State of Iowa

1926

SIXTEENTH BIENNIAL REPORT

of the

ATTORNEY GENERAL

for the

BIENNIAL PERIOD ENDING DECEMBER 31, 1926

BEN J. GIBSON
Attorney General

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ATTORNEY GENERAL'S DEPARTMENT

Ben J. Gibson	Attorney General
Maxwell A. O'Brien	Assistant Attorney General
Neill Garrett	Assistant Attorney General
Herbert A. Huff	Assistant Attorney General
Stanton S. Faville	Assistant Attorney General
Earl F. Wisdom	Assistant Attorney General
Eloise Taylor Williams	Secretary to Attorney General
Gladys Gustin	Stenographer
Hazel Webster	Stenographer
Mary Ward	Stenographer
Dorothy Donohoe	Stenographer
Myrtle Osbrink	Stenographer

REPORT OF THE ATTORNEY GENERAL

To the Honorable John Hammill, Governor of Iowa:

I have the honor to submit herewith a brief report of the business of the Department of Justice for the years 1925 and 1926.

During this period of time more business has passed through this department than during any like period in the history of the state. This being true, it is impossible to more than briefly refer to some of this business which may interest and be of benefit to the people of the state.

DEPARTMENT FINANCES

It has always been our belief that the appropriations made by the legislature for each of the several divisions of expenditure, namely, for salaries, contingent fund, peace officers, etc., were the maximum to be expended. Therefore, in the year 1921 we set out with a definite policy which was to conduct the affairs of this office every year so as to show a saving in each appropriation provided by the legislature. This we have succeeded in doing during every year of the six year period. Every division of the office has been conducted for less than the appropriations. The average of such savings will be not less than twenty per cent. We are pleased with the report of the Budget Director relative to the finances of the department. He says:

> "We believe the department to be efficiently conducted and in our opinion the best results obtained for money expended and we feel that the work of the department does not conflict with or duplicate that of any other department."

RAILROAD TAXATION

During this period the last of the so-called railroad tax cases were determined in favor of the state. The cases referred to were those brought by the Chicago, Rock Island & Pacific Railway Company and the Chicago, Great Western Railroad Company. The result of these cases was the securing of some $350,000.00 additional revenues for the state.

BANK TAXATION

All of the bank tax cases determined during this period were determined in favor of the state and the municipalities of the state, save the cases brought in Polk County which are now pending in the Circuit Court of Appeals. The work so far as this department is concerned is completed.

PRIVATE BANK TAXATION

The private bank tax cases were determined adversely to the state. It seems to the writer that the legislature should give very careful consideration to this question of private bank taxation. Not that an injustice should be done but rather that there should be more of an equality as between private bank taxation and corporate bank taxation.

INSURANCE TAXATION

There is now pending in the Supreme Court of the State of Iowa the case of New York Life Insurance Company v. W. J. Burbank, et al. This case involves the gross premium tax statute of the state. The determination of this case is of the most vital importance to the state. It involves hundreds of thousands of dollars in revenues. We have arranged for an advancement of this case so that it will be determined by the Supreme Court in February. The reason for this advancement is so that whatever may be the outcome of the case the legislature will be advised so that they may give consideration to remedial legislation. This is a matter which must be cared for during the coming session.

CASES IN THE SUPREME COURT OF THE UNITED STATES

A large number of cases have been determined in the Supreme Court of the United States in which this department has been interested. These cases have been uniformly determined in favor of the state. The two most important cases dealing with the railroad tax laws and the bank tax laws of the state. In both instances the statutes of Iowa were upheld.

The docket in the Supreme Court of the United States is now clear, there being no cases pending.

CASES IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA

The docket in this court is now clear. Because of the recent decision of the Supreme Court of the United States, the so-called

Automatic Fire Box Laws have been enjoined and the cases entirely disposed of. There is pending in this court a case involving one of the bank receiverships of the state but this case has nothing to do with the state business proper.

CIVIL CASES IN THE SUPREME COURT OF IOWA

Civil cases in the Supreme Court of Iowa are practically determined. The only ones remaining being one or two collateral inheritance tax cases and the insurance tax case to which we have referred. It may be said that the docket in the Supreme Court of Iowa so far as the civil cases are concerned is practically cleared.

CRIMINAL CASES IN THE SUPREME COURT OF IOWA

The criminal cases determined in the Supreme Court of Iowa and pending at this time are all referred to in a separate part of this report. The affirmances and reversals of criminal cases for the years 1925 and 1926 were as follows:

92 Affirmances and 27 Reversals for 1925.
85 Affirmances and 12 Reversals for 1926.

BANK RECEIVERSHIPS

It is indeed unfortunate that during the past two years a large number of state and savings banks and loan and trust companies have failed. This department has nothing to do with such institutions as going institutions. However, under the law, when such institutions are closed the Attorney General acts as advisor for the Superintendent of Banking. As such advisor we have carried a large number of cases to the Supreme Court of the State. Perhaps the most outstanding of these cases being the bank preference cases. These cases involved the question as to whether or not the sureties on depository bonds or the depositors should stand the losses to public fund. The Supreme Court decided favorably to the depositors.

STATE FUNDS IN CLOSED BANKS

During the past two years this department has had to do with the collection of state funds deposited in closed banks. These deposits may be roughly referred to as follows:

That in the United State Bank of Des Moines, consisting of some $280,000.00; that in the Commercial Savings Bank of Des Moines, consisting of some $250,000.00; that in the Mechanics Savings Bank of Des Moines, consisting of some $150,000.00 and that in the Central Trust Company of Des Moines, consisting of some $375,000.00. All of these funds have been recovered and have been

paid to the state with the exception of approximately $5,000.00 still remaining unpaid in the Mechanics Savings Bank. It is certain that this will be paid to the state.

Unfortunately we find that in the recent closing of the Iowa Loan & Trust Company the state had on deposit $500,000.00. These funds will necessarily have to be cared for from the state sinking fund.

BUREAU OF INFORMATION AND IDENTIFICATION

We have continued the work of the Bureau of Information and Identification along the same lines as heretofore. The success of this bureau has now become a matter of comment nationwide. Similar bureaus are now being established in most of the states. A separate division of this report is devoted to the work of the bureau.

We have already made certain recommendations relative to this bureau to the Budget Director. In these recommendations we have suggested that the appropriation for peace officers be increased. We are firmly convinced after six years' experience that the state cannot expend money more profitably than in the employment of a state peace force equal to the necessities of the state.

INHERITANCE TAX MATTERS

During the two year period a large volume of litigation in connection with inheritance tax matters passed through the department. The more important of the cases are referred to in the schedule elsewhere set forth in this report. See Schedules E and F. Relating to inheritance tax matters, Assistant Attorney General Herbert A. Huff has submitted to me the following statement. In this statement he points out certain defects in the statute and suggests certain remedial legislation. Since receiving this statement, I have given very careful consideration to it and I do not hesitate to join in the recommendations made. Mr. Huff says:

> "There are some serious defects in the administrative features of the inheritance tax statute.
>
> To make the law workable, and to better enable the Treasurer's office to administer the law these defects should be corrected by legislation.
>
> This department, in co-operation with the Treasurer's office, has prepared a comprehensive bill changing and strengthening the administrative features of the present statute. It will, of course, be impracticable to discuss in this report each and all of the features of this bill.
>
> The experience of this department and the Treasurer's office in attempting to thoroughly carry out the provisions of the law has convinced both departments that the changes embodied in the bill should be enacted into law as speedily as possible. The bill creates in the office of the Treasurer of State a department known as the Inheritance Tax Department, the head of which will be known as the Commissioner of the Inheritance Tax Department.
>
> This provision was inserted in the bill for the purpose of giving the department a greater dignity, and to place our law in line with the laws of practically all of the other states that levy inheritance taxes.
>
> I recommend to the Legislature a careful and thorough examination of said bill, and the enactment of a statute along the lines suggested therein."

REMEDIAL LEGISLATION

It is not our purpose to make extended recommendations for remedial legislation. We have made a number of recommendations in our previous reports and we respectfully invite attention thereto. In addition thereto may we offer one or two suggestions which we believe may be of some benefit?

1. It is a matter of common knowledge that the laws of Iowa relating to criminal procedure are unduly technical and cumbersome. For a number of years the press of the state has insisted upon a simplification of these laws, all to the end that all technicalities in procedure and all unnecessary delays in the prosecution of criminals be eliminated. The lawyers of the state have for years recognized the fact that great improvements may be made in these laws all for the benefit of the state.

Nearly a century ago in Great Britain a complete revision of the laws relating to criminal procedure was had. The net result has been that there all technicalities are eliminated. The trial of a criminal is very simple. There is no delay either in the trial court or in the court of appeals. If the accused is innocent he is released almost instantly. If he is guilty his punishment is swift and certain.

Some lawyers claim that it is impossible to adopt such a simple method of procedure as that prevailing in Great Britain. Without assuming to dispute these statements, we do say without the fear of contradiction that our laws can be remedied. We do not see why the laws in this state should not be such as to prevent the release of criminals because of technical errors either on the part of the county attorney or of the trial court. We do not see why there should be any delay in the presentation of cases in the trial court or in the supreme court. It is our firm belief that a commission

should be appointed by the legislature to go into this matter in detail to the end that the next General Assembly may have before it a clear, simple plan for the elimination of technicalities and unnecessary delays in criminal procedure. If such a commission is successful, as we believe it will be, its work will be of inestimable value to the state not only from the standpoint of law enforcement but from the standpoint of economy.

We believe that this commission should consist of representatives of the courts as well as of the bar.

2. What we have said relative to criminal procedure we say also relative to criminal law. There are many duplications in our criminal statutes. There are many conflicting statutes. There are many unnecessary statutes. This necessarily results in impeding law enforcement. We believe that the commission to which we have referred should also report relative to the revision of these statutes.

3. The American Bar Association and the Commission on Uniform Laws of the United States have submitted to this department for transmission to the legislature a proposed uniform Concealed Weapons Law. We have given careful consideration to this statute and believe that its adoption uniformly throughout the United States will result in much good. This statute is available in this department for the use of the legislature.

4. We have observed during the last few years a gradual inclination on the part of law enforcing officers to dispense with the services of the grand jury. In many respects this inclination is for the betterment of criminal procedure and the enforcement of the law. However, it must not be forgotten that the grand jury has a place in criminal procedure. The grand jury is an investigating body. It is selected from all parts of the county, the original purpose being to have a grand juror from each part of the county report to the whole jury conditions in his part of the county. The net result was that the grand jury once assembled had a fairly accurate knowledge of matters demanding investigation from all parts of the county. It then in secret investigated such matters as it believed worthy of investigation. If there was no crime nothing was done; if there was crime the county attorney was notified and indictments prepared and presented. Today the grand jury is generally used for no other purpose than to take evidence in matters submitted by the county attorney and to return indictments at his suggestion.

We believe that law enforcing officers are overlooking one of the best instrumentalities at their disposal in the grand jury. Good

wholesome investigations in secret before the grand jury can never do harm and generally will result in good. We believe that something should be done to the end that the grand jury may be what it ought to be, namely: a powerful instrumentality for the enforcement of the law.

5. We believe legislation should be enacted to provide for a school for the sheriffs of the state at least once each year. Of course, the sheriffs should not be given additional compensation but they should be allowed their expenses while attending such school. The school should be under the supervision of the Attorney General and should be held for the purpose of creating a spirit of co-operation and uniform service among such officers. This is one state and there should be complete working accord among all the sheriffs of the state.

Under the law, as it now stands, the Attorney General is required to buy and file a bond for $10,000.00 He has no funds in his hands. It is our opinion that this requirement should be eliminated from the statutes.

CONCLUSION

I cannot close this report without expressing to you and to the people of the State of Iowa my gratitude for the many honors conferred upon me. It has been a distinguished honor to serve as Attorney General for Iowa and this honor I appreciate.

I desire also to express to all who have been associated with me in the work of the Department my appreciation for their splendid co-operation and help.

Respectfully,
BEN J. GIBSON, Attorney General.

SCHEDULE "A"—CRIMINAL CASES SUBMITTED TO THE SUPREME COURT OF IOWA

JANUARY TERM, 1925

Title of Case	County	Decision	Nature of Action
State vs. Gibson (C. C.)	Cass	Affirmed	Malpractice.
State vs. Davis	Union	Affirmed	Bootlegging.
State vs. DeBolt	Ringgold	Affirmed	Larceny of Poultry.
State vs. Parry et al.	Lucas	Affirmed	Soliciting for Prostitution.
State vs Singleman	Johnson	Affirmed	Seduction.
State vs. Wion	Ringgold	Affirmed	Larceny of Poultry.
State vs. Speedling	Linn	Reversed	Liquor Nuisance.
State vs. McDonnell	Adair	Affirmed	Maintaining a liquor nuisance.
State vs. Rice	Marion	Affirmed	Liquor Nuisance.
State vs. Zambuletta	Marion	Affirmed	Liquor Nuisance.
State vs. Feldman	Des Moines	Affirmed	Receiving stolen property.
State vs. Gibson (C. T.)	Union	Reversed	Disposing of mortgaged property.
State vs. Jergenson	Wapello	Modified and affirmed	Driving auto while intoxicated.
State vs. Parenti	Adams	Affirmed	Nuisance.
State vs. Sell	Wapello	Reversed	Wife and child desertion.
State vs. Paden	Shelby	Reversed and remanded	Conspiracy.
State vs. Costello	Cherokee	Affirmed	Assault with intent to inflict great bodily injury.
State vs. Dickson	Davis	Modified and affirmed	Assault with intent to inflict great bodily injury.
State vs. Gibson (G. A. and Eleanor)	O'Brien	Reversed and remanded	Excessive use of narcotics.
State vs. Sterman	Madison	Affirmed	Libel.
State vs. Smith (Fred Lee)	Woodbury	Affirmed	Assault with intent to commit murder.
State vs. Meade	Polk	Affirmed	Liquor nuisance.

State vs. Rubio	Polk	Affirmed	Prostitution.
State vs. Shea	Polk	Affirmed	Liquor nuisance.
State vs. Stewart	Polk	Affirmed	Uttering a forged instrument.
State vs. Beeson	Polk	Affirmed	Assault with intent to commit murder.
State vs. Mickle	Polk	Affirmed	Murder, first degree.
State vs. Wenks	Polk	Affirmed	Receiving stolen property.
State vs. Chapman	Humboldt	Affirmed	Possession of material for manufacture of liquor.
State vs. Mehl	Chickasaw	Affirmed	Resorting to a house of ill-fame for purpose of lewdness.
State vs. Miller	Fayette	Affirmed	Bootlegging.
State vs. Alberts	Johnson	Reversed	Rape.
State vs. Lammers	Wright	Affirmed	Bootlegging.
State vs. Smith (Earl)	Polk	Affirmed	Larceny.
State vs. Speedling	Linn	Affirmed	Liquor nuisance.
State vs. Stoner	Fremont	Affirmed	Nuisance.
State vs. Vanuto	Polk	Affirmed	Liquor nuisance.
State vs. Frear	Jones	Reversed	Escape.
State vs. Hagedorn	Audubon	Affirmed	Statutory rape.
State vs. Ivey	Chickasaw	Affirmed	Larceny.
State vs. Poston	Pottawattamie	Reversed	Assault with intent to commit rape.
State vs. Larson	Winneshiek	Reversed	Keeping a house of ill-fame.
State vs. Manhattan Oil Company	Polk	Affirmed	Operating a motor carrier without permit.
State vs. Terry	Shelby	Reversed and remanded	Incest.
State vs. Boyd	Henry	Affirmed	Receiving stolen property.

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State vs. Kendall	Pottawattamie	Modified and Affirmed	Operating a motor vehicle while intoxicated.
State vs. Brown	Polk	Affirmed	Breaking and entering.
State vs. Carr (Chas.)	Sioux	Affirmed	Assault with intent to inflict great bodily injury.
State vs. Cedarquist	Sioux	Affirmed	Nuisance.
State vs. Madison	Union	Affirmed	Carrying concealed weapons.

MAY TERM, 1925—Continued

Title of Case	County	Decision	Nature of Action
State vs. Parry	Lucas	Affirmed	Keeping a gambling house.
State vs. Renslow	Guthrie	Affirmed	Larceny.
State vs. Simons	Muscatine	Affirmed	Murder, first degree.
State vs. Smith (Ed)	Lucas	Affirmed	Breach of Sabbath.
State vs. Sposita	Polk	Modified and affirmed	Liquor nuisance.
State vs. Briggs	Calhoun	Affirmed	Driving an auto while intoxicated.
State vs. Briggs	Calhoun	Affirmed	Bootlegging.
State vs. Dingman	Polk	Affirmed	Gambling by selling pools.
State vs. Russell	Webster	Affirmed	Nuisance.
State vs. Soodhalter	Polk	Affirmed	Gambling by selling pools.
State vs. Berg	Polk	Reversed	Embezzlement.
State vs. Carr (Lee)	Polk	Affirmed	Murder, first degree.
State vs. Crabbe	Des Moines	Reversed	Larceny.
State vs. Cornelius	Marion	Reversed and remanded	Practicing medicine without a license.
State vs. Ellington	Mahaska	Affirmed	Assault with intent to commit rape.
State vs. Gaskill	Polk	Affirmed	Murder.
State vs. Hillman	Fayette	Affirmed	Liquor violation.
State (Appellant) vs. Johnson	Kossuth	Reversed	Nuisance.
State vs. Lozier	Polk	Affirmed	Receiving stolen property.
State vs. McGee	Marion	Reversed	Fraudulent conveyance.
State vs. Olson	Woodbury	Affirmed	Nuisance.
State vs. Russell	Polk	Reversed	Assault with intent to do great bodily injury.
State vs. Walker	Polk	Affirmed	Sodomy.
State vs. Fortunski	Cerro Gordo	Affirmed	Lewd, immoral and lascivious acts.

SEPTEMBER TERM, 1925

Title of cases	County	Decision	Nature of action
State vs. Hough	Taylor	Affirmed	Murder.
State vs. Ross	Mahaska	Affirmed	Rape.
State vs. Beachem	Woodbury	Affirmed	Receiving stolen goods.
State vs. Carr (Earl)	Sioux	Affirmed	Nuisance.
State vs. Carr (Roy)	Sioux	Affirmed	Bootlegging.
State vs. Waterman	Sioux	Affirmed	Liquor nuisance.
State vs. Wright	Lee	Reversed	Desertion.
State vs. Marsh	Polk	Affirmed	Liquor nuisance.
State vs. Shepard, et al.	Polk	Affirmed	Assault with intent to inflict great bodily injury.
State vs. Touche	Polk	Affirmed	Liquor nuisance.
State vs. Detloff	Sioux	Affirmed	Obtaining money by false pretenses.
State vs. Heeren	Plymouth	Affirmed	Maintaining intoxicating liquor in a building.
State vs. Herzoff	Cherokee	Affirmed	Carnal knowledge of an imbecile.
State vs. Marx and Kauffman	Plymouth	Reversed	Maintaining a liquor nuisance.
State vs. Reid	Lyon	Reversed and remanded	Maintaining a liquor nuisance.
State vs. Augustine	Webster	Affirmed	Nuisance.
State vs. Peacock	Henry	Affirmed	Assault with intent to commit murder.
State vs. Beam	Fremont	Affirmed	Nuisance.
State vs. Smith (Wm.)	Montgomery	Affirmed	Larceny.
State vs. Butler	Hamilton	Reversed	Receiving stolen property.
State vs. Herring	Johnson	Reversed	Child desertion.
State (Appellant) vs. Carr	Dubuque	Affirmed	Influencing election while manager.
State vs. Kennedy	Linn	Affirmed	Operating a motor vehicle while intoxicated.
State vs. Baugh	Polk	Affirmed	Uttering a forged instrument.
State vs. Brundage	Linn	Affirmed	Bootlegging.
State (Appellant) vs. Caskey	Buena Vista	Reversed	Nuisance.
State vs. Eggleston	Howard	Affirmed	Bootlegging.
State vs. Ellis, et al.	Polk	Affirmed	Gambling device.
State vs. Gran	Buena Vista	Affirmed	Nuisance.
State vs. Giles	Pottawattamie	Affirmed	Operating a motor vehicle while intoxicated.
State vs. Gude	Fremont	Reversed and remanded	Desertion.

SEPTEMBER TERM, 1925—Continued

Title of Case	County	Decision	Nature of Action
State (Appellant) vs. Judkins	Clarke	Affirmed	Cheating by false pretenses.
State vs. Keck, et al.	Buena Vista	Affirmed	Unlawfully selling intoxicating liquor.
State (Appellant) vs. Kenne	Kossuth	Affirmed	Bootlegging.
State vs. Lamberti	Dallas	Reversed	Rape.
State vs. McWilliams	Howard	Affirmed	Uttering a forged instrument.
State vs. Metcalfe	Woodbury	Affirmed	Assault with intent to commit murder.
State vs. Napier	Lucas	Reversed	Larceny.
State vs. Overbay	Fremont	Affirmed	Operating a motor vehicle while intoxicated.
State vs. Reynolds	Fremont	Affirmed	Manslaughter.
State vs. Sexsmith	Mahaska	Reversed	Manslaughter.
State vs. Trybom	Montgomery	Affirmed	Murder.
State vs. Voss	Pocahontas	Affirmed	Liquor nuisance.
State vs. Wilcoxen	Fremont	Reversed	Seduction.
State vs. Wilson	Woodbury	Affirmed	Maintaining a liquor nuisance.

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State vs. Dvorak	Linn	Affirmed	Maintaining a liquor nuisance.
State vs. Carroll, et al.	Decatur	Affirmed	Assault with intent to commit murder.
State vs. Madison	Union	Affirmed	Murder.
State vs. Cox	Johnson	Affirmed	Nuisance.
State vs. Fisher (Cornelius)	Muscatine	Affirmed	Intoxication.
State vs. Fisher (Cornelius)	Muscatine	Affirmed	Intoxication.
State vs. Fisher (Neal)	Muscatine	Affirmed	Intoxication.
State vs. Marshall	Cherokee	Affirmed	Bootlegging.
State vs. Pettingill	Cherokee	Affirmed	Illegal transportation of liquor.
State vs. Nelson	Wright	Affirmed	Bootlegging.
State vs. Kennedy	Webster	Affirmed	Liquor nuisance.
State vs. Patrick	Johnson	Reversed and remanded	Rape.
State vs. Barger	Cerro Gordo	Affirmed	Maintaining a liquor nuisance.

State vs. Luckenbach	Louisa	Affirmed	Illegal possession of liquor.
State vs. Tuttle	Cerro Gordo	Affirmed	Maintaining a liquor nuisance.
State vs. McCaske	Woodbury	Affirmed	Robbery.
State (Appellant) vs. Casebolt	Webster	Reversed	Illegal transportation of intoxicating liquor.
State vs. Fahey	Franklin	Affirmed	Driving an auto while intoxicated.
State vs. Hanson	Wright	Affirmed	Unprofessional conduct.
State vs. Meighan	Chickasaw	Affirmed	Liquor nuisance.
State vs. Hatcher and Riley	Harrison	Reversed and remanded	Rape.
State vs. Mueller	Clayton	Affirmed	Rape.
State vs. Pinkerton	Tama	Affirmed	Murder, first degree.
State vs. Reed	Harrison	Reversed	Murder, first degree.

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State vs. Arthurs	Dallas	Affirmed	Fraudulent banking.
State vs. Grove	Webster	Affirmed	Illegal transportation of liquor.
State vs. Kennedy	Jasper	Affirmed	Nuisance.
State vs. Randa	Polk	Affirmed	Keeping a gambling house.
State vs. Emery, et al.	Polk	Affirmed	Breaking and entering.
State vs. Kinney	Polk	Affirmed	Liquor nuisance.
State vs. Olmstead	Polk	Affirmed	Larceny of a motor vehicle.
State vs. Smith	Polk	Affirmed	Having in his possession instruments intended for use in manufacture of intoxicating liquor.
State vs. Schmidt	Polk	Affirmed	Liquor nuisance.
State vs. Thomas	Polk	Affirmed	Receiving deposits while insolvent.
State vs. Weymiller	Allamakee	Affirmed	Desertion.
State vs. Williams	Polk	Affirmed	Breaking and entering.
State vs. Dye	Harrison	Dismissed	Bootlegging.
State (Appellant) vs. Bailey	Woodbury	Affirmed	Illegal possession of narcotic drugs.
State vs. Burch	Marion	Affirmed	Liquor nuisance.
State vs. Debner	Iowa	Reversed	Uttering a forged instrument.
State vs. Derry	Marion	Affirmed	Lewd, immoral and lascivious acts.
State vs. Heath	Carroll	Affirmed	Statutory rape.
State vs. Japone	Linn	Affirmed	Maintaining a liquor nuisance.

MAY TERM, 1926—Continued

Title of Case	County	Decision	Nature of Action
State vs. Kaufman	Scott	Affirmed	Maintaining a liquor nuisance.
State (Appellant) vs. McCarty	Van Buren	Affirmed	Fraudulent banking.
State vs. Moss	Monona	Reversed	Seduction.
State vs. Reinhard	Clayton	Reversed	Nuisance.
State vs. Sipes	Clay	Reversed and remanded	Murder.
State vs. Taylor	Linn	Affirmed	Lewd, immoral and lascivious acts.

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State vs. Gill	Crawford	Affirmed	Larceny.
State vs. Ashmore	Adams	Affirmed	Breaking and entering a freight car.
State vs. Weller	Lee	Affirmed	Larceny.
State vs. Stanley	Adams	Affirmed	Selling cigarettes without state stamps.
State vs. Schmuck	Adams	Affirmed	Larceny.
State vs. Striggles	Polk	Affirmed	Keeping a gambling house.
State vs. Bayles	Woodbury	Affirmed	Larceny of motor vehicle.
State vs. Clouse	Mahaska	Affirmed	Bigamy.
State vs. Lake	Plymouth	Affirmed	Maintaining a liquor nuisance.
State vs. Duskin	Lucas	Reversed	Illegal transportation of intoxicating liquor.
State vs. Gillman	Wapello	Modified, affirmed and remanded	Operating a motor vehicle while intoxicated.
State vs. Hixson	Jefferson	Reversed	Cheating by false pretenses.
State vs. Kneeskern	Floyd	Affirmed	Murder.
State vs. Anderson	Muscatine	Affirmed	Bootlegging.
State vs. Barton	Plymouth	Affirmed	Maintaining a liquor nuisance.
State vs. Boever	Plymouth	Affirmed	Having possession of intoxicating liquor.
State vs. Folger	Sioux	Affirmed	Larceny by embezzlement.
State vs. Rounds	Woodbury	Affirmed	Adultery.
State (Appellant) vs. Sexsmith	Mahaska	Affirmed	Manslaughter.
State vs. Solomon	Woodbury	Affirmed	Murder.

State vs. Challe	Hamilton	Affirmed	Unlawful selling of intoxicating liquor.
State vs. Ingman	Hamilton	Affirmed	Unlawful selling of intoxicating liquor.
State vs. Monder	Polk	Affirmed	Robbery with aggravation.
State vs. Peterson	Worth	Affirmed	Bootlegging.
State vs. Peterson	Worth	Affirmed	Bootlegging.
State vs. Halley	Polk	Affirmed	Liquor nuisance.
State vs. Shaw	Polk	Affirmed	Entering a bank with intent to rob.
State vs. Sweeney	Black Hawk	Affirmed	Murder in second degree.
State vs. Webb	Scott	Affirmed	Operating a motor vehicle while intoxicated.
State vs. Zellmer	Union	Reversed	Possession of illegal fishing tackle.
State vs. Clay	Polk	Affirmed	Manslaughter.
State vs. Crosser-Crosbie	Hardin	Affirmed	Illegal possession of intoxicating liquor.
State vs. Flory	Poweshiek	Affirmed	Murder.
State vs. Kelly	Polk	Affirmed	Entering a bank with intent to rob.
State vs. LaBarre	Polk	Affirmed	Robbery with aggravation.
State vs. Norris	Polk	Affirmed	Liquor nuisance.
State vs. Ostby	Hancock	Affirmed	Fraudulent banking.
State vs. Render	Polk	Affirmed	Soliciting for prostitution.
State vs. Speck	Polk	Affirmed	Rape.
State vs. Wagner	Polk	Affirmed	Entering a bank with intent to rob.
State vs. Conn	Emmet	Affirmed	Possession of intoxicating liquor.
State vs. Feraday	Fayette	Affirmed	Liquor nuisance.
State vs. Johnson	Pottawattamie	Affirmed	Liquor nuisance.
State vs. Graham	Polk	Affirmed	Larceny.
State vs. Joy	Harrison	Affirmed	Receiving stolen property.
State vs. McMahon	Page	Affirmed	Bootlegging.
State vs. Marshall	Polk	Reversed	Obtaining money by false pretenses.
State vs. Shaffer	Marshall	Affirmed	Malicious injury to building, fixtures, etc.

SCHEDULE "B"—INHERITANCE TAX CASES—SUPREME COURT

Title of Case	County	Decision	Notation
In re Estate of James Chaffin	Page	Modified	Treasurer of State, Appellant.
In re Estate of Serina Nilson	Calhoun	Reversed	Treasurer of State, Appellant.
In re Cumberland Presbyterian Church vs. Johnson, Treasurer of State	Des Moines	Affirmed	Treasurer of State, Appellee.
In re Estate of Fred G. Meinert	Plymouth	Still pending	Treasurer of State, Appellee.
In re Estate of Alice L. Graham	Pottawattamie	Still pending	Treasurer of State, Appellant.

SCHEDULE "C"—PARTIAL LIST OF INHERITANCE TAX CASES—DISTRICT COURT

Title of Case	County	Notation
In re Estate of Murell W. Starns	Wapello	Court held that War Risk Insurance when payable to an estate was subject to the payment of an inheritance tax.
In re Estate of Anders Anderson	Plymouth	Court held that under the treaty with Denmark, property passing to a mother who was residing in Denmark at the time of the death of the decedent is taxable.
In re Estate of Grada Leusink	Sioux	This case involves the right to levy a tax on property passing under a will to carry out a trust agreement. Case tried but no decree entered.
In re Estate of Daniel B. Whitaker	Mitchell	Court held that the provisions of the will should determine the amount of the tax, and not an agreement for the distribution thereof by the heirs.
Charles H. Chappell	Scott	Involves right to tax trust property in the possession of a trust company in Chicago which passes under the terms of a will executed and probated in Iowa. Case tried but no decree entered.
R. E. Johnson vs. H. T. Scurr, Administrator	Union	Action to collect tax. Still pending.
In re Estate of Harriet E. P. Ballou	Wright	Action to recover the tax and enforce lien. Still pending.
In re Estate of Mary Burke	Clinton	Involves the exemption of a bequest for religious purposes. Still pending.
In re Estate of Sarah A. Brown	Taylor	Involves the right to levy a tax upon annuity contracts entered into with a foreign church corporation, and also the exemption statutes. Still pending.
In re Estate of William Thomas	Decatur	Involves right to reduce the tax on account of a bank failure and the depreciation of certain assets. Still pending.
In re Margaret Foley	Fayette	An action to recover the tax of the Administratrix and sureties on her bond. Still pending.
In re Estate of Emma Smith	Van Buren	Action to recover tax and enforce lien. Still pending.
In re Estate of Thomas E. Cosgrove	Hardin	Action to recover tax and enforce lien. Still pending.

NOTE: In addition to the foregoing there were 289 other cases in which compromise settlements were made with the approval of the court, the Attorney General having investigated and advised settlement in said matters. Total value of compromises, $83,801.35.

SCHEDULE "D"—REPORT OF BUREAU OF INVESTIGATION

The agents of this bureau have assisted local authorities in the investigation of law violations, attempted law violations and suspected law violations as set out in the following schedule:

Murder	63
Attempted murder	5
Manslaughter	3
Burglary (banks)	9
Burglary	14
Entering bank with intent to rob	4
Larceny (grand and petit)	87
Breaking and entering	26
Forgery	11
Conspiracy	6
Obtaining money by false pretenses	5
Aiding prisoner to escape	3
Attempt to pass weapons to inmate of prison	2
Robbery	73
Highway robbery	5
Rape	11
Arson	8
Possession of burglar tools	1
Carrying concealed weapons	3
Abortion	2
Sodomy	3
Incest	5
Soliciting for purpose of prostitution	3
Disorderly conduct	1
Seduction	3
Lascivious acts	10
Conveying venereal disease	3
Selling obscene literature	2
Stock thefts	29
Embezzlement	33
Receiving stolen property	2
Fraudulent cases	3
Malicious mischief	18
Operating motor vehicle while intoxicated	7
Driving car without consent of owner	4
Removal from office	11
Revoking physician's license	2
Fake diploma college	1
Vagrancy	3
Escape jail	5
Intoxication	18
Gambling	59
Threatening letters	2
Black hand investigations	1
Captured insane persons	1
Mysterious disappearance	1
Investigation death by poison (accidental)	3
Investigation of dead persons, cause unknown	6

Desertion of dependent wife or child	3
Returning runaway children	5
Returning inmates to industrial schools	7
Fugitives from justice (from Iowa)	2
Fugitives from justice (other states)	8
TOTAL	605

In addition to the above this department made a large number of other investigations for the various State Departments, sheriffs and county attorneys.

LIQUOR INVESTIGATIONS

This bureau has co-operated with local authorities in the investigation of liquor violations as follows:

Number of Investigations	491
Convictions:	
Bootlegging	242
Liquor nuisance	54
Illegal transportation of liquor	30
Illegal possession of liquor	42
Injunctions secured	60

In addition to the above, the officers of this department assisted in the serving of a large number of search warrants and resulting therefrom a large quantity of intoxicating liquor and mash was destroyed together with the vessels.

AUTO THEFT INVESTIGATIONS

This bureau has assisted in the recovery of fifty-four automobiles with approximate value of $25,000.00. It is to be noted that automobile thefts in this state have been reduced approximately fifty per cent in the last two years.

DIVISION OF IDENTIFICATION, STATISTICAL TABULATION

July 15, 1921 to Jan. 1, 1927

Number of finger print records received from sheriffs	5,234
Number of finger print records received from police	8,267
Number of finger print records received from penal institutions	6,974
Number of finger print records received from state bureau	159
Number of finger print records received from outside Iowa	8,895
Total number of finger print records received	29,529
Total number of finger print records filed by formulae	28,469
Total number of finger print records filed alphabetically	34,474
Total number of finger print records filed numerically	18,200
Total number of finger print records filed by crime	21,795
Total number of finger print records filed by photographs	14,248
Total number of finger print identifications made by formulae	3,558
Total number of finger print identifications made alphabetically	1,449
Total number of finger print identifications made by latent prints	26
Total number of finger print identifications made of unknown dead	5
Total number of finger print identifications made	5,038
Total number of confessions secured pertaining to forged F. P.	2
Total number of pleas of guilty from persons identified as having previous criminal records	2,674
Total number of convictions won by trial based on finger prints alone	1
Total number of circulars issued for fugitives	59
Total number of fugitives apprehended by circulars	33

SCHEDULE "E"—VIGILANTES MOVEMENTS

The Chief of the Bureau reports as follows:

"I beg to report that I think the year's work in promoting and assisting in keeping up and re-organizing County Vigilantes has done much to discourage bank robbery in this state. Numerous sheriffs have received much valuable aid, from these organizations, in search for and apprehension of criminals, due to the fact that they were able to call, at a moment's notice, a picked bunch of instructed and dependable men, properly deputized and bonded, heavily armed and instructed in the use of firearms.

"Since the decrease in bank robberies and the increase of thefts of live stock and poultry, many sheriffs have organized Vigilantes in the rural communities of their counties and are meeting with success in their plans.

"It is gratifying to note the interest shown by numerous County Vigilante organizations in law enforcement.

"In several counties, at the last general election, new sheriffs were elected, who had been acting as county chiefs, defeating the present incumbents due to the fact principally that they showed a greater interest in law enforcement.

"At the present time many Iowa counties are in need of more and better law enforcing officials and no plan has ever been conceived that has met with better success.

"At the present time six states are organizing Vigilantes on the Iowa plan and are meeting with marked success.

"At the State Shoot for the Vigilantes, held at Fort Des Moines on September 13th and 14th, 1926, on the U. S. rifle and revolver ranges, the number of entries were so great that some vigilantes were unable to compete in any of the matches.

"I hope to see the vigilante work kept up and can see many chances for improvement.

"From the middle of September until after the holidays the average vigilante seems to be busier with his usual avocations and gives less attention to the practice of firearms and fewer meetings are held.

"During the year, or up to September 15th, a representative from our department attended sixty county bankers and vigilantes meetings.

"Twelve County Vigilante Shoots.

