the purpose of ascertaining whether it was used to include townships.'"

In fitting a drainage and levee district into the foregoing definition of political or municipal corporation, it is to be borne in mind that such tax districts are not the creation of the state, but are created by the Board of Supervisors under the authority of Section 455.1, Code of 1958, providing as follows:

> "455.1 Jurisdiction to establish. The board of supervisors of any county shall have jurisdiction, power, and authority at any regular, special, or adjourned session, to establish a drainage district or districts, 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, in such county, whenever the same will be of public utility or conducive to the public health, convenience, or welfare."

These are taxing districts, and in the words of Webb City and Carterville Waterworks Company vs. Carterville, 153 Missouri 128, as follows:

> "Municipal corporations are created by the state for the public good. They exercise by delegation from the state a portion of the sovereign power. The principal object of their creation is to act as administrative agencies for the state, and to provide for the police and local government of the different localities. They are charged with governmental authority, and civil, political and municipal duties are imposed upon them."

these corporations exercise no portion of the State's sovereign power. This was the view of the Court in the case of Archer v. City of Indianapolis, Indiana, 122 N.E.2d 607, where a sanitary

district was created by an Act of the Legislature, and under the following constitutional provision:

> "No political or municipal corporation in this State shall ever become indebted in any manner or for any purpose to an amount in the aggregate exceeding two per centum on the value of the taxable property within such corporation, to be ascertained by the last assessment for State and county taxes, previous to the incurring of such indebtedness; and all bonds or obligations, in excess of such amount, given by such corporations, shall be void * * *."

It was determined that such sanitary district was not a political or municipal corporation within the foregoing terms, and concluded the following:

> "(6,7) There is no constitutional provision limiting the number or amount of bonds that may be issued in anticipation of special benefit taxes by a special taxing district. We conclude that the legislation under consideration does not violate Art. 13, Sec. 1, of our Constitution, which relates only to political or municipal corporations.
>
> "Judgment affirmed."

In view of the foregoing conclusion, I find it unnecessary to answer your question 2.

Very truly yours,

OSCAR STRAUSS
First Assistant attorney General

OS:la

TAXATION: Moneys and Credits: Deduction: Where taxpayer fails to claim deduction at time of assessment or to protest assessment by May 20, he loses the deduction and no refund can be made. (Sections 441.19, .33, .37 and 445.60.)
(MURRAY TO MADDOCKS, WRIGHT CO. ATTY., 11/13/61) #61-11-15

State of Iowa
DEPARTMENT OF JUSTICE
Des Moines

November 13, 1961

Robert A. Maddocks
Wright County Attorney
Clarion, Iowa

Dear Mr. Maddocks:

This will acknowledge receipt of your letter dated September 27, 1961, in which you ask the following question:

"PROBLEM:

When the assessment was made for the taxes to be due and payable in 1961, a farmer failed to deduct the Agricultural Stabilization and Conservation corn loan as indebtedness from his monies and credits. Now, before paying the second half of his taxes in 1961, the farmer wants to amend the original assessment and pay the tax due after allowing the amended assessment.

"QUESTION:

1. May an individual amend his former assessment before actually paying the current tax so as to pay a reduced tax?"

First, we are unable to find any statutory authorization which would permit a taxpayer to "amend" his assessment. Actually, the assessment is made by the county assessor (Iowa Code (1958), Section 441.18, as amended) with the assistance of the taxpayer (Iowa Code (1958), Section 441.19, as amended). If the taxpayer is not in agreement with the assessment he may appeal to the Board of Review between May 1 and May 20, inclusive, for redress (Iowa Code (1958), Section 441.37, as amended). He may if the Board of Review does not grant him relief, then appeal to the District Court

(Iowa Code (1958), Section 441.33, as amended). Therefore, we would conclude that if the taxpayer has failed to follow the procedure outlined above, his assessment can no longer be amended.

Your letter also calls our attention to Section 445.60, Code of Iowa (1958), which reads:

> "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."

The provisions of Section 445.60, Code of Iowa (1958), provide another method of obtaining redress in this situation if the Board of Supervisors should find that the tax was "erroneously or illegally * * * paid." We make no comment on how this determination should be made. In this regard, see 1930 A. G. O. 206 and 1922 A. G. O. 124.

Very truly yours,

George W. Murray
Special Assistant Attorney General

GWM/WEA/bjf

STATE OFFICERS AND DEPARTMENTS: Employment Security Commission -- Section 96.7, subsection 3, subparagraph d, Code 1958. Where a statute is repealed and at the same time re-enacted in substantially the same terms, it is operative under its original terms.

November 21, 1961

Employment Security Commission
112-116 Eleventh Street
Des Moines 8, Iowa

Attention: Don G. Allen
General Counsel

Gentlemen:

This is to acknowledge yours of the 14th, inst., in which you submitted the following:

> "The Iowa Employment Security Commission respectfully requests your opinion as to the application and interpretation of certain portions of the above-indicated amendment to the Iowa Employment Security Law.
>
> "This Act, to begin with, struck from section 96.7 of the Code of Iowa 1958, subsection 3, paragraph "d," subparagraphs (1), (2), (3), (4), and (5), and inserted the amendment herein referred to in lieu thereof. We are particularly concerned with the said subparagraph (5), which reads as follows:
>
> 'Whenever the unemployment trust fund account of the state equals or exceeds one hundred ten million dollars the contribution rates in subparagraphs 1, 2, and 3 hereof shall be reduced to and shall remain at fifty percent thereof until said unemployment trust fund account of the state shall have been reduced to seventy million dollars, in which event the said

#61-11-16

contribution rates shall revert to the rates stated in subparagraphs 1, 2, and 3 hereof.'

"Lines 25 to 32 of S. F. 436, together with Senator Buck's amendment, read as follows:

'Whenever the unemployment trust fund account of the state equals or exceeds one hundred ten million dollars ($110,000,000) the contribution rates herein stated, except the rates of contribution higher than one point nine per cent (1.9%), shall be reduced to and remain at fifty per cent (50%) thereof until said unemployment trust fund account of the state shall have been reduced to seventy million dollars ($70,000,000) in which event the said contribution rates shall revert to the rate herein stated.'

"The above-quoted portion of the law which was struck and the portion of the amendment passed in lieu thereof are practically identical in regard to the reference to the necessity of having $110,000,000.00 in the fund before the one-half rate could be granted certain employers.

"At the time of the enactment and for some time thereafter and presently the fund does not have $110,000,000.00 in it, but approximately $102,000,000.00 or $103,000,000.00.

"The Accounting Department of the Iowa Employment Security Commission, which computes and fixes the rates of taxation for employment security contributions in this state, has raised the question that the striking of the old statute rendered its provision of no effect, and the enacting of a new provision bars the application of the 50% return due to the fact that at the time of the passage of the Act and presently there is not $110,000,000.00 in the fund.

> It follows that this situation was true as to the amount in the fund on the computation date October 1, 1961, which is the date as of which rates are computed.
>
> "The question which we submit is can we give, under this situation, to the designated employers the 50% rate which they had under the old law, or do we have to go back to a 100% rate due to the fact that the fund does not now and did not have at the time of passage of the law $110,000,000.00?
>
> "Inasmuch as we are in the process of presently computing rates, we would appreciate your early opinion."

In reply thereto, you are advised as follows.

The legislative history of Chapter 85, being Senate File 436, discloses that Section 96.7, subsection 3, paragraph d, Code of 1958, was amended by striking therefrom subparagraphs 1, 2, 3, 4, and 5. Such Section 96.7, subsection 3, paragraph d, subparagraph 5, which is the only one in question herein, appears in the Code of 1958 as follows:

> "(5) Whenever the unemployment trust fund account of the state equals or exceeds one hundred ten million dollars the contribution rates in subparagraphs 1, 2, and 3 hereof shall be reduced to and shall remain at fifty percent thereof until said unemployment trust fund account of the state shall have been reduced to seventy million dollars, in which event the said contribution rates shall revert to the rates stated in subparagraphs 1, 2, and 3 hereof."

Chapter 85, in striking the foregoing numbered subsection 3, paragraph d, subparagraph 5, inserted therein, with the exception of changing the rate of contribution, the same provision in terms as follows:

> "Whenever the unemployment trust fund account of the state equals or exceeds one hundred ten million dollars ($110,000,000) the

> contribution rates stated herein, except the rates of contribution higher than one point nine per cent (1.9%), shall be reduced to and remain at fifty per cent (50%) thereof until said unemployment trust fund account of the state shall have been reduced to seventy million dollars ($70,000,000) in which event the said contribution rates shall revert to the rate herein stated."

Thus, insofar as pertinent here, the re-enacted statute contained in Chapter 85 is in the same form as it appears in the Code of 1958. In other words, in the same Act there was a repeal of a statute and its re-enactment in the same terms. The effect of such a legislative situation is stated in Section 2035 of Sutherland Statutory Construction, 3rd Edition, Vol. 1, in terms as follows:

> "§ 2035. Repeal and re-enactment.
>
> "The re-enactment of a statute which has been repealed by specific provision, or by implication from later legislation upon the subject matter invalidates the previous repeal and restores the statute to effective operation. Likewise, where a statute has been amended and changed by a later enactment, the reaffirmation of the statute in its original form operates to repeal any inconsistent amendments and modifications which have been engrafted upon the statute since its original enactment. When, however, an existing statute is re-enacted by a later statute in substantially the same terms, a repeal by implication is effectuated only of those provisions which are omitted from re-enactment, while the unchanged provisions which are reiterated in the new enactment are construed as having been continuously in force. Those statutes which prove inconsistent with the re-enactment are, of course, repealed by implication."

and the note in support of the foregoing text states the following:

> "A so-called 'simultaneous repeal and re-enactment' is therefore a misnomer, for there is no repeal by implication effectuated

> of the original act, and even though the 'repeal' is declared by specific provision in the later enactment the courts will construe the unchanged provisions as being continuously in force . . . (numerous cases cited) . . . General construction acts in many jurisdictions provide that those provisions repeated in the later enactment shall be construed as continuations. House v. Boscour, 10 N.Y.S. (2d) 934 (4th Dept. 1939). Rights and liabilities accrued under statutes substantially re-enacted by a later statute are thus saved. Commissioner of Internal Revenue v. Emery, 62 F. (2d) 591 (CCA 7th, 1932); Evans v. Superior Court, 14 Cal. (2d) 563, 96 P. (2d) 107 (1939); Moore v. Commonwealth, 155 Va. 1, 155 S.E. 635 (1930)."