"Went to various counties to attend forty meetings that were postponed on account of rains, bad roads, etc.

"Spent three days in Chicago attending a conference of State Chiefs of Vigilantes, of Illinois, Indiana, Iowa and Minnesota, to-wit: April 9th to 11th.

"Spent two weeks in attending ten bankers group meetings in behalf of vigilante work, to-wit: May 10th to 14th and May 24th to 28th.

"Spent three days at the Iowa Bankers Convention at Sioux City in behalf of vigilante work, to-wit: June 21st to 23rd.

"Spent two days at the Vigilante State Shoot, to-wit: September 13th and 14th.

"Spent three days at the Iowa State Sheriffs Convention at Waterloo, to-wit: July 27th to 29th.

Number of County Chiefs in the State Jan. 1, 1926	40
Number of County Chiefs in the State to date	75
Increase of County Chiefs since January 1, 1926	35
Number of County Chiefs making reports	58
Number of counties having no organizations	12

"It is pleasing to note that during the past year of the 15 successful and unsuccessful bank holdups and robberies, that only two instances were the robbers anyways successful, that of the Continental Trust & Savings Bank, Des Moines, and the Modale Savings Bank, Modale, Iowa. In the latter instance, however, $3,666 of the $4,544 taken has been returned or is in the possession of the officers at this time, leaving only $878 which we have not obtained. It is also pleasing to note the interest taken in numerous counties by the citizens, in many instances the County Board of Supervisors have appropriated county funds toward arming and equipping vigilantes."

SOME OF THE

IMPORTANT OPINIONS

OF THE

ATTORNEY GENERAL

FOR

Biennial Period

1925-1926

OPINIONS OF THE ATTORNEY GENERAL

STATE BOARD OF EDUCATION: Liability for damages existing against the contractor and surety on the bond for the construction of public improvement exists until barred by the Statute of Limitations.

January 6, 1925. *Secretary, State Board of Education*: We have received your letter of December 19, 1924, asking an opinion upon a question relating to contractor's bond for the construction of public improvements. Your letter is as follows:

"Section 10300, Code, 1924, is as follows: *'Public improvements—bond and conditions.* Contracts for the construction of a public improvement shall, when the contract price equals or exceeds one thousand dollars, be accompanied by a bond, with surety, conditioned for the faithful performance of the contract, and for the fulfillment of such other requirements as may be provided by law. Such bond may also be required when the contract price does not equal said amount.' When does a bond that is furnished by a contractor, in favor of the Iowa State Board of Education, terminate?"

In a general way your question may be answered as follows: The liability of a surety on a construction or building bond terminates only when the contractor has fully and completely complied with his contract, paid all claims of subcontractors and other charges, and the improvement has been accepted by the board, commission or officer authorized to make the improvement. However, when the contract has apparently been completed and accepted and all claims paid and it has been subsequently discovered that the material or labor is defective and not in accordance with the provisions of the contract and that the work has been done in a defective and unworkmanlike manner, liability for damages still exists against the contractor and the surety on the bond until barred by the statute of limitations. Modern Steel Structure Company v. Van Buren County, 126 Iowa, 606, so holds.

DEPOSITORY BONDS: Depository bonds running to the county need not be renewed at the expiration of the office of the county treasurer. It is advisable for the board of supervisors to renew the resolution, however. If the bond runs to the county treasurer, it must be renewed at the expiration of his term of office.

January 21, 1925. *Auditor of State*: This department is in receipt of your letter dated January 14, 1925 in which letter you ask for an official opinion from this department. Your letter is in words as follows:

"From time to time we have had inquiries from county treasurers and other county officers concerning the question as to how often the depository bonds should be renewed. This department has held that new bonds should be secured by the county treasurer at the beginning of his official term and if re-elected to the office, at the beginning of each of his terms of office.

"Under the provisions of Code 1924, Section 7404, the Board of Supervisors are to pass a resolution in regard to the place of deposit and the amount that can be deposited, and since the Board of Supervisors must reorganize every year, it is possible that these resolutions should be passed by the Board each year and new bonds negotiated to meet the conditions and requirements of the Board in regard to the place of deposit and the amount to be deposited.

"We are now confronted with the questions:

"First: As to the frequency that these depository bonds should be fixed by the Board of Supervisors and new bonds of our state form 211 procured.

"Second: When office of county treasurer passes from one party to another, at commencement of regular term should new bonds of this form 211 be procured?

"Third: If a change during the term is made on account of resignation or other vacancies that might occur in the treasurer's office, should new bonds of this form 211 be procured?

"Your ruling in regard to this matter at an early date will be appreciated."

You are advised that the Board of Supervisors is a continuing board. The question as to whether or not a depository bond is a continuing bond is a question of fact. If at the time of its execution it is executed for an indefinite time, it then covers the entire period of the term of office of the county treasurer or other public officer executing it. It is perhaps advisable and I think is advisable for the Board of Supervisors at the commencement of each year to renew the resolution, bond and depositories by a proper resolution entered of record. This keeps the records in the county auditor's office clear and leaves no shadow of doubt. This is a mere matter of policy and is one to be determined largely by the Board itself.

The thought I want to leave, however, is that the depository bond should be a continuing bond during the term of office of the county treasurer for whose benefit it runs. It is not necessary of course that this be done, but if not done then a new bond must be executed at the time of the expiration of the old one. Of course if the bond runs to a given county treasurer and there is a resignation, it should be renewed in favor of the new treasurer as a part of the accounting contemplated by law.

MUNICIPALITIES: Where property owner waives objections to proceedings, he is liable for interest on the assessments only. Where the property owner does not waive objections he must pay interest up to the day the assessment becomes delinquent and must pay the penalty only after such date.

January 30, 1925. *County Attorney, Marshalltown, Iowa:* We have received your letter of December 16, 1924, asking this Department for an opinion upon the question which you have stated as follows:

"The County Treasurer has requested me to write to you for an opinion of the following matter: 'In special assessment cases where the payment of the tax is delinquent, should the treasurer charge both interest upon the assessment and also a one per cent per month penalty.'

"The case of Fitchpatrick v. Fowler, 157 Iowa, 215 holds, under section 1989A26 of the Code, Supplement where there is a prescribed contract limiting the interest rate to six per cent per annum, that, that is all that should be charged and collected by the treasurer.

"Now this section has been revised by sections 6031 and 6032 of the Code of 1924 and there is an implied waiver or 'contract.' We would, therefore, like to know if the County Treasurer would therefore, not be precluded from collecting more than the six per cent per annum just the same as under the old statute where the owner signed up a written agreement?"

I. We shall first discuss the amount of interest or penalty that must be paid by the property owner who waives the right to object to the special assessment proceedings. Section 6032 of the Code reads as follows:

"Unless the owner of any lot or railway or street railway, the assessment against which is embraced in any bond or certificate provided for by law, shall, within thirty days from the date of such assessment, file written objections to the legality or regularity of the assessment or levy of such tax upon and against his property, such owner shall be deemed to have waived objections on these grounds and shall have the right to pay said assessment, with interest thereon not exceeding six per cent per annum, in ten equal annual installments. In no case shall the owner of any lot be liable for more than the value of the property included in such assessment. The cost of oiling the streets may not be paid in installments."

This section makes a change in the provisions of the old statute. Under the former statute, to entitle the property owner to the right to pay his assessment in installments, it was necessary for him to promise and agree in writing that he

would not make any objections of illegality or irregularity as to the assessment or levy of such tax upon and against his property, and that he would pay said assessment with interest thereon. Section 3889, Compiled Code.

Under the drainage statute, it was held by the Supreme Court, that, when the property owner signed an agreement substantially the same as the one provided for in said Section 3889, he had the right to pay the said installments with six percent interest per annum until paid, and that such owner was not liable for the penalty which the statute provided shall attach to the delinquent assessments of those who do not waive such objections. It was held in such case that such an agreement constituted a special contract governing the rate of interest after maturity of an installment as well as before. *Fitchpatrick v. Fowler*, 157 Iowa 215.

The new statute, however, above quoted, provides that unless a property owner within thirty days from the date of such assessment files written objections to the legality or regularity of the assessment or levy of such tax upon and against his property, such owner shall be deemed to have waived objections on these grounds and shall have the right to pay said assessment with interest thereon in ten equal annual installments.

Notwithstanding the change in the statute, we believe the provisions of the present statute in effect create a contract between the property owner and the city, and that even though the assessment, or installments thereof, may subsequently become delinquent, the property owner has the right to pay the same with interest thereon, and cannot be forced or compelled to pay the penalty. By complying with the provisions of the statute and refraining from filing objections to the assessment, the property owner parts with or abandons a valuable right, and he does so for the purpose of obtaining the right to pay the same in ten annual installments. To permit him to abandon such a right upon the conditions specified in the statute and then to subject him to the penalty provided therein for not paying the assessment when due would in effect change a contract between the property owner and the city. We are of the opinion that this cannot be done.

II. Having determined the amount of interest that must be paid by a property owner when he waives objections to the assessment, we shall now determine the amount of interest or penalty that must be paid by a property owner in the event he does not waive objections to the proceedings.

Section 6033 of the Code of 1924 reads as follows:

"The first installment, with interest on the whole assessment from date of levy by the council, shall mature and be payable thirty days from the date of such levy, and the others, with interest on the whole amount unpaid, annually thereafter at the same time and in the same manner as the March semiannual payment of ordinary taxes.

"Any or all installments not yet paid together with accrued interest thereon may be paid on the due date of any installment.

"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.

"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 April following."

It will be observed that, under the provisions of the section just quoted, the first installment, with interest on the whole assessment from the date of levy, shall mature and be payable thirty days from the date of such levy, and the other installments, with interest on the whole amount unpaid, annually thereafter at the same time and in the same manner as the March semi-annual payment of ordinary taxes. It is also provided therein that 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.

To determine the interest and penalty on ordinary taxes, we must turn to Section 7214 of the Code, which reads as follows:

"If the first installment of taxes shall not be paid by April first, the whole shall become due and draw interest as a penalty of one per cent per month until paid, from the first of March following the levy; and if the first half shall be paid when due, and the last half shall not be paid by October first following such levy, then a like interest shall be charged from the date such last half became delinquent."

It will be noted that the above section provides that if the first installment of taxes shall not be paid by April first, the whole shall become due and draw interest as a penalty of one per cent per month until paid. This is also true of the second installment if it is not paid by the first day of October. It is, we believe, quite apparent that the penalty of one per cent per month is the total amount that may be assessed or collected upon taxes that are delinquent.

Therefore, we are of the opinion that such taxes shall draw interest at the ordinary rate until they become delinquent, and that after they become delinquent, the amount of the penalty shall be computed at the rate of one per cent per month, but that both interest and penalty cannot be exacted after the taxes become delinquent. Special assessments, therefore, bear the same interest and penalty.

TAXATION—CORPORATIONS: The interest of members of a mutual cooperative corporation is subject to taxation under the provisions of Section 7102, even though the corporation is a mutual one without profit the company is subject to taxation upon the value fixed by the Executive Council.

February 13, 1925. *Secretary, Executive Council*: I wish to acknowledge receipt of your favor of the 26th requesting the opinion of this department upon the proposition submitted to you by the Farmers Electric Line No. 2 of Grundy Center, Iowa. The facts upon which the request is based are in substance as follows:

"The Farmers Electric Company of Grundy Center was organized for the purpose of building an electric line from the farms of the members to the city limits of Grundy Center and connecting at that point with the light and power line in the city. The members of this company bought the poles, wires and other equipment, each member paying for his own meter and his proportionate share of the cost of the erection of the line. In order to avoid personal liability, these farmer members incorporated and were issued shares in the corporation for their interest in the line. No money is collected or handled except that to pay costs and taxes, when each member pays his proportionate share. They claim to be a mutual corporation in every respect except in name. Upon this state of facts they claim that the shares of the members of this corporation are to be taxed as real estate instead of through the Executive Council, as previously done. It is their contention that Section 7102, Code of Iowa 1924, authorizes the tax in the manner contended for by them."

We are of the opinion that the company in question falls within the provisions of Chapter 340, Code of Iowa 1924, and that the company must file the statement as therein provided, with the Executive Council of Iowa, prior to the 1st day of May in each year, and are subject to assessment and taxation upon the value to be determined by the Executive Council.

Section 7102 is a part of Chapter 340, Code of Iowa 1924, and reads as follows:

"The value of the interests of members in such cooperative corporations or associations which are not organized or operated for profit shall for the purpose of taxation, be deemed real estate, and be assessed as part of the real estate served by such transmission line or lines."

It is to be observed that the section just quoted refers to the taxation of "the interests of members," and does not refer to the property of the corporation. Conceding, for the purpose of this opinion, that the corporation in question is a co-operative corporation not organized or operated for profit, we are even then of the opinion that the property of the corporation is to be taxed upon a value fixed by the Executive Council. The interest of the members as evidenced by their stock in the company or their proportionate share of its assets is subject to taxation the same as real estate and in addition to the advalorem tax levied upon the property of the company.

SCHOOLS AND SCHOOL DISTRICTS: Accredited colleges must as a part of the regular course provide proper instruction in the fundamental principles of a republican form of government and the instruction of the constitution of the United States and the state of Iowa under the provisions of Sec. 3862.

February 14, 1925. *Superintendent of Public Instruction*: This department is in receipt of your letter dated February 2, 1925, in which you request an opinion. Your request is in words as follows:

"Section 3862 of the Code of Iowa, 1924 relates to teachers certificates and provides as follows:

'all examinations shall cover the fundamental principles of a republican form of government and the constitution of the United States and of the state of Iowa.'

Section 3866 of the Code provides:

'Graduates from accredited colleges in state. The state board of educational examiners may accept graduation from the regular and collegiate courses in the state university, state teachers college, state normal schools, and the state college of agriculture and mechanical arts, and from other institutions of higher learning in the state having regular and collegiate courses of equal rank, as evidence that a teacher possess the scholarship and professional fitness requisite for a state certificate.'

If in accordance with Section 3866 the Board of Examiners accepts college record in lieu of examination for state certificate should the transcript of college credits show that a course covering the fundamental principles of a republican form of government and the constitution of the United States and the state of Iowa has been pursued during the college course? Further in your opinion could high school credit in the above named subject be substituted for college credit?"

Your attention is respectfully invited to the provisions of chapter 193 of the Code, 1924, and particularly to Section 3868 thereof, which provides in words as follows:

"State Certificate. In all cases where graduation shows compliance with the requirements of sections 3863 and 3864 hereof, and the board is satisfied that the applicant possesses good moral character and is professionally qualified, the board shall issue a state certificate to the applicant, valid for five years, to teach in any public school in the state."

In connection therewith your attention is invited to the provisions of Sections 3862, 3863 and 3864 thereof, which provide the subjects in which the applicant for a state certificate must be qualified.

No college or university, where graduation does not show compliance with these three sections, is eligible under the accredited college class provided in Section 3866 of the Code, 1924. It necessarily follows that all accredited colleges must, as a part of their regular and collegiate courses, provide proper instruction in the "fundamental principles of a republican form of government and the constitution of the United States and of the state of Iowa."

The legislature in prescribing this as a mandatory subject did not intend the ordinary teaching of the constitution as a part of a history course, nor as a part of the ordinary civics course. The legislative purpose was to insure that every

teacher in the public schools of this state should be qualified not only in the abstract principles, but should also be imbued with the spirit of our institutions and should know and understand the ideals of our form of government.

The Board of Educational Examiners should give consideration to this matter not harshly and arbitrarily but still with a definite purpose in mind of insuring that every applicant for a state certificate, whether as a graduate from an accredited college or otherwise, is specially qualified in the mandatory subject required. It may be difficult to enforce a definite rule during this school year but certainly with the coming school year the teaching of the subject should be required.

I would suggest that the colleges and universities of this state remove all doubt, and provide a special course naming it in compliance with the legislative requirement.

BANKS AND BANKING: A surety company is liable on the bond of a city treasurer who deposits money in a bank in excess of the limit fixed by the statute when such bank becomes insolvent.

February 14, 1925. *Auditor of State*: This department is in receipt of your letter dated February 12, 1925 in which you request an official opinion. Your letter is in words as follows:

"For the information of Hon. W. G. Ray, Mayor of Grinnell, I am asking that you kindly give this department an opinion on the following:

The Merchants National Bank at Grinnell failed. At the time the bank suspended business the city of Grinnell had on deposit in said bank to the credit of B. J. Carney, as city treasurer a total of $61,917.30. The city was protected by a bond for the Treasurer in the American Surety Co., for $50,000. There was also, in the possession of the city clerk a depository bond for the bank, given by the United States Fidelity and Deposit Co., in the sum of $50,000.

The Fidelity and Deposit Co., has paid the $50,000 called for on its bond, and the money is now in the hands of the city.

Does the fact that the depository bond has been paid free the American Surety Co., from action by the city to recover the excess deposited by the treasurer over his bond of $50,000?

What action should the city take in order to protect the balance of its funds in the defunct bank? Should the city make a demand on the treasurer for an accounting and settlement, and on his failure to so account and settle in full, should action be started against his bondsmen?

You are advised that in our judgment there can be a recovery of the difference between the $50,000 received by the city and the amount of the deposit from the American Surety Company. You will observe that the deposit in excess of $50,000 was illegal and there would be a clear liability on the part of the bond company as well as on the part of the treasurer.

CITIES AND TOWNS: Cities and towns may anticipate the collection of taxes over a period longer than the current year where necessary to make reasonable improvements.

February 17, 1925. *Director of the Budget*: You have orally requested us to prepare an opinion upon a question submitted to you by Mr. W. J. R. Beck of Fort Madison, Iowa. The question may be stated as follows:

"May cities and towns anticipate the collection of taxes as provided in Section 6261 beyond the taxes actually spread upon the assessment books or may they anticipate the collection of taxes for more than one year in the future."

Section 6261 of the Code, 1924, reads as follows:

"Any city or town may anticipate the collection of taxes authorized to be levied for the grading fund, city improvement fund, district sewer fund, city sewer fund, the fund for equipping fire departments, the fund for the construction of sewer outlet and purifying plants, the fund for paving roadways, and the fund for flood

protection, and cities of the first class may so anticipate the taxes used for the fund for the construction of main sewers, and for that purpose, may issue certificates or bonds with interest coupons." Section 6261.

In the determination of the question submitted to us, we must consider also Sections 6262 and 6263, which read as follows:

"Such certificates and bonds shall be respectively denominated city grading certificates or bonds, city improvement certificates or bonds, district sewer certificates or bonds of the particular sewer district, city sewer certificates or bonds of said city, fire department equipment certificates or bonds, sewer outlet and purifying plant certificates or bonds, paved roadway certificates or bonds, flood protection certificates or bonds, and main sewer certificates or bonds, and all the provisions of this chapter shall apply to such certificates, bonds, and coupons, with such changes only as are necessary to adapt them thereto." Section 6262.

"Said certificates or bonds and interest thereon shall be secured by said assessments and levies, and shall be payable only out of the respective funds named, pledged to the payment of the same, and no certificates or bonds shall be issued in excess of taxes authorized and levied to secure the payment of the same. It shall be the duty of said city to collect said several funds with interest thereon, and to hold the same separate and apart, in trust, for the payment of said certificates or bonds and interest, and to apply the proceeds of said funds pledged for that purpose to the payment of said certificates or bonds and interest." Section 6263.

It will be observed that the funds described in Section 6261 relate to improvements or equipment that are more or less permanent in their nature, and that such funds are not required to pay the ordinary running expenses of municipalities.

We believe it is a fair and reasonable construction of the statute to say that the taxes specified in the statute may be anticipated for more than the current year. To construct the improvements or purchase the equipment therein provided for manifestly requires a larger sum of money than the amount raised for any of said funds in one year. The purpose of the statute is to provide means for the making of the improvements and the purchasing of the equipment and this can only be done by anticipating the taxes for more than the current year.

Therefore, we are of the opinion that cities and towns may reasonably anticipate the collection of the taxes authorized to be levied for the purposes specified therein, for such a length of time as is reasonably necessary to enable the municipalities to make the improvements or purchase the equipment contemplated by the statute.

COUNTY ROADS: County not liable for work of grader on left side of road, but if work done by individual contractor, liable for negligence.

February 17, 1925. *County Attorney, Guthrie Center, Iowa.* We have received your letter of February 9, 1925, asking this Department for an opinion upon the question which you have stated as follows:

"Recently the Board of Supervisors, through the County Engineer, put up this question to me:

"A part of the contractors undertaking the maintenance of the roads are equipped with a maintainer which does not have a reversible blade. They are consequently required to do a large part of the work (about half) on the left side of the highway. In the majority of instances the contractor is furnished a maintainer by the County. In the event of an accident resulting from the fact that a maintainer is being driven on the left side of the highway, what is the liability of the contractor and the county?

"While recent decisions have restricted the liability of the County in nearly all matters of tort, and have recognized the right of maintenance as superior to the rights of ordinary traffic I advised the Board that in my opinion a court or jury would be very likely to find that a patrolman who habitually used the left hand side of highways for almost half of his work, in view of the modern use of highways might well be considered negligent. At the time the letter was written to the Board, I supposed the question was more or less hypothetical. I am advised, however, that the County is the owner of about $9,000 worth of old-time road equipment which would be unavailable in the event that only maintainers with *reversible* blades are to be used.

"Regardless of the legal liability of the County the Board is naturally desirous of doing nothing which would make it liable to damages if it were a private corporation. Then, too, there is the natural disinclination of the patrolmen to undertake work in performing which they might daily be construed to be negligent and be personally liable in damages occasioned thereby.

"While no very definite rule might be laid down as to what would constitute negligence, as this is a matter that concerns the County quite deeply the Board of Supervisors has asked me to request an opinion from your office in the matter as to the liability as above."

The law of the road is embodied in part in Sections 5019 and 5020 of the Code, 1924. These sections read as follows:

"The operator of a motor vehicle, in cities and towns, shall at all times travel on the right-hand side of the center of the street."

"Persons on horseback, or in vehicles, including motor vehicles, meeting each other on the public highway, shall give one-half of the traveled way thereof by turning to the right."

It is apparent that the first section applied only to highways in cities and towns.

We believe the contractors who are improving the roads may use such a maintainer as described in your letter even though by doing so it is necessary for him to work on the left side of the highway. It should be operated, however, in such a manner as to cause as little inconvenience to the traveling public as possible, and to secure the safety thereof.

If the contractor is performing public work on the highway, the county would not be liable for his negligence, and if such contractor is acting under the direct supervision of the board of supervisors, immunity from liability also attaches to the contractor.

The following authorities, in principle, support our conclusions:

Kincaid v. Hardin County, 53 Iowa 430;
Packard v. Voltz, 94 Iowa 277;
Beeks v. Dickinson Co., 131 Iowa 245;
Wood v. Boone County, 153 Iowa 92;
Snethen v. Harrison County, 172 Iowa 81;
Gibson v. Sioux County, 183 Iowa 1006;
Cunningham v. Adair County, 190 Iowa 912.

However, the immunity from liability which attaches to the agents or employees of the county applies only to such agents or employees, when the officers of the county exercise the right of control not only as to the ultimate completion of the work, but also as to the manner of doing it.

We are of the opinion that if road construction work is done by an independent contractor who exercises his own discretion as to the manner of doing the work and the public officials exercise no control thereof and are only interested in the ultimate result of such work, the contractor would be liable for negligence in performing the work, although the county, its officers and employees, would not be.

We believe this conclusion is the direct result of the rule announced by the Supreme Court in the cases above cited.

PRISONERS' GOOD TIME. A prisoner who escapes from the penitentiary and is subsequently apprehended and convicted of an escape, is admitted to be serving one continuous sentence, and good time is figured as though upon one sentence for the total time of both sentences, unless the warden, with the approval of the Board of Control, determine that the amount of good time earned prior to his escape is forfeited, and such determination entered of record.

February 21, 1925. *Board of Control of State Institutions, Building:* Conforming to your oral request we have given consideration to the problems confronting you and arising because of the decision of the Supreme Court of this state in the case *Edward Fisher v. T. P. Hollowell* determined February 10, 1925. In order that this matter may be clear may I quote the following sections of the Code:

"No convict shall be discharged from the penitentiary or the men's reformatory until he has served the full term for which he was sentenced, less good time earned and not forfeited, unless he be pardoned or otherwise legally released. He shall be deemed to be serving his sentence from the day on which he is received into the institution, but not while in solitary confinement for violation of the rules of the institution." Section 3773.

"Each prisoner who shall have no infraction of the rules of discipline of the penitentiary or the men's reformatory or laws of the state, recorded against him, and who performs in a faithful manner the duties assigned to him, shall be entitled to a reduction of sentence as follows, and if the sentence be for less than a year, then the pro rata part thereof:

1. On the first year, one month.
2. On the second year, two months.
3. On the third year, three months.
4. On the fourth year, four months.
5. On the fifth year, five months.
6. On each year subsequent to the fifth year, six months.' Section 3774 of the Code, 1924.

"The board of control shall cause to be kept at each of said institutions the following permanent records:

1. A record of each infraction, by a prisoner, of the published rules of discipline.
2. Such other records for the use of the board of parole as may be approved by the executive council." Section 3775, Code, 1924.

"A prisoner who violates any of such rules shall forfeit the reduction of sentence earned by him, as follows:

1. For the first violation, two days.
2. For the second violation, four days.
3. For the third violation, eight days.
4. For the fourth violation, sixteen days and, in addition, whatever number of days more than one that he is in punishment.
5. For the fifth and each subsequent violation, or for an escape, or attempt to escape, the warden shall have the power, with the approval of the board of control, to deprive the prisoner of any portion or all of the good time that the convict may have earned, but not less than as provided for the fourth offense." Section 3776, Code, 1924.

"When a convict is committed under several convictions with separate sentences, they shall be construed as one continuous sentence in the granting or forfeiting of good time." Section 3777, Code 1924.

In the decision of the Supreme Court, to which I have referred, it is to be observed that the Supreme Court simply holds that where a convict is sentenced to the penitentiary, and subsequently escapes and is prosecuted and convicted as an escape, that the two sentences shall be considered in the granting or forfeiting of good time as one continual sentence. The decision of the Supreme Court is correct, and we do not believe it advisable to file a petition for a rehearing. Now, the question arises as to what this decision actually means as applied from the practical standpoint. The exact meaning may be better demonstrated by a practical example. Assume that Joe Doe is convicted and sentenced to the state penitentiary for grand larceny, the term being five years. Assume that prior to the expiration of the five year sentence for grand larceny the prisoner escapes and is brought back, convicted and sentenced as an escape for a five year term. In computing good time we have one continuous sentence of ten years, and this sentence is to be considered in computing good time as though it were the original sentence.

In order that this may be exactly clear to you in its application, I call your attention to the provisions of Section 3774 of the Code which provide for the computation of good time. The good time allowed the prisoner by the statute is to be entered upon his record as provided in Section 3775 of the Code. Going back for a moment to the example I have referred to—John Doe, on his sentence under the larceny charge, would be entitled to his good time as provided in Section 3774 of the Code, from year to year until the sentence expired. However, John Doe has violated the law and has become an escape and has been convicted as such. The question arises now, what effect does the escape and the conviction thereof, have upon good time earned by the prisoner on the larceny sentence. The law says, with reference thereto:

"The warden shall have the power, with the approval of the Board of Control, to deprive the prisoner of any portion or all of the good time that the convict may have earned, but not less than as provided for the fourth offense."

It follows that the warden, with the approval of the Board of Control, should determine the amount of the forfeiture of good time to be entered on the record. He must enter the minimum of sixteen days, but with the approval of the Board, he may forfeit all of the good time under the first sentence earned up to the time of his return to the penitentiary.

I believe this should be clear and easily understandable, and I would suggest to your Honorable Board that you instantly direct the warden to make the entries on the records of every prisoner who has escaped, or attempted to escape, to the end that these records may be clear as to the good time to be allowed on the sentence considered as one continuous sentence.

SHERIFFS: A sheriff or deputy is not entitled to recover for injuries to his car even though used in the performance of duties of his office. Entitled to traveling expenses and no more.

February 23, 1925. *Auditor of State:* This department is in receipt of your letter dated February 20, 1925 which letter is in words as follows:

"In line with our conversation in your office I am writing you concerning the payment of the deputy sheriff's claim in Woodbury County where the Board of Supervisors have allowed a claim for damages to a car belonging to one of the deputy sheriffs. The car, I understand, was damaged while the deputy sheriff was on official business in connection with a criminal arrest. The auditor refuses to issue a warrant on this claim allowed by the board and submits it to us with a request that we take the matter up with you with a view to determining whether it is proper for him to issue the warrant under the circumstances."

You are advised that the board of supervisors, the auditor and the treasurer each should refuse to either allow or pay the claim referred to in this letter. A sheriff and therefore, a deputy sheriff is entitled to his actual and necessary traveling expenses. When he uses his own car he is entitled to the reasonable value of the use, but not to damages to the car. So far as the sheriff is concerned he is in the same position as any other person furnishing a car for hire.

BLUE SKY LAW: Certificate of detective bureau held to be within the Blue Sky Law.

February 23, 1925. *Secretary of State:* We have received your letter of January 20, 1925, submitting to this department a question upon which you desire the opinion of this department. We also acknowledge receipt of a copy of the service contract of the United Service Detective Bureau. Your letter is as follows:

"You will find enclosed a copy of the service contract which the United Service Detective Bureau of Fort Dodge, Iowa, contemplates offering for sale at a price which, we understand, to be $15.00 per year. They were of the opinion that such a contract may be sold without having it qualified under the provisions of the Iowa Blue Sky Law. We, therefore, submit the question to your department and ask that you kindly indicate as to whether or not such contracts may be entered into or rather, disposed of in Iowa without first filing an application with and procuring a permit from this department."

The service contract is too voluminous to be set forth herein in its entirety. However, said contract provides that a liberal reward will be paid by the bureau for information leading to the arrest and conviction of any person or persons perpetrating any theft, burglary, robbery, swindling scheme, fraud or confidence game on the person named therein, and any person or persons committing such acts shall be vigorously prosecuted by the detectives of the bureau.

The same reward, so the contract provides, will be paid for information leading to the arrest and conviction of any of the employees of the bureau's clients who steal or embezzle from said client any money, stamps, material, merchandise, tools, or other property of any name or nature.

Section 8525, which provides under what conditions a person, firm, company, association, or corporation shall be required to secure a permit to sell stock, reads as follows:

"Every person, firm, association, company, or corporation that shall, either directly or through representatives or agents, sell, offer, or negotiate for sale, within this state, any stocks, certificates, bonds, debentures, certificates of participation, certificates of shares or interest, preorganization certificates and subscriptions, memberships, profit sharing certificates, investments, contracts, unit interests in property, estates, shares of participation, common law trust agreements or real estate, oil, gas or mineral leases, provided, however, that this shall not apply in whole or in part to mineral leases in Iowa lands; and notes or other evidences of indebtedness, and evidence of, title to, interest in or liens upon any or all of the property or profits of an individual or company, hereinafter referred to as 'stocks, bonds, or other securities', shall be subject to the provisions of this chapter, except as herein otherwise provided; and shall, before selling or offering for sale any such securities in this state, be required to secure a permit from the secretary of state."

It will be observed that the above section is quite comprehensive in character and was evidently intended by the legislature to cover all kinds of claims or stocks, bonds, securities representing interests in property, or other instruments providing for the payment of money or transfer of property.

It will also be observed that the phrases "certificates of participation," "certificates of shares or interest," "memberships," "profit sharing certificates," appear therein. We are of the opinion that these phrases are broad enough to embrace within their meaning the certificates issued by the United Service Detective Bureau.

The section of the Code, 8526, relating to the securities that do not come within the operation of the statute is too lengthy to set forth in this opinion. We have examined the same carefully, however, and we believe that the certificate in question does not come within any of the exceptions therein noted.

SCHOOLS AND SCHOOL DISTRICTS: A school corporation maintaining a school for deaf children is not entitled to state aid for non-resident pupils.

February 24, 1925. *Secretary, State Board of Education:* We have received your letter of February 4, 1925, asking this department to prepare an opinion upon the question which you stated in your letter as follows:

"A part of Chapter 224, entitled 'Instruction of Deaf' is, as follows:

"Section 4348. *Instructors authorized.* 'Any school corporation within the state having residing therein deaf children of school age may provide one or more special instructors for such deaf children, the instruction given under such special instructors to be substantially equivalent to that given other children of corresponding age in the graded schools.'

"Section 4349. *State aid—amount.* 'To any school corporation providing such instruction and complying with all of the provisions of this chapter there shall be granted and paid as hereinafter provided state aid in an amount to be computed at twenty dollars for each month that each child not more than twelve years of age as instructed under the provisions of this chapter.

'No child more than twelve years of age shall be admitted to such instruction.'

"A part of a letter that Professor M. G. Clark, Superintendent of Schools, Sioux City, Iowa, wrote to me on January 31, 1925 is, as follows:

"'Otto E. Braun of Sibley, Iowa, R. R. No. 3, was in the city the other day and stated he has a child, Louis Braun, age 6, totally deaf, that he would like to put into our school.

"'He, of course, is not a citizen of Sioux City and I do not feel we have any right to take him unless you definitely authorize us to do so. If he should come in, would the state allow us $20.00 per month for him as they do citizens of Sioux City?'"

The Board of Education of the Independent School District of Sioux City, Iowa, has the right to admit a non-resident child to the Day School for Deaf Children that is maintained as a part of the public school system and to charge reasonable tuition.

"I shall appreciate your giving me an opinion as follows:

"Is a school corporation that maintains a day school for Deaf Children entitled to state aid under the provisions of Section 4349 of the Code, 1924, for non-resident deaf children, who are attending said school?"

Chapter 224 of the Code, 1924, relates exclusively to the instruction of the deaf. The two sections you have embodied in your letter constitute a part thereof.

The statute provides that "any school corporation within the state *having residing therein deaf children* of school age, may provide one or more instructors for such deaf children. * * *" It is quite apparent that the instruction given under the above quoted portion of the statute is limited to children of school age residing in the school district.

We are, therefore, of the opinion that a school corporation maintaining a school for deaf children is not entitled to state aid under the provisions of the statute for non-resident deaf children who are attending said school.

TAXATION: An emergency levy, under the provisions of Section 373 of the Code can only be used for emergency purposes and must be kept distinct and should not be collected for the purpose for which other funds are raised.

February 25, 1925. *County Attorney, Allison, Iowa:* We desire to acknowledge receipt of your letter of February 17, 1925, submitting to this department the following inquiry:

"Our board of supervisors levied a 1.1 emergency levy for emergency purposes as per Chap. 24 of the 1924 Code. It is their interpretation of Sec. 373 of this chapter that they could levy this and then use it for any fund that they saw fit. Some of the railroads, however, are questioning the legality of this as you will find from the enclosed letter written to the County Auditor who requested me to write to you to find out whether or not the board was right in making this levy."

Section 370 of the Code provides that estimates shall be made, filed and considered by the municipalities, and that no municipality shall certify and levy in any year any tax or assessment on property subject to taxation, unless the requirements of the statute are complied with.

The estimates provided for therein are as follows:

(1) The amount of income thereof for the several funds from sources other than taxation.

(2) The amount proposed to be raised by taxation.

(3) The amount proposed to be expended in each and every fund and for each and every general purpose during the fiscal year next ensuing.

(4) A comparison of such amounts so proposed to be expended with the amounts expended for like purposes for the two preceding years.

Section 373 reads as follows:

"Each municipality may include in the estimate herein required an estimate for emergency or other expenditure which amount can not reasonably be foreseen at the time the estimates are made, and such emergency fund shall be used for no other purpose."

It will be observed that the above section provides for an emergency fund which shall be raised for the purpose of meeting any emergency or expenditure other than those provided for in the ordinary levies. We are of the opinion that this fund shall remain a separate and distinct fund for use in case of an emergency or extraordinary expenditures.

Section 380 provides that no greater tax than that so entered upon the record shall be levied or collected for the municipality proposing such tax for the purposes indicated, and, therefore, no greater expenditure of public money shall be made for any specific purpose than the amount estimated and appropriated therefor, except as provided in Sections 373 and 381.

We believe the emergency fund provided for in Section 373 is a separate and distinct fund and by levying the same no greater tax would be levied and collected for any of the purposes for which the other funds are raised. Besides, Section 380 specifically excludes Section 373 from the operation of the statute.

Therefore, we are of the opinion that the tax levy authorized by Section 373 is an addition to and supplements the other levies and that it should be used only for any emergency or other expenditure as provided in the section.

BANKS AND BANKING: A bank cannot set off the indebtedness of an individual partner against a firm deposit, nor can a partnership set off their interest against their individual indebtedness to the bank.