The rule has the support of the following from 50 Am. Jur, paragraph 525, title Statutes, in terms as follows:

> "It is a general rule of law that where a statute is repealed and all, or some, of its provisions are at the same time re-enacted, the re-enactment is considered a reaffirmance of the old law, and a neutralization of the repeal, so that the provisions of the repealed act which are thus re-enacted continue in force without interruption and all rights and liabilities incurred thereunder are preserved and may be enforced."

I am, therefore, of the opinion, by reason of the foregoing, that the original statute, Section 96.7, subsection 3, subparagraph d, repealed remains in effective operation in the terms thereof. As a result thereof, the 50 per cent rate which was imposed under the original repealed act is still operative.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:la

COUNTIES AND COUNTY OFFICERS: County Attorneys -- A commission on a fine imposed as a result of a contempt proceeding is allowable where the county attorney rendered some contribution in the proceedings. Section 340.9, Code 1958. November 22, 1961
(YOST TO RASCHE, CLINTON CO. ATTY., 11/22/61) #61-11-20

No Fees

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

Dear Mr. Rasche:

This will acknowledge receipt of your letter under date of June 2, 1961, wherein you state:

> "Is a county attorney entitled to a commission on a fine paid by the attorney for the defense who is cited for contempt during the course of a criminal trial being tried by the county attorney and the contempt proceedings result in a record of conviction being entered and such proceedings are captioned 'State of Iowa vs. John L. Delaney'?"

We advise you as follows:

Section 340.9(15), Code 1958, provides in part:

> " . . . except in counties having a population of sixty thousand or over according to the latest federal census, in addition to the salary above provided, he shall receive the fees as now allowed to attorneys for suits upon written instruments where judgment is obtained, for all fines collected where he appears for the state, but not otherwise (emphasis supplied) . . ."

and an interpretation of the phrase, "for all fines collected where he appears for the state, but not otherwise" is necessary to answer your query.

We are not unmindful that, while proceedings to punish for contempt are in their nature criminal, they are not such as contemplated in section 301 (presently section 336.2, Code 1958) requiring the county attorney to appear in criminal cases. Brennan v. Roberts, 125 Iowa 617, 101 N.W. 460 (1904).

However, we do not believe this precludes the county attorney from obtaining a commission on a fine paid for contempt where he appears for the State in the contempt proceedings. The language employed by the legislature states, "for all fines collected where he appears for the state", and we are of the opinion that the words employed are explicit and definite, and where such is the case the words used shall govern. State ex rel. Halbach v. Clausen, 216 Iowa 1079, 250 N.W. 195. The statutory language is the most persuasive evidence of the legislative intent (Birmingham v. Ruckers' Imperial Breeding Farm of Ottumwa, Iowa, C.C.A. (1946) 152 F. 2d 837), and it is our belief that the legislature contemplated the appearance of the county attorney for the State in other than criminal cases where a fine would be imposed. In referring to the context and examining other verbiage in the statute, the use of the word "all" is all-inclusive and is not limited, restricted, or confined to fines imposed in strictly criminal cases.

Your question as submitted fails to indicate whether or not the county attorney physically appeared for the State, an appearance was entered of record on behalf of the county attorney, or some contribution by the county attorney was rendered in the contempt proceedings. Entitlement by the county attorney to a commission on the fine paid as a consequence of the conviction for contempt is necessarily predicated upon at least one of the above mentioned requisites. As support for this position, we invite your attention to a recent Staff Opinion rendered by this office under date of November 9, 1961.

Therefore, it is our belief that entitlement to the commission on a fine paid in a contempt proceeding wherein the State is a party, rests upon the county attorney's rendering some contribution as mentioned herein, so as to be an efficient cause in the imposition and collection of the fine in question.

Very truly yours,

WILLIAM J. YOST
Assistant Attorney General

WJY:bl

SCHOOLS: County superintendents -- County superintendents are not entitled to expenses from school districts incurred for the purpose of promoting legislation. Ch. 272, Code 1958. (REHMANN TO FORD, DES MOINES CO. ATTY.,11/22/61) #61-11-21

November 22, 1961

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

Dear Mr. Ford:

Reference is made to your letter of September 30, 1961 in which you state the following:

> "Our County Superintendent of Schools has been retained by several of the independent and community school districts in our county at various times to represent them in advancing the cause of the so called impacted area bills in Washington.
>
> "In short, our County Superintendent of Schools has taken trips to Washington each time the impacted area bill has been up for consideration and on each of the occasions he has been paid expenses by one of the school districts which had received funds under the so called impacted area bills. As you know Des Moines County has a large federal ordnance plant within its area and as a result of the location of that plant here has received substantial federal aid since 1941 which aid has been distributed to the affected school districts.
>
> "The payments by the interested school district of the expenses of the County Superintendent of Schools have come from the general fund.
>
> "Will you please advise us whether school funds raised by taxation can be used by the school district to advance legislation the passage of which would result in substantial receipt of federal funds by the school district?"

In reply thereto, we advise as follows:

It is fundamental that "school districts are creatures of statute with only those powers expressly conferred by statute

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or reasonably and necessarily implied as incident to exercise of a power or performance of a duty expressly conferred or imposed by statute." See Silver Lake Cons. Sch. Dist. v. Parker, 238 Iowa 984, 29 N. W. 2d 214; Ind. Sch. Dist. of Danbury v. Christiansen, 242 Iowa 963, 49 N. W. 2d 263; Lincoln Dist. v. Redfield Dist., 226 Iowa 298, 283 N. W. 881. If, therefore, the district in question has the power concerning which you inquire, it must derive from the express provisions of some statute.

A careful examination of the statutes discloses approximately fourteen different uses to which the general fund of a school district may be put. Briefly, they are as follows: section 268.3 relates to payment of teachers' instruction to State College of Iowa; section 279.25 relates to the purchase of insurance, supplies and textbooks; section 280.11 refers to payment for dental clinics; section 282.20 relates to the payment of tuition fees; section 290.4 relates to appeal costs under Chapter 290; section 291.13 authorizes use of the general fund by the electors; section 294.3 covers state aid to the general fund and the use thereof for the benefit of the school district; section 297.10 refers to the rental of school property paid into the general fund for the purchase of needed supplies; section 298.1 refers to the ordinary expenses of the school district based upon the per pupil cost; section 298.22 relates to interest payments from the general fund; sections 301.1, 301.4, and 301.19 refer to textbooks and expenditures therefor from the general fund as they affect the school district.

One general provision under Chapter 272 authorizes expenditures from the general fund to be used by the county superintendent of schools under the direction of the State Superintendent of Public Instruction. Let us examine Chapter 272 -- you will note that it is primarily designed for the purpose of holding "teachers meetings, demonstration teaching or other field work for the improvement of instruction as may best fit the needs of the public schools in his county . . . ". (Section 272.1, Code 1958). The primary reasoning behind Chapter 272 is clearly found in 1922 O.A.G. at page 273, wherein this office held that the superintendent of schools could not receive expenses from county funds for conventions or meetings outside the state. However, in an opinion issued in 1928 O.A.G. at page 55, this office held that where a school board designated a superintendent and a party of teachers to attend a convention outside the state, the superintendent, being sent as a delegate of the board, was entitled to his expenses therefor.

Both of these opinions refer to "teachers meetings, demonstration teaching or other field work for the improvement of instruction as may best fit the needs of the public schools in his county." The facts stated in your letter tend to indicate

that the superintendent in his trips to Washington, D. C. was there to promote legislation and not for the special purpose of representation of a school district at a professional "teachers meeting, demonstration teaching or other field work for the improvement of instruction". This appears to be the criteria by which a superintendent is entitled to compensation for his expenses.

Therefore, in view of the foregoing authority, we are constrained to hold that the county superintendent of schools cannot receive compensation from the school district for expenses incurred while he was in Washington D. C. for the purpose of promoting legislation.

Very truly yours,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:bl
cc: Paul Johnston, Supt.
of Public Instruction

MOTOR VEHICLES: Examinations for driver's license -- Section 321.186, 1958 Code of Iowa, does not authorize the Department of Public Safety to require a physical examination of every new applicant for an operator's or chauffeur's license.
(SNELL TO PESCH, COM'R. PUBLIC SAFETY, 11/22/61) #61-11-17

November 22, 1961

Mr. Carl H. Pesch, Commissioner
Department of Public Safety
State Office Building
L O C A L

Dear Mr. Pesch:

This is to acknowledge receipt of your recent letter in which you requested an opinion relating to section 321.186, 1958 Code of Iowa, and stated:

"My first question has to do with whether or not the 'such further physical and mental examinations as the department finds necessary to determine the applicant's fitness to operate a motor vehicle safely upon the highways', is a condition precedent to the departmental examination, or is it a condition subsequent to the departmental examination for new applicants for operators or chauffeurs licenses? Further, would it be within the purview of this statute for this department to require every new applicant for an operator's or chauffeur's license to submit himself to a physician of his choice for a physical examination; the results of which would be presented to the Departmentof Public Safety and in the event of any physical disability or impairment would be sufficient grounds for the department to deny the issuance of an operator's or chauffeur's license to such person who has a physical impairment or disability?

"You will notice that section 321.177 sets forth those persons whom this department shall not license. I would direct your particular attention to subparagraph 7 of this section which states 'to any person when the Commissioner has good cause to believe that such person by reason of physical or mental disability would not be able to operate a motor vehicle with safety upon the highways.'

"This department is seriously considering requiring every new applicant for an operator's or chauffeur's

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license to be examined by a physician of his choice to determine whether such applicant, or applicants, are physically capable of operating a motor vehicle with safety upon the highways of this state."

Section 321.186, 1958 Code of Iowa, provides for the examination of new or incompetent operators of motor vehicles in the following language:

"Examination of new or incompetent operators. The department may examine every new applicant for an operator's or chauffeur's license or any person holding a valid operator's or chauffeur's license when the department has reason to believe that such person may be physically or mentally incompetent to operate a motor vehicle, or whose driving record appears to the department to justify such an examination. Such examinations shall be held in every county within periods not to exceed fifteen days. It shall include a test of the applicant's eyesight, his ability to read and understand highway signs regulating, warning, and directing traffic, his knowledge of the traffic laws of this state, and shall include an actual demonstration of ability to exercise ordinary and reasonable control in the operation of a motor vehicle and such further physical and mental examinations as the department finds necessary to determine the applicant's fitness to operate a motor vehicle safely upon the highways."

In examining the history of this statute, it is apparent that significant changes have been made in the language used by the legislature. The predecessor of section 321.186 in the 1935 Code of Iowa was section 4960-d14. That section from the 1935 Code read as follows:

"Examination of applicants. The department shall examine every applicant for an operator's or chauffeur's license before issuing any such license, except as otherwise provided in section 4960-d15. The department shall examine the applicant as to his physical and mental qualifications to operate a motor vehicle in such manner as not to jeopardize the safety of persons or property and as to whether any facts exist which would bar the issuance of a license under sections 4960-d5 to 4960-d9, inclusive, but such examination shall not include investigation of any facts other than those directly pertaining to the ability of the applicant to operate a motor vehicle with safety, or other than those facts declared to be prerequisite to the issuance of a license under this act."

Section 4960-d15, which is referred to in the above statute, provided for the waiver of examination on renewal, and stated:

> "The Department may in its discretion waive the examination of any person applying for the renewal of an operator's or chauffeur's license issued under this act."

Sections 4960-d5 to 4960-d9 referred to in section 4960-d14 applied respectively to the licensing of minors, a person whose license had been suspended, habitual drunkards, mental incompetents, and physical incompetents.

The use of the word "shall" by the legislature in the first sentence of section 4960-d14 is significant. The word "shall" when addressed to public officials in a statute has been held to be mandatory. City of Newton v. Bd. of Supv. of Jasper Co., 135 Iowa 30, 112 N. W. 127 (1907). Thus, it is clear that the legislature, by section 4960-d14, not only granted the authority to the Department of Public Safety but directed it to examine every applicant for an operator's or chauffeur's license as to his physical and mental qualifications to operate a motor vehicle.

The language used in section 4960-d14 was changed by the 47th General Assembly, which repealed in its entirety the 1935 motor vehicle law contained in Chapter 251 of the 1935 Code of Iowa, and enacted a substitute therefor. The Iowa Court has stated that a statute is to be judged from its language and, on occasion, aid to such construction may be had from its history. See Bowman v. City of Davenport, 243 Iowa 1135, 53 N. W. 2d 249, 254 (1952). The substitute statute enacted by the 47th General Assembly provided for examination of new applicants in the following language:

> "Examination of new applicants. The department may examine every new applicant for an operator's or chauffeur's license. Such examination shall be held in the county where the applicant resides within not more than fifteen days from the date application is made. It shall include a test of the applicant's eyesight, his ability to read and understand highway signs regulating, warning, and directing traffic, his knowledge of the traffic laws of this state, and shall include an actual demonstration of ability to exercise ordinary and reasonable control in the operation of a motor vehicle and such further physical and mental examination as the department finds necessary to determine the applicant's fitness to operate a motor vehicle safely upon the highways."

An examination of this statute readily reveals a significant change, in that the legislature, in the first sentence, changed the word "shall" to the word "may". Generally, the word "may" in a statute indicates permission only, and confers discretion, unless the contrary is clearly indicated by the context of the statute. See Bechtel v. Bd. of Supv. of Winnebago County, 217 Iowa 251, 251 N. W. 633 (1934). It has also been stated, in State ex rel. Wright v. Iowa State Board of Health, 233 Iowa 872, 10 N. W. 2d 561, 563 (1943):

> "It is true that the word 'may' is, in the field of statutory construction, sometimes given the meaning of 'must' or 'shall', but it is also true that this meaning will never be ascribed to it unless it is necessary to give effect to the clear policy and intention of the legislature."

It would seem that, in specifically changing the word "shall" used in a statute to the word "may", the legislature intended that the Department no longer be commanded to examine every new applicant for an operator's or chauffeur's license, but that it be granted the discretion to do so. This discretion in the Department of Public Safety appears to have been somewhat more restricted by the enactment of the 48th General Assembly. That legislature granted to the Department the additional authority to examine persons holding a valid operator's or chauffeur's license, as well as new applicants; but added the proviso that the Department had this authority when it had reason to believe that such person may be physically or mentally incompetent to operate a motor vehicle. Chapter 121, section 29, Laws of the 48th General Assembly, thus provided as follows:

> "The department may examine every new applicant for an operator's or chauffeur's license or any person holding a valid operator's or chauffeur's license when the department has reason to believe that such person may be physically or mentally incompetent to operate a motor vehicle. Such examinations shall be held in every county within periods not to exceed fifteen days. It shall include a test of the applicant's eyesight, his ability to read and understand highway signs regulating, warning, and directing traffic, his knowledge of the traffic laws of this state, and shall include an actual demonstration of ability to exercise ordinary and reasonable control in the operation of a motor vehicle and such further physical and mental examinations as the department finds necessary to determine the applicant's fitness to operate a motor vehicle safely upon the highways."

It may be seen that section 321.186 of the 1958 Code of Iowa is substantially the same as the quoted enactment by the 48th General Assembly. An addition to the enactment by the 48th General Assembly was made by the 50th General Assembly, which granted to the Department the authority to examine a person whose driving record appears to justify such an examination.

This study of the legislative history of section 321.186 indicates that, although the Department was commanded by the legislature at one time to examine every applicant for an operator's or chauffeur's license as to his physical and mental qualifications, such is not now contemplated under section 321.186. Section 321.186 now makes such examinations dependent upon whether the Department has reason to believe that an applicant may be physically or mentally incompetent to operate a motor vehicle.

The legislature's use of the singular word "person" in section 321.186 further indicates the legislative intent that this authority granted to the Department of Public Safety to require physical and mental examinations of an applicant should be exercised on an individual basis. Generally, words that are used in a statute are to be given their usual and commonly-used meaning, unless it is plain from the statute that a different meaning is intended. See Patterson v. Iowa Bonus Board, 246 Iowa 1087, 71 N. W. 2d 1, 7 (1955). It should be noted that the legislature has been consistent by its use of the singular word "person" in section 321.177(7), to which you refer. That section provides that the Department shall not issue a license to any person when the Commissioner has good cause to believe that such person, by reason of physical or mental disability, would not be able to operate a motor vehicle with safety on highways.

Thus, in answer to your first question, the phrase in section 321.186, "such further physical and mental examinations as the department finds necessary to determine the applicant's fitness to operate a motor vehicle safely upon the highways", is a condition subsequent to the determination that a specific person should be so examined by the Department. It follows, therefore, that your subsequent question must be answered in the negative.

Very truly yours,

BRUCE M. SNELL, JR.
Assistant Attorney General

BMS:bl

SCHOOLS: Disposition of schoolhouse -- Under section 297.20, Code 1958, the school district has no duty to fill the hole left when a schoolhouse has been removed by a third party. The provisions of section 297.15 et seq. are mandatory upon the school district and cannot be bypassed.
(REHMANN TO RASCHE, CLINTON CO. ATTY., 11/22/61) #61-11-19

November 22, 1961

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

Dear Mr. Rasche:

Reference is made to your letter of October 17, 1961 in which you set out several facts relating to the sale of school buildings as well as the duty of the school board to a landowner in the event a building is removed instead of being sold with the real estate. More specifically, you propound the following questions, to wit:

> "(1) Based upon these facts, if a school district sells a building located on real estate that reverts to the then owner of the real estate by virtue of a right of reversion contained in the deed, does the school district have to fill the holes left by virtue of the removal of the building, and cave in the foundations?
>
> "(2) Does a school district have to follow the statutory provisions of Sections 297.15 and related statutes in the sale of school houses where the underlying real estate is owned by the then owner of the land by virtue of a reversion contained in a deed at the time the real estate was originally conveyed to the School district, or does the School district have the authority and power to by-pass Sections 297.15 and related statutes, and sell said buildings by public auction without following the provisions of these statutes?"

In reply thereto, we advise as follows:

The Supreme Court has never had the opportunity to discuss the problem presented in your first question, nor was the advertisement enclosed with your letter explicit as to the duties of the responsible parties. Therefore, general law relating to this subject must be relied upon in order to find your answer.

61-11-19

Your attention is directed to 87 C. J. S., Trustees § 122, page 1082, wherein it states:

> "Title and possession do not warrant a recovery for property severed if it has been sold to a third person. Possession and equitable title in the plaintiff do not authorize a recovery of the damage for injury to the freehold. Possession of the land under a contract for purchase does not warrant a recovery of the damages for any injury to the freehold."

From the foregoing authority, it would appear that where a school district contracts with separate parties, one for the removal of the schoolhouse which, under such circumstances, is personal property in nature, and the other for the sale of the property to the reversionary interest, no recovery can be had by the person holding the freehold, either from the person severing the schoolhouse or from the school district. Authority for the support of such a view can be found in the case of Southern Railway Co. v. Ethridge, 108 Ga. 121, 33 S. E. 850.

Thus, in answer to your first question, the school district has no duty to fill the hole left by the removal of a school building from the freehold. We will not comment as to the liability which might be incurred as an attractive nuisance by the person so removing the school building, which is of no concern to the school district since they have disposed of any or all interest they may have had in the property.