February 26, 1925. *Superintendent of Banking:* We wish to acknowledge receipt of a request for an opinion from J. J. Matthews, in charge of the Farmers State Bank of Lamoni, Iowa. The proposition upon which you request our opinion is in substance whether or not a partnership having a deposit in the firm name is entitled to off-set the interest of the members of the partnership in the firm account against the individual indebtedness of any such members.

A bank has no lien on the deposits of a partner on his individual account for the balance due from a firm of which the depositor is a member. (*Manhattan Bank v. Walker*, 130 U. S. 267, 32 L. Ed. 950; *International Bank v. Jones*, 9 N. E. [Illinois] 885). And we are of the opinion that a bank cannot set off the indebtedness of an individual partner against a firm deposit; nor can the members of a firm set off their interest in the firm deposit against their individual indebtedness due the bank. (*Coote v. United States Bank*, 3 Cronch C. C. 95; *Chanute National Bank v. Crowell*, 51 Pacific [Kansas] 575; *Hodgin v. Peoples National Bank*, 32 S. E. [North Carolina] 887; 3 R. C. L. 591, par. 219).

This question has never been squarely passed upon by the Supreme Court of Iowa, but we are of the opinion that it would follow the great weight of authority indicated by the above citations.

SCHOOLS AND SCHOOL DISTRICTS: SCHOOL BUSSES. School busses may take a route required by them to drive out of the school district if it is a matter of convenience or practicality, but they cannot be used for transporting pupils of other districts.

February 27, 1925. *Superintendent of Public Instruction:* Under date of January 9th you submitted a request for an opinion to this department, which request is as follows:

"Your opinion is requested on the following:

1. Has a school board of a consolidated school district a legal right to plan a route of transportation taking the bus outside of its school district?

2. Has the school board a legal right to send the bus outside of the school district to gather up children living in another district, thus requiring the children of the district to be taken outside of the district of their residence, and to travel much farther in going to and from school, over the protest of the parents."

Replying to your communication will say that the question of a right in a consolidated school district to plan a road of transportation taking a bus outside of the school district depends entirely upon the conditions. If it is done for the purpose of better accommodation to the patrons of the school or for the purpose of obtaining better road over which to transport such children, the Board would undoubtedly have the right to go outside of the district. In other words, they would not be limited to traveling the roads of their own district if some other more practical and better route was to be had. I do not think, however, that they can take the consolidated school bus outside of the district for the purpose of picking up children belonging in other districts.

TAXATION: Property of a manufacturing or mercantile corporation must be assessed to the corporation and the stock in such corporation cannot be assessed for taxation.

February 27, 1925. *County Attorney, Keokuk, Iowa:* We desire to acknowledge receipt of your letter of February 24, 1925, asking this department to prepare an opinion upon a question relating to the proper method of assessing corporations engaged in manufacturing or mercantile business. Your letter is in the following language:

"The local assessor has submitted to me a question with reference to Section 7008, Code of 1924, applicable to assessing shares of stock of any corporation organized under the laws of this State, except corporations otherwise provided for in Chapters 331 to 341, inclusive. My own idea is that this Section does not refer to the ordinary corporation engaged in manufacturing or mercantile business, which has tangible assets which are assessed to the corporation the same as though the property belonged to an individual.

"I shall appreciate very much your opinion with reference to just what corporations Section 7008 does refer to, and whether or not it refers to such corporations as above mentioned. Take, for instance, a corporation engaged in the wholesale dry goods business with a large stock of merchandise, a valuable building and real estate holdings, accounts receivable and money in the bank. Would this corporation be required to pay taxes on its tangible property and would its stockholders also be required to pay taxes upon the shares of stock? It does not seem to me that it should."

The question you have submitted is absolutely free from doubt because the Supreme Court in two comparatively recent cases has passed upon the exact question you have submitted. Before citing these authorities, however, we shall refer to certain sections of the Code of 1924.

Section 7008 provides in part as follows:

"The shares of stock of any corporation organized under the laws of this state, except as provided in Section 7102, shall be assessed to the owners thereof as moneys and credits at the place where its principal business is transacted."

This section prescribes the ordinary and usual method of assessing the shares of stock of corporations organized under the laws of this state. However, the statute specifically provides that it shall not apply to corporations otherwise provided for in Chapters 331 to 341, inclusive, and to corporations covered by Section 7102.

Section 7102 relates to the taxation of the interest of members in cooperative corporations or associations, which are not organized or operated for profit and it is not necessary to consider this section in the determination of the question under consideration.

We must, therefore, turn to the statutes, that is Chapters 331 to 341, inclusive, to determine whether any other method is provided for the taxation of mercantile and manufacturing corporations.

We find the answer to this question in Sections 6971 and 6972, relating to the taxation of merchants, and Sections 6975 and 6976 covering the taxation of manufacturers.

In brief, the statutes provide that stocks or merchandise shall be assessed at the average value of the stock during the year next preceding the time of assessment. Section 6972.

It is also provided that stock of a manufacturer shall be assessed at its average value estimated upon the materials only which enter into the combination manufacturer or pack. Section 6976.

It is quite manifest then that these sections take manufacturing and mercantile corporations out of the operation of the provisions of Section 7008.

It is a well known rule that when the statute provides a method for the assessment of property, that method is exclusive.

Union Petroleum Co. v. Indian Petroleum Co., 192 Iowa 1373;
Wahkonsa Investment Co. v. City of Ft. Dodge, 125 Iowa 148;
Layman v. Iowa Telephone Co., 123 Iowa 591.

We are, therefore, of the opinion that the property of manufacturing or mercantile corporations must be assessed to the corporation as such, and the stock in such corporations cannot be assessed for taxation. The following authorities fully support our conclusions:

Union Petroleum Co. v. Indian Pet. Co., 192 Iowa1373;
Bennett v. Finkbine Lumber Co., (Iowa) 198 N. W. 1;
Morril v. Bentley, 150 Iowa 678.

The first of the above cited cases involved the question as to the proper method of assessing the property of a mercantile corporation, and the second case cited related to the assessment of the property of a manufacturing corporation. In both cases it was held that the property should be assessed to the corporation and that the shares of stock were exempt from taxation. These cases are, therefore, determinative of the question you have submitted.

LEGISLATURE: A member of the legislature is entitled to receive his compensation although he receives a per diem compensation as a presidential elector for a period of time while in the G. A.

March 2, 1925. *Auditor of State:* I wish to acknowledge receipt of your favor of the 25th requesting the opinion of this department upon the following proposition:

"On January 12, 1925, the claim of Oscar Ulsted for services rendered as presidential elector, amounting to $5.00 per diem, was filed in this office. I find by the records that Mr. Ulsted is also a member of the General Assembly and has been paid compensation as such during the time these services were rendered for which

his claim is filed. Is it permissible, under the law, to issue a warrant in payment of this claim?"

Chapter 45, Code of Iowa, 1924, provides for the qualification, election and payment of presidential electors. The only prohibition in the qualifications of an elector that concerns his holding any other office is the following language used in Section 963, Code of Iowa, 1924:

"* * *, no one of whom shall be a person holding the office of Senator or Representative in Congress, or any office of trust or profit under the United States."

It is therefore apparent that a State senator or representative could at the same time qualify as a presidential elector.

Section 971, Code of Iowa, 1924 provides that the presidential electors shall receive as compensation $5.00 a day for every day's attendance, and mileage.

The members of the General Assembly of Iowa are paid under the provisions of Section 14, Code of Iowa, 1924, which provides in part:

"* * *: To every member, for each full regular session $1,000.00, and for each extra session the same compensation per day while in session, to be ascertained by the rate per day of the compensation of the members of the General Assembly at the preceding regular session; * * *"

The members of the General Assembly for each regular session thus receive the sum of $1000.00 as compensation, regardless of the number of days spent in session. This pays for the performance of his duties during the whole of the session of the General Assembly. There is no provision prohibiting a member of the General Assembly from receiving other compensation during his service as a member thereof, except the constitutional provision contained in Section 21 of Article III of the Constitution of Iowa. This section reads as follows:

"No senator or representative shall, during the time for which he shall have been elected, be appointed to any civil office of profit under this state, which shall have been created, or the emoluments of which shall have been increased during such term, except such offices as may be filled by election by the people."

It is thus apparent that the prohibitions apply only to appointive offices which have been created or the emoluments thereof increased during such term. Offices filled by the vote of the people at an election are excepted. The office of Presidential Elector is an elective office and therefore does not come within the prohibitions of the section just referred to.

We are, therefore, of the opinion that under the statutes of this State a member of the General Assembly who is elected a presidential elector is entitled to receive his per diem compensation as presidential elector, even though he is at the same time a member of the General Assembly in regular session.

SCHOOLS AND SCHOOL DISTRICTS: Method of dissolution of consolidated school district discussed.

March 3, 1925. *County Attorney, Spencer, Iowa:* We desire to acknowledge receipt of your letter of February 23, 1925, requesting this department to prepare an opinion on the question, which you have stated therein as follows:

"We have a question concerning a consolidated school district in this county and is one which involves the interpretation of the present amended law in relation to dissolution of such corporation.

"A consolidated school district was duly organized but no bonds were issued nor school building built. A petition is now being circulated and submitted to be presented to the County Superintendent for the dissolution of such corporation.

Section 4188 of the Code of 1924 provides for the dissolution of the corporation organized for the purposes of maintaining a consolidated school. Subdivision 4

of this Section provides for a hearing before the county superintendent, in which hearing the county superintendent is to review the matter on its merits and make ruling thereon. The 40th General Assembly, extra session, amended this subdivision by making it mandatory that in case in such district for which petition for dissolution has been filed no bonds have been issued or school building built that the county superintendent shall at once approve of such petition.

Subd. 5 and 6 of this Section provides for appeal from such decision to the board of education and in so providing state that the Board shall approve of or enter an order dismissing the petition for dissolution.

"The question we are concerned with is whether or not it is mandatory for the board to approve of the petition for dissolution or whether it is discretionary on their part as to whether or not they approve of the petition or dismiss it.

"I would like your opinion as to the interpretation of this section as amended and whether or not the board has more authority and more discretionary power in this particular instance than the county superintendent from whose decision the matter is appealed of whether the board on appeal is limited to the mandatory provisions provided in Subd. 4 of this section."

The determination of your question depends upon the construction of Section 4188 of the Code. It relates to the method to be followed in securing the dissolution of consolidated school districts. It is too lengthy to be embodied in this opinion in its entirety. We shall, however, copy herein the fourth, fifth and seventh subdivisions thereof. They read as follows:

"4. On the final day fixed for filing objections, the interested parties may present evidence and arguments to the county superintendent, and the county superintendent shall review the matter on its merits and within five days after the conclusion of any hearing, shall rule on any objections and enter an order of approval or dismiss said petition, and shall at once publish this order in some newspaper in which the original notice was published. Where such district for which petition for dissolution has been filed has not issued bonds, or built a school building, the county superintendent shall at once approve such petition.

5. Any person living or owning land within the school corporation may appeal, and such appeal shall be dealt with as provided by sections 4159 and 4160.

7. If the petition for dissolution is approved, an election shall be called and held as provided in sections 4164 and 4165."

The first of the above portions of the statute provides for a hearing before the county superintendent on the petition for dissolution of such districts. A reasonable discretion is vested in the county superintendent to approve or dismiss said petition. However, it contains a positive mandate that the county superintendent shall approve said petition where the district for which the petition for dissolution has been filed, has not issued bonds or built a school building.

If the petition actually has been signed by a majority of the qualified voters residing within the corporation, the county superintendent has no alternative or discretion in such case, but the petition for the dissolution thereof must in such a case be approved by such official.

However, the county superintendent has the right or authority to determine the question as to whether or not the petition has been signed by the required number of electors.

The second subdivision of the statute above quoted provides for an appeal to the board of education by any person living or owning land within the school corporation.

The statute must be given such a construction as to carry out the intention of the Legislature. Manifestly, it could not have been the purpose of the legislature to grant the right to appeal from the action of the county superintendent when the statute makes it mandatory upon such official to approve the petition.

If the petition is actually signed by the required number of voters residing within the corporation, the statute leaves no discretion in the county superintendent to approve or dismiss, and, therefore, there is nothing for the board of education to determine on appeal. However, the right of appeal does lie from the ruling of the county superintendent to the effect that the petition has been signed by a majority of the qualified electors, residing in the district, but upon appeal no other question may be raised or determined by the board of education.

Therefore, it is our opinion that an appeal may be taken only for the purpose of raising that one question as to whether or not the petition is signed by the required number of voters.

TRUST COMPANIES: The duration of a trust company is limited to a period of 20 years and has no authority to buy or sell real estate for its own profit.

March 16, 1925. *Superintendent of Banking:* We wish to acknowledge receipt of your favor of the 13th requesting our opinion upon the following proposition:

"In connection with the incorporation of the Bechtel Trust Company of Davenport, some differences of opinion have arisen, and the attorneys have requested an opinion from your office. Inasmuch as the statutes are not clear, we believe it advisable that we have your ruling on these points for our guidance.

"May trust companies incorporate for fifty years? Section 9304 of the code makes certain sections of Chapter 414 applicable to trust companies. Concerning their organization, do you construe Sections 9155 and 9157 to 9161, inclusive, applicable to trust companies in their entirety? Or, does the clause in Section 9304 'so far as same relate to time and manner of commencing business' preclude their organization for fifty years?

"They desire to include in the general object powers the right 'to buy, hold and sell such real estate and personal property as may be desirable for its own use or profit'. Is this permissible? It has been the policy of the Banking Department to restrict the powers of a trust company if general banking powers were assumed, and we have objected to this clause. You will realize that this is a question of importance, and we shall appreciate an opinion from your office at an early date."

Section 9304, Code of Iowa, 1924, refers to certain sections of the Code and makes them applicable to trust companies. One of the sections referred to is Section 9157. This section specifies what shall be included in the Articles of Incorporation of a savings bank. Subdivision 4 thereof provides:

"The time of its existence, which shall not exceed fifty years."

It is to be remembered, however, that a trust company is incorporated for pecuniary profit, and therefore the provisions of the law in reference to corporations for pecuniary profit, insofar as the same are applicable, govern trust companies. In this connection Section 8364, Code of Iowa, 1924, provides:

"Corporations for the construction and operation, or the operation alone, of steam railways, interurban railways and street railways, for the establishment and conduct of savings banks, or for the transaction of the business of life insurance, may be formed to endure fifty years; those for other purposes, not to exceed twenty years."

A trust company is not a savings bank within the meaning of the terms of the Code of Iowa, and we are, therefore, of the opinion that the provisions of Section 8364, just quoted, limit the provisions of Section 9157, granting authority to fix the duration of a corporation for a period of fifty years, to a savings bank; the duration of a trust company to a period of not exceeding twenty years.

The trust company referred to by you will in fact be engaged in a general banking business. By implication the general banking laws of the State of Iowa will therefore limit and control the company's operations, except insofar as they are

expressly given other powers or are otherwise restricted. It is to be noted that there is no statutory provision granting a corporation of this character authority to do a general real estate business. We are, therefore, of the opinion that the provision of the general banking laws would control and that such a company could not legally engage in the buying and selling of real estate for its own use and profit.

SCHOOLS AND SCHOOL DISTRICTS: Where a school district has been attached to an adjoining corporation, the original district cannot be restored where there is no township or school district to which it may reattach or no board to receive it.

March 17, 1925. *Superintendent of Public Instruction:* We have received your letter of February 2, 1925, asking this department for an opinion upon the question, which you have stated as follows:

"Section 4132 of the Code, 1924, provides as follows:

'Where territory has been or may be hereafter set off to an adjoining school township in the same or another county, or attached for school purposes to an independent district so situated, it may be restored to the territory to which it geographically belongs upon the concurrence of the respective boards of directors, and shall be so restored by said boards upon the written application of two-thirds of the electors residing upon the territory so set off or attached, together with a concurrence of the county superintendent and the board of the school corporation which is to receive back the territory.'

"We have a case in which territory was attached to an adjoining corporation and no part of their school corporation was left. They now wish to be restored to their original district but there is no board to receive them. In this case shall the county superintendent receive the territory and establish a school district or how shall they proceed?"

It will be observed that the section of the Code quoted in your letter covers only that part of a school corporation which has been set off to an adjoining school township in the same or another county, or attached for school purposes to an independent district so situated, and does not apply to a situation where there was in reality a consolidation of two districts.

Therefore, where there is no township or school district to which it may be reattached, or in which there is a board to receive it, the said statute does not apply and there is no way for the territory to be detached from the school district. We know of no pertinent statute that authorizes the division of a district under the conditions stated in your letter. Therefore, we are of the opinion that it may not be done.

LEGISLATURE—BILLS: Paragraph 2, Section 47 of the Code is directory only. It is not necessary in the title to a bill to refer to the chapter and title if the section number is given.

March 17, 1925. *Chief Clerk, House of Representatives:* This department is in receipt of your letter dated March 13, 1925, which letter is in words as follows:

"My attention has been called to the fact that bills amending the Code do not refer always to the chapter and title amended in accordance with the requirements of Paragraph 2, Section 47 of the Code. It seems to me pure surplusage to require reference to the chapter and title when reference is already made to the section number.

"I am wondering if you would rule that omission of reference to title and chapter would render these bills seriously defective."

You are advised that the requirements of Paragraph 2, Section 47 of the Code are directory only. If the Legislature passes a statute which refers to the law either by section number or otherwise with sufficient particularity so that the law

amended is identified, the bill is good. Of course any member would have the right to raise a point of order which might require the amending of the bill to conform to the statute, which would in fact be a rule for all practical purposes.

HIGHWAYS: Question of the right of the board of supervisors to expend the primary road fund or portion thereof for secondary road improvements discussed.

March 18, 1925. *Iowa State Highway Commission, Ames, Iowa:* You have orally called the attention of this department to the situation as it exists in those counties which have completed the primary road system either through graveling or hard surfacing. You call attention to the uncertainty as to the authority of the board of supervisors to expend the primary road fund, or a portion thereof, for secondary road improvements. This department is also in receipt of a communication from Wilber W. Harris, County Attorney of Pocahontas County, in which he presents the same situation and asks for an opinion. In order that this matter may be disposed of finally, and both requests answered, we write this opinion.

The opinion will be based upon the facts submitted by Mr. Harris, which facts are clearly disclosed in his letter. This letter is as follows:

"We have at hand your letter of Feb. 18th, in reply to our inquiry of Jan. 30th, in which we submitted four questions to you relative to road matters for your opinion.

"Questions three and four have been answered in a manner which definitely and clearly settles the point raised by the board.

"However, when submitting your answers to questions one and two to the Board, the writer was advised that he did not state the questions to you in quite the proper terms, so that your answers could fully and definitely settle the points raised by the Board.

"I will go into this matter rather in detail so that you will be able better to understand our proposition. There is a fine yet clear distinction between the Board of Supervisors and the Highway Commission as to this particular point of law. The Highway Commission holds that, first, a sufficient amount in actual cash must be set aside to cover items under subdivisions 1, 2, and 3 of Section 4737 of the Code of 1924, and not touched until needed; and second, that sufficient cash must be on hand to the credit of the County, in addition to the above, to cover the entire cost of any proposed Primary-Secondary Road Construction project, before such money can be appropriated for such primary-secondary project.

"The Pocahontas County Board of Supervisors, disagree with this interpretation of the law by the Highway Commission. The Board feels that it is unreasonable and unnecessary to set aside, now, an actual amount of cash to cover all these fixed costs of maintenance and costs of such proposed primary-secondary project, all of which are costs which will be spread over the entire year, this in view of the fact that they are as reasonably sure of getting the excess money as they are of the amount needed to meet the requirements of subdivisions one, two and three of the above quoted section. They feel that they are given discretionary powers in the expenditures of all monies in their charge, and believe that if they appropriate an amount from their anticipated revenues to cover the fixed costs provided for in Section 4737, that such appropriation can be taken care of partly from the later receipts into the primary road fund as well as from the first moneys paid into said fund during the current year. Such arrangement will at once guarantee these definitely named expenses above referred to and permit the inauguration of such primary-secondary road project early enough to insure completion before it is too late in the fall to do the work.

"Pocahontas County, for the year 1924, received to the credit of its primary road fund the sum of $101,000.00 of which there was an unexpended balance on Jan. 1st, 1925, of $15,000.00 which amount will cover uncompleted projects now under contract (these projects complete the primary system).

"It is expected that Pocahontas County will receive a sum of at least $101,000.00 for the year 1925.

"The sum of $50,000.00 has been appropriated by the Board to take care of the

items under subdivisions 1, 2 and 3 of Section 4737 of the Code, of 1924. This will leave a balance in the primary funds anticipated for the year 1925 of $51,000.00.

"QUESTION.

"Now, then, Can the Board of Supervisors proceed at this time with the letting of contracts, with the Highway Commission's approval of plans, for the purpose of improving secondary roads, the total cost of which plus the amount required to comply with subdivisions 1, 2, and 3 of Section 4737 of the Code of 1924, does not exceed the entire funds anticipated for the current year, altho the said funds are not cash to the County's credit?"

Section 4737 is too lengthy to set forth in its entirety in this opinion. However, in part the statute reads as follows:

"After the primary road system, as now constituted, or as it may hereafter be constituted in any county, by authorized modification, is fully improved by grading, draining, and graveling or other surfacing approved by the highway commission, the state highway commission shall each year appropriate from said county's allotment of the primary road fund a sufficient amount:

"1. To pay the cost of maintaining the primary road system of said county during said year.

"2. To pay the interest and maturing principal of certificates, if any, issued by said county in anticipation of said county's allotments of the primary road fund.

"3. To pay the interest and maturing principal of primary road bonds, if any, issued in anticipation of said county's allotment of the primary road fund.

"All funds remaining in said county's allotment of the primary road fund, after the above amounts have been set aside, are hereby made available for the grading, draining or graveling of secondary roads in said county which connect with or form laterals or feeders to the primary roads of said county."

It will be observed that all funds remaining in the county's allotment of the primary road fund, after the amounts provided for therein are set aside, are made available for the grading, draining or graveling of secondary roads in such county which connect with or form laterals or feeders to the primary roads of said county. This section makes funds available for secondary road purposes only after the primary road system is fully improved by grading, draining and grading, or other surfacing approved by the State Highway Commission.

We now turn to a consideration of the sections of the statute relating to the creation of the primary road fund and its apportionment to the counties.

Section 4690 of the Code, 1924, reads as follows:

"There is hereby created a fund which shall be known as the primary road fund, which shall embrace all federal aid road funds, and all funds derived from year to year by the state under acts regulatory of motor vehicles, except such portion of said motor vehicle fund as may be necessary to maintain the federal aid engineering fund, and as may, by law, be retained in the state treasury as a maintenance fund for the state highway commission, or as a fund to cover administration of the motor vehicle department."

Section 4692 of the Code, 1924, reads as follows:

"The state highway commission shall open an account with each county in the state in relation to the primary road fund, and shall first credit each county with any unused portion of the allotment of the federal-county-cooperative road fund, as shown by the official supplementary bulletin of the state highway commission of June, 1917, and designated as 'volume five, number six,' and shall each year credit each county with its allotted portion of the primary road fund, and charge it with the amount of all duly and finally approved vouchers for claims properly chargeable to said county. Said account shall also show the amount of each separate authorization of bonds or road certificates hereunder, and the amount, number, date, maturity, and interest rate of each series of bonds or certificates actually issued by the county under this chapter. The said commission shall, at all proper times, keep each county fully informed as to the state of its account."

Attention is also invited to Chapter 251 of the Code, 1924, containing provisions of the motor vehicle law which provides for the licensing of motor vehicles for the calendar year. For example, motor vehicles are licensed for the year 1925. The license so issued permits the holder to drive the motor vehicle so licensed upon the public highways from the first day of January to the thirty-first day of December, 1925, inclusive. The primary road fund is made up of motor vehicle fees plus such federal aid as may be granted to the state by the federal government. It is apparent that at least that portion of the primary road fund derived from motor vehicle fees would be available for the calendar year.

It is our opinion that the county may estimate the amount of the primary road fund for a given calendar year and after deducting therefrom the fixed charges, as provided in the first, second and third subdivisions of Section 4737 of the Code, 1924, proceed to plan projects, enter into contracts and do such other acts as may be necessary to improve the secondary roads of the county upon the basis of such estimated receipts. Any other rule would be absurd. If the county cannot, until the actual cash is received by the state treasurer and allocated and the county informed of the allocation, proceed with a project contemplating the expenditure of the money which will reasonably be available for the year the true purpose of the statute will be defeated. If, however, the county can proceed with its projects, based upon the actual receipts which may be reasonably expected, the secondary roads will be improved in conformity to the true spirit and purpose of the law.

It is advisable for the Highway Commission to estimate the primary road fund available for the given year and to inform the counties of the amount which they may reasonably expect as available for use in the improvement of the secondary road system. This will result in the counties being informed as early in the year as possible. It is to be remembered that the actual payment for the work must depend upon the actual receipt of the cash from time to time by the state for the use of the county. This, however, can readily be taken care of in the contract.

It is also to be remembered that the federal aid cannot be allocated until it has been actually set apart for the benefit of the state. Therefore, in making the estimate, consideration must be given to this fact by the Highway Commission.

BUDGET—TOWNSHIP ROAD SYSTEM: The township trustees cannot purchase road machinery to be paid for by warrants maturing over a period of years. The township may incur a debt only for the authorized levy for the year.

March 19, 1925. *Director of the Budget:* You have orally requested this department to prepare an opinion upon a question submitted to you by Matt Conway of Creston, Iowa. The question submitted by him may be briefly stated as follows:

The trustees of one of the townships of Union County desire to purchase a tractor to be used in the improvement of the township roads. They desire to know whether warrants in payment of the purchase price of the tractor may be issued, a portion of which will become due in May of 1925 and a portion to become due in each year up to the year 1928.

The question submitted is whether it would be legal for the township trustees to enter into a contract for the purchase of the tractor and anticipate the taxes raised for road purposes in the township over a period of four years.

Section 4795 of the Code, 1924, provides for the levying of a township road fund of not to exceed six mills.

It is provided in Section 4797 that the township road fund may be used for the purchase of tools, road drags and machinery.

Section 4781 of the Code of 1924 reads as follows:

"The township trustees are charged with the duty to repair and improve the

roads of said system in their township, and to equitably and judiciously expend the funds of the township, including road poll taxes, for the specific purposes for which authorized.

"They shall not incur debts for said purposes unless funds have been provided for the payment thereof by an authorized levy.

"They may let by contract, to the lowest responsible bidder, any part of the township work for the current year."

We are of the opinion that the underlined portion of the section absolutely prohibits the incurring of any debts for road purposes, which would, of course, include the purchase of tools or machinery, unless funds have been provided for the payment thereof by an authorized levy. In other words, that for such purpose the township may incur a debt only in the event the debt is safely within the authorized levy for the year.

Therefore, we are of the opinion that the township trustees may not issue warrants in 1925 payable in May, 1926, in May, 1927, and in May, 1928, for the purchase of a road tractor.

Of course, the trustees may issue warrants payable in the year 1925 provided the total amount thereof does not exceed the authorized levy for the year.

STATE OFFICERS: State is not liable for the negligence of its officers or employees while acting within the scope of their employment, neither would the officer or employee be liable for damages.

March 24, 1925. *Secretary of Agriculture:* We have received your letter of March 20, 1925, asking this department to prepare an opinion upon the question which you have stated as fbllows:

"The question has arisen as to the liability of inspectors of this department driving state cars in case of accidents.

Recently, one of our inspectors had a head-on collision with another car. Both cars were badly damaged; also the drivers of both cars were injured.

Is the state or is the inspector personally liable for the damages to the other car and its occupants?"

Recently we prepared an opinion upon this identical question for C. R. Jones, Auditor of the State Highway Commission. We attach hereto copy of this opinion.

Our answer to your inquiry, therefore, is as follows:

If the inspector in your department, who was driving the official car that collided with another car, was transacting the business of the state and was acting entirely within the scope of his employment, neither the state nor the inspector would be liable in damages resulting from such collision, even though the inspector may have been negligent in operating the car.

The authorities cited in the opinion prepared for Mr. Jones are conclusive upon this question. This opinion, therefore, should be read in connection with the other opinion.

PUBLIC LIBRARIES: The library board has authority to designate the librarian as their agent and to pay his traveling expenses for work within the county which is legal and necessary.

March 24, 1925. *Superintendent of Public Instruction*: We wish to acknowledge receipt of your favor of the 26th requesting the opinion of this department in the following language:

"Is it legal for a library board in a city where a public library has been duly organized and established by vote of the people, and where an annual tax is levied to pay for purchase of new books, and to pay for salaries of librarian and assistants and other library expenses, for the library board to set aside one hundred dollars ($100.00) to pay the traveling expenses of the city librarian to travel over the county and to small towns in the county to work up sentiment to induce the Board of Supervisors of that county to levy a library tax of one mill on the dollar on all property in the county outside of city where this library is organized and now operating, and to authorize this city librarian to take such time off from her duties as city librarian as she finds necessary to call upon citizens over the county to induce them to lobby for the passage of such a resolution by the Board of Supervisors of a county?"

The Board of Trustees of a public library organized under the provisions of Chapter 299, Code of Iowa 1924, have very broad powers and are vested with a large discretion in the management of the library and in the handling of funds coming into their hands as trustees. Section 5858, part of the chapter just referred to, enumerates the powers of the Board of Trustees. Paragraph 2 thereof provides:

"To have charge, control and supervision of the public library, its appurtenances and fixtures, and rooms containing the same, directing and controlling all the affairs of such library."

Paragraph 8 of this Section also provides:

"To have exclusive control of expenditures of all taxes levied for library purposes, as provided by law, and of the expenditure of all moneys available by gift or otherwise for the erection of library buildings, and of all other moneys belonging to the library fund."

Section 5859 of this Chapter confers the power upon the Board of Library Trustees to make contracts for the use of the library facilities. The section reads in part as follows:

"Contracts may be made between the Board of Trustees of any free public library and any city, town, school corporation, township, or county for its use by their respective residents. * * *"

We are of the opinion that under the provisions of the section just referred to that the Board of Library Trustees have authority to designate the librarian as agent to act in their behalf in arranging contracts between any city, town, school corporation, township or county, and that in this work it would be proper and legal for the Board of Trustees to pay the expenses of a librarian in traveling to and from the places that it is necessary for her to visit for this purpose, and any other legal and necessary expense incident thereto. We, of course, do not believe that it would be legal or proper for the Board of Trustees to pay any sum of money for the purpose of lobbying or to pay the expenses of the librarian while engaged in attempting to create sentiment in favor of a contract between the trustees and the county.

BUDGET LAW: A school township not divided into subdistricts is subject to the provisions of the local budget law.

March 24, 1925. *Director of the Budget*: You have orally requested us to prepare an opinion upon a question of law submitted to your department by the Klipto Loose Leaf Company of Mason City, Iowa. The letter of said company reads as follows:

"In the correction of the budget law passed late last season, paragraph 1 reads the word 'municipality' which means the county, city, town, school district (other than rural independent district and school township divided into sub-districts.)

The question has come up whether a school township not divided into sub-districts is still subject to the budget requirements.

We presume you have threshed this out carefully and can give us this information without difficulty.

Will you not kindly note on this letter and return it, whether or not this class of school township has or has not been eliminated from the budget requirements."

Section 369 of the Code, 1924, as amended by Senate File No. 330 of the Special Session of the 40th General Assembly, reads in part as follows:

"As used in this chapter and unless otherwise required by the context:
1. The word 'municipality' shall mean the county, city, town, school district (other than rural independent school district and school township divided into sub-districts,) and all other public bodies or corporations that have power to levy or certify a tax or sum of money to be collected by taxation, but shall not include any drainage district, township, road district or rural independent school district or school township divided into sub-districts."

It will be observed that all school districts are included within the definition of the term 'municipality' with the following exceptions: first, rural independent school districts, and, second, school townships divided into subdistricts. It does not exclude from the provisions thereof an ordinary school township except as indicated.

We are, therefore, of the opinion that a school township not divided into sub-districts is subject to the provisions of the statute relating to the local budget.

TAXATION: 1. A soldier buying property under a contract or monthly payment plan is entitled to the soldier's exemption.
2. Taxation of property platted and sold under monthly payment plan discussed.

March 26, 1925. *Auditor of State*: We desire to acknowledge receipt of your letter of January 30, 1925, asking this department for an opinion upon two questions, which you have stated as follows:

"First: When a number of town lots are assessed together and some of them are afterwards sold under contract, or rather under the monthly payment plan, is the treasurer obliged to separate this tax and make separate receipts for the purchaser of these contract lots or should he insist on the seller paying the tax on the whole as they appear on the tax lists leaving the item to be adjusted between buyer and seller?

"Second: Where property is sold under contract or monthly payment plan, and the purchaser is a soldier, is such property subject to soldier exemption?"

I

We shall first discuss the second question contained in your letter.

The statute provides for the following exemptions from taxation:

Three thousand dollars in actual value to any honorably discharged union soldier, sailor, or marine of the Mexican War or the war of the rebellion;

One thousand eight hundred dollars in actual value of any honorably discharged soldier, sailor or marine of the war with Spain, Chinese relief expedition or the Philippine insurrection;

Five hundred dollars to any honorably discharged soldier, sailor, marine or nurse of the war with Germany.

The statute also provides for an exemption to the wife of any such soldier, sailor or marine where she is living with her husband and he has not otherwise received the benefits provided therein.

An exemption is also allowed to a widow remaining unmarried, and to a minor child or children of any such deceased soldier, sailor or marine. Section 6946.

When a purchaser of real estate under a contract takes possession thereof, he is liable for the taxes accruing thereon after the purchase.

Miller v. Corey, 15 Iowa 166;
Lillie v. Case, 54 Iowa 177;
Sherman v. Savory, 2 McClary 107;
National Surety Co. v. Walker, 148 Iowa 157;
Mitchell v. Mulet, 189 Iowa 1150.

It is, therefore, our opinion that if the soldiers referred to in your second inquiry purchased property under a contract of sale and took possession thereof, and at the time the tax is levied occupies the same, or receives the rents and profits therefrom, he is the owner of the property within the meaning of the taxation statute and must pay the taxes that accrue thereon, and would be entitled to the soldiers' exemption on said property at the time the assessment is made.

However, if the contract entered into between the alleged vendor and purchaser is not a good faith contract of purchase, but is entered into for the sole purpose of providing a subterfuge to evade the plain provisions of the taxation statute, then the taxes should be paid by the alleged vendor and the so-called purchaser would not be entitled to the exemption.

This is a matter, however, that must be determined under the peculiar facts of each case.

II.

It has been held by the Supreme Court that where a tract of land has been assessed as one tract, and parts of the same are sold subsequent to the assessment and the levy of the tax thereon, the treasurer is not required to separate the tax and accept the payment of a part thereof and issue separate receipts therefor.

McClintock v. Sutherland, 35 Iowa 487;
Cone v. Wood, 108 Iowa 260;
Shaw v. Orr, 30 Iowa 360.

However, the Legislature enacted a statute prescribing the procedure to be followed in securing an apportionment of the taxes when a tract of real estate has been assessed and taxed as one item of property, and thereafter and before the tax is paid the title to different portions of said real estate becomes vested in different parties in severalty, and the said owners are unable to agree as to what portion of the total tax each portion of the real estate should bear. The method prescribed in the statute is to file with the board of supervisors a written application for the apportionment of such tax and the service of notice upon the interested parties who do not appear voluntarily. It also provides for an appeal to the district court by any party who may be aggrieved by the order of apportionment. Chapter 350 of the Code, 1924, Sections 7297 to 7304, both inclusive.

A careful reading of the statute will fully answer the first inquiry contained in your letter.

PUBLIC FUNDS: Constitutionality and operation of Brookhart-Lovrien Bill, discussed.

March 27, 1925. *Governor of Iowa:* This department is in receipt of your request for an official opinion. For convenience we quote your request at length. It is in words as follows:

"There has been submitted to me for approval House File No. 129 by Lovrien, and I desire an opinion from you on the following propositions:
1. Is this bill as it passed the House and the Senate retroactive? In other words, are the provisions therein applicable to banks that have already failed and are now in the hands of a receiver, or to banks that have failed wherein receiver has not been appointed?
2. Is it the duty and obligation of the State Treasurer to collect $500,000.00 under this bill and invest it as provided therein immediately subsequent to the passage thereof, or does this bill contemplate raising this fund after the losses of public money have actually occurred?"

Does this bill apply to banks that have already failed and are now in the hands of a receiver for the purpose of liquidating the affairs of such bank. It is clear that this act is not retroactive. It is elementary that statutes have a prospective and not a retroactive effect. It is only when the statute expressly provides that it shall operate retrospectively that it will be given such effect.

State v. Iowa Telephone Company, 175 Iowa 607;
Sawyer v. Steinman, 148 Iowa 610;
Elks v. Conn, 186 Iowa 48;
Farmers Cooperative Creamery Co. v. Iowa State Ins. Co., 112 Iowa 608;
McIntosh v. Kilbourne, 37 Iowa 420;
Lozier v. Hale, 10 Iowa 470;
Forsyth v. Ripley, 2 G. Greene 181.

The effective portion of this statute is contained in Section 4 which provides "whenever a depository bank is placed in the hands of a receiver for liquidation". It is apparent that this applies to banks placed in the hands of a receiver after the act takes effect and not to banks placed in the hands of a receiver prior to the taking effect of the act. This result is more apparent when we take into consideration the provisions of the original bill. Section 11 of the original bill expressly provided that the act should apply to public funds in banks "now in the hands of a receiver where no distribution of assets has been made." This section and provisions were entirely stricken out by the committee. The intention of the committee is apparent that the statute should have a prospective and not a retroactive effect.

Does this statute apply to banks now closed but for which banks a receiver has not been appointed. As will have been noted, this statute has a prospective and not a retroactive effect. It will not apply so as to affect rights vested prior to its taking effect. The title to this act provides among other things "a method for the payment of public funds in banks which have since become insolvent." This means banks which have become insolvent from and after the taking effect of the act and which are closed and placed in the hands of a receiver. While the language of this act is not clear and there are some conflicting provisions, we are convinced that it will not apply to banks which are closed and which cease to do a general banking business as provided by the Constitution of Iowa prior to the actual taking effect of the act. Take the statute by its four corners and observe that it amends all of the statutes relating to the deposit of public funds. For example, observe that Section 6 amends Section 139 of the Code, 1924, by vesting in the Executive Council the power and the duty of fixing the limit to be deposited in banks by the Treasurer of State. Compare this with the provision contained in Section 4 to the effect that the act only applies to "public funds deposited by authority of and in conformity with the direction of the legal governing council or board as is by law charged with the duty of selecting depository banks for said funds and fixing the amount thereof". In order that the state may secure the advantages of this act it must therefore conform to the provisions of Section I and make its deposits within the limits fixed by the Executive Council of Iowa.

What we have said relative to the state applies likewise to school districts,—see Section 7 of the act. It applies likewise to townships,—see Section 8 of the act. We are therefore of the opinion that this statute does not apply to any bank which is closed, whether in the hands of a receiver or not prior to the taking effect of the act. Observe in this connection that a bank ceases to be a bank at once it ceases to make specie payments upon demand. Constitution of Iowa, Article VIII, Section 11. Therefore, when a bank ceases to make specie payments within the meaning of the Constitution and is closed after the taking effect of the act, deposits in such bank will be subject to the provisions of the act.

Is it the duty and obligation of the State Treasurer to collect $500,000.00 under this bill and invest it as provided therein immediately subsequent to the passage of the act, or does the bill contemplate raising this fund after the losses of public

money have actually occurred. The act is not entirely clear. Some of its terms are conflicting and at first blush would give rise to the impression that there must be created by the State Treasurer a sinking fund of not less than $500,000.00. We believe, however, that a more careful reading of the act will clearly demonstrate the fallacy of this impression.

Let us take this act by its four corners to determine what is really intended. The purpose of the act is to provide a security for the public revenues of the several public bodies of this state. In the exercise of its police jurisdiction, the Legislature is attempting to provide for the security of not only its own revenues but the revenues of each and every political subdivision within its four walls. It is not to be assumed that the Legislature would create a fund of $500,000.00 to lie unused in the state treasury unless there was some reason for so doing. On the other hand, it is to be assumed that the fund to be collected by the State Treasurer would only be collected as the necessity therefor should arise.

Section 4 of the act provides in substance that whenever a depository bank is placed in the hands of a receiver for liquidation that the Superintendent of Banking of Iowa shall certify the list of public deposits therein and as approved by the court to the Treasurer of State. The act then provides that "the Treasurer of State shall *thereupon* simultaneously divert all interest coming into his hands from state deposits and deposit the same in said sinking fund and *shall issue* an order to the county treasurers of the several counties directing them to collect from the depository banks the interest upon all public deposits * * * and it shall then become the duty of all depository banks to pay such interest to the county treasurers * * * and to the Treasurer of State." The bill then further provides "the diversion of funds shall continue until such claims are paid and it shall then be the duty of the Treasurer of State to discontinue such diversions of interest * * * and to so notify the county treasurers * *". This section is the heart of the bill. It provides as to what funds shall be protected and the method of securing the money to pay the claims in the event of loss. Sections 1, 2 and 3 are subservient to Section 4 and should as a matter of fact follow it in order. Section 4 clearly contemplates that there shall be no diversion of interest until the necessity therefor arises by virtue of the actual approval by a court of competent jurisdiction of the claims and the filing thereof with the Treasurer of State. It further contemplates that the diversions of interest must cease instantly upon there being received by the Treasurer of State a sufficient fund to pay the claims actually approved and filed as stated.

It may be said, however, that Section 1 is in conflict with Section 4. If in conflict with Section 4 it must give way thereto. Section 4 is specific. Section 1 is general. Section 4 provides when the Treasurer of State can issue a call and when the call must be raised. Section 1 provides that *"at no time shall any call be sent out for the collection* of such funds or diversion of interest be *commenced* when there is a balance on hand in such fund of more than $500,000.00. In other words the Treasurer cannot issue the call if he has $500,000.00 on hand. He can, however, issue no call unless he has claims on hand as provided in Section 4. What is the reason for the provision as contained in Section 1? The reason is apparent. The statute contemplates that the State Treasurer shall be subrogated to the rights of the local bodies and that all dividends which otherwise would go to the local bodies shall go to the Treasurer of State and shall be deposited in the sinking fund. The necessary result being that there will accumulate in the sinking fund a considerable sum of money. This sum might possibly reach the extreme of

$500,000.00. It is a weakness of the statute that no provision is made for the return of these dividends to the several counties pro rata rather than have the limitation of $500,000.00 placed thereon as stated. This, in my judgment should be cured by an amendment to the statute, but as it has nothing to do with the answer to your question, we will say nothing more about it. Section 2 is the most confusing of all the provisions of the act. This provides for the diversion of the funds. However, this statute cannot be construed as a diversion of all interest. If it is to be so construed, then there is no provision for a stoppage. In other words, all interest would be paid to the State Treasurer. Such a construction can not be placed upon the statute. This section is in the nature of a preamble and is made necessary solely to provide limitations upon the payment of interest into the general funds of the state, the county, the school district and the township. It has nothing to do with the question as to when the diversion shall commence and when it shall cease. Section 4 is controlling on these propositions.

It is therefore the opinion of this department that the Treasurer of State under this statute will have no authority or power to divert the interest from the regular channels nor will such interest be diverted from the regular channels unless there be filed with the Treasurer of State claims properly approved, and then only for such a length of time as will raise a sufficient sum to equal the claims actually approved and filed with such Treasurer.

We have asked Mr. Lovrien, the author of this bill, to express for our use his impressions with reference thereto, together with a history of the enactment of the statute. We subjoin hereto as Exhibit A a copy of his report to this department.

INSANE PATIENTS. The care of a person transferred from the psychopathic hospital to the State hospital for the insane should be paid for by the county of his residence, otherwise to be considered a state case.

March 27, 1925. *Secretary, Iowa State Board of Education:* We have received your letter of March 20th, 1925, submitting to this department an inquiry as to the construction of certain statutes of the state. Your letter is as follows:

"A part of a letter that Dr. Samuel T. Orton, Director of the State Psychopathic Hospital wrote to me on March 16, 1925, regarding Miss Doris Shaw, is as follows:

'Some time ago we received a patient from Davenport, who was obviously seriously in need of state hospital care and we sent her to the hospital at Mt. Pleasant as a Scott County patient. Our information was that she had lived in Scott County from July, 1923 until October, 1924, and while living there was under treatment in the Chiropractic Sanitarium.

'We have recently had a letter from the auditor of Scott County, a copy of which I am enclosing. I do not entirely understand the Senate Amendment under which our commission of insanity operates as I see no way in which we can commit a case as a state case. I would be glad if you will take this matter up with the Attorney General and get an opinion from him for the handling of this and such future cases as may arise.

'While with us Miss Shaw was a private case so that the question of her settlement while in residence here was not raised.'

"According to the latter part of Chapter 197, of the Code, 1924, the Medical Director, the Assistant Medical Director, and one of the members of the medical staff of the State Psychopathic Hospital, have the authority under certain conditions, to send a patient to a State Hospital for the Insane.

"Is a person, who has been a patient in the State Psychopathic Hospital, when transferred by the authorities thereof to a hospital for the insane, a private or a state case?"

Section 3581 of the Code of 1924, provides that the necessary and legal costs and expenses attending the arrest, care, investigation, commitment, and support of an insane person committed to a state hospital shall be paid:

1. By the county in which such person has a legal settlement, or
2. By the state when such person has no legal settlement in this state, or when such settlement is unknown.

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

We believe your inquiry should be answered in the following way:

That if the person transferred from the psychopathic hospital to the state hospital has his residence in Iowa, the cost of his care and support should be paid by the county of his residence; otherwise, it should be considered a state case and the cost thereof paid by the board of control.

HIGHWAYS—FEDERAL AID: The requirements made by the State in order to secure Federal aid discussed.

March 30, 1925. *Speaker of the House of Representatives:* We desire to acknowledge receipt of your letter of March 21, 1925, asking this department to prepare an opinion upon three questions contained therein. Your letter is as follows:

"You are requested, for the benefit of members of the House interested in road legislation, to give an opinion on the following propositions in connection with what legislation is required to be adopted by the State of Iowa to comply with the Federal Highway Act.

1. Does the Federal Highway Act require that the State Highway Commission have entire control of the maintenance of the Primary Road System?

"If so, will the following amendment to the law comply with that requirement:

'Amend Section 4736 by striking from line 13 the words, "hard surfaced", and inserting in lieu thereof, the word, "primary".'

2. If the law in relation to the Primary Road System of the State of Iowa is changed by adding thereto the following provision, will that comply with the requirements of the said Federal Highway Act, and particularly with Section 7 thereof, which provides that the funds of the state for primary road purposes shall be under the direct control of the State Highway Department?

"The suggested amendment is as follows:

Section 7. The primary road fund is hereby divided into two accounts, to-wit: the state primary road account and the county allotment primary road account. The state primary road account shall consist of all moneys received by the state each year from the federal government for the improvement of highways and an equal amount of state funds to be set aside by the State Highway Commission from the primary road fund, before said fund is allotted among the counties. The county allotment primary road account shall consist of all other moneys credited to the primary road fund and shall be allotted to the various counties of the state in the ratio that the area of the county bears to the total area of the state. Each county's allotment primary road account shall be expended only in said county.

3. Will it be sufficient if the amendment provided in Paragraph 2 becomes effective November 1, 1926?"

Section 7 of the Federal Highway Act reads as follows:

"That before any project shall be approved by the Secretary of Agriculture for any State such State shall make provisions for State funds required each year of such States by this Act for construction, reconstruction, and maintenance of Federal-aid highways within the State, which funds shall be under the direct control of the State highway department."

Certain definitions as provided in the Federal Aid Act must be considered in its construction. Your attention is invited to the following as contained in Section 2 of such act. We quote therefrom the following:

"The term 'State Highway Department' includes any state department, commission, board, or official having adequate powers and suitably equipped and organ-

ized to discharge to the satisfaction of the Secretary of Agriculture the duties herein required."
also

"The term 'State funds' includes for the purpose of this act funds raised under the authority of the state, or any political or other subdivision thereof, and made available for expenditure under direct control of the State Highway Department."

It necessarily follows that the funds made available by the state must be available for expenditure under the direct control of the Iowa State Highway Commission. It may be interesting to know that the same phrase appears in Section 7 of such act. It is important, therefore, to consider the meaning of this phrase.

The word "direct" is an adjective and has been defined by the courts as follows:

"Immediate; immediate or proximate, as distinguished from 'remote'; express; free from intervening agencies or conditions; hence characterized by immediateness of relation or action." 18 Corpus Juris, 1043.

The word "control" as a noun means:

"The act of superintending; care and foresight for the purpose of directing and with authority to direct, power to restrain; restraining or directing influence; regulating power. It is sometimes employed or used as equivalent to, if not synonymous with, management." 13 Corpus Juris, 837.

The following quotation from a decision of the Supreme Court of the State of California may be interesting: (*McCarthy v. Board of Supervisors*, 15 Calif. App. 579),

"The work is to be done, not simply under the 'supervision', but also under the 'control' of the surveyor. 'Supervision' implies oversight and direction. 'Control' must have been used to authorize additional power, such as is contained in one of its definitions, 'to exercise a restraining or governing influence over, to regulate.' How could the surveyor govern or regulate the construction of the bridge without a supervision over the employment of labor and the purchase of material? He could supervise the structure by directing its completion in accordance with the plans and specifications. He could not 'control' it without a directing power as to the cost. This power manifestly could not be exercised without the privilege of employing the labor and purchasing the material."

Before reaching our ultimate conclusions it is imperative that we call your attention to the construction placed upon the Federal Aid Act by the Department of Agriculture of the United States. After all is said and done it is the construction placed upon the statute by the Federal Government that is determinative of the whole matter. The state cannot construe a federal statute so as to bind a department of the federal government. If we are to accept the provisions of a federal act to be administered by a federal agency we must accept the construction of such federal act placed thereon by such federal agency in the absence of a decision by the federal courts. This elementary rule governing the relationship existing between the state and the federal government is, therefore, of the first importance.

Recently the Governor of Iowa, the Honorable John Hammill, requested the Department of Agriculture for an express opinion as to the construction placed upon this statute by the federal government. The following quotation from the letter received by the Governor from the Secretary of Agriculture dated February 2, 1925, is conclusive. Among other things the Secretary of Agriculture says:

"It is the view of this department that legislation to correct the existing deficiencies will involve such revision of the present law as will empower the State Highway Commission to determine the types of pavements, including hard-surfacing types, without the necessity of such question being submitted to the electors and independently of action by the county boards. Also, the State Highway Commission should be empowered to maintain all roads improved with federal-aid and absolutely to control all work necessary to accomplish such maintenance and it

should be provided with sufficient funds under its control for carrying on both the construction program and the maintenance work required."

In a letter from the Department of Agriculture to the Iowa State Highway Commission dated February 28, 1925, we find the following:

"In order to fully meet the requirements of the Federal Highway Act, it is essential that the State Highway Department be given full jurisdiction and control, both for construction and maintenance, over the system of highways within the State on which Federal aid funds will be expended, and such jurisdiction and control necessarily should extend to and include the selection of the roads to be improved; the determination of the types of improvements to be made; the making of surveys and the preparation of plans, specifications and estimates; the advertisement and award of contract; and the supervision and direction of all construction and maintenance work. There should also be provided state funds under the direct control of the State Highway Department adequate for carrying out all of the foregoing activities. The bill would not vest the State Highway Commission with powers in excess of the foregoing requirements."

Section 12 of the Federal Aid Act supports the construction thus placed upon the statute. This section reads as follows:

"That the construction and reconstruction of the highways or parts of highways under the provisions of this Act, and all contracts, plans, specifications, and estimates relating thereto shall be undertaken by the State Highway Departments subject to the approval of the Secretary of Agriculture. The construction and reconstruction work and labor in each state shall be done in accordance with its laws and under the direct supervision of the State Highway Department, subject to the inspection and approval of the Secretary of Agriculture and in accordance with the rules and regulations pursuant to this Act."

With these observations we take up in order the questions submitted by you. The first question is:

Does the Federal Highway Act require that the State Highway Commission have entire control of the maintenance of the primary road system?

You are advised that under the construction placed upon the statute by the Secretary of Agriculture and with which construction we agree, the Federal Statute requires that the Iowa State Highway Commission or some other state agency provided by the state of Iowa, shall have entire control of the maintenance of the primary road system.

You are further advised that it is our opinion that the amendment suggested will not meet the requirements of the Federal Act. The laws of Iowa should provide expressly for the maintenance of the primary road system under the direct control of the Iowa State Highway Commission and should provide sufficient funds for expenditure under the direct control of such commission for such purpose.

The second question submitted by you is in words as follows:

If the law in relation to the Primary Road System of the State of Iowa is changed by adding thereto the following provision, will that comply with the requirements of the said Federal Highway Act, and particularly with Section 7 thereof, which provides that the funds of the state for primary road purposes shall be under the direct control of the State Highway Department?

The suggested amendment is as follows:

Section 7. The primary road fund is hereby divided into two accounts, to-wit: the state primary road account and the county allotment primary road account. The state primary road account shall consist of all moneys received by the state each year from the federal government for the improvement of highways and an equal amount of state funds to be set aside by the State Highway Commission from the primary road fund, before said fund is allotted among the counties. The county allotment primary road account shall consist of all other moneys credited to the primary road fund and shall be allotted to the various counties of the state

in the ratio that the area of the county bears to the total area of the state. Each county's allotment primary road account shall be expended only in said county.

This question must be answered in the negative. In so answering it, however, we desire to make the following observations. The state of Iowa must, if it accepts the federal aid, comply with the requirements of the federal government. This is elementary. The Department of Agriculture has said what must be done by the state. The state must vest in the Iowa State Highway Commission or some other designated agency the direct control of the expenditure of the funds. This amendment does not vest such control in the Iowa State Highway Commission.

The third question submitted by you is in words as follows:

Will it be sufficient if the amendment provided in Paragraph 2 becomes effective November 1, 1926?

You are advised that Paragraph 5 of House Roll No. 9859 of the 67th Congress of the United States provides in words as follows:

"Section 24 of the Act entitled 'An Act to amend the Act entitled "An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes,"' approved November 9, 1921, is amended to read as follows: 'That in any State where the existing constitution or laws will not permit the State to provide revenues for the construction, reconstruction, or maintenance of highways, the Secretary of Agriculture shall continue to approve projects for said State until five years after November 9, 1921, if he shall find that said State has complied with the provisions of this Act in so far as its existing constitution and laws will permit.'"

It follows that the Secretary of Agriculture is directed by the act to approve projects until November 9, 1926 "if he shall find said state has complied in so far as its existing constitution and laws will permit". This, we believe, answers the question.

COUNTIES—COURT EXPENSE FUND: The County court expense fund cannot be used to pay the salaries of the sheriff, county attorney or county clerk.

April 4, 1925. *County Attorney, Leon, Iowa:* We wish to acknowledge receipt of your favor of the 24th requesting the opinion of this department as to whether or not the salaries of the county attorney, sheriff and clerk of the district court can be paid from the Court Expense Fund.

Section 7172, Code of Iowa, 1924, provides for the creation of a Court Expense Fund. This section in part reads:

"In any county where, by reason of extraordinary or unusual litigation the rates herein fixed for ordinary county revenue are found to be insufficient to pay the same, the Board of Supervisors may create an additional fund to be known as a Court Expense Fund, and may levy for such fund such rate of taxes as shall be necessary to pay all court expenses charged to the county. Such fund shall be used for no other purpose, and the levy therefor shall be dispensed with when the authorized levy for the ordinary county revenue is sufficient to meet the necessary county expenditures, including such court expenses. * * *"

Section 5235, Code of Iowa, 1924, provides that salaries of the county attorney, clerk of the district court and the sheriff shall be paid from the county general fund.

We are of the opinion that it was plainly intended by the legislature that the Court Expense Fund should be used solely to pay the expenses of unusual litigation for which the county was chargeable, and that it was not contemplated this fund could be used to pay salaries of any county officials. The legislature carefully guarded the uses of the Court Expense Fund and in the section above quoted, said:

"Such fund shall be used for no other purpose."

And when the emergency or unusual litigation causing additional expense chargeable to the county has ceased to exist, then the court expense fund is to be discontinued.

We are of the opinion, therefore, that the salaries of the sheriff, county attorney and clerk of the district court cannot be paid from the Court Expense Fund.

EXAMINATION: Auditor has authority to send examiners to cities and towns of less than three thousand population to install prescribed and uniform systems of accounting.

April 6, 1925. *Auditor of State:* We have received your letter of April 4, 1925, asking this Department to prepare an opinion upon the question which you have stated as follows:

"I find Section 111, Code, 1924, provides that 'The Auditor of State shall prescribe a uniform system of blanks and forms for the financial accounts, receipts and reports of all county, city and town offices including offices of cities acting under a special charter'.

"I also find that Section 112 of the Code says 'It shall be the specific duty of each county, city and town officer to install and use in his office a system of uniform books and forms so prescribed for his office. State examiners are charged with the *specific duty* to *assist* all such officers in installing said system'.

"Section 113 of the Code gives the Auditor of State authority to send examiners only to cities and towns having a population of three thousand or more, including cities acting under special charter.

"I desire to secure an opinion from your department as to whether, considering these sections, the Auditor of State has any authority to send examiners to cities and towns of less than three thousand population for the purpose of installing prescribed uniform systems of accounting."

It is our opinion that the Auditor of State has authority to send examiners to cities and towns of less than three thousand population for the purpose of installing prescribed and uniform systems of accounting.

Under the statute a town is defined as a municipal corporation having a population of less than two thousand. A city may have a population of two thousand or more. Section 5623, Code of 1924.

The statute makes it the specific duty of each county, city and town officer to install and use in his office a system of uniform books and forms prescribed by the Auditor of State.

State examiners are charged with the specific duty of assisting all such officers in installing said systems.

As the statute specifically applies to cities and towns regardless of the population thereof, it of necessity requires the Auditor of State to send examiners to such cities and towns as well as cities with a larger population. Any other construction would be narrow and would have a tendency to defeat the very purpose of the statute.

COUNTIES: County may not make allowances to orphanages that are sectarian institutions.

April 21, 1925. *Auditor of State:* We have received your letter asking this department to prepare an opinion upon the question, which you have stated therein as follows:

"A short time ago we talked in your office concerning the payments made in Woodbury county to the Boys and Girls Home, St. Anthony's Orphanage, Florence Crittendon Home, and The Convent of the Good Shepherd.

"In line with your suggestions, I wrote to our examiner inquiring if these were sectarian institutions and have a reply from him under date of March 8th, copy of

which I enclosed. We question particularly whether such appropriations are proper, especially when the provisions of 1924 Code, Section 5256 and 5257 are taken into consideration.

"I would appreciate your informing us in regard to the propriety of these appropriations for the subjects stated at your earliest convenience."

For the purpose of getting a clear understanding of the question you have submitted, we will copy in this opinion the letter of J. I. Israel, relating to the appropriations for the certain boys and girls homes made by the board of supervisors.

"Your letter of March 5th in regard to payments made to different institutions received. They are as follows:

Boys & Girls Home
The St. Anthony Orphanage
Florence Crittendon Home
Convent of Good Shepherd

"The county pays the Boys and Girls Home $5,000.00 per year, the St. Anthony Orphanage $1,000.00, the Florence Crittendon Home $1,000.00, the Convent of the Good Shepherd $250.00. We are informed that the St. Anthony's Orphanage and the Convent of the Good Shepherd are sectarian institutions, we are further informed that the Boys and Girls Home and the St. Anthony Orphanage takes care of the boys and girls of the county without any additional expense to the county and file monthly reports of the number. We have made inquiries for these reports but so far have been unable to get hold of them.

"On April 4, 1923, the board entered the following resolution covering these institutions: 'Resolved that in lieu of all claims growing out of or that may result from the care of county charges or other persons for whom the county might become liable, that there be and there hereby is allowed to the following named institutions to be paid in quarterly installments during the calendar year of 1923, the following sums to-wit:

The St. Anthony Orphanage	$1,000
The Florence Crittendon Home	1,000
The Good Shepherd Home	250

and it is further resolved that the county auditor be and he is hereby instructed to issue warrants on proper funds in accordance with the terms of this resolution. There was a resolution made several years ago similar to the above covering the Boys and Girls Home.

"In looking through the minutes of 1924 today we find a similar resolution as above fixing the same amounts to be paid these institutions, except as to the Boys and Girls Home which it does not mention."

Section 5256 of the Code, 1924, reads as follows:

"Public money shall not be appropriated, given, or loaned by the corporate authorities of any county or township, to or in favor of any institution, school, association, or object which is under ecclesiastical or sectarian management or control."

We are of the opinion that under the provisions of the section just quoted, the allowances of $1,000.00 to St. Anthony's Orphanage and $250.00 to the Convent of the Good Shepherd are absolutely null and void because they are sectarian institutions.

Sections 3653 and 3654 provide for the maintenance of detention homes and schools for dependent, neglected and delinquent children in counties having a population of more than 40,000 and providing for a tax of one mill for the maintenance thereof and paying the salary and expenses.

Section 3655 reads as follows:

"The board of control shall designate and approve the institutions to which such children may be legally committed and shall have supervision and right of visitation and inspection at all times over all such institutions."

These sections undoubtedly authorize the expenditure of the fund raised by such a tax for the support of such children in a private institution with the one limitation that no money shall be appropriated, given, or loaned to or in favor of any institution, school, association or object under ecclesiastical or sectarian management or control.

However, we believe that the payment of such funds must be based upon the reasonable value of the services actually rendered. Bills should be properly itemized, sworn to and submitted to the board. The law does not contemplate that any sum, regardless of the value of the services rendered, may be appropriated for and paid to said institutions. The procedure pointed out herein should be followed in all such cases.

CITIES AND TOWNS: Cost of making a plat and schedule for sewer outlet to be paid from improvement fund where project does not pass city council.

April 21, 1925. *Director of the Budget:* You have requested us to prepare an opinion upon a question relating to the municipal law of the State, which was submitted to your department by J. O. Gregg, City Manager of Iowa Falls. The letter of Mr. Gregg is as follows:

"Will you please advise or furnish the necessary legal form or proceedings, for the construction of Sewer outlet and Disposal Plant.

"This city has made no arrangement nor anticipated any expenditure along this line, when we made the budget last August, but the construction of a new dam here this summer will necessitate the extension of Sewer out-let, and just how we are to proceed under the new budget law is just not clear to us.

"The estimated cost of same is about $100,000. And the expense of plans and schedule for same would be about $4,000. Should the bids for same exceed our ability to legally assess the above amount, how are we to legally pay for the Engineering, which as I interpret the law requires plans and schedule to be prepared in advance, prior to the date of hearing.

"If the majority of the benefited district object, which I am certain they will, can we legally proceed with the improvement?"

The portion of the budget law which relates to public contracts and bonds is embodied in Chapter 23 of the Code, Sections 351 to 367, both inclusive. A reading of this Chapter will give all the information as to how to proceed in conducting the proceedings for the extension of the sewer outlet that is necessary.

The more serious question, however, is the second one contained therein. The statement of facts is not clear or as complete as it might be, but as we understand the question submitted, it is as follows:

If the proceedings should be dismissed and the improvement should not be constructed, how can the city legally pay the expense of the plans and schedules therefor, which will cost about $4,000.00?

Section 5993 of the Code, 1924, provides that before the resolution of necessity is introduced, the council shall prepare and file with the clerk a plat and schedule showing the following facts:

1. The boundaries of the district, if any;
2. The streets to be improved;
3. The width of such improvement;
4. Each lot proposed to be assessed;
5. An estimate of the cost of the proposed improvement, stating the same for each different type of construction and kind of material to be used.
6. In each case the amount thereof which is estimated to be assessed against each lot.

This is a condition precedent to the introduction and consideration of the resolution of necessity.

Section 5994 of the Code, 1924, reads as follows:

"The cost of making the plat and schedule shall be paid from the improvement fund."

Under the provisions of Section 5996 of the Code, at the time of the hearing on the resolution of necessity, the city council may amend and pass, or pass the resolution as proposed. However, if at the time set for the consideration thereof, a remonstrance shall have been filed with the council, signed by sixty per cent of the property owners, and by the owners of seventy-five per cent of the property subject to assessment, the resolution then cannot be passed, except by unanimous vote of the entire council.

It is quite apparent, we think, that the legislature sought, by the passage of Section 5994, to make provision for the payment of the costs of making the plat and schedule. Under the statute even though the council does not order the construction of the sewer, the council must order the payment of the cost of making the plat and schedule from the improvement fund. If no levy has been made for such fund, the levy may be made in a subsequent year to pay the cost thereof.

We also are of the opinion that under Section 6261 of the Code, warrants may be issued in anticipation of the amount to be received in the improvement fund, and for that purpose the city council may issue certificates or bonds with interest coupons. We have so held in an opinion prepared for your department on February 17, 1925.

HIGHWAYS: In the improvement of highways the county is under no obligation to purchase additional right of way for the purpose of taking care of the fences of the abutting owners.

April 23, 1925. *Right of Way Engineer, Iowa State Highway Commission:* We desire to acknowledge receipt of your letter of the 21st instant asking this department to prepare an opinion upon the question which you have stated as follows:

"In Washington County in constructing our primary roads we bought sufficient right of way to construct our slopes. However, due to the nature of the soil the banks have caved thus causing the fences at different points to fall into our road. "I wish to ask whether the responsibility lies with the County and State and whether we should go back and purchase additional right of way of the farmers to take care of his fences."

It seems to be well settled that so far as the public highways are concerned the owner of land adjoining a highway has no right to excavate on his own land or to take any action that will interfere with the lateral support of the highway so as to cause it to subside or render it unsafe for travel. 29 C. J. 547—Note 68 and authorities cited therein.

However, no correlative duty rests upon the public to maintain the lateral support of the abutting property. State v. Rosenberger (N. Y.) 20 L. R. A. (n. s.) 287. The rule is well expressed in the above case as follows:

"As between the proprietors of adjacent lands, neither proprietor may excavate his own soil so as to cause that of his neighbor to loosen and fall into the excavation. The right to lateral support is not so much an easement as it is a right incident to the ownership of the respective lands. It is true that the application of the doctrine in the case of a public street or highway will be somewhat broader. In the case of adjacent landowners the right is only to the support of the land in its natural state, while in the case of the street or highway the improvement of the land, to fit it for its intended use as a public highway, may tend to add to the lateral pressure. But that would be the permanent and natural condition of the land acquired for the public travel. *It is further true that the municipality is not under a similar obligation to the abutting owner, and for the reason that, with respect to the construction and maintenance of the public highway, it exercises a governmental function and can come under no liability in its reasonable performance thereof. It constitutes an exception to the general rule of lateral support."*

This rule has been adopted by the Supreme Court of this state in the case of Talcott Bros. v. City of Des Moines, 134 Iowa, 113.

The syllabus of this case contains the following statement: The rule of lateral support obtaining between adjoining land owners does not prevail in favor of the property owner against the municipal corporation owning the adjoining street.

We are, therefore, of the opinion that the county or state are under no obligation under the law to purchase additional right of way for the purpose of taking care of the fences built by the abutting property owners. However, we suggest that the officers of the county and state should cooperate with the abutting property owners in every way possible to so construct the highway and the fences as to cause as little damage as possible to such owners.

MOTOR CARRIER: Certificates issued by the Railroad Commission for the operation of motor carriers, under the provisions of Chapter 252, Code, 1924, are still in force and effect unless revoked.

April 24, 1925. *Secretary, Railroad Commission:* This department is in receipt of your letter dated April 23, 1925, in which you propound the following inquiry:

"Will you please advise your opinion as to whether or not certificates of authorization to operate as motor carriers, which have been granted under the provisions of Chapter 252, Code of Iowa, 1924, automatically become null and void upon the taking effect of House Files Nos. 379 and 380, passed by the 41st General Assembly, or whether such certificates of authorization heretofore granted under Chapter 252, Code of Iowa, 1924, remain in effect until terminated by the Board under the provisions of the law now in effect."

House Files Nos. 379 and 380, enacted by the 41st General Assembly, repeal Chapter 252 of the Code, 1924, relating to motor carriers. House File No. 380, however, is practically a re-enactment of Chapter 252 of the Code, 1924, with the exception of the revenue features of the law which were separately embodied in House File No. 379. Sections 4, 5 and 6 of House File No. 380 are in practical effect, with some changes, a re-enactment of Section 5097 of the Code, 1924, and relate to the issuance of certificates by the Board after hearing.

It is a generally recognized rule and one recognized in this state that when statutes are repealed by acts which substantially retain the provisions of the old laws the latter are held not to have been destroyed or interrupted in their binding force but that in practical operation and effect the new law is to be considered a continuance of and modification of the old law rather than as an abrogation of the old laws and the re-enactment of new ones. See *Hancock v. District Township of Perry*, 78 Iowa 550.

It is the view of this department that where certificates have been issued by the Board of Railroad Commissioners for the operation of a motor carrier, under Chapter 252 of the Code, 1924, the Commission should hold that such certificates are still in force and effect unless the Board has for some legal cause revoked such certificates.

TAXATION: Board of supervisors has no authority to correct assessment and where tax is voluntarily paid it cannot be recovered back by the taxpayer.

April 28, 1925. *County Attorney, Glenwood, Iowa:* This department is in receipt of your letter dated April 25, 1925, in which you request an opinion. Your letter is in words as follows:

"Let me put a concrete case for your opinion on the question of the authority of a board of supervisors to refund taxes voluntarily paid. A taxpayer without protest gives in $16,000 of foreign corporation stock to the assessor of his township,

makes no appearance before the equalization board and in due time without further question pays the first half of the tax on the assessment. The stock was improperly assessed as *personal property* instead of *monies and credits*. The difference in the amount of his tax was about $350.00.

1. Has the board now authority to correct the assessment; that is, to change to monies and credits?

2. Can the portion he has already voluntarily paid be now paid back to him?"

You are advised that the board of supervisors has no authority to correct the assessment in question.

You are further advised that the tax once voluntarily paid cannot be recovered back. For your information you are advised that the action of the local board of review in classifying property for taxation purposes is final unless appealed from. Apparently the result will be to injure the taxpayer but the rules governing taxation are fixed and certain and cannot be varied from.

BUDGET LAW: The sections of the Budget Law relating to the transfer of funds do not apply to township funds.

April 30, 1925. *Director of the Budget:* We desire to acknowledge receipt of your letter of the 21st instant asking this department to prepare an opinion upon the question as to whether or not the transfer of funds in townships would come under the supervision of the director of the budget. The portion of the statute relating to the temporary and permanent transfer of funds is embodied in Sections 387 and 388, which are a part of Chapter 24, Code of 1924, which deals entirely with the local budget law.

This chapter relates alone to the levying of taxes by municipalities as therein defined, and other subjects closely related thereto. As originally enacted the word "municipality", as used in this chapter, included townships. However, this statute was amended so that the definition of "municipality", as now found in the statute, is as follows:

"The word 'municipality' shall mean the county, city, town, school district (other than rural independent school district and school township divided into subdistricts) and all other public bodies or corporations that have power to levy or certify a tax or form of money to be collected by taxation, but shall not include any drainage district, township, road district or school township divided into subdistricts."

The above definition applies only to the provisions of the budget law as found in this chapter, unless otherwise required by the context.

It is, therefore, our opinion that in view of the change in the statute eliminating townships from the definition of municipality, Sections 387 and 388 of the Code, 1924, relating to the transfer of funds, being a part of said chapter, do not apply to township funds.

Therefore, we are of the opinion that the transfer of funds in townships would not come under the supervision of the director of the budget.

RIVERS AND STREAMS: Title to abandoned river bed of a meandered stream is in the State of Iowa.

May 1, 1925. *State Game Warden, Fish and Game Department:* You have requested the opinion of this department upon the following proposition:

"We have a letter from Nevada, Iowa, asking the status of the old channel of the Skunk River, which as you know has been abandoned by the straightening of the river bed through a new channel.

"In your opinion, would the old river bed still be the property of the state, and as such could be stocked with fish by this Department? Parts of the old bed are fed by natural springs and people in that vicinity are asking that additional stocking with game fish be done there."

The first question presented by your request is as to whether or not the change in the channel of the stream would effect the rights of the riparian owners on the old channel.

The law on this proposition is well settled that whereby a sudden, violent, artificial means, the channel of a river is changed, the title to the shore and bed of the old channel is uneffected by the change and remains in the original owner.

Smith v. Miller, 105 Iowa, 688;
Nebraska v. Iowa, 143 U. S. 359, 361.

Therefore, where the old channel has been abandoned by means of a new artificial project to straighten the river bed, it is the opinion of this department that the rights of the riparian owners upon the old channel are uneffected by the change.

Therefore, it is necessary to next determine the rights of the riparian owners upon the channel of the Skunk river. The law is well settled in this State that where a stream has been meandered by the United States government under the direction and authority of the Department of the Interior, that the title to the bed of such meandered stream is vested in the State of Iowa.