The provisions for the liquidation of property owned by the school district are clearly set out by sections 297.15 to 297.25 inclusive. Sections 297.22 through 297.24 are specific legislation relating to the sale of certain property under certain statutory conditions without the approval of the electors as provided in section 278.1, Code 1958. Sections 297.15 through 297.20 inclusive are general provisions relating to the disposal of rural school property, being modified, however, to the extent that the provisions of section 297.22 et seq. as set out above relate to the special disposition of property under certain circumstances. Whether the provisions of section 297.15 or section 297.22 are followed is immaterial, provided that the statutory authority found thereunder is complied with.

As recently as 1954, the Supreme Court of the State of Iowa, commenting on the disposition of school property, noted this in the case of Suck v. Benton Twp., 246 Iowa 1, 8, 66 N. W. 2d 434, as follows:

> "That this proposition is sound there can be no doubt. The statutes involved herein are for the public benefit and are mandatory, not merely directionary." (emphasis ours)

The failure of a school district to comply with this statutory mandate would render any purported sale void and any conveyance thereunder illegal.

Thus, in answer to your second question, it is mandatory that the school district follow the provisions of sections 297.15 et seq. or section 297.22 et seq. in the disposition of any property owned by the school district.

Very truly yours,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:bl
cc: Paul Johnston, Supt.,
Public Instruction

SCHOOLS: Tuition -- School districts can only incur liability to pay tuition based upon the statutory duty imposed upon them under section 282.7. When such liability occurs it must be taken into consideration in the division of assets and liabilities under section 275.28.
(REHMANN TO CADY, FRANKLIN CO. ATTY., 11/22/61) #61-11-18

November 22, 1961

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

Dear Mr. Cady:

Reference is made to your letter of June 30, 1961, wherein you state the following:

> "The Chapin Independent School District designated the Hampton School as the school for attendance for students of this district. At that time there were two special designations granted, authorizing students of the district to go to Sheffield. These related to grade school students. Three grade school students went to the Sheffield District, which is the district that they received special designation to attend, and on or about March 1, 1961, nine additional students moved into the district, and all of them attended the Sheffield-Chapin School without having obtained special designation, and the question has now arisen as to whether or not the Chapin Independent School District has to pay the tuition and/or transportation for these students who are in fact attending a school other than that designated.
>
> "Out of the nine who have attended the Sheffield-Chapin School, there are four high school students and five grade school students, and I would like to know if under Section 282.7 there is a difference as to the responsibility of the school district for payment of the tuition and transportation of high school or grade school students.
>
> "One remaining question exists, and this relates to the obligation of the district to pay for the tuition and transportation of said students. The Chapin Independent School District, due to a reorganization, has now been absorbed by the Hampton District and Sheffield District, and the assets and liabilities are

#61-11-18

> to be divided on July 10th. The question which we have is this: In the event that your answer to the above question is in the affirmative, so that the Chapin District is obligated to pay both for the students who attended the designated district and other students who attended the non-designated school, how is the amount to be divided, since there is not a sufficient amount in the treasury to pay the entire amount due, but there is only enough to pay for the students who attended the designated school and the high school students who attended the non-designated school."

In reply thereto, we advise as follows:

It is a matter of long judicial standing and common knowledge that, before a school district can incur a liability for the payment of transportation or tuition, there must be a corresponding statutory duty placed upon the school district in order to accomplish this end. This is clearly stated in the case of Dermit v. Sergeant Bluff Cons. Sch. Dist., 220 Iowa 344, 261 N. W. 636. Once a statutory duty is imposed upon a school district, it must in turn respond to the mandate of the General Assembly for the purpose for which the express intent was made. This basic concept is discussed generally in the following cases: Silver Lake Cons. Sch. Dist. v. Parker, 238 Iowa 984, 29 N.W. 2d 214; Ind. Sch. Dist. of Danbury v. Christiansen, 242 Iowa 963, 49 N.W. 2d 263; Lincoln Dist. v. Redfield Dist., 226 Iowa 298, 283 N.W. 881.

Specific reference is made to section 282.7, which provides, to wit:

> "Attending in another corporation -- payment. The board of directors in any school district may by record action discontinue any or all of its school facilities. When such action has been taken, the board shall designate an appropriate approved public school or schools for attendance. Tuition shall be paid by the resident district as required in section 279.18 and section 282.20 for all pupils attending designated school, except that high school pupils may attend school of choice and be entitled to tuition, but must attend school designated for attendance to qualify for transportation. Designations shall be made as provided in chapter 285."

Your attention is invited to the case of Ind. Sch. Dist. of Danbury v. Christiansen, 242 Iowa 963, 49 N.W. 2d 263, which

holds that a school district is liable for the tuition of all its pupils which are sent to another district, and the county treasurer is under a mandatory duty to transfer those funds from the debtor district to the creditor district. However, such action could be enjoined if the claim of the creditor district is illegal. Thus, in order to have a legal claim against the sending district, the sending district must have done two things: 1. discontinued its facilities by record action, and 2. designated an appropriate approved public school for attendance.

In answer to your first question, therefore, the school district does have the statutory duty to pay the tuition claims of all students who reside within the school district, provided such claims are legal. The sending district is liable for tuition and transportation of elementary students and of high school students attending the designated school. In cases where high school students attend districts other than the one designated, the sending district would be liable for only the tuition of said pupil and no liability would be incurred for the costs of transportation. Thus, a creditor district may compel the county treasurer to transfer funds of the sending district to the creditor district; however, if the statutory provisions set out above are not met, the debtor district could enjoin the transfer of the funds because the claim would be illegal.

In answer to your second question, regarding the division of assets and liabilities under the provisions of section 275.28, only those liabilities which are legally incurred by a school district can be considered in such division of assets and liabilities. It would appear from the facts presented in your letter that, because the students in question did not receive special designation, the debtor district would be liable only for tuition and not for transportation of those high school students who attended the high school district other than the one designated by the debtor district. With regard to the five students who attended the elementary school, the sending district has a statutory obligation to pay. However, due to the failure to obtain a special designation, no legal liability is imposed upon the sending district for the payment of this tuition.

Yours very truly,

THEODOR W. REHMANN, JR.
Assistant Attorney General

TWR:bl
cc: Paul Johnston, Supt.
of Public Instruction

HEALTH: Powers - Dept. of Health - jurisdictional limitations. By reason of statutory (Chapters 135, 332) and constitutional limitations, (Chapter 1 of the Code and Preamble of the constitution of the State of Iowa) the Department of Health is without authority to authorize or permit the construction, maintenance and operation of a sewage treatment plant within the state for the use and benefit of a foreign municipality.
(BIANCO TO ZIMMERER, COM'R. PUB. HEALTH, 11/27/61) #61-11-22

November 27, 1961

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

Attention: Paul Houser, Director

Dear Sirs:

Reference is made to letter under date of October 27, 1961 addressed to Mr. Houser by T. A. Filipi, Director, Environmental Health Services for the State of Nebraska, requesting permission to construct a sewage treating plant on the Iowa side of the Missouri river, for the use and benefit of the city of Nebraska City, Nebraska, as to which you request advice as to the authority of the Department of Health to issue such permit.

In reply thereto we would advise that it is our considered opinion that the department lacks jurisdiction to issue such permit for the following reasons:

> Under the provisions of Section 332.3 (2), counties have power - "To make such rules not inconsistent with law, as it may deem necessary for its own government, the transaction of business, and the preservation of order," - among many other specific powers, including zoning powers, regulating location and use of structures, etc. Also boards of supervisors have jurisdiction of the incorporation and establishment of sanitary districts as provided by Chapter 358 of the Code, which includes the construction, maintenance and operation of sewage treatment plants and systems.

However, under Section 135.26, it is unlawful to construct, install or modify any dosposal system without first securing a written permit from the department of health.

Nebraska City, which is seeking a permit is, of course, located beyond the territorial limits of the State of Iowa, i. e. on the west bank of the Missouri River, the western boundary of the State of Iowa at that point being the middle of the main channel of the river.

The department of health, as an administrative agency of the state; its jurisdiction is coextensive with the jurisdiction of the state.

What is the jurisdiction of the state with respect to the above matter?

It has been said that it is not the policy of a state to place limitations on the power and means of maintaining its own existence. (See Teget v. Lambach, 226 Iowa 1346, 286 N. W. 522, 123 A. L. R. 392)

The state has power to control its internal affairs and to prescribe such laws as are proper for the government of its citizenry, and to adopt a general policy of its own respecting the health, social welfare, and education of its citizens, provided such laws do not contravene the provisions of the federal or state constitutions. (State v. Vartelo, 191 Iowa 1060,1067, 181 N. W. 508)

What effect the establishment and operation of a sewage treatment plant in the State of Iowa, for the use and benefit of a foreign municipality upon the health and welfare of the citizens of Iowa cannot be foreseen or circumscribed without some means of jurisdiction and regulation.

The sovereign powers of the state cannot and does not extend beyond its territorial borders.

It has been so held in the early case of Mississippi and M. R. Co. v. Ward, (1862), 67 U. S. 485, 2 Black 485, 17 L. Ed. 311.

This case was followed, in the case of Gilbert v. Moline Water Power and Mfg. Co. (1866) 19 Iowa 319, enunciating the principles governing the states jurisdiction involving property out of, or beyond its territorial limits, wherein it was held:

The concurrent jurisdiction of the states of Illinois and Iowa over the Mississippi river (and this also applies to Iowa and Nebraska as to the Missouri river) attaches to cases, either civil or criminal, arising out of the commerce of such river; but does not authorize the courts of Iowa to abate a nuisance established and existing in said river on the Illinois side of the main channel. Under this rule the same would be true as to nuisances on the Nebraska side of the Missouri river. The court used this pertinent language to amplify the rule:

> "Now, while it is, of course, not claimed that the laws of this State would have any inherent authority beyond the jurisdiction of the State, or that our laws can bind or affect property out of or beyond our territorial limits, it is insisted that this property, or that this alleged nuisance, is so situated that either State may direct the manner of its use, and order its removal or abatement if found to be of the character charged. That the courts of Illinois might do this, there is, of course, no doubt. But the claim is, that

> our courts have the same concurrent right, on the complaint of one of our citizens, whose property, situated within our jurisdiction, is injured by the alleged unlawful obstruction. We do not believe, however, that the acts and constitutional provisions referred to include cases like that now before us."