McManus v. Carmichael, 3 Iowa 1;
Serrin v. Grefe, 67 Iowa 197; and many other cases.

This department has been informed by the Secretary of State that the Skunk river is not a meandered stream near Nevada, Iowa, which is the point in question. You are advised that it is the opinion of this department that under the authorities in this State, the title to the bed of the stream would not be in the State of Iowa where the stream has not been meandered, as is the case here, unless it can be shown that the stream is navigable in fact.

This is a matter of proof which would have to be determined from evidence in the case. If navigability in fact can be shown, it will be recognized as navigability in law, and as such the title to the bed would be regarded as vested in the State of Iowa.

McManus v. Carmichael, 3 Iowa 1.

We do not believe from the facts stated that it can be shown that the Skunk river is a navigable stream at the point in question. We are, therefore, of the opinion that it cannot be considered as navigability in point of law.

If it is in fact non-navigable and has never been meandered, then you are advised that it is the law of this State that the title to the bed of the stream vests in the riparian owners and that the riparian owners hold the title to the thread or center line of the stream.

Compton v. Hites, 184 Iowa 1074.

Therefore, we are of the opinion, upon the facts stated that the title to the channel of the stream is vested in the riparian owners and not in the State of Iowa, and that the State is without authority to stock the stream with game fish.

PUBLIC FUNDS: Board of supervisors does not need to release bonds for public funds deposited after the enactment of the Brookhart-Lovrien Bill. In case bonds are kept, they shall be for the benefit of the State Treasurer.

May 8, 1925. *County Attorney, Clinton, Iowa:* This department is in receipt of your letter dated April 28, 1925, in which you request an official opinion. Your letter is in words as follows:

"Our county auditor has asked me to write you for your opinion regarding the cancellation of the bonds given by various banks in our County to guarantee the County funds deposited with them by the County Treasurer. Mr. Strohm, our

County Auditor, had a letter from J. C. McClune, Auditor of State, under date of the 23d inst., in which he says 'that in regard to cancelling the bonds that are now in force will say that when this resolution is made a proper matter of record and when the banks have filed the amount subject to for this on the deposit to the County Treasurer according to the opinion of the Attorney General's office the old bonds *could* be released.' Mr. Strohm wishes to know how these old bonds could be released. That is, are the bonds released automatically when this resolution is passed by the Board of Supervisors or is there anything further that the Board of Supervisors must do in order to release said bonds."

You are advised that there is nothing in the law requiring the board of supervisors to release the bonds given to secure public funds. The statute, in fact, provides that where such bonds are carried they shall be for the benefit of the state treasurer upon payment to the county of the amount due. The county may continue the bonds or release them. The matter is wholly one up to the board of supervisors of the county and unless the board expressly releases the bond, it is not released.

SOLDIERS BONUS: Held under facts submitted that a woman was still the wife of a deceased ex-service man.

May 8, 1925. *Secretary of Bonus Board:* We wish to acknowledge receipt of your favor of the 27th requesting the opinion of this department on Claim No. 73395, George F. Canny, deceased. The facts submitted by you are in substance as follows:

Mrs. Sylvia Rock has filed the above claim with the Bonus Board as guardian of Leonard F. Canny, lawful child of George F. Canny, ex-service man, deceased. She is the divorced wife of the ex-service man and mother of the child in question. Subsequent to his divorce from the claimant the ex-service man was again married to Awilda Moore, with whom he was living at the time he entered the service. Subsequent to his entering the service and without securing a divorce, Awilda Canny went to Kansas City, Missouri, with one Peter Jackson and there a marriage ceremony was performed between Jackson and Mrs. Canny; they have since lived together as husband and wife. Upon the above state of facts you submit the following question:

"Does the evidence submitted establish the question that Sylvia Rock, as guardian of Leonard F. Canny, minor son of George F. Canny, deceased ex-service man, is the proper beneficiary of any compensation payable under the provisions of Section 4 of the Iowa Soldiers' Bonus law?"

Under the facts submitted by you, it is clear that Awilda Canny is still the lawful wife of George F. Canny, deceased ex-service man. Her purported marriage to Peter Jackson is of no legal force or effect. Under the provisions of Section 4, Chapter 332, Laws of the Thirty-ninth General Assembly, the husband or wife, child or children, etc., in the order named of the deceased ex-service man, are entitled to be paid the benefits of the Act. There is no exception provided in the chapter referred to, that would authorize the payment of the benefits of the Act to Mrs. Sylvia Rock, guardian of Leonard F. Canny. The benefits must be paid to those named in the Act in the order named "and none other".

COUNTY: In counties where bridges have been destroyed by flood, the Board of Supervisors, upon proper resolution finding of the emergency, may provide for the construction of bridges, and authorize warrants for the payment. If the contracts were not let according to law, a subsequent Board of Supervisors may cancel the warrants. Action was brought by the contractor and a settlement made in which warrants were issued based upon a settlement; they replaced

the first warrants issued and may be charged to the expenditure for the year in which the emergency was found.

May 11, 1925. *County Attorney, Council Bluffs, Iowa:* This department is in receipt of your letter dated May 7, 1925, in which you request an official opinion. For convenience your letter is quoted at length. It is in words as follows:

"I am writing to you at the very urgent request of the Board of Supervisors and the County Engineer. Following the settlement and adjustment of the Wickham Bridge & Pipe Co. case against the county in which we stipulated for judgment in the sum of approximately $32,000.00, warrants were drawn by the County Auditor on the bridge fund in payment of said judgment. You will recall that originally warrants had been issued to the Wickham Bridge & Pipe Co. in payment for the work and that these warrants had been stamped for lack of funds and were afterwards cancelled. Prior to the issuance of the original warrants there was a resolution of necessity passed which recited that the work was emergency work and was made necessary by reason of floods, etc. When the warrant was given, however, on the bridge fund in payment of the judgment, there were funds in the bridge fund to pay the warrant and it has been paid. This, with work already contracted for, entirely uses up the collectible revenue for the current year in the bridge fund. I have a lengthy statement from the County Engineer setting forth the program of bridge work which they had contemplated for this year. It appears from his statement that much of the necessary repairs had been postponed since 1923 on account of considerable work caused by floods, etc. and that consequently many of the bridges in the county are in dangerous condition and badly in need of repairs and that they are bridges on school bus routes and mail routes and that unless some means can be devised those roads will have to be closed to traffic. Moreover, the Board had gone ahead in contemplation of this program and had ordered materials, some of which is enroute and some of which has been delivered. The engineer tells me that there has been delivered about $11,000.00 worth and that there is approximately $9,000.00 more material either enroute or ordered. This was done when they were not expecting this $32,000.00 would be paid out of the bridge fund and that came after their other plans and contracts had been made.

"It occurs to me and I think you will agree with me, that the money paid the Wickham people in settlement of the judgment was no different than the original warrants and that it was for emergency purposes under their original resolution of necessity and it seems to me that it should come within the exception to the provisions of the so-called Tuck law and that the Board should have available the collectible revenues for the current year over and above the amount paid on that judgment.

"In view of your connection with the case, however, I did not feel that I should advise the Board to do this without your sanction. My own suggestion is that this money paid on the Wickham judgment should be treated as money paid for emergency work, thereby leaving the current collectible revenues in the bridge fund available for ordinary repairs. Will you kindly advise me whether that method of handling the situation meets with your approval and in your opinion complies with the law."

Chapter 104 of the Acts of the 40th General Assembly places a limitation on the expenditures which may be made by counties and county officers for county purposes. This statute provides in substance that it shall be unlawful for any county in a given year to expend from any county fund in excess of an amount equal to the legally collectible revenue in said fund for said year. There is provided, however, an exception, namely:

"To expenditures for bridges or buildings destroyed by fire or flood or other extraordinary casualty, or expenses incurred in connection with the operation of the courts."

The facts in this case are that in Pottawattamie County, in the year 1924, a number of bridges were destroyed by flood. The Board of Supervisors realizing this situation entered a proper resolution finding the existence of the emergency.

In this resolution, provision was made for the construction of bridges to meet the emergency. The bridges were constructed and warrants issued for the payment of the work. Subsequently, and in the year 1925, an investigation was made and it was found that the Board of Supervisors in letting contracts for the construction of the bridges had not complied with the law. The Board of Supervisors upon learning this adopted a resolution cancelling the warrants, which was proper.

Subsequently, the contractor brought an action in the District Court of Pottawattamie County for the purpose of compelling payment. This action was subsequently settled upon a reduction in the contract price of a very considerable sum. New warrants were then issued in lieu of the old ones, which were surrendered.

The question arises, as to whether or not the exemption which unquestionably would attach to the old warrants, attaches to the new. The new warrants simply replace the old, and are to be charged to the expenditures for the year 1924.

It must not be understood that interest would be allowed from the date of the old warrants for the very simple reason that the agreement provides that there should be no charge for interest. Therefore, so far as the expenditures from the bridge fund for the year 1925 are concerned, Pottawattamie County has a perfect right to expend an amount equal to the legally collectible revenues for the year 1925 without regard to expenditures made for the year 1924.

The true rule for the government of all public officials is that actual expenditures for a given year must not exceed the legally collectible revenues for such year.

Some confusion has arisen in the application of this statute because of the other provisions of the law to the effect that warrants outstanding shall be paid from funds later collected. This provision, of course, has nothing to do with the act to which I have referred.

SCHOOLS: A school district must pay the tuition for nine months to an adjoining corporation even though the corporation of a child's residence maintains school for only eight months.

May 11, 1925. *Superintendent of Public Instruction:* We have received your letter of May 9, 1925, asking this Department to prepare an opinion upon the following question:

"If a child is permitted to attend school in an adjoining corporation as provided for in Section 4274 of the Code, 1924, would the Board be required to pay nine months' tuition to the adjoining corporation when the district of the child's residence maintains only eight months of school?"

It is the opinion of this Department that, under the provisions of the statute just quoted, a school district would be required to pay the tuition to an adjoining corporation for the entire nine months nothwithstanding the fact that the corporation of the child's residence maintains school for only eight months.

It clearly was not the intention of the legislature that a child attending a school in a district other than the one in which the child lives should receive instruction only for a portion of a school year.

To receive such instruction as the law required, a child must attend school for the entire year.

SCHOOL FUNDS: A deed for land sold on execution in an action brought to recover the amount due to the school fund should be issued to the state for the benefit and use of the school fund. (2) Board of supervisors has the right to accept the conveyance of the property mortgaged in full satisfaction of the mortgage debt. It is not necessary to bring an action for the foreclosure thereof.

May 16, 1925. *Auditor of State:* We have received your letter of April 8, 1925,

asking this Department to prepare an opinion upon the questions which you have stated therein as follows:

"In the examination of Mahaska County, we learn of a $4,000 mortgage on farm property where it seems that it will be necessary to institute foreclosure proceedings, unless the transfer of the property can be made direct to the state or county by the party who now owns the land. If this could be done under the provisions of Section 4476, considerable saving and expense could be affected, but we are inclined to think that this Section 4476 does not refer to the regular proceedings outlined to be followed in connection with recovery of the school funds. In this matter, Sections 4500 to 4505 inclusive, seem to outline clearly the procedure that should be followed in securing the settlement of school fund loans and recovering the money for the state.

"The questions arising in this connection are as follows:

1. If foreclosure proceedings could be avoided and the sale made under the provisions of Section 4476, should the title pass direct to the state or to the county?

2. If it is held that the title pass to the state, who would be the judge in regard to the condition of the title? What would be the procedure in disposing of the land?

3. If it would be held that this title to the land could be passed to the county, where would there be any legal authority for the county to make payment?

An opinion regarding these matters at an early date while the examiner is still at work in that county would enable us to see that proper proceedings were instituted in regard to the matters in question."

The procedure for the recovery of the amounts due to the school fund is prescribed in Sections 4500 to 4505, both inclusive.

It is provided in Section 4502:

"When lands have been bid in by the county for the state under foreclosure of school fund mortgages and the time for redemption has expired, a sheriff's deed shall be issued to the state for the use and benefit of the permanent school fund. The county auditor shall thereupon notify the auditor of state, who shall give the county credit for the amount of principal in the original notes remaining unpaid."

Section 4503 of the Code, 1924, reads as follows:

"All lands acquired by the state under foreclosure proceedings shall be resold within two years from date of foreclosure. Such lands shall be appraised, advertised, and sold in the manner provided for the appraisement, advertisement, and sale of the sixteenth section or lands selected in lieu thereof."

It is, therefore, apparent that, under the provisions of 4502, deed for lands sold on execution in an action brought to recover the amount due to the school fund should be issued to the state for the benefit and use of the school fund, and that all lands acquired under foreclosure proceedings must be appraised and sold in the manner provided for the appraisement, advertisement and sale of the sixteenth section or lands selected in lieu thereof.

To determine the procedure for the sale of the sixteenth section, we turn to Section 4473 of the Code, 1924, which reads as follows:

"When the board of supervisors shall offer for sale the sixteenth section of lands selected in lieu thereof, or any portion of the same, or any part of the five hundred thousand more grant, the county auditor shall give at least forty days' notice by written or printed notices posted in five public places in the county, two of which shall be in the township in which the land to be sold is situated, and also publish a notice of said sale once each week for four weeks preceding the same in a newspaper published in the county, describing the land to be sold and the time and place of such sale. At such time and place or at such other time and place as the sale may be adjourned to, he shall offer to the highest bidder, subject to the provisions of the chapter, and sell, either for cash or one-third cash and the balance on a credit not exceeding ten years, with interest on the same at the rate of not less than six per cent per annum, to be paid at the office of the county treasurer of

said county on the first day of January in each year, delinquent interest to bear the same rate as the principal."

It is the opinion of this department that the Board of Supervisors has the right to accept the conveyance of the property mortgaged in full satisfaction of the mortgage debt, and that it will not be necessary to bring an action, have judgment entered in, execution issued and the property sold under such execution. To deny the county this right would work a grave injustice and hardship to the mortgagor. We believe that it was not the intention of the legislature to deprive the county of the right to accept such a conveyance in satisfaction of the mortgage debt.

Our answers to your inquiries, therefore, are as follows:

1. That if foreclosure proceedings may be avoided by agreement between the Board of Supervisors and the mortgagor, it is our opinion that the title should pass directly to the state and not to the county as provided in Section 4502. The Board of Supervisors act for the state under the provisions of the statute.

2. The procedure that must be adopted in the sale of the property thus conveyed is the procedure prescribed in Section 4503 of the Code, 1924, which is self explanatory.

The proper officers of the county would be the ones to determine the condition of the title. Before the board agrees to accept the conveyance, the matter should be submitted to the County Attorney for investigation.

On account of the answers to the first two questions, it will not be necessary to answer your third inquiry.

SCHOOLS—CONTIGUOUS TERRITORY: "Contiguous Territory" within the meaning of Section 4174, Code, 1924, means adjoining and bordering territory.

May 18, 1925. *County Attorney, Primghar, Iowa.* We wish to acknowledge receipt of your favor of the 2d requesting our opinion on the following proposition:

"Section 4174 of the 1924 Code provides for the organization of territory remaining after the formation of a consolidated district and says that each piece shall constitute a rural independent school corporation and shall be organized as such, unless two or more contiguous sub-districts are left, in which event such remaining portion shall constitute a school township. The Consolidated School District of the Town of Archer in this County added four sections of land to its territory about two years ago, and this left remaining two sub-districts which cornered only. There is a district of 12 sections of land which corners with a district of 4 sections of land, as per the crude illustration enclosed. Sections 28, 27, 33 and 34 are now maintaining that they are entitled under the law to be a rural independent district for the reason that, although said four sections corner with Section 23, which section 23 is one of the other 12 sections remaining, yet the four sections, 28, 27, 33 and 34 are not contiguous with the land in which section 23 is located; in other words, cornering is not contiguous. The said four sections claiming to be a rural independent district have petitioned the County Superintendent to call an election to elect a School Board in said four sections."

In answering your inquiry and in interpreting the meaning of Section 4174, Code, 1924, we must do so in the light of the preceding sections of Chapter 209, Code, 1924, and the policy of the legislature in dividing rural districts into school corporations. We believe it was the intention of the legislature to divide rural districts in such a way that the divisions made would be so situated as to form a suitable school corporation. This intent seems to be evident from the language used in Section 4173, Code, 1924. That part of Section 4174, Code, 1924, to be interpreted, reads as follows:

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

The word "continguous" has been variously interpreted, and the interpretation in each instance has depended upon the circumstances involved in the particular instance. The Supreme Court of this State has not interpreted the meaning of this word. As a matter of statutory construction it is a well established rule that the words used are to be given their ordinary and commonly accepted meaning. The ordinary meaning of the word "contiguous" is synonymous with "adjoining," and we are inclined to believe that as used in the statute above quoted, it has this meaning.

The Supreme Court of North Dakota in Griffin v. Dennison Land Company, 119 NW, 1041, 1043, has given a very clear definition of this word when used in reference to lands. It is there said:

"'Contiguous' is defined by Webster to mean 'in actual contact; touching; also adjacent; near; neighboring; adjoining;' He defines 'contiguous angles' as such angles as have one leg common to both angles. The word 'contiguous' in the statute defining 'tract' as applied to land, when used in the Revenue law, as any contiguous quantity of land in possession of, owned by, or recorded as the property of the claimant, means land which touches on the sides; and two quarters of the same section which only touch at the corner do not constitute, for the purpose of taxation, one tract or parcel of land."

It was held in *Wild v. People* ex rel, Stevens, 81 NE (Ill.), 707, 708, that neither two tracts which merely corner on each other, nor two tracts with a strip fifty feet wide included merely for the purpose of connecting them, constitute "contiguous" territory.

The Circuit Court of Appeals in *Anvil Hydraulic Drainage Company vs. Code*, 182 Federal, 205, 105 C. C. A., 45, wherein it appeared that there were several claims held in common and the annual assessment work for all, under the statute, might be done on one of the claims, or on adjacent patented land, or even on public land, provided the claims were "contiguous", and the work was for the benefit of them all, held that mining claims which touch each other only at a common corner were not "contiguous" within the rule authorizing the performance of assessment work for several contiguous claims on any one of them. The Supreme Court of New York in *Baxter v. Realty Company*, 112 N. Y. Sup. 455, 456, said that what is "contiguous" in reference to tracts of land must be that they touch entirely on one side.

There are many authorities holding that "contiguous" and "adjacent" are synonymous, and that land to be "contiguous" need not even corner or touch, but that such tracts may be nearby or in the vicinity of each other. In some instances such a definition might be proper, but when we take into consideration the policy of the legislature and the evident intention and purpose of the law in question, it is apparent that such a construction would defeat the plan and purpose of the statute. The purpose of the statute in question and of other legislation concerning the division of territory into school corporations was to provide convenient, accessible and compact territorial divisions. We do not believe it would be contended that the use of the word "contiguous" in the statute before us would authorize the establishment of a school corporation composed of territory that does not touch at any point, but which is all in the same vicinity and adjacent, although separated by intervening land. We do not believe the mere fact that the tracts in question corner make them "contiguous" within the meaning of Section 4174, Code of 1924.

We are, therefore, of the opinion that to accomplish the purpose and intention of the legislature the territory to be "contiguous" must be more than cornering and must in fact be adjoining and bordering territory.

CONDEMNATION: Cities of the first class in letting a contract for the erection of a bridge are covered by the provisions of Chapter 23, Code, 1924. When the cost of the improvement exceeds $5,000, a hearing is required and an appeal may be taken to the director of the budget providing the amount involved is $25,000.00 or more.

DIRECTOR OF THE BUDGET: The director of the budget has nothing to do with the condemnation of land for streets in cities and towns.

May 18, 1925. *Director of the Budget:* We wish to acknowledge receipt of your favor of the 16th with an enclosed copy of a letter from C. W. Wakeman, City Clerk of Fort Dodge, Iowa. In this letter the following inquiry is made:

"This city is contemplating the building of a bridge and viaduct over Soldier Creek and the M. & St. L. R. R. right-of-way, and in order to do so must relocate North 7th Street, requiring condemnation of the land which it is proposed to cross. The property necessary will cost approximately $20,000.00. I would like to know how this proposition will be affected by the budget law and the law of contracts. What is the procedure necessary for the lining up of this project, and the payment of the condemnation costs and for the property so acquired."

In reply we will only deal with the request insofar as it concerns your duties as Director of the Budget. The other matters inquired about are matters of procedure that should be taken up with the city solicitor of Fort Dodge, who can properly advise the city clerk thereof.

Fort Dodge is a city of the first class, and in letting a contract for the erection of the bridge and viaduct in question, they will be governed by the provisions of Chapter 23, Code of Iowa, 1924, which in substance provides that contracts for public improvements, the cost of which is $5,000.00 or more, shall only be let after the adopting of plans and specifications, proposed form of contract, and after a public hearing at which objections may be presented to the proposed improvement. Thereafter, if such objections are overruled an appeal may be taken to the Director of the Budget, providing the amount involved is $25,000.00 or more. The chapter referred to provides for the procedure on appeal.

The Director of the Budget has nothing to do with the condemnation of land for streets in cities and towns. Payment for lands condemned in a city is of course limited by the provisions of Section 380, Code of Iowa, 1924, to the amount levied or collected by the city in the fund from which the payment is to be made.

BLIND—SCHOOL FOR—Removal of non-resident inmate—maintenance in case of failure to remove: County from which inmate was committed must bear expense of maintenance, or of sending inmate outside of state.

May 21, 1925. *Iowa State Board of Education:* You have requested the opinion of this department upon a proposition arising out of a situation wherein one, Loretta Pohl, a minor who has been a pupil at the Iowa School for the Blind at Vinton, whose parents have left the State of Iowa and moved to Gregory, Texas, and have failed to make arrangements to take the little daughter with them. You also state that the parents are poor and do not have funds with which to pay the transportation expenses of Loretta and an attendant from Vinton to Gregory. You have submitted the following interrogatories for answer:

"1. Has the Iowa School for the Blind the legal authority to pay the transportation expenses of Loretta Pohl, from Vinton, Iowa, to Corpus Christi, Texas, and the expenses of an escort?

2. If the Iowa School for the Blind cannot do this, what is to be done with the child?"

You have called our attention to the provisions of Section 4071 of the Code, 1924, which provides that when pupils are not supplied with clothing or transportation, it shall be furnished by the Superintendent who shall make out an account therefor against the parents, if the pupil be a minor, which bill shall be certified by the Superintendent on the first day of April and October of each year to the Auditor of State and by him collected from the county of the pupil's residence.

You suggest that perhaps under the provisions of this section there may be authority to pay the transportation expenses involved in sending the child and an attendant to Texas. We have carefully read the provisions of law pertaining to the matters involved in your inquiry and are of the opinion that the provisions of Section 4071 apply only to transportation within the state between the place of residence of the pupil and the school at Vinton. However, in view of the situation and also of the fact that it will be necessary under the law for the county from which the child was committed to pay the cost of the support and care of the child if she remains in this state, it will perhaps be advisable for you to take up this matter with the board of supervisors of the county concerned and explain to them the situation. They may find it desirable and to the best interests of the county to pay the expenses incident to transporting this child to her parents out of the county poor funds rather than to pay the cost of maintaining the child at Vinton to the State.

Unless some such arrangement is made, we are of the opinion that it will be necessary to consider the child an abandoned child and therefore a charge of the county from which she was committed.

SCHOOLS: The Superintendent of Public Instruction has no statutory authority to compel school authorities to comply with the provisions of Section 4261, Code, 1924, providing for the teaching of elementary agriculture, domestic science and manual training. Action, however, may be brought against school officials who refuse to comply with the statute, to recover the forfeiture and penalty provided under the provisions of Section 4216, Code, 1924.

May 21, 1925. *Superintendent of Public Instruction:* You have requested an opinion from this department on the proposition of whether or not there is any way in which the members of a school board may be compelled to comply with the provisions of Section 4261 of the Code, 1924, which provides that the teaching of elementary agriculture, domestic science and manual training shall be required in all public schools of the state, except in rural independent districts and school townships, as prescribed by the State Superintendent of Public Instruction.

You are advised that we have made a careful search of the statutes and find no specific statute through or under which you may require the school authorities in any district concerned to comply with the provisions of this section. Your attention is called, however, to the provisions of Section 4216 of the Code, 1924, which provides among other things that any school officer who wilfully violates or who wilfully refuses or fails to perform any duty imposed by law, shall forfeit and pay into the treasury of the school corporation in which the violation occurs the sum of $25.00. Action to recover shall be brought in the proper school corporation and be applied to the use of the schools therein.

STATE BOARD OF EDUCATION: The provisions of Section 10310 relating to payments made under contract for the construction of public improvement are mandatory and must be embodied in the contract.

May 22, 1925. *Iowa State Board of Education:* We have received your letter of May 19, 1925, asking this Department to prepare an opinion upon a question which you have stated as follows:

"At the present time the Iowa State Board of Education is preparing contracts for equipment for the new Heating Plant, located on the campus of the State University at Iowa City, Iowa.

Two sections of the proposed agreement are as follows:

'(4)—Payments on equipment under this contract shall be by warrants properly drawn upon the disbursing officer of the Board and shall be due and payable at the following times and upon the following terms.

65% of contract price 15 days from date of bill of lading.

25% of contract price 45 days from due date of first payment.

10% of contract price 30 days by Iowa law after erection and testing and acceptance of equipment by engineer or his representative, but in no event more than six months from date of bill of lading, providing equipment is acceptable.

"(5)—Should the shipping date of equipment to be provided under this contract be deferred at request of the Board, the following terms and conditions of payment shall govern:

65% of contract price 15 days from contract shipping date.

25% of contract price 30 days from date of bill of lading.

10% of contract price 30 days by Iowa law after erection and testing and acceptance of equipment by Engineer or his representative but in no event more than six months from date of bill of lading, provided equipment is acceptable."

"I am calling your attention to Section 10310 of the Code, 1924, entitled—"Payments under public contracts," which is as follows:—

"'Payments made under contracts for the construction of public improvements, unless provided otherwise by law, shall be made on the basis of monthly estimates of labor performed and material delivered; said payment to be made for not more than ninety per cent of said estimates and to be so made that at least ten per cent of the contract price will remain unpaid at the date of the completion of the contract, anything in the contract to the contrary notwithstanding.'"

"The first sentence of Section 10312, of the Code, 1924, entitled "Retention of Unpaid Funds," is as follows:—

"'Said fund shall be retained by the public corporation for a period of thirty days after the completion and final acceptance of the improvement.'"

"I shall appreciate your giving me your opinion about the legality of both sections."

It is the opinion of this Department that the provisions of Section 10310 of the Code, 1924, which are cited in your letter, are mandatory and must, in substance, be embodied in the contract.

All payments made under contracts for construction of public improvements must be made in accordance with the provisions of the statute. Therefore, the fourth and fifth paragraphs of the proposed contract, which are embodied in your letter, should be stricken from the contract because they are inconsistent with the provisions of said Section 10310.

Of course, we do not mean to hold that a substantial compliance with the provisions of the statute is not sufficient. Any provisions that in substance comply with the law may be inserted in the contract, but such provisions may not be in direct conflict, or inconsistent with, any provisions that the statute provides shall be embodied in such contracts.

SCHOOL CORPORATIONS: Outstanding warrants should be paid out of the current revenue in the order in which they are issued. School district may issue warrants equal in amount to the annual revenue of a particular fund even though there are warrants outstanding payable from said fund for the expenditure of the previous year.

May 23, 1925. *Deputy Superintendent of Banking:* We have received your letter of the 9th inst., asking this Department to prepare an opinion upon a question of law contained in a letter from Mr. Owen F. Conwell, Vice President and Cashier of the State Savings Bank, Goodell, Iowa.

The letter from Mr. Conwell reads as follows:

"I would like opinion as to the cashing of school warrants when account overdrawn by the treasurer in meeting payments of warrants drawn. Would this come under the Budget Law, and, if so, has the school board the right to issue warrants when they have no funds on hand?

At present, we are cleaned up with all school warrants, since they received their apportionment from the county treasurer May 1, 1925, but for the last few years they have usually been in debt for the payment of teachers' salaries and incidental expenses, and we have handled the warrants for them on 6% interest rate."

Section 4318 of the Code, 1924, permits the stamping of school warrants:—"Not Paid for Want of Funds", when the fund upon which they are drawn is insufficient to pay the same.

Section 4318 of the Code, 1924, reads as follows:

"When an order cannot be paid in full out of the fund upon which it is drawn, partial payment may be made. All school orders shall draw lawful interest after being presented to the treasurer and by him indorsed as not paid for want of funds."

Chapter 24, as part of the Budget Law and known as the Local Budget Law, contains the provisions of the statute relating to the assessment and levy of taxes by municipalities as defined therein.

The word, as defined in Section 369, as amended by Chapter 86 of the Laws of the Extra Session of the Fortieth General Assembly, includes school districts, other than the rural independent school districts, and school townships divided into subdistricts.

Section 380 of the Code, 1924, which forms a part of this Chapter, reads as follows:

"No greater tax than that entered upon the record shall be levied or collected for the municipality proposing such tax for the purpose or purposes indicated; and thereafter no greater expenditure of public money shall be made for any specific purpose than the amount estimated and appropriated therefor, except as provided in Sections 373 and 381."

Section 373 provides for the inclusion in the estimate required an estimate for emergency or other expenditure which amount cannot reasonably be foreseen at a time the estimates are made, and such emergency fund shall be used for no other purpose.

Section 381 permits the levying of a five per cent tax in addition to any tax levied by a municipality, except such taxes as are approved by a vote of the people, but in no case shall any tax levy be in excess of any limitation imposed thereon now or hereafter by the constitution and laws of the State.

It is our opinion, therefore, that warrants may be issued on any fund of a school corporation, even though there is no money in the particular fund upon which they are drawn, but that such warrants shall not be issued in excess of the tax authorized for said purpose by said Sections 373, 380 and 381.

The provisions of the statutes just cited are mandatory and must be observed by the school corporations of the State.

We deem it advisable, however, to say that, under the statutes referred to in this opinion, the school districts may issue warrants equal in amount to the annual revenue for a particular fund, even if there are warrants outstanding payable from said fund for the expenditures of the previous year.

The outstanding warrants should be paid out of the current revenues in the order in which they were issued. To determine the total amount of warrants which may be issued each year, the collectible revenues for the year must be taken as a basis.

HIGHWAY COMMISSION: The expenses incurred by the Highway Commission in making the investigation in connection with the construction of the highway bridge across the Mississippi river between Iowa and Wisconsin may be paid out of the highway commission maintenance fund.

May 23, 1925. *Iowa State Highway Commission:* We have received your letter of May 8, 1925, asking this Department to prepare an Opinion upon the question which you have stated as follows:

"Circumstances have arisen which make it necessary for the Highway Commission to investigate the matter of the construction of a bridge across the Mississippi River in the vicinity of McGregor or Lansing, connecting the State of Iowa and the State of Wisconsin. This investigation will necessitate a study of the traffic conditions at each of these sites, the making of surveys, foundation soundings, the preparation of preliminary plans, and estimates of cost. We have had the matter up with the Wisconsin Highway Commission and have reason to believe that the Wisconsin Commission will co-operate with us in this work and will doubtless share half the cost.

"Before proceeding to incur the necessary expenses on this work, we wish to secure your opinion on the following question:

1. Under the law would the state highway commission have authority to make payment from its support fund created by Section 4744 of the Code, 1924, for the cost of the necessary engineering and investigational work in connection with the preliminary plans, surveys, and estimates for the construction of a highway bridge across the Mississippi River between the State of Iowa and Wisconsin?

In addition to said Section 4744, I would call your attention to Sections 4663 of the Code, 1924. Such interstate bridge, when completed, would constitute a connecting link between the primary road system of this state and the State Trunk Highway system of Wisconsin."

As stated in your letter, the section of the statute which contains the provisions relating to the State Highway Commission Maintenance Fund is Section 4744 of the Code, 1924, and reads as follows:

"There is hereby created a fund for the maintenance of the state highway commission consisting of two and one-half per cent of all moneys paid into the state treasury under the act regulatory of licenses on motor vehicles. Said fund shall be used for no other purpose than as a maintenance fund for said state highway commission, and shall be drawn out only on warrants drawn by the auditor of state on itemized vouchers approved by the state highway commission. The expenditures of said commission shall be audited by the executive council, and a full and complete report of all said expenditures shall be published in the annual report under the act creating the state highway commission. At the end of each biennial period, the unexpended funds remaining in the highway maintenance fund for said biennial period shall be placed to the credit of the primary road fund."

To determine the question you have submitted, it is necessary to consider not only the section just quoted but, also, Section 4663 which reads as follows:

"The state highway commission and the board of supervisors of any county bordering on a state line are authorized jointly to confer and agree with the highway authorities of such border state on proper plans for the construction, improvement, maintenance, and apportionment of work and cost of roads, bridges, and culverts on or across the state line."

We believe that this section should be given such a construction as will give the state highway commission ample and full authority to carry out the duties vested in it by such statute.

Manifestly expenses must be incurred by the commission in carrying out such duties and such expenses must be paid in some way and out of some fund.

It is clear, we think, that the expenses incurred by the commission in so doing must be paid out of the highway maintenance fund created by Section 4744 of the Code, 1924. Any other construction would, in our opinion, defeat the purpose of the legislature in enacting the statute.

Therefore, we are of the opinion that the State Highway Commission may pay such expenses out of its maintenance fund.

TOWNSHIP ROADS: Roads abandoned by non-use are to be counted as township roads in computing the basis for the gasoline tax until such time as the roads are abandoned in the manner prescribed by statute.

May 25, 1925. *County Attorney, Manchester, Iowa.* You have requested the opinion of this department upon the following statement of facts:

"The County Engineer has asked me for an opinion on the following question: There are a number of roads in this County, which are shown on the Plat, but which have been abandoned by non-usage, and are at the time impassable, as you know, the revenue received from the gasoline tax is distributed to the Townships in accordance with their mileage, should the above roads be considered in the distribution of this fund."

In regard thereto you are advised that it is the opinion of this department that until a township road which has once been established is abandoned in the manner prescribed under the statutes of this state, that it still constitutes part of the township road system.

This department is not concerned with the manner in which the township trustees perform their duties in maintaining the township roads, and they should be counted as part of the roads of the township until such a time as they are legally abandoned under the proceedings specified.

Therefore, the gasoline tax should be discharged on the basis of the miles of township roads as shown by the plat in the County Auditor's office.

TAXATION: In an action brought to recover taxes, the Board of Supervisors may direct and authorize the county attorney to bring suit or may employ other counsel to do so. (2) If the other counsel is employed the compensation must be reasonable, and the 10% allowed delinquent tax collectors does not apply thereto.

May 25, 1925. *Attorney for Appanoose County:* We have received your letter of May 20, 1925, asking this Department to prepare an Opinion upon the question which you have stated therein as follows:

"In 1922 it seems that T. G. Fee, County Attorney, and the Board of Supervisors made an arrangement with Poston & Murrow, of Corydon, Wayne County, to collect delinquent taxes due and owing Appanoose County by the Seymour Telephone Company, and agreed to pay this firm of attorneys the same per cent of the recovery as was paid them by Wayne County,—to-wit 50%.

"They have closed up the matter and have tendered the Appanoose County Treasurer a check for $321.28. However, he and the Supervisors are reluctant to accept this amount on the ground that the statutes only authorize a 10% collection fee.

"I am enclosing Poston & Murrow's letter setting out the history of the transaction.

"Will you kindly advise as to whether the Board of Supervisors have the implied authority to exceed the statutory 10% collection fee, in extraordinary cases? Should the Board, or rather, Treasurer, accept this amount and credit the Seymour Telephone Company with paying in full the taxes for the years 1915 to 1920 inclusive, or should the full amount of those taxes be paid in and the warrant on the general fund in the sum of $321.28 be drawn in favor of Poston & Murrow for legal services?"

The letter of Bracewell, Murrow & Poston referred to in your letter is too

lengthy to be copied into this opinion. However, it is only necessary for us to state that an action was brought in the District Court for the recovery of the taxes due on the Seymour Telephone Company's property and that on September 11, 1923, judgment for the sum of $595.31 was recovered against the owner, a man by the name of W. W. Tracey. The amount of tax finally collected was $642.57. This action was brought and the money collected by the said firm of attorneys. At the time the suit was brought an agreement was made with said firm of attorneys under the terms of which they were to receive as a fee for bringing the suit 50% of the amount of recovery. The question for our determination is as to whether or not the 10% which the statute provides shall be paid to a delinquent tax collector is applicable to the state of facts under consideration; in other words, may the said firm of attorneys recover only the amount specified in the statute.

Section 1452a of the Code Supplement, 1913, (Code, 1924, 7186) which was in force and effect at the time of the bringing of the action involved in this inquiry, and the recovery of judgment thereon, reads as follows:

"In addition to all other remedies and proceedings now provided by law for the collection of taxes on personal property, the county treasurer is hereby authorized to bring or cause an ordinary suit at law to be commenced and prosecuted in his name for the use and benefit of the county for the collection of taxes from any person, firm or corporation as shown by the tax list in his office, and the same shall be in all respects commenced, tried, and prosecuted to final judgment the same as provided by the code for ordinary actions."

It is well settled that when an action is brought to recover taxes the Board of Supervisors may direct and authorize the county attorney to bring suit, or may employ other counsel to do so.

We believe that the statute providing for the appointment of delinquent tax collectors does not apply to this situation and that the compensation provided for therein does not necessarily govern the amount that may be paid for the bringing of such actions. The county would be under obligation to pay the attorneys a reasonable amount for the services rendered by them in such actions.

We are not, however, passing upon the reasonable value of the services in the case under consideration; nor do we say that 50% is reasonable or otherwise. We only hold that the Board of Supervisors may allow a reasonable fee for attorney's services in such actions and that the amount specified in Section 1407 of the Code Supplement, 1913, (Sections 7222-7225 of the Code, 1924,) is not necessarily applicable to such services and does not govern in determining the amount due.

CONDITIONAL SALE CONTRACT: The county recorder should require the payment of an extra fee where a conditional sale contract is assigned on the back thereof.

May 25, 1925. *Auditor of State:* We have received a letter from Mr. George H. Bradshaw, an attorney of Fort Dodge, Iowa, requesting this department to prepare an opinion upon a question relating to the registry laws of the state.

On account of the fact that the question submitted may arise in other transactions, we have concluded to prepare an official opinion and address it to your department so that it may be used by county recorders in dealing with a similar state of facts.

The letter of Mr. Bradshaw is as follows:

"Mr. Arthur L. Nelson, Recorder of Hamilton County, has taken the position that the L. W. Wheeler Loan Company must pay a double filing fee for its conditional sales contract. He states that this is true because the conditional sales contract contains an assignment and that he is filing both an assignment and a conditional sales contract. He further states that he will not accept a release under these

forms unless it is made by the seller or unless the assignment is acknowledged before a Notary Public.

"I have written to Mr. Nelson in regard to this matter and he has referred to you, inferring that you have given an opinion to that effect.

"I am enclosing herewith one of the L. W. Wheeler Loan Companies forms. It is my opinion, as long as the assignment is made a part of the conditional sales contract itself, that it is acknowledged by the one acknowledgment of the sale itself. Therefore, that the L. W. Wheeler Loan Company has a right to release and satisfy the same, and that only one filing fee should be charged. This in fact, is the practice with all the county recorders as to these particular forms, except Mr. Nelson at Webster City, Iowa."

Accompanying said letter was a copy of a conditional sale contract which it will not be necessary for us to set forth in this opinion. At the bottom of said contract, is a note which is attached to the original contract in such a way as to be easily detached therefrom.

On the back of the contract is an assignment of the conditional sale contract and the note thereto attached.

Sections 10015 and 10017 read as follows:

"No sale or mortgage of personal property, where the vendor or mortgagor retains actual possession thereof, is valid against existing creditors or subsequent purchasers, without notice, unless a written instrument conveying the same is executed, acknowledged like conveyances of real estate, and such instrument, or a duplicate thereof, is duly recorded, or filed and deposited with the recorder of the county where the property shall then be situated, or if the mortgagor be a resident of this state, then of the county where the holder of the property resides."

"Upon receipt of any instrument affecting the title to personal property, the recorder shall indorse thereon the time of receiving it, and shall file the same in his office for the inspection of all persons, and such filing shall have the same force and effect as if recorded at length."

It will be observed that the two sections above quoted contain the phrases "written instrument," "such instrument" and "any instrument,"—all relating to the sale or mortgage of, or instrument affecting the title to, personal title.

An assignment of a conditional sale contract is, in our opinion, an instrument, affecting the title to personal property and is separate and distinct from the conditional sale contract itself. If the conditional sale contract had been executed and some time subsequent to the execution thereof, an assignment has been executed and filed in the office of the county recorder, it would have necessitated the payment of another fee at the time the assignment was filed with such officer. The fact that the assignment is printed on the back of the contract and executed at the same time does not make it a part of the original contract. It is separate and distinct therefrom and should be so considered in determining the fee to be charged.

We are, therefore, of the opinion that, under the facts stated in your letter, the L. W. Wheeler Loan Company should be required to pay a fee for filing the conditional sale contract and an additional fee for filing the assignment.

CORPORATIONS: Co-operative associations organized under Section 8459 to Section 8485 of the Code, 1924, are not required to publish notice of incorporation.

May 25, 1925. *Secretary of State:* We have received your letter of May 13, 1925, asking this Department to prepare an opinion upon the question which you have stated as follows:

"The preamble to a set of articles of incorporation filed with this Department a short time ago provides as follows:

"We, whose names are hereto subscribed, hereby associate ourselves into a body corporate under the provisions of Chapter 1, Title IX, of the Code of Iowa and acts amendatory thereof, particularly Sections 1641-r1 to 420 inclusive of the Supple-

mental Supplement to the Code, 1915, as amended by the Acts of the 39th General Assembly; assuming all the powers, rights and privileges granted bodies corporate under said laws, and do hereby adopt the following Articles of Incorporation:"

"Kindly advise us as to whether or not, in your opinion, this co-operative association should have published a notice of incorporation, as provided by Section 1613, Code of Iowa, 1897, and acts amendatory thereto.

"If your answer is in the affirmative, we also ask that you indicate as to what would be the results for failure to publish. Do the stockholders become individually liable for debts contracted by the corporation? If not, would such liability fall upon the officers or directors whose duty it might have been to attend to the publication of the notice?"

The statute referred to in your letter relates to the incorporation of what the statute terms a co-operative association, society, company or exchange for the purpose of conducting any agricultural, dairy, mercantile, mining, manufacturing or mechanical business on the co-operative plan. It will not be necessary in the determination of the question you have submitted to copy any part of the statute in this opinion. It will suffice to say that the statute is embodied in Sections 1641r1 to 1641r20, Code Supplement, 1915,—Sections 8459 to 8485 of the Code, 1924, both inclusive.

The three sections prescribing the method of incorporating such an association are Sections 1641r2, 1641r3 and 1641r4. It will be observed that in none of these sections, or in any other part of the statute, is there any requirement that notice of the incorporation of such an association shall be published.

The statute seems to be comprehensive in its nature and does not refer to or embody in it any provisions of the general incorporation laws of the state.

To determine the requirements for the incorporation of such a company, it, therefore, is only necessary to refer to the provisions of the act itself.

We are, therefore, clearly of the opinion that it is not necessary for such a co-operative association to have notice of incorporation published, as provided in Section 1613 of the Code, 1924, and acts amendatory thereto.

INSURANCE: Under Senate File 211, passed by the Forty-first General Assembly, life insurance companies can purchase the bonds of a joint stock land bank.

May 25, 1925. *Insurance Commissioner of Iowa:* This department is in receipt of your letter dated May 4, 1925, in which you request an official opinion. Your letter is in words as follows:

"Senate File 211, passed by the Forty-first General Assembly, amended Section 8737 of the 1924 Code, relating to the investment of funds by life insurance companies by adding to Paragraph One thereof the following:

'Or Federal farm loan bonds issued under the Act of Congress, approved July 17, 1916.'

The question has arisen in this department as to whether or not said amendment authorizes the purchase by life insurance companies of what are known as joint stock land bank bonds issued by joint stock land banks, created by authority of the Act of Congress approved July 17, 1916."

You are advised that the amendment in question authorizes the purchase by life insurance companies of what are known as joint stock land bank bonds issued by joint stock land banks created by authority of the Act of Congress approved July 17, 1916. It also applies to bonds issued by the Federal land bank.

TAXATION: House File 340, Acts of the 41st General Assembly does not authorize the board of supervisors to compromise and settle delinquent assessments.

May 27, 1925. *Auditor of State:* We wish to acknowledge receipt of your favor of the 25th requesting our opinion on the following proposition:

"House File 340 of the Forty-first General Assembly amends Section 7193 and provides that under certain conditions the boards of supervisors of a county is authorized to compromise delinquent real estate taxes. We have been asked by a county treasurer if this statute would cover delinquent special taxes such as sewer, paving, etc., and since the matter will no doubt be of general interest and in order to secure uniformity of practice, we thought best to ask you for a written opinion concerning this matter."

Section 7193, Code, 1924, referred to in your request, concerns "former delinquent real estate taxes." The language of this section refers only to the "tax" in question, and nowhere is the term "special assessment" used. House File No. 340, Forty-first General Assembly, amends Section 7193, and gives the Board of Supervisors authority to compromise and settle delinquent "taxes." In the amendment referred to, "special assessments" are not referred to.

It has been uniformly held by the courts wherein the definition of the word "tax" has been determined, that assessments of benefits for local improvements such as sewer; paving, etc., are not regarded as a "tax," and that the word "tax," and the term "special assessment" are not used as the equivalent of each other, or that either includes the other.

Board of Improvement v. Sisters of Mercy, 109 SW. (Ark.) 1165, 1167;
Farnham v. City of Lincoln, 106 NW (Neb.) 666, 668;
Des Moines & Mississippi Levy District v. Chicago, B. & Q. Ry. Co., 145 SW. (Mo.), 35, 39;
Alderson v. Houston, 96 Pac. (Cal.) 884, 886.

We are, therefore, of the opinion that Section 7193, of the Code, 1924, as amended, does not include special assessments such as sewer and paving assessments.

HIGHWAYS—BOARD OF SUPERVISORS: The Board of Supervisors may withhold final order in the matter of improvement of roads in the secondary road system, under the provisions of Section 4746, Code, 1924, until the roads designated are drained or graded to their satisfaction, and such draining and grading is not to be included as part of the cost of the project.

May 27, 1925. *County Attorney, Estherville, Iowa.* We wish to acknowledge receipt of your favor of the 4th requesting the opinion of this department. Your request in substance is as follows:

Under the provisions of Chapter 237, Laws of the 38th General Assembly now contained in the Code of 1924, in Sections 4746 to 4753, inclusive, an agreement was reached between the trustee of a township in your county and the Board of Supervisors for the graveling of a secondary road. The project was delayed until after a new Board of Trustees was elected and qualified. The new Board of Trustees now have in mind a different route than that originally proposed and agreed upon. The original route had not been brought to grade and drained, as required before the graveling was done. You state that under these circumstances, parties along the route as originally established contend that the Board of Supervisors have authority to proceed with the draining and grading of the proposed improvement, and to charge up the cost of this work to the township funds. The opinion of this department is desired as to whether or not the Board of Supervisors have authority to complete the grading and draining of the original established route and pay for the same from the county funds, and reimburse the county funds used from the township funds, under the provisions of Section 4752, Code, 1924.

This project is part of the contemplated improvement for a township road, of the secondary road system.

Section 4746, Code, 1924, at the beginning, uses the following language.

"In order to provide for the graveling, oiling or other suitable surfacing of roads of the secondary system, the Board of Supervisors shall have power, * * *."

The law then proceeds to prescribe the method of establishing the contemplated improvement, and provides that the county engineer shall make a report on the

project which report shall contain a statement of "the necessity, if any, for further grading or draining of such roads." After providing for the notice and hearing upon the contemplated improvement, the statute then gives the Board of Supervisors the following authority:

"It may modify the petition, either by excluding lands therefrom or by adding lands thereto, or otherwise modifying the same, or the board may withhold final order in such matters until such roads, or any designated part thereof, are drained or graded to their satisfaction. * * *"

We believe that it will readily be seen from a reading of the provisions hereinbefore referred to that the improvement contemplated was only for the "graveling oiling, or other suitable surfacing of roads of the secondary system," and that the Board of Supervisors can withhold their final order in the matter until the roads designated, "or any designated part thereof are drained or graded to their satisfaction." It was not the intention of the legislature to include the draining or grading of the contemplated improvement in the assessment authorized under the provisions of this act, and the Board of Supervisors would not be authorized to complete the draining and grading of such route under the provisions of the sections hereinbefore referred to.

BOARD OF SUPERVISORS—BOARD OF REVIEW: The statute does not require that the county board of review give notice in case it adds to the assessment of a certain class of property.

May 27, 1925. *Auditor of State:* We wish to acknowledge receipt of your favor of the 13th requesting our opinion on the following proposition:

"We are confronted with a question as to whether or not a county Board of Review must give notice before increasing valuation in making the county equalization.

"In calling our attention to this matter, the county auditor suggests that Code Section 7137 provides that the Board of Supervisors, as a county Board of Review, shall adjust assessments substantially the same as the State Board adjusts assessments of the several counties. Code Section 7142 provides that before the Executive Council can add to the valuation of any kind or class of property, ten days' notice must be given.

"Kindly give us your opinion as to whether or not the county board should give such notice before raising any of the valuations of the assessment districts."

Section 7137, Code, 1924, providing for the duties of the county Board of Review in adjusting the assessment of the several townships, cities and towns, in part reads as follows:

"* * * and to add to or deduct from the assessed value of the property substantially as the State board adjusts assessments of the several counties of the State."

This statute was contained in the same form as Section 1375, Code, 1897.

Referring to the duties and powers of the State Board of Review, Section 7141 provides for an adjustment by the state board of the value of property in the several counties by adding to or deducting from the value of each kind or class of property. Section 7142, Code, 1924, provides in substance, that in case the Executive Council (the State Board of Review) adds to the valuation of any class of property, that it shall give ten days' notice thereof to the auditor of the county whose valuation it is proposed to raise, and for a hearing before the Executive Council upon any objections made to the proposed increase in valuation. It is to be noted that this section was enacted by the 37th General Assembly, and was an amendment to Section 1379, Code, 1897. The latter section was the same as Section 7141, Code, 1924, hereinbefore referred to.

Thus, prior to the amendment enacted by the 37th General Assembly, no notice of an increase in valuation was required to be given by the Executive Council. The provisions of Section 7137, Code, 1924, hereinbefore referred to, only provides that the county Board of Review in adjusting the valuations shall do so "substantially as the state board adjust assessments of the several counties of the state". This has been interpreted to mean that they shall adjust the values upon the various classes of property in the townships, cities and towns of the county, by adding to or taking from the assessed value of such property. In other words, the county Board of Review functions to obtain equal taxation of the people of the respective subdivisions of such county. The statute does not require the county Board of Review to follow the same procedure as the state Board of Review, and does not require a notice to be given in case the county board adds to the assessed value of certain property, unless the necessity for the giving of a notice is to be inferred because of the fact that the 37th General Assembly by amending Section 1379, Code, 1897, requires a notice to be given by the state Board of Review.

We do not believe that such an interpretation can be placed upon Section 7137, Code, 1924, and we are of the opinion that the county Board of Review need not give a notice in case it adds to the assessed value of any property coming before it.

CITIES AND TOWNS: The equipment and maintenance of a fire department is part of the "general and incidental expense" of the town, and if it does not have a fire fund the general fund may be used to buy fire equipment and to maintain the same.

May 27, 1925. *Director of the Budget:* You submit to us the following statement upon which you request our opinion:

"Can a town use the General Fund to buy fire equipment if they have a Fire Equipment Fund, but do not have sufficient funds in same to buy the equipment needed.

"Can a town use the General Fund to buy fire equipment if they do not maintain a Fire Equipment Fund."

In answer to your first proposition will say that under the provisions of Section 6211, paragraph 8, Code, 1924, which provides for a levy to be used as a fire fund, it is also provided that "no part of the General Fund shall be used for equipping the fire department." Thus by the express limitations of the statute, when there is a fire fund the town cannot use the general fund to buy fire equipment.

Section 6207, Code, 1924, provides for the general fund and reads as follows:

"The council of each city or town shall levy a tax for the year then ensuing for the purpose of defraying its general and incidental expenses, which shall not exceed ten mills on the dollar."

The equipment and maintenance of a fire department is clearly a part of the "general and incidental expenses" of the town, and we are of the opinion that if the town does not have a fire fund it may use the general fund to buy fire equipment and maintain the same.

May 27, 1925. *Auditor of State:* We wish to acknowledge receipt of your favor of the 25th requesting the opinion of this department upon the following proposition:

"The present state census that is in progress is apt to change the population of several counties in such a way that the salaries of county officials will be affected thereby. Some will perhaps be increased and some no doubt, decreased by the census.

"Our question is, when will these changes be effective? In other words, if there is to be an increase or decrease of salary based on the census, when should the salaries of the county officers affected thereby, be changed?"

You are advised that this department has held in an official opinion dated October 7, 1920, found in the official reports of the Attorney General of Iowa for the years 1919-1920, at page 808, that the census becomes effective upon the certification or publication of the census report, as recorded under what are now the provisions of Chapter 261, Code, 1924.

Under the provisions of Chapter 261, Code, 1924, county officials are to be paid at a rate based upon the population of the county in which they serve, which section in reference to compensation of county officials, reads:

"* * * shall receive for this annual salary in counties having a population of: * * *"

Section 429, Code, 1924, provides:

"Whenever the population of any county, city or town is referred to in any law of this State, it shall be determined by the last certified or certified and published official census, whether the same be a state or national census, unless otherwise provided. * * *"

It is further provided in Section 421, Code, 1924, in substance that the Executive Council shall certify an abstract or compilation of the census to the Secretary of State, who attaches thereto a certificate dated and signed by him to the effect that the record constitutes a true compilation of the census. When this is done, the record thus made becomes effective, and the pay of county officials should thereafter be based upon the population as shown in the certified compilation.

CITIES AND TOWNS: A county official holding a check in payment of paving assessment for a period of two weeks and then being unable to collect through failure of the drawee bank would be personally liable.

May 28, 1925. *Auditor of State:* This department is in receipt of your letter dated May 26, 1925, in which you request an official opinion. Your letter is in words as follows:

"I have received a letter quoted herewith from one of our examiners now engaged in his work at Sioux City. He says:

'In going over the treasurer's receipts today, I discovered a receipt for about $95.00, issued to the American State Bank as a dividend, for a check of approximately $475.00. The check, as given, was good but it was held by the city for about two weeks before they tried to send it through. It never got through the clearing house, as the Bank had already closed its doors.

As explained by the city auditor and city treasurer the check for about $475.00 was given then as payment on a paving assessment. The check was to be paid to the contractor, as they were collecting the payments for him instead of turning the certificates to the contractor, and letting him collect. The city was holding this check, however, until they had a large enough amount to call the contractor in and pay him the collections. In the meantime the bank failed.

Upon the failure of the bank, they tried to collect this amount from the property owner again, but he refused to pay it again, on account of the check having been issued a couple of weeks before, and the money in the bank awaiting the check being presented for payment.

Thereupon the city council authorized payment in full on this check—to be paid from the paving fund in order that the city officials would not have to make up the loss.

All of this occurred during the period of the previous examination.

Now, under the period in which we are working, the city collects this $95.00 dividend, and, properly credits it to the paving fund.

Do you see any reason why the balance of this check as paid from the paving fund—should not be charged to the city official who held the check too long to get payment on it? I do not see why the paving fund should stand it. What is your opinion on it?"

"I am asking that you kindly give me an opinion on this matter at as early a date as possible, as we would like to have the same to file with the examiners before they complete the work at Sioux City."

You are advised that the official holding this check without authority would be liable to the city for the amount of the loss.

CIGARETTES: The word "permit", as used in the chapter relating to the sale of cigarettes, is synonymous with the word "license," and the sale of cigarettes without first obtaining a permit may be punished under the provisions of Section 13072, Code, 1924. In addition thereto proceedings may be commenced under the provisions of Section 1577, Code, 1924, to abate a nuisance and collect the mulct tax.

May 28, 1925. *County Attorney, Burlington, Iowa:* We wish to acknowledge receipt of your favor of the 20th requesting the opinion of this department as to whether or not a person who has failed to secure a permit for the sale of cigarettes, under the provisions of Chapter 78, Code, 1924, can be prosecuted under the provisions of Section 13072, Code, 1924.

The question arises over the interpretation of the word "permit", as used in the chapter relating to the sale of cigarettes. Section 13072, Code, 1924, provides for the punishment of any person, firm or corporation doing business without procuring a license, when the business transacted by them is prohibited without first procuring a license.

The ordinarily accepted definition of the word "license" is found in Webster, wherein it is said that a license is a "permit from proper authorities to perform certain acts or carry on certain business; a grant of permission." In the interpretation of the statutes of this state the words and phrases used are to be given their ordinary and accepted meaning, and we are of the opinion that the word "permit" as used in the chapter relating to the sale of cigarettes is synonymous with the word "license," and that the sale of cigarettes without first obtaining a permit may be punished under the provisions of Section 13072, Code, 1924.

In addition to the punishment provided in the section last referred to, you will also note that a failure to procure a permit for the sale of cigarettes is punishable, under the provisions of Section 1577, Code, 1924, as a nuisance, and in addition that a mulct tax may be assessed against the property.

STATE BOARD OF EDUCATION: At the end of thirty days from the completion and final acceptance of a public improvement, claims are on file, the public corporation should retain at least the duplicate of the amount of claims on file.

May 28, 1925. *Secretary, State Board of Education:* We have received your letter of May 13, 1925, asking this Department to prepare an opinion upon the question which you have stated as follows:

"Mr. A. Emmert, contractor, has completed the construction of the addition to the Hospital located on the campus of the Iowa State College, Ames, Iowa; but he has not presented the final estimate.

"On April 17, 1925, the George P. Smith Company of Charles City, Iowa, filed a claim against the contractor for $1,622.01. In addition to this claim, there are eleven doors in the building which cannot be accepted because they are warped. The Superintendent of Buildings and Grounds of the Iowa State College, and the architects, Messrs. Proudfoot, Rawson & Souers, have estimated that our claim against the contractor is $308.00. The situation is as follows:

"Final estimate of A. Emmert	$
Claim of George P. Smith Company, Charles City	1,622.01
Amount necessary to complete the doors	308.00

A part of a letter that Mr. A. Emmert wrote on April 8, 1925, to the Business Manager of the Iowa State College, is as follows:

"'See the Bonding Company, the U. S. Fidelity & Guaranty Company, who wrote

my bond on the Hospital and they will bond me for the George P. Smith Company claim and also the Burkhart claim. My bills are paid with the exception of the above. Please get together so I can get my final estimate. Let me hear from you soon so I can get my bond for the above claim.'

"A part of Section 10312 of the Code, 1924, is as follows:

"'Said fund shall be retained by the public corporation for a period of thirty days after the completion and final acceptance of the improvement. If at the end of said thirty day period claims are on file as herein provided the public corporation shall continue to retain from said unpaid funds a sum not less than double the total amount of all claims on file.'

"We are anxious to make a settlement with the contractor, Mr. A. Emmert. You will notice that he is willing to give us a bond for the amount of the two claims. My judgment is that we are justified in paying the contractor the amount of the final estimate, less twice the amount of the claims of sub-contractors, in accordance with the statute.

"Please answer the following questions:

1. Shall we make a settlement in accordance with Section 10312 of the Code, 1924, or shall we accept a bond from the U. S. Fidelity & Guaranty Company?
2. In either event, what is the legal procedure?"

Section 10310 of the Code, 1924, provides that payments on public contracts shall be for not more than 90% of said estimates and be so made that at least 10% of the contract price will remain unpaid at the date of the completion of the contract.

The section you have quoted in your letter, Section 10312, requires the retention of said fund by a public corporation for a period of thirty days after the completion and final acceptance of the improvement. If after the end of said thirty day period claims are on file, the public corporation shall continue to retain from said unpaid funds a sum not less than double the amount of all claims on file.

We are of the opinion that the State Board of Education should retain a sum equal to double the total amount of the claims on file. The statute should be followed in every particular. If the provisions of the statute are complied with, then the Board will be fully protected in any subsequent proceeding that may be instituted.

STATE BOARD OF EDUCATION: The State Board of Education has the legal right to pay a regular monthly estimate provided they retain 10% as provided by the statute.

May 29, 1925. *Secretary, State Board of Education:* We have received your letter of May 8, 1925, asking this department to prepare an opinion upon a question which you have stated therein as follows:

"A part of a letter that Mr. Herbert H. Schoepp, Attorney for the Independence Indemnity Company of Philadelphia, Pa., wrote to me on May 7, 1925, is as follows:

"'Kindly advise me if there is any reason why the Board of Education would hold up the J. A. McDonald Construction Company estimate, outside of the notice served by this Company. In other words, have there been any claims filed which would give the school board authority to hold payment of the estimate and if so what proportion of the estimate would be held.'

"On May 2, 1925, Mr. Schoepp wrote to me as follows:

"'This is to advise you that the Independence Indemnity Company as surety for J. A. McDonald Construction Company on their contract with the Iowa State Board of Education for the erection of the elementary school at Iowa City does hereby notify you not to pay any further estimates to the McDonald Construction Company on the aforementioned contract.

"'I might advise at this time that arrangements are being made whereby some other method will be worked out so that there will be no tie-up of future estimates.'

"I believe a copy of this letter is in your files. The Independence Indemnity Company has not authorized us to pay an estimate for the month of May, 1925.

"As you know, the J. A. McDonald Construction Company is the contractor for the construction of the Elementary and High School Building located on the campus of the State University at Iowa City, Iowa. We have paid several estimates. The construction of the building will not be completed for some time. Therefore, very likely, there will be several monthly estimates to be paid before the final one is presented. Section 10310 of the Code, 1924, provides the method for paying regular, or monthly, estimates for the construction of public improvements; and Section 10312 relates to the payment of final estimates.

"Several sub-contractors, who have furnished materials used by the J. A. McDonald Construction Company in the construction of the Elementary and High School building at Iowa City, have filed claims with us. I believe I have sent you a copy of the letter I have written to each one of them.

"As far as I know, there is little we can do at the present time regarding the payment of those claims. I understand, however, that unless such claims are settled by the contractor before the building is accepted by the Iowa State Board of Education, they come under the provisions of Section 10312 of the Code, 1924.

"A part of a letter that Mr. W. H. Bates, Secretary of the State University, wrote to me on May 7, 1925, is as follows:

"'Under Section 10 of the Contract, considering the amount of claims already on file, it seems to me we could be perfectly justified in withholding this payment. This thing seems to be getting worse all the time and will surely come to a head within the next few days.'

"I am enclosing a blank contract which contains Article 10.

"Please give me your opinion regarding the following question:

"Has the Iowa State Board of Education legal authority to refuse to pay a *regular monthly estimate* (not the final estimate), or any part of it, because sub-contractors have filed claims with us against the contractor?"

Section 10310 of the Code, 1924, provides that payments made under contracts for the construction of public improvements, unless provided otherwise by law, shall be made on the basis of monthly estimates of labor performed and material delivered; said payments to be made for not more than ninety per cent of estimates and to be so made that at least ten per cent of the contract price will remain unpaid at the date of the completion of the contract.

Sections 10311 and 10312 read as follows:

"No public corporation shall be permitted to plead noncompliance with the preceding section, and the retained percentage of the contract price, which in no case shall be less than ten per cent, shall constitute a fund for the payment of claims for materials furnished and labor performed on said improvement, and shall be held and disposed of by the public corporation as hereinafter provided."

"Said fund shall be retained by the public corporation for a period of thirty days after the completion and final acceptance of the improvement. If at the end of said thirty-day period claims are on file as herein provided, the public corporation shall continue to retain from said unpaid funds a sum not less than double the total amount of all claims on file."

It is the opinion of this department that in making payment of estimates and in retaining the percentage of said estimates the three sections of the Code, 1924, just referred to, two of which are copied into this Opinion, should be followed in every particular. These sections were embodied in the law for the purpose of protecting the sub-contractors, and in entering into contracts with the principal contractor, such sub-contractors must take notice of the provisions of the statute and they can in no way complain of the action of the State Board of Education in paying all of the estimates with the exception of the portions that must be retained under the provisions of the statute.

We are, therefore, of the opinion that the State Board of Education has the legal right and authority to pay a regular monthly estimate, provided they retain ten per cent as provided by the statute.

HIGHWAYS—TUCK LAW: The board of supervisors does not have the right to enter into a contract for the construction of a road improvement in an assessment district, if the collectible revenues for the year are less than the portion of the cost of constructing said improvement that must be paid out of such funds.

May 29, 1925. *County Attorney, Eldora, Iowa:* We desire to acknowledge receipt of your letter of May 19, 1925, asking this Department to prepare an Opinion upon the question which you have stated in your letter as follows:

"The Board of Supervisors have asked me for an opinion concerning their right to proceed under Section 4746 of the Code, 1924.

"The secondary road system in this county is to a large extent graded and drained. A large number of property owners have signified their intention to petition the Board for the establishment of road assessment districts. The specific question is—whether or not, in view of Section 5258, the Board would have the right to approve such proposal in view of the fact that such an expenditure would be in excess of the collectible revenues for such purpose this year. Would the Board have authority to approve such a project, enter into contract for construction work, issue warrants for such expenditure and issue funding bonds?

"In this county, such a procedure would seem to be a good business policy; however, I am in doubt as to the legality of such an action and would appreciate your advice."

Section 4746 of the Code, 1924, provides that in order to provide for the graveling, oiling, or other suitable surfacing of roads of the secondary system, the board of supervisors shall have power, on petition therefor, to establish road assessment districts, but such districts need not necessarily follow the zone limits provided therein for the improvement of primary roads.

Section 4750 provides that the total cost of improving a county road in said secondary system within an assessment district, by oiling, graveling, or other suitable surfacing, shall be apportioned and paid in the proportion of seventy-five per cent from the county road fund and twenty-five per cent from assessments on benefited lands, or may, by agreement between the Board of Supervisors and all of the trustees of the township in which the road is located when the petition requests such method of payment, be paid as provided in Section 4751.

Section 4751 provides that the total cost of improving a township road within an assessment district shall be apportioned and paid in the proportion of twenty-five per cent from the county road fund, fifty per cent from the township road funds, and twenty-five per cent from the special assessments on benefited lands.

Section 5258, the original Tuck Law, provides, in part, as follows:

"It shall be unlawful for any county, or for any officer thereof, to allow any claim, or to issue any warrant, or to enter into any contract, which will result, during said year, in an expenditure from any county fund in excess of an amount equal to the collectible revenues in said fund for said year, plus any unexpended balance in said fund, for any previous year. * * *"

It is the opinion of this Department that, under the sections of the statute above quoted, the Board of Supervisors does not have the right to enter into a contract for the construction of a road improvement, in an assessment district, as provided in Section 4746, if the collectible revenues for the year that are available for the payment of the portion of the cost hereof, which is, under Sections 4750 and 4751, payable out of public funds, are less than the portion of the cost of constructing such improvement that must be paid out of such funds.

The exceptions to the Tuck Law, as embodied in Section 5259 of the Code, 1924, do not include the expenditure for secondary road purposes.

BOARD OF SUPERVISORS: An emergency fund cannot be created in the county by transferring the same from the general fund for that purpose, but must be created by levy. If the voters of a county authorize the project, the surplus in the general fund may be used in payment thereof.

May 29, 1925. *Director of the Budget:* We wish to acknowledge receipt of a copy of a resolution passed by the Board of Supervisors of Hardin County, Iowa, and copy of a letter from J. D. Bridgens, County Auditor of Hardin County, concerning the proposed construction of a county home for the poor in that county. You have orally requested our opinion upon the authority of the Board of Supervisors of Hardin County, Iowa, to create an emergency fund by transferring $25,000.00 from the general fund and thus creating the emergency fund. The county auditor in his letter states the fund in question to have been created as follows:

Section 373, Code, 1924, provides for the creation of an emergency fund. This section reads as follows:

"Each municipality may include in the assessment herein required, an assessment for emergency or other expenditure, which amount cannot reasonably be foreseen at the time the estimates are made, and such emergency fund shall be used for no other purpose."

The language used in the statute just quoted clearly discloses that it was the intention of the legislature to provide for the creation of an emergency fund only upon estimates submitted, such fund to be raised by a regular levy, the same as other revenues for the county. We are of the opinion that the transfer of $25,000 from the general fund in the manner stated by the auditor of Hardin County was not authorized by statute, and the funds to the credit of the emergency fund procured in the manner stated were unlawfully transferred from the general fund, and should be returned to the fund from which they were unlawfully taken.

The question next arises whether the general fund can be used to pay for the erection of a county home for the poor, provided its expenditure is authorized by the voters of the county.

The county general fund may be used for any purpose in connection with the operation of the county's business, in the event that a special fund is not provided for the particular purpose or use contemplated.

We are, therefore, of the opinion that the $25,000.00 appearing in the emergency fund of Hardin County should be returned to the general fund, and in event the voters of Hardin County authorize the contemplated project, then the surplus in the general fund may be used to pay for the same.

LABOR COMMISSIONER: Senate File No. 180 repealed the provisions of Chapter 83, Code, 1924, relating to the rules and regulations adopted by the conference board.

June 3, 1925. *Bureau of Labor Statistics:* We wish to acknowledge receipt of your favor of the 16th requesting the opinion of this department as to whether or not the 41st General Assembly by the enactment of Senate File 180 repealed the provisions of Chapter 83, Code 1924, relating to the rules and regulations adopted by the conference board appointed by the Governor as provided in Sections 1681 and 1682 of said chapter.

The title to Senate File 180 reads as follows:

"To repeal sections Sixteen Hundred Seventy-nine (1679), Sixteen Hundred Eighty (1680), Sixteen Hundred Eighty-one (1681), Sixteen Hundred Eighty-two (1682), Sixteen Hundred Eighty-four (1684), and Sixty-seven Hundred Fifty-three (6753), and to amend Section Sixteen Hundred Eighty-three (1683), of the

Code of 1924, relating to regulations concerning the safety, installation, equipment, and maintenance of passenger and freight elevators and to enact a substitute therefor."

It will appear from a reading of the title that the legislature intended to repeal the sections of the law relating to the regulations concerning the safety, installation, equipment and maintenance of elevators. Section 1682, Code, 1924, repealed by Senate File 180 contained the following language:

"Such board shall adopt a code of standards, rules and regulations for the construction, installation, equipment, maintenance and operation of elevators, and when adopted shall have the force and effect of law. * * * *"

From the statement submitted by you we assume that the conference board did in fact adopt a code of standards, rules and regulations, as they were authorized to do under the provisions of the code section. By virtue of the language used in the statute, rules and regulations or the code of standards so adopted have the same force and effect as law; however, it is only by reason of the provisions of this statute that such rules and regulations or code of standards have this effect. Thus the code of standards, rules and regulations adopted by the conference board become a part of the statute, with the same force and effect as though written into the law itself.

If it is contended that the code of standards, rules and regulations adopted by the conference board, were not repealed by the legislature in Senate File 180, Laws of the Forty-first General Assembly, we would have this anomalous situation. The code of standards, rules and regulations, as we have shown, are dependent for their status and enforcement upon the provisions of the section just referred to. Without the authority and legal status given the code of standards, rules and regulations by this section, they would be unenforcible and without effect. The repeal of the statute would take away the foundation for such code of standards, rules and regulations and remove the only thing that makes them effective and enforcible. The code of standards, rules and regulations without the statute would become void of all use or purpose whatsoever. The legislature did not intend by the enactment of Senate File 180 to leave this situation.

We are of the opinion therefore, that the legislature, in Senate File 180, Acts of the Forty-first General Assembly, repealed the code of standards, rules and regulations adopted by the conference board under the provisions of Section 1682, Code, 1924.

HIGHWAYS: Section 4779 does not relate to secondary roads and, therefore, patrolmen have no authority to enforce the laws of the road outside of cities and towns on any other than primary roads. (2) Such patrolmen are authorized to act as peace officers only while on duty as such patrolmen. (3) He would have the right to enforce all of the laws the same as other peace officers.

June 3, 1925. *County Attorney:* We have received your letter of May 9, 1925, asking this department to prepare an opinion upon the questions which you have stated as follows:

"The Board of Supervisors of Pocahontas County have asked me to advise them whether, in case they pass a Resolution, giving the additional authority to road patrolmen authorized in Section 4779 of the Code, 1924, the patrolmen would have authority to enforce the road laws on all roads of the county or be restricted to the primary roads.

"You will notice that in the fourth line of this section the word 'primary' is inserted and it is ambiguous at least if not misleading. The view taken by some of the Board was that this word primary restricted the power of the patrolmen to the primary roads and that if a driver violated the law on a county road the patrolmen would not have authority to deal with him.

"My view of the construction to be placed on the word is to use it as a modifier of the word law and consider that the legislature had in mind the law as it applies to the primary roads and not use it as a restriction to the territory in which the patrolmen may act; I think it would have been fortunate if the word 'primary' had been left out of the section.