Therefore it is our opinion that the department of health is without authority to authorize or permit the construction, maintenance and operation of a sewage treatment plant within the State for the use and benefit of a foreign municipality by reason of statutory and constitutional limitations.

Yours truly,

FRANK D. GIANCO
Assistant Attorney General

FDGirm

COUNTIES AND COUNTY OFFICERS: Qualification of Deputy Assessor. A Deputy County Assessor has no independent or original status, and in order to qualify for appointment to such office under a new Assessor is required to pass examination required by Section 10, Chapter 291, Acts of the 59th G.A.

(Straus to Hoover, Clay County attorney
#61-12-1

November 28, 1961

Mr. Earl E. Hoover
Clay County Attorney
Spencer, Iowa

Dear Mr. Hoover:

This will acknowledge receipt of yours of the 2nd, inst., in which you submitted the following:

> "We have a new county assessor taking office Jan. 1, 62. The woman who has been deputy assessor, and is still so acting, took the examination for assessor and passed it, but was not selected as assessor. The new assessor wants her for a deputy and my question is: does she have to take the Deputy Assessor's Examination?
>
> "Does it make any difference whether she has just passed the Assessor Examination this fall?
>
> "I think the assessors would like this matter clarified."

In reply thereto, I advise as follows.

The status of deputies generally is set forth in 43 Am. Jur, title Public Officers, paragraph 460, as follows:

> "§ 460. Generally: Definitions and distinction -- Among the principal aides to public officers are deputies and assistants. The two are by no means the same or equivalent, and the two words are not legally synonymous. An assistant is one who aids, helps, or assists, while a deputy is a person appointed to act for another, a substitute

#61-12-1

> or delegate who acts officially for his principal. Another distinction sometimes pointed out is that an assistant may or may not be sworn, while 'deputy' implies only the sworn class. The former is the more comprehensive of the two words and includes the latter within its reach, but the person described thereby is usually more clerical than otherwise, while the latter may do anything that his principal may do. And while ministerial acts may be delegated by an officer or board to 'assistants' whose employment is authorized, they do not have the status of deputies to whom quasi-judicial functions may be delegated. A deputy is a person appointed as the substitute of another and empowered to act for him in his name and behalf in all matters in which the principal may act. His principal is responsible for his acts, he is removable at the pleasure of his principal, and his authority ceases at the latter's death or disqualification. Legislative authorization for the appointment of a 'deputy' does not create or authorize the appointment of an 'assistant'."

With these general observations in mind of the legal status of deputies, examination of Chapter 291, Acts of the 58th General Assembly to determine whether these principles, in part or in whole, are applicable to the office of deputy, is pertinent. In that aspect, it appears that: (1) The power of appointing a deputy assessor is vested in the assessor from a list of eligible persons for such office, provided by the Examining Board. Such eligibility is for a period of two years from the date of examination. (2) While the term of office of the assessor is fixed at six years, the term of the deputy is not fixed and can only be terminated subject to suspension or discharge upon written charges for neglect of duty, disobedience

of orders, misconduct, or failure to properly perform his duties. (3) That the duties of the deputy are such as may be assigned to him from time to time by the assessor. (4) That in the event of a vacancy in the office of assessor, the chief deputy will act as assessor.

Though the foregoing provisions do not expressly conform with the general principles applicable to the appointment and the performance of the duties of deputy assessors, it is to be observed that a deputy assessor does not, under the provisions of Chapter 291, have independent or original status, but on the other hand his appointment and the tenure of his status is the prerogative of the assessor.

Chapter 291, Section 11, Laws of the 58th General Assembly, provides with respect to these provisions the following:

> "Sec. 11. Appointment of deputy assessors. The assessor shall appoint from the qualified applicants certified by the examining board such number of deputy assessors as shall have been previously authorized by the conference board. If for any reason the assessor is unable to appoint from this list some or all of the deputy assessors authorized, or in case the list contains fewer names than the number of deputy assessors authorized, the assessor shall so notify the examining board and the examining board shall forthwith hold another examination.
>
> "The assessor may peremptorily suspend or discharge any deputy assessor under his direction, upon written charges for neglect of duty, disobedience of orders, misconduct, or failure to properly perform his duties. Within five (5) days after delivery of said written charges to such employee, he may appeal by written notice to the secretary or chairman of the examining

> board. Such board shall grant him a hearing within fifteen (15) days, and a decision by a majority of said examining board shall be final."

There is confirmation of this view in the interpretation of Section 341.6, Code of 1958, where the duties to be performed by deputies are prescribed in substantially the same language as used in Chapter 291, Section 11, heretofore quoted, specifically Section 11, Chapter 291, provides the following:

> ". . .
>
> . . . .
>
> "The assessor shall designate one (1) of said deputies as chief deputy, and the assessor shall assign to each deputy such duties, responsibilities, and authority, from time to time, as may be proper for the efficient conduct of his office.:"

And, in the case of Thompson Bros. v. Phillips, 198 Iowa 1964, 200 N.W. 727, it was observed:

> "The sheriff is authorized by statute to appoint deputies, for whose acts he shall be responsible. Section 510, Code of 1897 (Section 5238, Code of 1924). The act of the deputy is the act of the sheriff; he has no original power, but acts as the representative or agent of the sheriff, who is the principal. Headington v. Langlens, 65 Iowa 276. It will be noted that the statute requires the sheriff to make the return, although the deputy is authorized to make the service. In Gray v. Wolf, 77 Iowa 630, a return signed 'By J. R. Myers, Deputy, J. W. Workman, Sheriff,' was held good. It was said: 'This was a service by Myers as deputy of Workman, sheriff.'"

It thus appears that the deputy assessor has neither independent nor original status. In view of the foregoing, we are of the opinion that the above deputy assessor, in order to be qualified for appointment to such position by the new assessor,

must pass examination provided by Section 10, Chapter 291, Acts of the 58th General Assembly, for the office of the deputy assessor.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:la

STATE OFFICERS AND DEPARTMENTS: State Printing Board -- Departments of the State located in Des Moines shall draw their supplies of paper stock, including carbon paper and copy paper, from the State Printing Board.

(Strauss to Gill, Secretary, Executive Council,
#61-12-2

December 6, 1961

Mr. Gary S. Gill, Secretary
Executive Council of Iowa
L O C A L

Dear Gary:

This will acknowledge receipt of your letter of the 15th, inst., in which you submitted the following:

> "The Executive Council respectfully requests an opinion on the following matter:
>
> "The Executive Council maintains a supply room in the Statehouse under authority of Chapter 19, Code of Iowa, 1958. Part of the inventory in this supply room is made up of the following: columnar pads, note book fillers, carbon paper, index cards, file folders, and copy paper (eg. Thermofax).
>
> "The aforementioned items are distributed pursuant to Sections 19.27 and 19.28 of the Code of Iowa, 1958.
>
> "On the other hand, Section 15.41, Code of Iowa, 1958, reads as follows:
>
> 'Paper stock drawn from printing board. All mimeograph paper, envelopes and other paper stock to be used in their Des Moines offices shall be drawn by the several state departments and agencies from the state printing board with its approval and charged to the several officials, boards, departments, commissions or agencies and paid from the printing appropriation of each board, official, department, commission or agency.'

#61-12-2

> "The other question that arises is what is the meaning of the phrase 'other paper stock' as used in the above statute. To be more specific, in view of the above provision of the Code, are any of the items set forth above included within this phrase and therefore should be handled through the printing board as opposed to the present system."

With the view that I take of this situation, I find it unnecessary to define the term "other paper stock". This view results from the fact that Sections 19.27 and 19.28, Code of 1958, are statutes of longstanding and appear to have been by statute the only source of paper supplies to the various state departments, and this would include the supplies described in Section 15.41, Code of 1958, herein quoted by you.

However, the 55th General Assembly, by Chapter 47, created the Central Printing Department. This Statute, by its terms, provided the printing requirements of the state departments located in Des Moines. In connection with the creation of such department was the enactment of Section 7 of Chapter 47, Acts of the 55th General Assembly, now described as Section 15.41, quoted by you, which required such departments located in Des Moines to draw the supplies described therein from the Printing Board. Thus, lacking statutory definition of "paper stock", this seems a proper place for the application of the rule of Ejusdem Generis, stated as follows:

Sutherland Statutory Construction, 3rd Edition, Vol. 2., at page 395:

"§ 4909. Ejusdem generis.

"A variation of the doctrine of noscitur a sociis is that of ejusdem generis. Where general words follow specific words in an enumeration describing the legal subject, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."

and, therefore, the term "other paper stock" would mean the paper customarily comparable to envelopes and mimeograph paper. Under this rule, this would include carbon paper and copy paper, which is, by statute, available to the departments in Des Moines from the Printing Board and not from the Council.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:la

STATE OFFICERS AND DEPARTMENTS: Reciprocity Board -- exemption of motor vehicles from December fees -- "new car" under section 321.106, Code 1958, means a motor vehicle not previously registered in this or any other state. "New car" under said section does not include trailers. Annual registration fee under 321.106 means a fee for a 12-month period. Registration fees for December are assessed except to the owner of a new car in good faith delivered to him in December. Non-resident owners are subject to the payment of Dec. registration fees as are resident owners.

(Sneed to Reciprocity Board, #61-12-4)

December 7, 1961

Iowa Reciprocity Board
State Office Building
Des Moines 19, Iowa

Gentlemen:

This will acknowledge receipt of your opinion request of September 25, 1961, in which you state the following:

"1. What is the legal interpretation as used in Section 321.106 of 'new'? Does this mean a vehicle which has never been licensed in any jurisdiction and is being licensed in Iowa for the first time anyplace?