"1. Please tell me whether the patrolman given the added authority mentioned in Section 4779 would have authority to enforce the laws of the road outside of towns and cities, on all county roads as well as primary.

2. And would he have authority to act anywhere in the county, outside of towns and cities.

3. Would he be authorized to act as a peace officer in respect to road laws at all hours of the day.

4. Would he have the same authority in other respects, aside from the enforcement of the road laws, as other peace officers? For instance would a patrolman arrest a man if he found liquor in his car? Or could a patrolman search a car in which he had reason to think that liquor was being transported?"

Chapter 243 contains the law relating to road patrolmen.

Section 4774 provides that the Board of Supervisors shall cause all highways under their jurisdiction to be patrolled, throughout each road-working season, and at such other times as they may direct, and to this end shall appoint such number of patrolmen as may be necessary to perform such duty.

It will be observed that all highways under the jurisdiction of the Board of Supervisors shall be patrolled during the period specified in the statute.

Section 4778 prescribes the duties of such patrolmen.

Section 4779 reads as follows:

"The road patrolmen appointed by the board of supervisors of any county may in addition to their other duties, enforce the provisions of the law relating to travel on the primary roads of the county outside of cities and towns. Each such patrolman shall while on duty wear an official badge, such that he may be clearly distinguished as an officer of the law by all persons using the public highways, said badge to be furnished by the board of supervisors of the county. Each such patrolman shall take the same oath as any peace officer and shall have the authority of a peace officer."

Section 4779 is manifestly limited to the enforcing of the provisions of the law relating to the travel on primary roads in the State of Iowa, outside of cities and towns. It does not apply to secondary roads in the county.

We, therefore, answer your questions as follows:

1. As Section 4779 does not relate to secondary roads, the patrolmen would have no authority to enforce the laws of the road outside of towns and cities on any other than primary roads.

2. The patrolman would be authorized to act as a peace officer only while on duty as such patrolman.

3. In our opinion, he would have the right to enforce all of the laws the same as any other peace officer. This is made manifest by the following language in Section 4779: "and shall have the authority of a peace officer."

We deem it advisable to say that the patrolmen provided for by the statute may be appointed deputy sheriffs in the manner provided by law, and if they are so appointed, they would have the right to exercise all the powers of such deputy sheriffs.

We also deem it advisable to call to your attention the fact that under the provisions of Section 13469 of the Code 1924, a private person may make an arrest (1) for a public offense committed or attempted in his presence; (2) when a felony has been committed, and he has reasonable grounds for believing that the

person to be arrested has committed it. The patrolmen, may, therefore, make an arrest under the provisions of this section of the statute the same as any other private individual.

INTOXICATING LIQUOR: Held that Section 1936, Code, applies to individuals as well as common carriers.

June 5, 1925. *County Attorney, Waverly, Iowa:* You have requested the opinion of this department upon certain sections of the liquor statutes of this State. You have submitted to this department the following questions in regard thereto:

"Question 1. A has a gallon of moonshine whiskey in his car and drives to a neighboring town. The jug has no mark or label of any kind thereon. The liquor and container are lawfully seized. Section 1936 of the 1924 Code states:

'No person shall be authorized to receive or *keep* such liquors unless same be marked or labeled as herein required.'

Can A be held for illegal possession of intoxicating liquor which would be a misdemeanor under Section 1934 of the 1924 Code? I feel this would be a reasonable interpretation and that A could be held."

In answer to the above question, you are advised that it is the opinion of this department that A would be guilty of illegally transporting liquor in violation of the provisions of Section 1936 of the 1924 Code. It is the interpretation of many law enforcers of this State that this section applies to individuals, and this department in inclined to agree with this view. There can be no doubt that such is the construction of the section after the amendment of the Forty-first General Assembly becomes effective on July 4th.

It is, therefore, our opinion that it is unlawful for any person to transport liquor where the same is not correctly labeled as to its contents, showing the kind and quality of liquor contained therein, and that for such illegal transportation, such person is subject to punishment by fine in the sum of $100.00 for each offense, including costs of prosecution, as provided in Section 1934 of the Code, 1924.

In this regard you are referred to the case of *State vs. Duncan*, 214 Pacific, 838 (Wash.), wherein the court held that intent to sell may be implied from having intoxicating liquor in the defendant's possession in an automobile and from the circumstances surrounding such possession.

You are, also, advised that it is the opinion of this department that A could be punished under the provisions of Section 1924 of the Code, 1924, as amended by the Acts of the Firty-first General Assembly, under which amendment possession of liquor is made unlawful. Therefore, where the defendant is found with liquor in his possession, he can be punished under the provisions of Section 1924, and subjected to a fine of not less than $30.00 nor more than $100.00 and by imprisonment in the county jail not less than three months nor more than one year under the provisions of Section 1927 of the Code, 1924, as amended by the Forty-first General Assembly.

Question 2 submitted by you has been answered by us in reply to Question 1.

"Question 3. A is found to be carrying a bottle of intoxicating liquors around in his pocket. He is unable to defend on any ground enumerated on page 6, Section 2, of 'Amendment to Intoxicating Liquor Statutes' 41st G. A. Is he guilty of illegal transportation of intoxicating liquors? My ruling 'Yes.' Is he guilty of illegal possession of intoxicating liquors? My ruling 'Yes.'"

In reply to the above question, you are advised that in our opinion A would be guilty of illegally transporting liquor under Section 1936 of the Code, 1924, as amended by the Forty-first General Assembly, effective July 4th.

There can be no question but what the carrying around of liquor upon the person of an individual constitutes transportation in violation of Section 1936. In this regard you are referred to the cases cited at the top of page 32 of the pamphlet on Laws Relating to Intoxicating Liquor, issued by this department in January, 1925.

It is also the opinion of this department that A would be guilty of illegal possession of intoxicating liquor, under the provisions of Section 1924 of the Code, 1924, as amended by the Forty-first General Assembly, by the provisions of which amendment, possession of liquor is made illegal. This amendment is now in effect.

"Question 4. Section 1924 of the 1924 Code has been amended by adding after the comma, following the word 'sale' in line 8 thereof, the words: 'or have possession of.' Does Section 1924 now mean that the finding of intoxicating liquors in one's possession and such person has no defense as mentioned on page 6 of 'Amendment to Intoxicating Liquor Statutes' above referred to he can be punished as per penalty for bootlegging? It is my opinion that he can be so punished."

You are advised that your interpretation of Section 1924, as set forth in your question submitted to this department is correct, and that a person having possession of liquor is punished under the provisions of Section 1927 of the Code, 1924, as amended by the Acts of the Forty-first General Assembly.

COUNTY RECORDER: The county recorder is liable for the fees derived from hunting licenses even though this fund has been lost through failure of a bank.

June 5, 1925. *Fish and Game Department:* You have requested an opinion of this Department upon the following statement of facts:

"County recorders, who are supplied by this Department with blanks for hunting licenses they issue, are required under Sec. 1725 of the Code, 1924, to remit to the State Treasurer at the end of each month the fees collected for licenses issued, such fees to be credited to the Fish and Game Protection Fund.

"The County Recorder at Algona, Kossuth County, had on deposit in the First National Bank of Algona $86.00 of hunter's license fees collected during November, at the time the bank closed on November 12th. At the end of the fiscal year, June 30, 1925, this recorder will be required to make an accounting to this office. The affairs of the bank will not, no doubt, be settled by that date, and even should they be, the recorder will not receive the full amount deposited.

"Is not this recorder personally responsible for the $86.00 funds of this Department? Can he be required to personally remit this amount when settling for the year ending June 30, 1925, or shall this office show upon our license records a balance due of $86.00, and accept what settlement the recorder receives from the bank?"

You are advised that it is our opinion that the county recorder is liable to transmit to the State Treasurer all fees which he collects under the provisions of Section 1725 of the Code, 1924. It is our opinion that loss of a part of this fund through deposit in a bank which subsequently becomes insolvent will not exonerate the recorder, and that he must pay to the Treasurer the full amount of the funds received by him, and the loss, if any, from failure of the bank, must be borne by the recorder and not the State Treasurer.

PUBLIC FUNDS: A private bank may be designated as a depository under the Brookhart-Lovrien Bill.

June 5, 1925. *Director of the Budget:* This department is in receipt of your letter dated June 1, 1925 in which you request an official opinion. Your letter is in words as follows:

"We are in receipt of the following inquiry from Mr. F. G. Pierce, Secretary of the League of Iowa Municipalities:

'I have an inquiry as to whether a town's funds may be deposited in a private

bank, and still be protected under the state guarantee law. I presume the law covers this, but thought you could give me the information.'

Will you kindly furnish this department with an opinion on the above question, and oblige."

You are advised that town and city funds may be deposited in either a private bank, a state or national bank. The depository must be approved in the same manner as any other depository of public funds.

For your information in order that this may be clear to you, your attention is invited to the fact that the statute refers to claims established in bankruptcy. Such claims could not be established in either a state or a national bank but only in a private bank. Therefore it was clearly the purpose of the Legislature to include these institutions.

APPROPRIATION: Appropriation expiring June 30, 1925, can only be used to pay a valid indebtedness occurring prior to that date.

June 6, 1925. *Iowa State Board of Health:* This Department is in receipt of your letter, dated June 3, 1925, in which you request an official opinion. Your letter is in words as follows:

"This Department for the past six months has been co-operating in the establishing and maintaining of a full time County Health Unit in Washington County. This County Health Unit has been operated for experimental purposes, and we have been conducting a model health unit, which may be patterned after by any county in the State, if the same proves to be a success.

"In establishing this unit, this Department entered into an agreement, which was approved by the Executive Council to help finance the work obligating ourselves to pay not to exceed $2,500 for the year 1925. This money is being paid out of our contingent fund, which fund, by an act of the last Legislature, expires June 30, 1925. We requisitioned an appropriation with which to carry on this work for the last six months of 1925, the amount was approved by the Budget Board but the Legislature failed to pass the same.

"The question is, inasmuch as the present appropriation only runs until June 30th, may we advance to Washington County the sum of $1,250 out of our funds that are available until June 30th, so that the County Health Unit may continue with this work under the original agreement made by us the 1st of January, 1925? You will understand that all unused balances in our funds have to revert to general revenue June 30th."

As we understand the proposition submitted, the Department of Health desires to advance for services to be rendered after June 30, 1925, money from the appropriation expiring June 30, 1925. This cannot be done. The appropriation expiring June 30, 1925, can only be used to pay for a valid indebtedness incurred prior to that date. This is not a situation where a contract entered into prior to June 30, 1925, may be paid from the fund available for the period ending on that date, although the contract is not fully completed until after that date. This is a case of a continuing expenditure of money which may be terminated at will by the Department of Health. This being true, it is the duty of the Department of Health to obey the mandate of the Legislature and terminate the expenditure in question on June 30, 1925.

There is but one fund that I know of available for your use and that is the fund which may be expended under the direction of the Retrenchment and Reform Committee. It is just possible that you might make an application to the Retrenchment and Reform Committee for an appropriation from their fund to meet this situation.

DRAINAGE: Board of supervisors has no right or authority to extend the time of payment of drainage certificates, bonds, or any coupons thereon.

June 8, 1925. *Auditor of State:* We have received your letter of June 8th, asking this Department to prepare an Opinion upon the question which you have stated as follows:

"The county treasurer of Webster County has written us concerning certain matters in connection with the handling of drainage taxed in Webster County. The Board of Supervisors in that county passed a resolution instructing the county treasurer to extend the time of payment in drainage assessments after the assessment had been made and certified to the treasurer by the auditor. They also ordered that the special assessment in question bear interest at the rate of 6% after April 1, 1925.

"In this matter we wrote the county treasurer that after the assessment had been legally spread by the auditor according to the resolution of the board of supervisors and certified to the county treasurer for collection, that the board were without authority to take up any individual assessments and extend the time for payment. We also held in this connection that when this assessment was certified to the treasurer, he was required to collect the penalties provided by law and that the board had no authority to interfere with such collection. The county treasurer now informs us that the board of supervisors in that county have taken like action in regard to another individual assessment in another drainage district.

"The question with us is, can the board of supervisors, after the assessment has been made and regularly certified for collection, interfere with the regular statutory provisions governing penalties and matters of collection?

"Kindly inform us in regard to this matter at your earliest convenience."

It is the opinion of this Department that the Board of Supervisors has no right or authority to extend the time of payment of drainage certificates or bonds, or any coupons thereon, nor to change the rate of interest after the same becomes delinquent.

Drainage certificates or bonds, when delivered to the contractor or sold and delivered to the purchaser, become contracts which are protected not only by the contract clause of the state constitution but the contract clause of the federal constitution as well.

The provisions of the statute, with reference to the time such certificates or bonds become due and the rate of interest thereon, are plain and unequivocal and must be followed in issuing such certificates and bonds.

We have no hesitation in saying that the action of the Board of Supervisors of Webster County, as detailed in your letter, is absolutely null and void and the county treasurer should disregard said action and should proceed in accordance with the law to collect the amounts due on such certificates and bonds, together with the rate of interest specified therein.

We consider the propositions of law stated herein so elementary that it will be unnecessary for us to cite either statutes or authorities in support thereof.

BUDGET LAW: Proceedings to condemn land for public purpose is an expenditure within the meaning of the Budget Law.

June 8, 1925. *Director of the Budget:* This department is in receipt of your recent letter in which you request an official opinion. Your request is in substance as follows:

"Are proceedings instituted by a city to condemn land for a public purpose governed by the provisions of Chapter 23, Code of 1924?"

The right of a city to condemn land is a right granted by specific statutes. The city has a right to condemn land for all public purposes as provided by the law. Therefore, as to the procedure connected with the condemnation of private property for public purposes the Director of the Budget has nothing to do.

However, where the city condemns land as a part of a public improvement within the meaning of the Budget law, the expenditure of money for such purposes is as

much within the jurisdiction of the Director of the Budget as the expenditure of the money for the completion of the improvement. What we mean to say is this—if the city starts out to make a public improvement and if, as a part of the expense of such public improvement, it is necessary to condemn land, the expenditure for that purpose is an expenditure within the meaning of the Budget Law.

REAL ESTATE MORTGAGE: Real estate mortgage containing a chattel mortgage or receivership clause, which has been fully recorded may be taxed in the chattel mortgage records without the expense of an extra fee.

June 9, 1925. *Auditor of State:* We have received several requests from attorneys and county attorneys for an opinion, construing the statutes with reference to indexing the chattel mortgage records, as provided in Section 10032 of the Code, 1924.

On account of the number of these requests, we have concluded to prepare an opinion for your department for the purpose of answering all of these requests.

The questions submitted may be stated as follows:

1. When a real estate mortgage has been recorded in the real estate mortgage records and at the same time it is indexed in the chattel records, as provided in Section 10032, does the fee of twenty-five cents have to be paid or does the fee for recording the real estate mortgage cover everything?

2. Would the rule be the same when the holder of the mortgage requested the county recorder to index the mortgage in the chattel mortgage book, several years after it had been recorded in the real estate book?

The applicable sections of the statute are Sections 10031 and 10032 of the Code, 1924, and they read as follows:

"The fees to be collected by the county recorder under this chapter shall be as follows:

1. For filing any instrument affecting the title to or incumbrance of personal property, twenty-five cents.

2. For recording or making certified copies of such instruments, fifty cents for the first four hundred words and ten cents for each one hundred additional words or fraction thereof."

Section 10031.

"Real estate mortgages which create an incumbrance on personal property or which provide for a receivership, shall, after being recorded at length, be indexed, if requested by the holder, in the chattel mortgage index book. Said indexing shall show the book and page where said mortgage is recorded and such record and index shall have the same effect as though said mortgage were retained by the recorder as a chattel mortgage, or as though the same had been recorded at length in the chattel mortgage records and indexed accordingly.

When such mortgage is released of record, the recorder shall make entry thereof in said chattel mortgage index book."

Section 10032.

It will be noted, that the fee of twenty-five cents, prescribed by the statute, is for filing any instrument affecting the title to or incumbrance of personal property.

It is the opinion of this department that when the real estate mortgage, containing the chattel mortgage or receivership clause, is fully recorded and is also indexed in the chattel mortgage records, no extra fee should be charged for indexing the same in the chattel mortgage index book.

The fee of twenty-five cents is to be charged only for filing the instrument when it is not recorded. The fact that the indexing is not done until some time after the mortgage is filed and recorded, in our opinion, will make no difference so far as the charging of a fee is concerned. The fee prescribed in Section 10031 is not for the indexing of the instrument but for the filing thereof when it is not recorded.

CITIES AND TOWNS: A city should not pay the city treasurer additional compensation for making up annual tax list of special taxes. However, if paid, no means of recovery are available.

June 9, 1925. *Auditor of State:* This department is in receipt of your letter of recent date in which you request an official opinion. Your request is in substance as follows:

"Can the city of Council Bluffs allow the city treasurer additional compensation over the salary fixed by ordinance for services rendered by said treasurer in making up the annual tax list of special taxes due the city?"

The question submitted by you raises a question which either directly or indirectly has been raised at various times throughout the state. For that reason, instead of answering your question directly, it is our desire to discuss the matter briefly.

The laws of this state impose upon every public official certain duties. Such duties arise either through an express provision of the laws or by necessary implication. A salary is paid such public officials for the performance of such duties. An officer failing to perform such duties necessarily fails to earn his salary. The governing board of every political subdivision of this state should insist upon every public official performing the duties imposed by law. There should be no half way measures adopted. The governing board should not permit others to draw compensation for services rendered which services should have been rendered by the official designated by law and paid a salary for so doing.

We must not be understood as saying that the governing board should not furnish necessary clerical help, but certainly one official should not be employed to do the work of another official else the municipality will, by the simple process of employing the city clerk to do the work of the city treasurer and the city treasurer to do the work of the city clerk, pay both officials a double salary. This will result in what may properly be termed a vicious circle.

We know of no means whereby the compensation paid to the city treasurer can be recovered by the city, but certainly the policy referred to should be severely condemned.

FISH & GAME: It is not necessary for bona fide non-residents to secure a license to fish in private ponds.

June 10, 1925. *State Fish and Game Department:* We have received your letter of June 5, 1925, asking this Department to prepare an opinion upon the following question:

"Chapter 76 of the Izaak Walton League of America contemplate leasing several sandpit ponds, stock them and maintain them entirely at the League's own expense, said ponds being located immediately across the Missouri River from this point and in the State of Iowa, Fremont County, and the members of this Chapter have requested me to write you and ascertain whether bona fide members of this organization would be permitted to fish these ponds, under above named conditions, unmolested."

Section 1719 of the Code, 1924, as amended by Chapter 34 (House File No. 164) of the Laws of the Forty-first General Assembly, reads as follows:

"No male person over the age of eighteen years shall fish in the stocked meandered lakes of the state without first procuring a fishing license, nor shall any non-resident fish in any state waters without first procuring a fishing license."

It will be observed that the statute requires non-residents to secure a license only to fish in any *state water*. Under the facts stated in your letter, the sand-pit ponds would not be state water but would be private ponds when maintained by private residents.

We are, therefore, clearly of the opinion that it would not be necessary for bona fide non-resident members of Chapter 76 of the Izaak Walton League of America to secure a license to fish in such waters.

LICENSE: All licenses provided under Section 2447 of the Code expire the 30th day of June.

June 15, 1925. *Iowa State Department of Health:* This department is in receipt of your letter dated June 12, 1925, in which you request an official opinion. Your letter is in words as follows:

"In accordance with the provisions in Section 2447 of the 1924 Code, this Department has already collected $1.00 renewal fee for every person licensed to practice any of the professions enumerated in Chapter 115.

Now, the wording in Section 2447, 'every license to practice a profession shall expire on the 30th day of June following the date of issuance of such license, and shall be renewed annually,' is being interpreted by a few to mean only those licensed since this law went into effect have to renew.

You will understand that we believe that the intent of the law was to have every licensee regardless when he received his State license, renew annually, and I might say that this is one dependable way in keeping track of the members of the different professions.

Will you kindly advise me at the earliest possible moment whether or not the reading of Section 2447 is interpreted by you to mean license shall be renewed regardless as to when the certificate was issued."

You are advised that all licenses must be renewed. Any other ruling would be intolerable. It is foolish to say that the legislature intended that a part of the licenses should expire on the 31st day of December and part on the 30th of June.

TRADE NAME STATUTE: Statute does not require the recording of the verified trade name statute. (2) The statute does not provide for the payment of a fee for filing such verified statement.

June 16, 1925. *Auditor of State:* We have received your letter of June 6, 1925, asking this Department for an opinion construing the provisions of Chapter 183 of the Laws of the Forty-first General Assembly (House File No. 147). Your letter is as follows:

"We have several requests concerning the matter in connection with the operation of the new law on trade names passed by the last general assembly, designated as House File 147. The questions submitted to us seem worthy of a special consideration and are as follows:

1. Does this law apply to corporations operating under trade names as well as partnerships?
2. Should the verified statement mentioned in the law be filed and remain in the recorder's office like a chattel mortgage, or should it be recorded and delivered to the one who files it; or should it be accepted, indexed only, and returned to the one filing it?
3. In case it is indexed only, what would be the fee for indexing?

These questions in connection with this law are very important and we trust may have your immediate attention so that we can be in possession of your opinion to distribute to county recorders in order to secure uniformity of practices under this law and further, that we may be enabled to shape up the forms that will be required for use of county recorders."

Omitting the title and the formal parts thereof the statute reads as follows:

"It shall be unlawful for any person or co-partnership to engage in or conduct a business under any trade name, or any assumed name of any character other than the true surname of each person or persons owning or having any interest in such business, unless such person or persons shall first file with the county recorder of the county in which the business is to be conducted a verified statement showing the name, postoffice address, and residence address of each person owning or having any interest in the business, and the address where the business is to be conducted. A like verified statement shall be filed of any change in ownership of the business, or persons interested therein, and the original owners shall be liable for all obligations until such certificate of change is filed.

Any person violating the provisions of this act shall, upon conviction, be punished by a fine of not less than twenty-five dollars ($25.00) nor more than one hundred dollars ($100.00), or by imprisonment in the county jail for a term not exceeding thirty (30) days, and each day that any person or persons violate the provisions of this act shall be deemed to be a separate and distinct offense."

I.

The first question is stated as follows:

"Does this law apply to corporations operating under trade names as well as partnerships?"

It will be observed that the statute applies to "any person or co-partnership." It is clear, we think, that the term "co-partnership" does not include a corporation and we are, therefore, limited to the determination of the question as to whether or not the word "person" in the statute is broad enough to include a corporation.

Section 63 of the Code, 1924, reads, in part, as follows:

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

"13. The word 'person' may be extended to bodies corporate."

This particular section of the code was under consideration by the Supreme Court in two cases that arose in the year 1907. It was held in these cases that corporations were included in the word "person" as used in the statute then under consideration.

Swartley v. Creamery Company, 135 Iowa, 573.;
State v. Des Moines City Railway, 135 Iowa 694.

In fact, the almost universal weight of authority is to the same effect. The many authorities so holding are cited in words and phrases under the word "person."

Vol. 6, Words and Phrases, page 5327 to 5330.
2nd Series, Vol. 3, Words and Phrases, pages 985 to 994.

It would be a waste of time to even attempt to cite, in this opinion, any of the many cases so holding. The cases cited in the two volumes of Words and Phrases define the term as used in statutes and constitutional provisions, especially the provisions of the federal and state constitutions, guaranteeing to all persons due process of law. We are united in the view that the term "person," as used in the statute, includes corporations.

On June 16, 1925, this department prepared an opinion for Honorable J. C. McClune, Auditor of State, upon the question which is stated in that opinion as follows:

"Does this law apply to corporations operating under trade names as well as partnerships?"

It was answered upon the theory that the inquiry related to the question as to whether or not all corporations were required to register their corporate names. The former opinion has apparently been misunderstood and for the purpose of

distinguishing the rule therein adopted from the one herein announced, we deem it advisable to call your attention to the fact that there is no conflict between the former opinion and this one. If a corporation uses a trade name, such trade name must, under the statute, be registered. If however, only the corporate name is used, then it is not necessary for the corporation to comply with the statute in question.

II.

The second question is stated in your letter as follows:

"Should the verified statement mentioned in the law be filed and remain in the recorder's office like a chattel mortgage, or should it be recorded and delivered to the one who files it; or should it be accepted, indexed only, and returned to the one filing it?"

It will be observed that the statute provides that any person or co-partnership engaged in or conducting a business under any trade name, or any assumed name of any character other than the true surname of each person owning or having any interest in such business, unless such person or persons *shall first file* with the county recorder of the county in which the business is to be conducted a verified statement showing the name, postoffice address, and residence address of each person owning or having any interest in the business, and the address where the business is to be conducted.

It will also be observed that the statute does not in specific terms require the recording of the verified statement. The word "file" or "filed," as defined by the courts, has acquired a well defined meaning. So far as we are able to discover, the use of this word in a statute has never been held to require the recording of the instrument. Many cases are cited in "Words and Phrases" in support of this statement.

2nd Series, 2nd Vol., Words and Phrases, pages 531 to 534;
3rd Vol., Words and Phrases, pages 2765 to 2770.

The phrase "filing of a paper" means the delivery of it to an officer at his office, to be kept by him as a paper on file.

Bedford v. Board of Supervisors, 162 Iowa 588.

We are, therefore, of the opinion that the statute does not require the recording of the verified statement, but the mere delivery of the same to and acceptance thereof by the recorder and the proper indexing thereof will satisfy the statutory requirements.

III.

The final question for our determination is stated as follows:

"In case it is indexed only, what would be the fee for indexing?"

There are two sections of the statute which relate to the fees that should be charged by the county recorder. One is Section 5177 and the other is Section 10031.

In our opinion neither of these sections is broad enough to cover the charging of a fee for filing and indexing the verified statement covered by the statute in question.

Section 5177 contains the provisions in regard to the fees to be charged by the county recorder for recording instruments in his office. It is manifest that such statute does not include the filing and indexing of the statements involved in your inquiry.

Section 10031 is a part of Chapter 437, relating to chattel mortgages and conditional sales of personal property. This section provides that the fees to be collected by the county recorder, under this chapter, shall be as follows:

"1. For recording each instrument containing four hundred words or less, fifty cents.

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

It is apparent that the fees provided for therein are limited by the phrase "under this chapter" to the filing or recording of the instruments that are specified in such chapter; namely, chattel mortgages and conditional sales of personal property. The provisions of this chapter, and especially Section 10031, cannot, in our opinion, be so construed as to cover the indexing of the verified statement provided for in the statute under consideration, so that the county recorder can charge a fee for indexing the same. In the absence of a statute providing that a fee shall be paid for such services, we are of the opinion that no fee can be charged therefor.

This is a matter which should be covered by statutory enactment, and the attention of the Legislature, at its next session, should be called to the fact that there is no provision in the statute authorizing or permitting the county recorder to charge a fee for filing and indexing the verified statements, covered by the statute, so that such a provision may be added to the law, if it is deemed advisable.

COUNTIES: Board of supervisors has no right to grant a leave of absence to a county superintendent.

STATE BOARD OF EDUCATION: State Board of Education may not employ a county superintendent to perform services for the state and pay him extra compensation therefor.

June 17, 1925. *Director of the Budget:* We have received your letter of June 10, 1925, asking the department to prepare an opinion upon the following questions:

"Does the county board of supervisors have the authority to grant leave of absence to the county superintendent for any given time or for certain hours during the day?

If they do have that authority and grant such leave of absence would it be legal for the state board of education to employ such a county superintendent and to pay him for it?

Would the fact that the county superintendent is not receiving the maximum salary which the law permits and, the fact that the combined salaries would be under the maximum salary permitted, have any bearing on the situation?

Could the state board of education contract directly with the county board of supervisors for a part of the time of the county superintendent and reimburse the county for such time as he might be giving the state?"

We will answer your questions in the following way:

First, it is the opinion of this department that the county board of supervisors does not have the right or authority to grant leave of absence to the county superintendent for any given time or for certain hours during the day. The said board has no power or authority to regulate the conduct of the office of the county superintendent. Such official should devote all of his time, or so much thereof as is necessary, to the discharge of the duties of the office. This does not, of course, mean that he must be physically present at all hours of the day or at all times of the year, but it is his duty to see that the duties of the office are properly discharged at all times of the day and for all portions of the year. He and he alone shall determine when he must be present at the office.

Second, it is also the opinion of this department that the state board of education may not employ a county superintendent to perform certain services for the state board and to pay him an extra compensation therefor. If the county superintendent should accept such employment, it would, for a brief period of time at least, mean an abdication of his office and leave the management thereof entirely in the hands

of subordinates. While this may be done under certain conditions, we are clearly of the opinion that the officer cannot devote his time to performing services for a state board and leave the management of his office to subordinates.

The answer to your first two questions renders it unnecessary for us to answer the third and fourth questions.

PUBLIC CONTRACTS: If no action is brought to determine the right to retain percentages within six months following the final acceptance of the improvement the retained percentages should be held until the right thereto is determined in a court proceeding.

June 17, 1925. *State Highway Commission:* We have received your letter of June 10, 1925, asking this department to prepare an opinion upon the question which you have stated as follows:

"Will you be so kind as to give me your opinion upon the following hypothetical case:

Pursuant to the provisions of Chapter 452, Code 1924, contract bond is given in support of a $10,000 contract for primary road construction, dated January, 1925. During the course of the construction of the work and within 30 days following the date of completion, claims aggregating $3,000 are filed against the contractor. The contractor is paid by the county and state $9,000 and $1,000 or 10 per cent, is retained.

Now assume that these claims remain unpaid for more than six months following the date of completion and that no action is brought by any party or parties at interest for the adjudication of these claims, what disposition will the county and state make of the retained percentage after the time for bringing suit has gone by?"

Chapter 452 of the Code of 1924 referred to in your letter contains the provisions of the statute relating to labor and material on public improvements.

Section 10310 provides that payments under contracts for public improvements shall be made for not more than 90% of said estimates and to be so made that at least 10% of the contract price will remain unpaid at the date of the completion of the contract, anything in the contract to the contrary notwithstanding.

In Section 10311, it is provided that the retained percentage of the contract price shall constitute a fund for the payment of claims for materials furnished and labor performed on the improvement, and shall be held and disposed of by the public corporation as hereinafter provided.

It is also provided in Section 10312 that the funds so retained shall be retained by the public corporation for a period of thirty days after the completion and final acceptance of the improvements and that if, at the end of said thirty day period, claims are on file, the public corporation making the improvement shall continue to retain from said unpaid funds a sum not less than double the total amount of all claims on file.

Section 10313 reads as follows:

"The public corporation, the principal contractor, any claimant for labor or material who has filed his claim, or the surety on any bond given for the performance of the contract, may, at any time after the expiration of thirty days, and not later than six months, following the completion and final acceptance, of said improvement, bring action in equity in the county where the improvement is located to adjudicate all rights to said fund, or to enforce liability on said bond."

It will be observed that the action therein authorized may be brought any time after the expiration of thirty days and not later than six months following the completion and final acceptance of said improvement.

For obvious reasons we do not deem it advisable to pass upon the exact question you have submitted. If we should hold that the retained percentages, after the expiration of the six months from the completion and final acceptance of said improvement, belong to the contractor it might be attended with disastrous results. We, therefore, suggest that such retained percentages should be held until such a time as an action is brought to determine the ownership of said fund or the disposition thereof, and said action is finally determined by the courts. Any other action on the part of the public corporation would be unwise.

DRAINAGE DISTRICT: County attorney may represent the property owner in any litigation growing out of drainage proceedings.

June 18, 1925. *County Attorney, Corning, Iowa:* We have received your letter of June 12, 1925, asking this department to prepare an opinion upon a question which you have stated as follows:

"I have read the opinion of your office in regard to the employment of attorneyss in drainage matters in Reports of Attorney General for 1919-1920, on page 328, and wish to ask this further question.

"Where the Board of Supervisors have employed counsel other than the County Attorney as counsel for them in a proposed drainage project and all things up to the hearing for claims and damages have been done, is the County Attorney prohibited from appearing for parties directly interested in the drainage project, but who want the channel of the ditch changed, and may he act as their attorney in an appeal from the decision of the Board of Supervisors?"

It is our opinion that the opinion of this department referred to in your letter, which is reported in the Attorney General's Report for 1919-1920 on page 328, announces correctly the propositions of law upon which your question must be determined. The following quotation therefrom is, in our opinion, absolutely determinative of the question submitted.

"As you suggest in your letter, this is not county work, and there is no reason why the county attorney may not be employed and paid, under all circumstances and proceedings when the Board is authorized to employ attorneys at all. * * * * In my judgment, the drainage district is a separate entity, and when acting for it, the Board is not in any sense representing the county * * *"

We have examined the present drainage statute with care and we find no portion thereof that imposes upon the county attorney any duties with reference to the administration of the law or that requires him to take any official action in relation thereto. The Board is considering the application for the establishment of a drainage district and in passing thereon is the representative of and acts directly for the district, as a separate unit or entity and in no sense represents or acts for the county as a whole.

We are, therefore, of the opinion that a county attorney may represent the property owners in any litigation that may grow out of such proceedings and may appear either before the Board of Supervisors or in the District Court upon appeal in such proceedings. While there is no legal reason for not doing so, we have serious doubts about the propriety or expediency of the county attorney representing any property owners who are involved in litigation over the establishment of a drainage district. However, we are clearly convinced that there is no legal obstacle to prevent the county attorney from doing so.

TRADE NAME STATUTE: In all cases where the trade name statute applies, any person, co-partnership, or corporation that comes within the statute must comply with the new law even though they were transacting business before the statute became effective.

June 22, 1925. *Auditor of State:* We have received a letter from Miss Laura

Dixon, County Recorder of Union County, in which she asks for an opinion upon the following questions:

"In regard to Index to Trade Names and Partnerships, House File No. 147, 41st G. A., does this apply to firms that have been in business for years, or just those that are starting in new?

"Also, would it apply in a case like this, where the full name is used but also add & Company, as 'Harry Hood & Company,' and what fee would be charged in any case?"

We have concluded to prepare an opinion upon the questions submitted for your department so that it may be used for the guidance of the County Recorders in carrying out the provisions of the statute in question.

Chapter 183 of the Laws of the 41st General Assembly (House File No. 147) makes it unlawful for any person or co-partnership to engage in or conduct a business under any trade name, or any assumed name of any character other than the true surname of each person or persons owning or having any interest in such business, unless such person or persons shall first file with the county recorder of the county in which the business is to be conducted a verified statement showing the name, postoffice address, and residence address of each person owning or having any interest in the business, and the address where the business is to be conducted.

The statute will become effective on July 4, 1925. It is manifest, we think, that immediately upon its becoming effective it will operate upon all persons or co-partnerships who are, at said date, engaged in or conducting a business such as provided in the statute. It will, of course, operate upon any person or co-partnership who begins the conducting of such a business as is prescribed in the statute after the date the statute becomes effective. It, manifestly, can have no retrospective operation, but it does apply to any person or co-partnership thus engaged in such business at the time the statute becomes effective.

We believe that if a co-partnership is transacting business under the name "Harry Hood & Company" that the statute will apply to such co-partnership, and, in order to secure the right to transact business, the co-partnership should fully comply with the law.

TAXATION: Collection and distribution of delinquent taxes discussed.

June 27, 1925. *Auditor of State:* You have requested the opinion of this department upon the following statement of facts:

"We have several inquiries concerning the operation of Chapter 149 of the 41st G. A. where it is provided that the interest and penalty on delinquent taxes collected shall be apportioned to and become a part of the general fund of the county. The amount allowed as compensation of delinquent tax collectors shall be paid from said fund. The questions are as follows:

1. Does the interest and penalty on delinquent taxes herein spoken of, refer to all delinquent taxes whether on real or personal property?
2. Does it apply to interest on special assessments?
3. If it is held that the provisions of this law refers to penalties on all delinquent tax collections, will it be considered to apply to these collections whether collected by a delinquent tax collector or by the county treasurer?

I think an opinion in regard to this matter at an early date will bring about uniformity of practice in the county treasurers' offices of the state in regard to this matter."

In regard thereto, you are advised that it is the opinion of this department that the amendment in question passed by the 41st General Assembly provides that all interest penalties collected on delinquent personal taxes is to be placed in the county general fund, and that the same does not apply to the collection of taxes on real property.

You are further advised that it is the opinion of this department that the section does not apply to the interest on special assessments.

It is our opinion that interest and penalties collected by delinquent tax collectors on delinquent taxes on personal property, after the 4th day of July, 1925, when this act becomes effective, are to be paid into the county general fund, and the said tax collectors are then paid from the general county fund. All delinquent taxes so collected are to be apportioned by the county treasurer according to the mills levied for the particular fund, and the amount of these taxes is to be reported by the county treasurer to the county auditor, who in turn charges each fund with the amount of the same.