"Does 'new' mean the first time the 'car' is registered in Iowa regardless of the number of times the vehicle has been registered in other jurisdictions?

"2. What is the legal interpretation of 'car' as used in Section 321.106? Chapter 321 does not have a statutory definition of a 'car'; however, it does define 'vehicle' and 'motor vehicle'. Does 'car' include trucks, tractors, and/or trailers, or would 'car' be confined to the popular concept of the meaning -- passenger cars?

"3. What is the legal interpretation of the word 'delivered' as used in Section 321.106? Does this mean 'delivered' to the titled owner? If the registrant is other than the titled owner, to whom must delivery be made? Under prorate registration the registrant in many instances is the lessee of the vehicle and not the titled owner.

"4. If a non-resident, starting in the Month of December, engages in remunerative employment or operates a business within Iowa, and, in connection with said employment or business, operates any motor vehicle, trailer, or semi-trailer, within Iowa, and his vehicles have been licensed in a state other than Iowa -- can he, in the Month of December, secure a license which is good for thirteen months; or must he license for the balance of the registration year?

#61-12-4

"5. Section 321.106 states: 'Where there is no delinquency and the registration is made in February or in succeeding months to and including November, the fees shall be computed on the basis of one-twelfth of the annual registration fee as provided herein multiplied by the number of the unexpired months of the year.' As this office has interpreted this to mean that when the carrier comes in in the Month of November, that the fee is computed on the basis of one-twelfth of the annual registration fee multiplied by the number of unexpired months--in other words, we would take the one-twelfth fee and multiply by two since you would have the unexpired Month of November and the Month of December. We do not interpret this to mean that the registration year ends in November. We have interpreted it to mean that when there is no delinquency, and registration is in December, that you have a one-twelfth annual registration fee still left; and that the only exception would be for the 'new car in good faith, delivered in December.'"

Section 321.106, 1958 Code of Iowa, states as follows:

"Where there is no delinquency and the registration is made in February or in succeeding months to and including November, the fees shall be computed on the basis of one-twelfth of the annual registration fee as provided herein multiplied by the number of the unexpired months of the year. Whenever any such fee so computed contains a fractional part of a dollar, it shall be computed as of the nearest fractional quarter dollar thereto, and said amount shall be the fee which shall be collected. For the purposes of this chapter, the fee so computed for an original registration in this state shall be deemed the annual registration fee for that year.

"No fee shall be required for the month of December for a new car in good faith delivered during that month."

Regarding your questions 1 and 2, which concern the above-quoted section 321.106, reference is made to the definitions for Chapter 321. Section 321.1(2) defines "motor vehicle" and "used motor vehicle" as follows:

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

> "'Used motor vehicle' or 'second-hand motor vehicle' means any motor vehicle of a type subject to registration under the laws of this state which have been sold 'at retail' as defined in chapter 322 and previously registered in this or any other state."

It is apparent from these definitions that the phrase "used motor vehicle" embraces a vehicle that has been previously registered in this or any other state. Also, by definition, the term "car" which is used in section 321.106 is synonymous with the term "motor vehicle". From examination of these definitions, it would appear that, had the legislature intended the word "car" as used in section 321.106 to mean a previously registered car, the phrase "used motor vehicle" would have been used in lieu of the word "car". Also, it is a general rule that a proviso for an exemption in any statute in derogation of its general enacting clause must be strictly construed. Palmer v. State Bd. of Assessment and Review, 226 Iowa 92, 283 N.W. 415 (1931). For the above reasons, I am of the opinion that the phrase "new car" as used in the second paragraph of section 321.106, 1958 Code of Iowa, means a motor vehicle that has not been previously registered in this or any other state.

Section 321.1(2) defines "motor vehicle" to include every vehicle which is self-propelled, with exceptions not applicable hereto. This definition therefore includes a motor truck or a truck tractor, but does not include trailers since the latter are not self-propelled.

Regarding question number 3, section 321.20 provides that every owner of a vehicle subject to registration under Chapter 321 shall make application to the county treasurer. The word "owner" is defined by section 321.1(36) as follows:

> "'Owner' means a person who holds the legal title of a vehicle or in the event a vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee or lessee or in the event a mortgagor of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner for the purpose of this chapter."

These sections indicate that the owner is the person who is responsible for registering a vehicle and consequently is the person who would be entitled to an exemption therefrom. I am therefore of the opinion that the exemption in section 321.106

for a new car in good faith delivered during the month of December applies to the owner of said car. To determine if said exemption applies in a particular fact situation, you should apply the definition of owner contained in section 321.1(36).

Your question number 4 inquiring as to the registration requirements of non-residents has reference to section 321.55, which says:

> "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."

The non-resident registration becomes delinquent, as does that of a resident, under section 321.135, as follows:

> "Such delinquencies shall begin and penalty accrue the first of the month following the purchase of a new vehicle, and the first of the month following the date cars are brought into the state, except as herein otherwise provided."

Consequently, it is my opinion that the non-resident is subject to the same provisions of law outlined in this opinion regarding the registration of vehicles as is a resident.

With reference to question number 5, I am of the opinion that the interpretation of section 321.106 that you have set out is the correct interpretation. If the interpretation were made that the annual fee is to be computed only to and including the month of November, that is, on an eleven-month basis, specific exemption provided for in the second paragraph of section 321.106 would be meaningless. There would be no need for a December exemption for new cars delivered in good faith if December fees for all motor vehicles or trailers were exempted, since then the lesser exemption would be included in the greater. A statute will not be so construed that part of it is rendered superfluous, and effect should ordinarily

be given to every provision of a statute if fairly possible. Ind. Sch. Dist. of Cedar Rapids v. Iowa Empl. Sec. Comm., 237 Iowa 1301, 25 N.W. 2d 491 (1947).

Very truly yours,

BRUCE M. SNELL, JR.
Assistant Attorney General

BMS:bl

BEER AND CIGARETTES -- Applicants -- fingerprints -- There is no authority under Section 124.23 Code of 1958, whereby local authorities can require an applicant for beer permit to be fingerprinted for purposes of investigation.

(Beamer to Jenkins, Monroe County Attorney
#61-12-3

December 7, 1961

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

Dear Mr. Jenkins:

We have your favor of October 5, 1961 reading as follows:

"Section 124.23 of the 1958 Code of Iowa empowers 'the authorities' to issue beer permits with the power to make thorough investigations of any applicant who makes application for a beer permit under the provisions of Chapter 124. By custom and by habit the State Beer Permit Board seeks the advice of the Chief of the local Police Department, from the Sheriff of the local County involved, and the local County Attorney to inquire of them if there is any reason of which they are cognizant why a beer license should not be issued to the applicant.

"In counties of our size this rarely gives any problem in that most people are known sufficiently that it is possible to state with a reasonable degree of certainty the fitness and the truth of the statements made by the applicant in his application for a license. Nevertheless, a problem has arisen in this county in which a person resident in this county for a period of less than one week made application for a permit and absolutely nothing was known regarding truth of the statements made by the applicant in his application nor was anything whatsoever known of his general moral character.

"So that we may be guided in our future actions in this regard, may we have your opinion as to the following:

'Where the local authorities have no personal knowledge of the applicant for a beer permit, does Section 124.23 give the local authorities the power to require that the applicant be fingerprinted and those fingerprints sent to the State Bureau of Criminal Investigation and the Federal Bureau of Criminal Investigation for a check of the applicant's criminal record, if any?'"

#61-12-3

In reply thereto we advise:

There is a mandatory duty placed upon the governing bodies authorized to issue beer permits to make a thorough investigation as set forth in Section 124.23 of the Code as follows:

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

How this investigation shall be conducted is, of course, discretionary with the members of the governing bodies.

However, the duty imposed upon such bodies to make a thorough investigation to determine fitness of applicant for permits to sell beer is imperative and not perfunctory, and it is not to be performed in light of, or with reference to, personal knowledge or opinion of members of such bodies. (See Madsen v. Town of Oakland, 219 Iowa 216, 257 N. W. 549).

There are many ways in which information may be gathered together to determine whether or not the applicant is of good moral character and repute. One would be to inquire of the State Bureau of Criminal Investigation as to whether or not the applicant has a criminal record.

Fingerprints of persons having such a record will be on file in the office of said bureau by virtue of the provisions of Chapter 749 of the Code. Fingerprints of such persons will be on file, if they have been charged or held for investigation of the crimes enumerated therein.

There is no condition specified in the statute, in order that a person may be entitled to a beer permit, to submit fingerprints with his application.

Therefore, it is our opinion, that Section 124.23 of the Code does not authorize local authorities to require that an applicant for a beer permit be fingerprinted for purposes of investigation of the applicant.

Yours truly,

FRANK D. BIANCO
Assistant Attorney General

FDB:rm

COUNTIES AND COUNTY OFFICERS: Sheriff - living allowance -- The sheriff is entitled to the Six Hundred Dollars ($600.00) living allowance provided by Section 340.5, Code of Iowa, when he elects not to use the living quarters provided.

Strauss to Ford, Des Moines County Attorney

#61-12-6

December 12, 1961

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

Dear Mr. Ford:

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

> "In Des Moines County the sheriff is provided with living quarters in the jail at the Courthouse. He has a free choice of whether he wishes to live in these quarters or allows his jailer to live in these quarters.
>
> "In Des Moines County the sheriff elects to live in his own home and to allow his jailer to occupy the living quarters. The Board of Supervisors is in no way concerned with whether the sheriff lives in these quarters or whether his jailer lives in these quarters and leaves that choice to the sheriff.
>
> "We are familiar with the May 9, 1923, opinion of the Attorney General concerning the subject. We are not able to determine whether the opinion refers to a situation where the Board of Supervisors makes the choice or whether the sheriff makes the choice.

#61-12-6

"Will you, therefore, please advise us whether the sheriff is entitled to the $600.00 living allowance under the code where he has the free election to determine the use of the living quarters under the circumstances as above stated?

"Many thanks for your usual prompt response to these inquiries. We have a meeting of some importance dealing with this subject on the 14th day of December, and are very much in hopes that we can have an opinion at that time."

In reply thereto, I would advise you that on authority of opinion of this Department issued March 28, 1957; opinion of this Department issued June 2, 1923, and appearing in the Report of the Attorney General, 1923-24, at page 136; and opinion of this Department issued October 25, 1919 and appearing in the Report of the Attorney General, 1919-20, at page 627, copies of each of which are hereto attached, that the sheriff is entitled to the $600.00 living allowance where he elects not to use the living quarters provided.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:la

Enclosures

COUNTIES AND COUNTY OFFICERS: Definition of Voucher -- The word "voucher", defined generally, in the context of Section 332.15, Code of 1958, includes the statement of account or claim upon which voucher is issued.

Strauss to Samore, Woodbury County Attorne

#61-12-5

December 12, 1961

Mr. Edward F. Samore
Woodbury County Attorney
Court House - Room 103
Sioux City, Iowa

Attention: Richard Rhinehart
Legal Counsel
Woodbury County Board of
Supervisors

Dear Mr. Samore:

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

> "A substantial portion of our storage space is required to provide for many years accumulation of claims and invoices, which invoices are in fact a statement of the account due and are attached to the claim when they are presented, in the first instance, to the Board of Supervisors for payment. The Statute in question authorizes destruction of, among other things, 'County vouchers', hence our question relative to the construction or meaning of 'County vouchers'."

In reply thereto, I would advise you that while there appears to be no statutory definition of the term "voucher", it has been defined generally in the following

#61-IV-5

words:

> "When used in connection with the disbursement of moneys it implies some instrument that shows on what account or by what authority a particular payment has been made, or that services have been performed which entitle the party to whom it is issued to payment. First Nat. Bank of Chicago v. City of Elgin, 136 Ill.App. 453, 465." See Words and Phrases, Volume 44, page 467.

Therefore, I am of the opinion that in the context of the Statute referred to, being Section 332.15, Code of 1958, it includes the statement of account or the claim upon which the voucher is issued.

Very truly yours,

OSCAR STRAUSS
First Assistant Attorney General

OS:la

TREASURER: Gas Tax Division - Refunds - Within the terms of the statutes, defining "motor fuel" and "special fuel", Sections 324.2 (1) and 324.33 (1) respectively, a user of special fuel cannot qualify for a refund under the provisions of Section 324.17 Code of Iowa, 1958, as amended.

December 18, 1961

Bianco to Abrahamson, Treasurer of State

#61-12-7

Honorable M. L. Abrahamson,
Treasurer of State,
L O C A L.

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

Dear Sir:

Reference is made to letter under date of November 8, 1961, by Mr. C. E. Borg, which reads:

"A need has developed to allow refund on Special Fuels to some users who make purchases on a tax paid basis where the Special Fuels (Diesel and L. P. Gas) are used for both highway and non-highway purposes. This applies mainly to corn shellers, roller mills and truck mounted feed grinders. Special Fuel, as defined in Section 324.33 subsection 1, is subject to 7¢ per gallon tax for diesel fuel and 6¢ per gallon tax for all other Special Fuels under Section 324.34. The tax is imposed when the fuel is delivered into the supply tank of a motor vehicle as defined in Section 324.37 subsection 2. Section 324.37 subsection 2 is further qualified in paragraph 3 in classifying certain equipment as "mobile machinery and equipment" not deemed to be a motor vehicle. This paragraph excludes certain other equipment including corn shellers, roller mills and grinders as 'mobile machinery and equipment' and they would therefore be deemed to be 'motor vehicles'.

"In the legislative session of 1959 amendments were enacted to permit refund of 'motor fuel' tax paid on 'motor fuel' used in corn shellers, roller mills and feed grinders becoming effective July 4, 1959. The amendments taken from my copy of House File 4 are as follows:

AN ACT TO PERMIT THE REFUND OF MOTOR FUEL TAX PAID ON MOTOR FUEL USED IN CORN SHELLERS AND ROLLER MILLS AND TRUCK MOUNTED FEED GRINDERS.

Section 1. Section three hundred twenty-four point seventeen (324.17), Code 1958, is hereby amended by inserting

#61-12-7

in line four (4) following the word, 'tractors,' the words, 'corn shellers, roller mills, truck mounted feed grinders'.

Section 2. Section three hundred twenty-four point fifty-seven (324.57), Code 1958, subsection three (3), is hereby amended as follows:

1. By inserting in line seven (7) of said subsection following the word, 'as' the words, 'corn shellers, truck mounted feed grinders, roller mills,'.

2. By striking from lines twenty-four (24) and twenty-five (25) the words: 'corn shellers, lime spreaders or feed grinders,' and inserting in lieu thereof the following: 'or lime spreaders,'.

"The above amendments would appear to do two things; (1) Amend Section 324.17 to classify corn shellers, roller mills and truck mounted feed grinders in the same category as tractors, stationary engines, aircraft or boats. (2) Amend Section 324.57 subsection 3 to classify corn shellers, roller mills and feed grinders as 'mobile machinery and equipment'. Since July 4, 1959 refunds have been made available to claimants of the tax paid on motor fuel (gasoline) used in corn sheller, roller mills and feed grinders where the equipment is operated by power take -off from the truck motor and the fuel is consumed from the truck tank, on the basis of these amendments.

"The specific problem relating to the need is, therefore: Can the law be interpreted to allow refund to claimants of the tax paid on Special Fuels (Diesel and L. P. Gas) used in the same equipment operated by power take-off in the same manner as above? If not can a rule and regulation be proposed and approved to cover this need under Section 324.58 of the law."

In reply thereto you are advised as follows:

Section 324.2 (1) defines "motor fuel", and Section 324.33 (1) defines "special fuel" respectively as follows:

> "324.2 (1). 'Motor fuel' shall mean (a) all products commonly or commercially known or sold as gasoline (including casinghead and absorption or natural gasoline) regardless of their classifications or uses; and (b) any liquid advertised, offered for sale, sold for use as, or commonly or commercially used as a fuel for propelling motor vehicles, which when subjected to distillation of gasoline, naphtha, kerosene and similar petroleum products (American Society of Testing Materials Designation D-86), show not less than ten per centum distilled (recovered) below three hundred forty-seven degrees Fahrenheit (one hundred seventy-five degrees Centigrade) and not less than ninety-five per centum distilled (recovered) below four hundred sixty-four degrees Fahrenheit (two hundred forty degrees Centigrade); provided, that the term 'motor fuel' shall not include liquefied gases which would not exist as liquids at a temperature of sixty degrees Fahrenheit and a pressure of

fourteen and seven-tenths pounds per square inch absolute, nor naphthas and solvents as hereinafter defined unless the liquefied gases or naphthas and solvents are used as a component in the manufacture, compounding, or blending of a liquid within (b) above, in which event the resulting product shall be deemed to be motor fuel."

"324.33 (1). 'Special fuel' means and includes all combustible gases and liquids suitable for the generation of power for propulsion of motor vehicles also any substance used for that purpose, except that it does not include motor fuel as defined in the motor fuel tax law."

The section of the law, Section 324.17, authorizing refunds, contains the following provision:

"324.17. Any person other than a licensee who shall use motor fuel for the purpose of operating or propelling farm tractors, corn shellers, roller mills, truck mounted feed grinders, stationary gas engines, aircraft or boats, for cleaning or dyeing or for any purpose other than in motor vehicles operated or intended to be operated upon the public highways and having paid the motor fuel tax on the fuel either directly to the treasurer or by having the tax added to the price of the fuel, and who has a refund permit shall, upon presentation to and approval by the treasurer of a claim for refund be reimbursed and repaid the amount of the tax which the claimant has paid on the gallonage so used. Every claim filed subsequent to July 4, 1957 shall be subject to the following conditions:" . . .

It would appear from a reading of these provisions of the law, that refunds are authorized only to those using "motor fuel" as defined in the law, Chapter 324. Those using "special fuel" cannot qualify for a refund.

In the case of Lawson v. Fordyce, 237 Iowa 26, 21 N.W. 2d 59, it was said that where a word is defined in a code section at the beginning of a chapter, the court must assume that word has the same meaning wherever else it is used in the chapter, unless otherwise stated.

The legislature may be its own lexicographer and write its own definitions of words and terms. (See State v. DiPaglia, 247 Iowa 79 71 N.W. 2d 601). Furthermore courts are bound to follow legislative definitions of terms in statutes, whether legislative definition conforms to usual and ordinary meaning of the defined word. (See Halpin v. Collis Co. 243 F. 2d 698).

Therefore in view of the plain meaning of the terms used as defined by the legislature users of special fuel cannot qualify for a refund under the provision of Section 324.17 of the Code, as amended.

Since the test to qualify for a refund, rests upon the type of fuel used,ie. "motor fuel" or "special fuel", we do not think a rule or regulation is called for, unless the treasurer deems a rule or regulation necessary requiring additional proof for a claimant to qualify for a refund.

Yours truly,

FRANK D. BIANCO
Assistant Attorney General

FDB:rm

MOTOR VEHICLES: Taxation of mobile homes -- Amendment to question 7 of staff opinion issued November 9, 1961.-- Mobile homes and house trailers in the hands of dealers or manufacturers are exempt as provided in Section 321.130, 1958 Code of Iowa, as amended.

December 22, 1961

STAFF OPINION

Mr. John W. Shafer
Allamakee County Attorney
Waukon, Iowa

and

Mr. Harry Perkins
Polk County Attorney
Room 406, Court House
Des Moines, Iowa

Dear Messrs. Shafer and Perkins:

On November 9, 1961, a staff opinion was issued by this Department pertaining to several questions asked by you on the subject of mobile homes. One of the questions in that opinion was stated in your letter as follows:

> "7. The amendment to Section 321.130 also raises this question: are trailer houses in the hands of a dealer and/or manufacturer assessable as personal property?"

The following amended answer to the above question is hereby issued to become a part of our opinion of November 9, 1961.

Prior to the amendment by the 59th General Assembly, Section 321.130, 1958 Code of Iowa, read as follows:

> "The registration fees imposed by this chapter upon private passenger motor vehicles or house trailers or semitrailers shall be in lieu of all taxes, general or local, to which motor vehicles or house trailers or semitrailers may be subject, and if a motor vehicle or house trailer or semi-trailer shall have been registered at any time under this chapter it shall not thereafter be subject to a personal property tax unless such motor vehicle or house trailer or semitrailer shall have been in storage continuously as an unregistered motor vehicle or house trailer or semitrailer during the preceding registration year or unless the same is actually being used for dwelling purposes for more than six months during each calendar year. This section shall not apply to occupied mobile homes."

The 59th General Assembly amended said section by deleting all references contained therein to "house trailers" and struck all words after the word "year" in line 15 of that section. The amended Section 321.130 now reads:

> "321.130 Fees in lieu of taxes. The registration fees imposed by this chapter upon private passenger motor vehicles or semitrailers shall be in lieu of all taxes, general or local, to which motor vehicles or semitrailers may be subject, and if a motor vehicle or semitrailer shall have been registered at any time under this chapter it shall not thereafter be subject to a personal property tax unless such motor vehicle or semitrailer shall have been in storage continuously as an unregistered motor vehicle or semitrailer during the preceding registration year."

It can be readily seen from an examination of Section 321.130 prior to the amendment by the 59th General Assembly that it contained ambiguities and inconsistencies. For example, the phrase "house trailer" in said section is not defined in the Code of Iowa. Chapter 216, Laws of the 58th General Assembly, contains a definition of "house trailer and mobile home" which pertains to Chapter 321, and Chapter 135D, 1958 Code of Iowa, contains a definition of "mobile home" in Section 135D.1. But since no definition of "house trailer" was contained in the Code, there has been considerable uncertainty as to what that phrase referred in Section 321.130. Also, prior to the most recent amendment, Section 321.130 indicated that personal property tax would have to be paid if a house trailer was actually being used for dwelling purposes for more than six months during each calendar year. However, the sentence immediately following this provision inconsistently stated that Section 321.130 would not apply to occupied mobile homes. By removing these inconsistent provisions from Section 321.130, the 59th General Assembly has cured some of the problems arising therefrom. We think that the amendment by the 59th General Assembly to Section 321.130 was made in part with these facts in mind.

The 59th General Assembly also provided that house trailers and mobile homes regardless of whether or not they are used on the highways pay a registration fee of $5.00. By removing the phrase "house trailer" from Section 321.130 it may also have been the legislative intent that no phrase be left in said section that might possibly have provided an exemption from the fees assessed under Chapter 135D by payment of a $5.00-registration fee. While deleting the phrase "house trailer," the legislature did retain the tax exemptions provided by Section 321.130 for a motor vehicle or a semitrailer. The definition of a semitrailer in Section 321.1(10) reads as follows:

> "'Semitrailer' means every vehicle without motive power designed for carrying persons or property and for being drawn by a motor vehicle and so constructed that some part of its weight and that of its load rests upon or is carried by another vehicle."

We think that this definition of semitrailer is broad enough to embrace mobile homes and house trailers and that the legislature must have so intended. Thus, the numerous statutes on required equipment for semitrailers apply to mobile homes and house trailers. Moreover, no legislative intent to expressly exempt mobile homes and house trailers from the definition of semitrailer appears. The California District Court of Appeal in Caperton v. Mast, 192 P. 2d 467, 85 C. A. 2d 157 (1948) construed the California statutory definition of "semitrailer"

which is nearly identical to the Iowa definition in Section 321.1(10). In that case, the California Court held that a house trailer was included within the definition of semitrailer.

For the above reasons, it is our opinion that the 59th General Assembly intended to embrace mobile homes and house trailers within the definition of semitrailers. Accordingly, mobile homes and house trailers in the hands of manufacturers or dealers continue to be within the exemptions provided to semitrailers by Section 321.130, 1958 Code of Iowa, as amended. This opinion hereby amends our answer to question 7 in our opinion to you dated November 9, 1961, and anything contained in the opinion of said date that is inconsistent with this amended opinion is hereby withdrawn.

Very truly yours,

EVAN HULTMAN
Attorney General

EH:BMS:hc

STATE OFFICERS AND DEPARTMENTS: Conservation -- Conservation Commission may release appropriated funds to a town to repair a road when repairs were such a part of the sewer project for which the funds were appropriated that but for the project the repairs would not have been occasioned. Iowa Code section 8.34 (1958); sec. 1, Ch. 12, Acts 56th G.A.

December 22, 1961

Creger to Brown, Sac County Attorney,

#61-12-8

Mr. Harold Brown
Sac County Attorney
State Bank Building
Sac City, Iowa

Dear Mr. Brown:

We have your letter of September 19, 1961, in which you state:

"The 56th General Assembly passed a law providing for the appropriation of $1,173,000.00 for: 'construction, acquisition, replacements, alterations for state parks and reserves, state forests, state waters, for dredging, for sanitary sewer projects for artificial lake development . . . '

"Subsequently, a letter of intent from the Legislature indicated that of this sum of money $125,000.00 was allocated for the sanitary sewer system of Blackhawk Lake.

"By conferences and negotiation between the Town of Lake View and the Conservation Commission, it was determined that the Town of Lake View should proceed with the sanitary sewer project. Accordingly, a contract was let for the work. It was contemplated that the repair work on the road, which was necessitated by the installation of the sewer line, would be completed at a later date after the sanitary sewer had been hooked up to the private properties surrounding the lake.

"Prior to the installation of the sanitary sewer system this particular road was in good condition. However, the installation of the sewer system cut up the road so badly that it became necessary to repair the same. This fact was known to both the Town of Lake View and the Conservation Commission prior to the actual work on the sewer. It was the contemplation of these two

#61-12-8

groups that the road would later be repaired and the funds then remaining, out of the $125,000.00 earmarked for this project, would be used for that purpose.

"The Town of Lake View has now let a contract for the complete resurfacing of this road. It was determined by the engineering firm hired by the Town that the resurfacing of the road would be more economical than attempting to repair the road. The engineering firm transmitted a letter to the Town Council, which in turn was sent to the Conservation Commission indicating that the cost for the improvement or repair of this road in the area where the sanitary sewer system was installed was approximately $27,000.00.

"Mr. Ray Mitchell, Superintendent of Parks in the Conservation Commission, has now indicated that he will not approve the release and disbursement of the funds remaining from this $125,000.00 until he is satisfied that the same would be legal as an expenditure of money for the purpose intended by the original act of the Legislature. Mr. Mitchell also advises that there remains in this fund the sum of $21,630.00.

"The question thus is, may the State Conservation Commission release these funds to the Town of Lake View to pay for the cost of repairing this road, which repairs were made necessary by the installation of the sanitary sewer system, within the authority of the act of the Legislature."

Section 1, Chapter 12, Acts of the 56th General Assembly (1955), provides as follows:

"There is hereby appropriated and set out of the general fund of the state from any moneys not otherwise appropriated, to the state conservation commission the sum of one million one hundred seventy-three thousand dollars ($1,173,000.00) or so much thereof as may be necessary for construction, acquisition, replacements, alterations for state parks and reserves, state forests, state waters, for dredging, for sanitary sewer projects for artificial lake development, for erosion control, for streams and lake access, for land acquisition and for design and investigation, but said funds appropriated and set aside by this act shall not be

> expended until it shall be determined by the conservation commission with approval of the budget and financial control committee and that its expenditures shall be for the best interests of the state."

We have been unable to locate the "letter of intent" referred to in your letter, but the Budget and Financial Control Committee did, on December 1, 1956, release from the appropriation the sum of $125,000.00 for the extension of the Lake View sewer system.

There is authority for the proposition that, upon the completion of a project undertaken with the use of appropriated funds, all unused moneys must in due course revert to the general fund. See Iowa Code section 8.34 (1958), which provides as follows:

> "Except as otherwise provided by law, the comptroller shall transfer to the fund from which any appropriation was made, any unexpended or unencumbered balance of such appropriation remaining at the expiration of three months after the close of the biennial fiscal term for which the appropriation was made. * * * "

However, see 1958 Op. Atty. Gen., p. 53, dated January 31, 1958, which states that:

> "In exercising this power granted to the Comptroller, in pursuance of his general supervisory (power) over the State's finances, he may use certain discretion under a liberal view of the intention of this statute, . . . "

Thus, the Comptroller has no duty to transfer moneys back to the general fund if the project for which they are intended is not completed. It is equally clear, however, that funds appropriated for a purpose must be used solely for that purpose (see 1960 Op. Atty. Gen., p. 36, dated May 19, 1959); and once that purpose is completed, no reason exists why the Comptroller should not charge off remaining excess funds.

Is the repair of the road referred to in your request a part of a "sanitary sewer project" within the meaning of section 1, Chapter 12, Acts of the 56th General Assembly, supra, so as to authorize the expenditure of state funds upon such repair? But for the sanitary sewer project the repairs would not have been occasioned, and they are therefore

In our opinion so much a part of the project that to prevent manifest injustice appropriated funds should be expended towards their completion. It is generally accepted that a statute should not be construed so as to lead to injustice or unreasonableness. See Case v. Olson, 234 Iowa 869, 14 N.W. 2d 717 (1944); Farmers Drainage Dist. v. Monona-Harrison Drainage Dist., 246 Iowa 285, 67 N.W. 2d 445 (1955); Schuler v. Holmes, 242 Iowa 1383, 49 N.W. 2d 818 (1952).

Your inquiry is therefore answered in the affirmative.

Very truly yours,

JOHN M. CREGER
Assistant Attorney General

JMC:bl