STATE BOARD OF EDUCATION: A notice of hearing under the budget law may be published either in a newspaper in a county in which the public improvement is to be made or in a newspaper of general circulation at the State Capitol. It is not necessary to publish such notice in more than one newspaper.

July 1, 1925. *Secretary State Board of Education:* We have received your letter of June 29, 1925, submitting to this department certain inquiries with reference to the requirements of the budget law relating to notice of hearing, before entering into a contract for the construction of a public improvement to cost $5,000 or more. As we understand the facts out of which your inquiries arose, they are as follows: The officers of the Iowa State College and the officials of the city of Ames reached an agreement with reference to opening what is known as the 13th Street Road connecting with the North road at a point south of Squaw Creek. The State Board of Education adopted a resolution which contains the following statements:

"That we hereby dedicate a strip of land extending from the East line of the State land on the North Road, and including the curves connecting said route with the North Road, and thirty-three feet wide, on each side of the center line of said road as shown on the plans prepared by the Supervisors of State roads for said Route, which land shall be used as a right of way for said road;

That, acting under the provisions of Section 5, Chapter 246, Acts of the regular session of the 40th General Assembly, we hereby appropriate $36,168.00 to be used in the construction of the state's portion of this route;

That the Supervisor of State Roads is authorized to enter into a contract for the construction of the state's portion of said Thirteenth Street Road, if the Board of Supervisors of Story County, prior to July 1, 1925, agrees to build the necessary bridge over Squaw Creek;"

The questions you have submitted may be stated as follows:

(1) Must the notice of hearing be printed in a newspaper published in the county in which the public improvement is to be made, or is it legal to publish it in a Des Moines newspaper of general circulation?

(2) Must the notice of hearing be published in more than one newspaper of general circulation?

(3) Must the notice of hearing be published more than once in a newspaper of general circulation?

Section 352 of the Code reads as follows:

"Before any municipality shall enter into any contract for any public improvement to cost five thousand dollars or more, the governing body proposing to make such contract shall adopt proposed plans and specifications and proposed form of contract therefor, fix a time and place for hearing thereon at such municipality affected thereby or other nearby convenient place, and give notice thereof by publication in at least one newspaper of general circulation in such municipality at least ten days before said hearing."

The requirement of the statute is that notice of the hearing shall be had by publication in at least one newspaper of general circulation in such municipality at least ten days before said date.

Section 351 contains the definition of "municipality." By its specific terms it includes the State Board of Education. We shall, therefore, answer your questions as follows: That the notice of hearing may be printed either in a newspaper published in a county in which the public improvement is to be made, or it may be published in a newspaper of general circulation at the State Capitol where the State Board of Education maintains an office. The better procedure, however, would be to publish the notice in the county where the improvement is to be constructed.

The statute does not require that the notice be published in more than one newspaper. The language of the statute is "and give notice thereof by publication in at least one newspaper of general circulation." It is within the discretion of the State Board to have it published in two newspapers but it is not obligatory for it to do so. It will also be observed that the statute does not require that it be published more than once in any one newspaper. In the absence of such a provision in the statute, we think it is manifest that the publication of such notice in one newspaper satisfies the statutory requirement.

HIGHWAYS: The State Highway Commission is empowered to determine all matters relating to the improvement of a county bridge or culvert on a township road.

July 1, 1925. *Iowa State Highway Commission:* We have received your letter of June 17, 1925, asking this department to prepare an opinion upon the question which you have stated therein as follows:

"We wish to request an opinion from you as to the Commission's jurisdiction under Sections 4661 and 4662 of the Code of 1924 as amended by House File No. 212, Acts of the 41st General Assembly, in deciding the matter of the location and construction of a new township road about ¾ mile in length, which is the subject of some dispute between the boards of supervisors of Shelby and Pottawattamie Counties.

We are not entirely clear as to whether the jurisdiction of the Commission extends to the hearing of complaints of this nature on township roads such as in this case, and we would appreciate your advising us of your opinion in this matter.

A bridge has washed out on one of the township roads in Shelby County and it is rather important that rather prompt action be taken in this particular case, and for this reason we would appreciate your giving the matter early attention."

Sections 4661 and 4662 read as follows:

"Boards of supervisors of adjoining counties in this state shall, subject to the approval of the state highway commission:

1. Make proper connections between roads which cross county lines and which afford continuous lines of travel.

2. Adopt plans and specifications for road, bridge, and culvert construction, reconstruction, and repairs upon highways, along and across county boundary lines, and make an equitable division between said counties of the cost and work attending the execution of such plans and specifications." Section 4661.

"In case such boards fail to perform such duty, the state highway commission may, on its own motion, or in case said boards are unable to agree and one of said boards appeals to said commission, said commission shall notify the auditors of the interested counties that it will, on a day not less than ten days hence, at a named time and place within any of said counties, hold a hearing to determine all matters relating to such duty. At said hearing the commission shall fully investigate all questions pertaining to said matters, and shall, as soon as practicable, certify its decision to the different boards, which decision shall be final, and said boards shall forthwith comply with said order in the same manner as though such work was located wholly within the county." Section 4662.

It will be observed that in the two sections just quoted the general word "roads" appears without specifying whether such roads shall be primary, secondary, county or township.

As your inquiry relates entirely to a bridge and not to the construction or improvement of roads in general, we shall limit this opinion to the exact question submitted.

Section 4662, quoted in this opinion, was amended by the Forty-first General Assembly by adding thereto three sections. The third section of said statute reads as follows:

"If said road be a county road, or *if the improvement be a county bridge or culvert on a township road,* bills therefor duly audited by said commission in accordance with said decision shall be forwarded to the auditors of the respective counties, and said auditors shall forthwith draw warrants for the amounts so audited, and the county treasurers shall pay the same as other county warrants."

Section 4662 of the Code, 1924, as amended by Chapter 112 of the Acts of the Forty-first General Assembly, empowers the commission to determine all matters relating to certain inter-county roads in the event the boards of supervisors of the adjoining counties cannot agree as to the improvement thereof. Chapter 112 undoubtedly empowers the state highway commission to determine all matters relating to the improvement of a county bridge or culvert on a township road.

We are clearly of the opinion that the statutes in question are broad enough to embrace within the powers therein granted to the state highway commission the right to locate, construct, alter or improve a bridge or culvert on a township road. Section 1, Chapter 112, Laws of the Forty-first General Assembly.

STATE BOARD OF EDUCATION: State must pay tax on automobiles the levying of which is provided for by the United States statutes, when purchasing the same.

July 2, 1925. *State Board of Education:* We have received your letter of June 22, 1925, asking this department to prepare an opinion upon a question that is raised in certain correspondence between your office and other parties relating to whether or not the State of Iowa must pay the war tax on a Kissel Truck purchased by the State University for public purposes. It will not be necessary to set forth this correspondence in the opinion. The matter was taken up by the Kissel Motor Car Company of Hartford, Wisconsin with the office of the Collector of Internal Revenue for the Milwaukee, Wisconsin district. The collector, in a letter to the Kissel Motor Car Company, set forth the government's position in the following language:

"In reply to yours of June 10th with reference to sale of truck to the State University of Iowa at Iowa City, you are referred to Article X of Regulations 47, copy of which is herewith enclosed. You will note the tax applies on articles when sold to the United States Government and to a State or political subdivision thereof, even though they are paid for entirely out of public monies and are used in the carrying on of governmental operation."

Article X of such regulations referred to in the letter of the Collector reads as follows:

"The tax applies to articles enumerated in Section 600, except those enumerated under subdivision 6, when sold to the United States Government. The same is true of articles sold to a State or political subdivision thereof, even though they are to be paid for entirely out of public moneys and are to be used in the

carrying on of governmental operation. When the Government supplies a manufacturer with all materials and parts, except a small portion furnished by the manufacturer under a contract stipulating that the manufacturer shall be guaranteed a certain profit, no tax is payable. Articles manufactured for Government use in plants taken over and operated by the Government are not subject to tax. The rules applicable to the taxability of sales to the United States Government apply equally in the case of articles sold to foreign government."

We believe that the State of Iowa is bound by these regulations and that the State University must pay the tax on automobiles, the levying of which is provided for by the United States statutes.

Therefore, it is our opinion that the State University should pay this tax.

VACATIONS: Heads of departments may grant state employees vacation not to exceed two weeks in one year.

July 3, 1925. *State Board of Control:* We have received your letter of July 3, 1925, asking this department to prepare an opinion upon the question which you have stated as follows:

"Our attention has been called to the failure of the legislature to reenact Section 34 of the Code of 1923, which provides for a vacation for the employees in the various offices of the State House.

Will you kindly inform us whether or not in the absence of such a section the present law can be construed to extend this consideration as in the past?"

The uncertainty as to whether or not employees of the state are entitled to a vacation arises from the fact that Section 34 of Chapter 334 of the Laws of the 40th General Assembly, commonly known as "The Salary Act," provided that all employees provided for in the act shall devote their entire time to the service of the state, except that this requirement shall not be interpreted to prevent the allowance of a reasonable vacation, such vacation to be had at the discretion of the head of the department or commission interested, and in no case to exceed two weeks in any one year, while such or a similar provision does not appear in Chapter 218, Laws of the 41st General Assembly known as "The State Budget Act." It has been the custom of the state government of Iowa to grant to its employes a vacation not exceeding two weeks in any one year. This has been a uniform and continuous custom almost from the very establishment of the state government. Where such a custom has been in existence for years with the full knowledge of the General Assembly and the General Assembly has not seen fit to change such custom by express statutory enactment, it must be presumed that it was the intention of such General Assembly that such custom should continue.

The contention that the Legislature by failing to include the provision to which we have referred, namely, the provision as contained in the salary act to the effect that such employees might be granted a vacation not to exceed two weeks in any one year, fails for the reason that the purpose of the Legislature in including this provision in the statute was not to permit that which was already the custom and law, but for the express purpose of construing and limiting the first part of the section. The first part of the section, as will be observed, provided that all employees should devote their entire time to the service of the state. The General Assembly, for the purpose of expressing its desire that the custom should not be set aside, expressly provided for the two weeks vacation.

True, the 41st General Assembly omitted the provision, but this is because of the fact that there was not a general salary act adopted, all appropriations being cared for in what is known as the Budget Law. The failure to include the provision cannot be construed as an expression of the Legislature that such vacations should not be granted.

It follows that the heads of the several departments of the state government are not deprived of the right to grant vacations to employes not exceeding two weeks in any one year.

DIRECTOR OF THE BUDGET. School townships not divided into subdistricts under the budget law. Secretary of the subdistrict, in the event a sum is voted in the subdistrict for a school house tax, should certify the same to the secretary of the school township, who in turn certifies it to the Board of Supervisors to make the levy.

July 5, 1925. *Director of the Budget:* We wish to acknowledge receipt of your favor of the 1st with the enclosed letter from George E. Frost, county auditor of Cerro Gordo, County. You asked our opinion as to whether or not certain school townships in Cerro Gordo County come under the budget system. From the statement in the auditor's letter, it is apparent that he has reference to school townships, one of which has not been divided into sub-districts and others that have been divided into sub-districts, under the provisions of Section 4126, Code of 1924.

There is no doubt but that under the provisions of Section 369, Code of 1924, as amended, school townships not divided into sub-districts come under the budget law.

The question further arises as to the procedure that should be followed in certifying an additional tax levy for school buildings in one of the numbered sub-districts. Your attention is called to Section 4219, Code of 1924, which reads as follows.

"At the annual subdistrict meeting, or at a special meeting called for that purpose, the voters may vote to raise a greater amount of schoolhouse tax than that voted by the voters of the school township, ten days previous notice having been given, but the amount so voted, including the amount voted by the school township shall not exceed in the aggregate the sum of fifteen mills on the dollar. The sum thus voted shall be certified forthwith by the secretary of said subdistrict meeting to the secretary of the school township, and shall be levied by the board of supervisors only on the property within the subdistrict."

And to Section 4315, Code of 1924, which provides:

"Within five days after the board has fixed the amount required for the general fund, he shall certify to the board of supervisors the amount so fixed, and at the same time shall certify the amount of schoolhouse tax voted at any regular or special meeting.

"In case a school house tax is voted by a special meeting after the above certificate has been made and prior to the first day of September following, he shall forthwith certify the same to the board of supervisors.

"He shall also certify to such board any provision made by the board of directors for the payment of principal or interest of bonds lawfully issued."

Under the provisions of the sections quoted, it is plain that the sum voted in the subdistrict for a schoolhouse tax should be certified by the secretary of the subdistrict to the secretary of the school township, who in turn certifies the tax to the board of supervisors. The amount of this tax, you will note, "shall be levied by the board of supervisors only on the property within the subdistrict."

MOTOR CARRIER LAW—REFUND OF TAXES: There is no statutory provision authorizing the refund of taxes paid under the Motor Carrier Law.

July 8, 1925. *Board of Railroad Commissioners:* This department is in receipt of your letter dated July 3, 1925, in which you request an official opinion. Your letter is in words as follows:

"Attached hereto please find copy of letter received from W. H. Bennett, Boone County Auditor, requesting an opinion regarding the authority of the Board of Supervisors to refund taxes paid under the motor carrier law." (Attached letter reads as follows:)

"I am in receipt of a petition of Charles R. Kuehn, for a refund of taxes paid for the months of June, July, August, September and October of 1924. As I understand it, Mr. Kuehn delivers products of the National Biscuit Company and was threatened last summer by the Iowa Board of Railroad Commissioners that if he did not take out a license under the Motor Carrier Law, that he would be prosecuted. He paid this tax under protest at that time and he now asks for a refund of $11.27 for the amount of the tax that was paid to Boone County.

What I would like to have is the opinion of the Railroad Commissioners whether or not our Board of Supervisors would have a right to refund said tax due to the fact that it was not levied by them.

Our county attorney has given his opinion that our Board would have such a right and that the Supreme Court of this state declared the Motor Vehicle Law void as found in Chapter 252 of the Code, 1924, and returned a decision April 8th. If you think that this tax should be cancelled, please advise us and I will take it up with the Board of Supervisors for allowance."

You are advised that there is no provision in the law authorizing the refunding of taxes paid under the Motor Carrier Law.

HIGHWAYS—BUDGET LAW: The provisions of Section 3945 relating to the expenditure of public moneys by the State Board of Education does not apply to the expenditure of public moneys under the provisions of Chapter 239 relating to state road districts. Sections 351 and 352 of the budget law apply to the work contemplated by the State Road Statute and must be complied with.

July 9, 1925. *Iowa State Highway Commission:* We have received your letter of June 26, 1925, asking this department to prepare an opinion upon the questions which you have stated therein as follows:

"Under the provisions of Chapter 246 Regular Session 40th General Assembly, which now appears as Chapter 239, Code of 1924, the Chief Engineer of the State Highway Commission is ex-officio General Supervisor of public highways upon and adjacent to lands belonging to the state at the state institutions under the Board of Education and the Board of Control and state parks under the State Board of Conservation. This law in substance has been in effect since 1913 except that previous to 1923 the road work at all state institutions came under the Board of Control.

In operating under said law all bids are received by the Supervisor of State Roads, all contracts are awarded by the Supervisor of State Roads, and are executed in the name of the Supervisor of State Roads. The bonds for the performance of such contracts are made payable to the supervisor of State Roads. In connection with the state road work under the above statutes, two questions have arisen upon which I desire your opinion. They are as follows:

1. Do the provisions of Section 3945 Code of 1924 apply to contracts let by the Supervisor of State Roads for road work at state educational institutions, and must the Supervisor of State Roads advertise for bids on said work in case the amount of the contract is in excess of ten thousand dollars.

2. Do the provisions of Section 351, 352, etc. 1924, apply to contracts let by the Supervisor of State Roads for road work at institutions under the Board of Education, and if so, is said hearing held by the Supervisor of State Roads or by the Board of Education?

As having some bearing on these questions, would state that the provisions of Section 3945 Code of 1924, do not apply to the Board of Control or the Board of Conservation, and clearly, therefore, in the letting of contracts for road work at institutions under the Board of Control or at parks under the Board of Conservation, it is not necessary that the Supervisor of State Roads receive bids therefor. Accordingly, if it is held that said Section 3945 must be complied with in the case of work on roads at educational institutions, then the conditions applicable to the awarding of contracts at the educational institutions are different from those at the penal and charitable institutions and the state parks, which work is identical in nature at all state institutions and parks.

Likewise, if the provisions of Sections 351, 352, etc. Code of 1924, requiring a hearing before a contract involving more than five thousand dollars is let, are held to apply to contracts let by the Supervisor of State Roads for work at the educational institutions, then the conditions would be different, for exactly the same kind of work at state parks, for said sections do not include the State Board of Conservation."

Chapter 239 referred to in your letter provides for the creation of what are denominated in the statute as state road districts. Under the provisions thereof, the chief engineer of the State Highway Commission is made ex-officio the general supervisor of said road districts. However, under the provisions of the statute, he exercises the powers of such supervisor under the direction of the Board of Control.

Section 4633, which is a part thereof, provides that roads within such districts shall be maintained, repaired and improved under the direction of the Board which is in control of said lands. Having briefly described the statutes relating to state roads we shall now turn to the specific statutes referred to in your letter for the purpose of determining the questions submitted to us.

Section 3945, which is a part of Chapter 195, relating to the State Board of Education, reads in part as follows:

"When the estimated cost of construction, repairs, or improvement of buildings or grounds under charge of the state board of education shall exceed ten thousand dollars, the said board shall advertise for bids for the contemplated improvement or construction and shall let the work to the lowest responsible bidder; provided, however, if in the judgment of the board bids received be not acceptable, the said board may reject all bids and proceed with the construction, repair, or improvement by such method as the board may determine. * *"

It will be observed that there appears in the above quoted portion of the statute the phrase "buildings or grounds." This statute is absolutely disassociated from the former statute relating to state roads and because of this fact we believe Section 3945 does not relate to, or have any bearing upon the other section of the statute.

We are, therefore, of the opinion that the provisions of Section 3945 do not apply to the expenditure of public monies under the provisions of Chapter 239.

II

Section 351, which is a part of what is known as the public contracts and bonds provisions of the Budget Law, defines the phrase "public improvement" and the word "municipality." The former is defined as "any building or other construction work to be paid for in whole or in part by the use of funds of any municipality." The word "municipality" is so defined therein as to include the State Board of Education, thereby making the said board subject to all the provisions of Chapter 23, the public contracts and bonds provisions of the Budget Law. The question for our determination, therefore, is as to whether or not the improvement of state roads, as provided in Chapter 239 of the Code, 1924, is a public improvement within the meaning of the statute. If the answer be in the affirmative, then the State Board of Education must comply with this portion of the Budget Statute in making the improvements contemplated by Chapter 239. We think it is perfectly obvious that the construction or improvement of such highways is a public improvement within the meaning of the statute, and that no other construction can be placed upon the provisions of the statute defining such phrase.

We are, therefore, of the opinion that Sections 351 and 352 of the Code apply

to the work contemplated by the State road statute and if the expense of the public improvement therein contemplated shall cost five thousand dollars, or more, the State Board of Education must comply with such statute.

MOTOR CARRIERS: A motor carrier that carries passengers in Iowa to points in South Dakota or adjoining states must comply with the provisions of the Iowa motor carrier law.

July 9, 1925. *County Attorney, Rock Rapids, Iowa.* I wish to acknowledge receipt of your favor of the 26th in which you request the opinion of this department on the following proposition, to-wit:

"There is a party in this town who is operating as a motor carrier between Rock Rapids and Sioux Falls. I wonder if I could have an information filed against this man. There is some doubt in my mind whether he is violating the state law, as he is doing an interstate business."

In reply we wish to say that if the man operating the motor carrier has not complied with the state statute requiring him to secure a permit from the Board of Railroad Commission, information should be filed against him.

The mere fact that he carries passengers not only to points in the State of Iowa, but to points in South Dakota and thus is engaged in interstate commerce, does not relieve him from complying with the Iowa statute. In *Michigan Public Utilities Commission v. Duke*, 69 L. Ed. 209, the Supreme Court of the United States said:

"This court has held that, in the absence of national legislation covering the subject, a State may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles, —those moving in interstate commerce as well as others; that a reasonable, graduated license fee imposed by a State on motor vehicles used in interstate commerce does not constitute a direct burden on interstate commerce, and that a State which, at its own expense, furnishes special facilities for the use of those engaged in intra state and interstate commerce, may exact compensation therefor, and, if the charges are reasonable and uniform, they constitute no burden on interstate commerce. *Hendrick vs. Maryland*, 235 U. S. 610, 622, 59 L. Ed. 385, 390, 35 Sup. Ct. Rep. 140; *Lane vs. New Jersey*, 242 U. S. 160, 167, 61 L. Ed. 222, 226, 37 Sup. Ct. Rep. 30. Such regulations are deemed to be reasonable and to affect interstate commerce only incidently and indirectly. * * *"

The cases cited in the opinion quoted from are also directly in point, and under these authorities we are of the opinion that the party in question must comply with the State statutes even though he is engaged in interstate business as a common carrier.

COUNTIES: An emergency fund may be levied by a county in the amount necessary to meet emergencies which may arise during the year. The construction and statutory limitation are the only limits imposed for the amount of this fund; and with the approval of the director of the budget an amount may be transferred from the emergency fund to the fund from which it is necessary to make payments in order to meet an emergency.

July 10, 1925. *Director of the Budget:* We wish to acknowledge receipt of your favor of the 29th ultimo requesting our opinion on the following proposition, to-wit:

"There seems to be some uncertainty with some of the local boards as to the interpretation of Section 373 of the Code, providing for an emergency levy.

Will you kindly furnish this department with an opinion on the following questions:

'To what extent may an emergency fund be levied and how is it handled in connection with the other funds of a municipality? (Many counties and towns with a low valuation must levy the maximum amount allowed to meet their expenses.)

'If an emergency arises in any particular fund which now carries the maximum levy allowed, may the municipality transfer money permanently to that fund from the emergency fund.'"

In reply we wish to say that the provisions of Section 373 of the Code, 1924, must be read together with the provisions of Section 381 of the Code, 1924. With these two sections in mind it is apparent that the emergency fund is limited to the assessments published, and the additional limitation that the total tax levy shall not exceed the limitation placed thereon in the case of certain municipalities by the laws of this state.

The emergency fund is a fund especially provided by the Budget Law. It is not elsewhere referred to. There seems to be no limitation as to the amount that can be levied to meet emergencies. It must be distinctly understood, however, that this fund as well as all other funds, are restricted by the maximum limitations of the statutes and the constitution. No municipality should levy more for this fund than, in the exercise of honest judgment, it may deem necessary to meet emergencies which may arise during the year.

This section is to be read in conjunction with the other provisions of the Budget Law to determine the method of levying and the uses to which the fund is to be put. It can be used for no other purpose than that for which it is levied and it cannot be transferred to another fund except to meet an emergency in that fund.

We are further of the opinion that under the provisions of Section 388, Code of 1924, when an emergency arises requiring additional expenditures in any particular fund, upon the approval of the director of the budget the municipality may transfer the required amount of funds necessary to meet the emergency in such particular fund from the emergency fund, without provision for its return.

MUNICIPALITIES: (1) Member of city council may not refuse to vote on the election of a city clerk.

(2) The mayor has a right to vote on the election of a city clerk in the event of a tie.

July 10, 1925. *Auditor of State:* We have received a letter from Mr. T. N. Carnall, Mayor of the City of Oelwein, asking this department to prepare an opinion upon a question relating to the municipal laws of the state.

We have concluded to prepare an opinion for your department upon the question submitted. The question submitted may be stated as follows:

"We have six city councilmen and they are divided equally upon the question of electing a city clerk. The mayor and three other councilmen wish to elect a new city clerk and the other three councilmen wish to keep the present city clerk. One of the councilmen will not vote upon the question, always making a tie vote. Have the councilmen a right to pass? Also, has the mayor a right to vote for city clerk when it is a tie vote?"

The questions submitted are as follows:

1. Does a member of the city council have a right to refuse to vote on the question of electing a city clerk?

2. In the event of a tie vote, does the mayor have a right to vote?

It is a well settled principle of parliamentary law that all members of a legislative assembly must vote upon all propositions submitted to it unless they have been excused therefrom by the legislative body itself. Of course, it is always expedient and wise for a member of such an assembly to ask for the privilege of being excused from voting on all matters that directly affect his own personal interests, and when his interests conflict with the interests of the public he should refrain from voting.

A mere reference to Section 5639 of the statute will answer the second inquiry. In prescribing the duties of the mayor, the statute provides as follows:

"5. He shall be the presiding officer of the council with the right to vote only in case of a tie."

We are clearly of the opinion that the mayor would have a right to vote in the event there is a tie on the proposition of electing a city clerk.

MUNICIPALITIES: The phrase "resident owners of property" in the statute relating to the extension of waterworks refers to the individual property owners and not to the lots that are owned by them.

July 10, 1925. *Auditor of State:* We have received a letter from the Superintendent of the Council Bluffs City Water Works asking for an opinion construing Chapter 118 (Senate File No. 13) of the Acts of the Forty-first General Assembly.

As the question submitted is of considerable importance, we have concluded to prepare an opinion upon this question for your department. The question, as stated by the Superintendent of the Water Works, is as follows:

"I am sending you herewith petition for extension of water mains which is a fair sample of those we have been receiving since the new law was passed by the 41st General Assembly.

"In determining the percentage of resident owners of property, there seems to be some question among our legal talent as to what is meant by 'resident owners.' For instance, if Charles W. Watson signed on his petition for lots 10-11-12 and 13 in block 20, Benson 1st Addition, does he count as four resident owners or simply as one resident owner? Of course, in order to properly pass upon the petition it is necessary for the Board to have proper interpretation of this part of the section above referred to."

Section 1 of said Chapter 118 empowers cities and towns which own and operate water works to extend the water mains and assess the cost of such an extension to abutting property as provided therein.

Section 2 reads as follows:

"Such extension, and assessments therefor, may be ordered only when petitioned for by seventy-five per cent (75%) of the resident owners of property subject to assessment."

We are of the opinion that the phrase "resident owners of property" refers to the individual property owners and not to the lots that are owned by such property owners. In other words, that the seventy-five per cent is to be determined by the number of property owners and not by the number of lots owned along the line of the proposed improvement.

MOTOR CARRIER LAW: The Railroad Commission need not allocate the total balance paid in under the Motor Carrier Law until in their judgment it is necessary.

July 11, 1925. *Board of Railroad Commissioners:* This department is in receipt of your letter dated July 9, 1925, in which you request an official opinion. Your letter is in words as follows:

"I am instructed by the Commission to request your opinion on the following:

1. Section 9 (a), Chapter 4, Laws of the 41st General Assembly reads 'All moneys received under the provisions of this Act shall be distributed as follows: For the administration and enforcement of the provisions of this act and the regulation of motor carriers one-fifth (1/5) or so much thereof as may be necessary shall be paid to the Commission by warrant drawn from time to time by the Auditor of State upon the Treasurer of State.'

Does this mean that one-fifth, or so much as necessary of the motor carrier tax collected by the Commission shall be paid by warrant from the Auditor of State to the Commission and then paid out by the Commission directly to claimants, or should the regular process of payment be followed through the Board of Audit, and warrants be drawn by the Auditor payable directly to claimants?

2. Section 9 (b) reads in part 'The balance shall be allocated each month by the Commission to the various counties in the proportion that the number of ton-miles of travel in the respective county bears to the total number of ton-miles of travel within the state.'

Does this mean, in connection with 9 (a) that in the event the entire one-fifth of the moneys collected is not spent each month, the remainder shall be allocated along with the four-fifths accruing directly to the counties, or is the balance remaining unspent from the one-fifth subject to the use by the Commission at any time?"

All of the receipts are held by the Treasurer of State until the allocation by your Commission. Claims are to be filed with the Auditor of State, approved by the Commission and paid in the regular manner, the only condition being that the warrants drawn by the Auditor of State shall be payable only from the receipts.

The Commission need not allocate the total balance, but may properly withhold the allocation for the one-fifth until in their judgment it is unnecessary to further retain the same for the purpose for which it is set apart. They should, however, allocate not only the four-fifths but also all of the remainder of the one-fifth not in their opinion necessary for the purpose of paying the expenses incurred in connection with the administration and enforcement of the provisions of this statute.

STATE INSTITUTIONS: Care of an inebriate at State Institution would be paid for in the same manner as that of an insane patient.

July 14, 1925. *Board of Control:* You have requested the opinion of this department upon the following statement of facts:

"Chapter 173 of the Code, of Iowa, 1924, provides for the commitment of persons addicted to the excessive use of intoxicating liquors and drugs by the Commissioners of Insanity of the various counties throughout the state. Section 3479 of this chapter provides that all statutes covering the commitment, custody, treatment and maintenance of the insane, so far as applicable, shall apply to the commitment, custody, treatment and maintenance of those addicted to the excessive use of intoxicating liquors and drugs. Paragraph one, Section 3586 of Chapter 178 of the Code, 1924, provides for the detention and care of insane patients at our state hospitals when it is found that their residence is not in the state of Iowa, and that they be maintained in our state hospitals at the expense of the state.

We have had several inquiries lately as to whether or not this particular section would apply to inebriates. That is, whether or not when it is found that they do not have a residence in this state should they be received and cared for in our state hospitals at the state's expense; or should they be maintained therein at the expense of the county from which they are committed?

It would seem to us that inebriate cases should not be handled the same as insane in this respect. Before answering the inquiries we have on this subject, however, we would be very glad to have your opinion."

In regard thereto you are advised that it is the opinion of this department that where an inebriate has been committed to a state institution, that the care of such inebriate is to be paid for in the same manner as is the care of an insane person, as provided by Section 3586 of the Code, 1924.

TAXES: Personal taxes become delinquent April 1st and October 1st. If not paid it is the duty of the county treasurer to collect by distress and sale, under Section 7189, Code, 1924. The treasurer may enforce collection by this method either after April 1st or October 1st, depending upon which installment is delinquent.

July 14, 1925. *Auditor of State:* We wish to acknowledge receipt of your favor of the 26th ultimo requesting our opinion on the following proposition:

"According to the provisions of Section 7210 taxes may be paid in installments by

paying one-half thereof before the first of March succeeding the levy, the remaining one-half before the first day of September following and in 7211 it is provided that where one-half of the tax has not been paid before the first day of April succeeding the levy, the whole amount shall become delinquent from the first day of March. Then according to the provisions of Section 7214 penalties accrue thereafter. According to the provisions of Section 7189 the treasurer shall collect all delinquent taxes by distress or sale of any personal property. The question with us is:

"1. When can the treasurer enforce collections by distress and sale?

"2. If the personal property taxes of current year's collections are not paid by March 1st, can the treasurer proceed to collect by distress and sale during the month of March, or must he wait until after April 1st?"

The personal taxes become delinquent under the provisions of the statute referred to by you, on the 1st day of April and the 1st day of October in each year. And if the first half of the taxes due are not paid prior to the 1st day of April, then the taxes are delinquent and it is the duty of the county treasurer to proceed to collect the same by distress or sale, under the provisions of Section 7189, Code of 1924. The section just referred to makes it the duty of the treasurer to collect "all delinquent taxes * * *." The taxes are delinquent under the statute at the time we have just stated, and we are, therefore, of the opinion that the treasurer can enforce collection by distress or sale after April 1st or October 1st, depending upon whether or not the first installment of the tax was paid.

RECORDING: County recorder may file a conditional sales contract without filing the assignment printed on the back thereof and accept the fee for filing in a single instrument.

July 14, 1925. *Auditor of State:* I wish to acknowledge receipt of your favor requesting our opinion upon the following proposition:

"If a party presents a conditional sales contract to the recorder on which is printed an assignment and requests that the conditional sales contract be filed without the assignment, can the recorder accept the instrument for the single filing fee without the assignment contract being stricken from the form?

Can the recorder refuse to accept such instruments for filing if the fees that he demands for filing are not paid when the instrument is presented?"

We are of the opinion that the recorder can file the conditional sales contract without filing the assignment and accept the fee for filing the single instrument. The recorder could not require a fee for filing an instrument bearing an assignment that is not effective, or that is not completed, merely because the printed form is attached to the conditional sales contract.

If the fees provided for filing any instrument are not paid when the instrument is presented and upon demand by the recorder, he need not record or file the instrument.

SCHOOL DISTRICTS: School Districts falling within the provisions of the budget law are not required to publish their estimates and have a hearing subsequent to July 1st. The estimate must be filed not less than twenty days before the date fixed for certifying the levy, and if the estimates are filed within such time and a hearing had, the requirements have been complied with.

July 14, 1925. *County Attorney, Algona, Iowa:* We wish to acknowledge receipt of your favor of the 10th requesting our opinion upon the following proposition:

"Would like the opinion of your department in regard to a matter under the state budget law. It appears that certain taxing districts, being school townships in Kossuth County, although their fiscal year begins July 1, or rather June 30, have published their estimates and had their hearing prior to the first of July. The budget director seems to take exception to this. I am unable to find anything in Chapter 24 of the code prohibiting this but it would be a very serious matter if it were to

interfere with the tax levies for the ensuing year. It may be that Section 375 makes this illegal but it occurs to me it is doubtful. Kindly give me your best opinion on this and oblige."

We find nothing in the provisions of Chapter 24, Code, 1924, requiring school districts coming within the provisions of the budget law to publish their estimates and have a hearing thereon subsequent to July 1st. Section 375, Code, 1924, reads in part as follows:

"Each municipality shall file with secretary or clerk thereof estimates required to be made in the five preceding sections at least twenty days before the date fixed by law for certifying the same to the levying board, and shall forthwith fix a date for a hearing thereon, and shall publish such estimates with a notice of the time when and the place where such hearing shall be held at least ten days before the hearing. * * *"

It is plain that the municipality must file the estimates not less than twenty days before the date fixed for certifying the levy, which is not later than August 15th (Section 383, Code, 1924). If the estimates are filed more than twenty days prior to August 15th and a hearing had, we believe the statutory requirements have been complied with.

COUNTY ATTORNEYS: The percentage allowed by the statute on fines collected are by way of additional compensation to be paid the county attorney who collects the fine, regardless of whether he prosecute the case or not.

July 14, 1925. *County Attorney, Orange City, Iowa:* We wish to acknowledge receipt of your favor of the 7th requesting our opinion upon the following proposition:

"Sec. 5228 of the Code of 1924 provides among other things as follows:

"'In addition to the salary above provided, he shall receive 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, etc.'

"Kindly give me your interpretation of the above statute. Does it mean that the County Attorney who actually collects the fine in a criminal case gets the fee or the county attorney who prosecutes the case to judgment but does not collect the fine? I am referring to an instant case in this county where it has been the custom of the County Attorney who actually gets the money for the county to get the fee and not the one who merely gets the judgment."

The provisions of Section 5228, Code, 1924, fix the compensation of the county attorneys in this State. That part of the section referred to, quoted by you, as the language clearly states, is in addition to the fixed salary based upon the population of the county. It is to be noted that the legislature provided that this additional compensation was not to be paid unless the fine is collected. It is also to be noted that by the terms of the section referred to, the county attorney would be entitled to the statutory attorney fees for suits upon written instruments where judgment is obtained, irrespective of the fact that the judgment is not collected. He would also be entitled to the statutory attorney fees for the foreclosure of school fund mortgages even though the obligation due the school fund is unpaid or the property not sold to some other purchaser than the county at the sheriff's sale.

The provision for the percentage to be paid upon fines collected is therefore an additional inducement offered the county attorney for the collection of fines assessed. If the fine is not collected, then the county attorney is not entitled to the additional compensation provided. We are, therefore, of the opinion that the additional compensation to the county attorney for fines collected is to be paid to the county attorney who collects the fine, and not to the county attorney who

prosecutes the case but who fails to make the collection. Under the statute it is to be understood that the county attorney, in order to be entitled to the percentage upon a fine collected, must have been instrumental in bringing about the collection by some act or proceeding in which he appears for the State. This proceeding or appearance might be after the rendition of the judgment imposing the fine.

This opinion is in accord with a former opinion of this department found on page 487, Reports of the Attorney General, 1911-1912.

TAXES: Interest on delinquent taxes on both real and personal property shall be apportioned in the general fund. (2) This is true whether such delinquent taxes are collected by the county treasurer or by delinquent tax collectors.

July 17, 1925. *Auditor of State:* We have received your letter of recent date requesting this department to prepare an opinion upon the question which you have stated as follows:

"We have several inquiries concerning the operation of Chapter 149 of the 41st G. A. where it is provided that the interest and penalty on delinquent taxes collected shall be apportioned to and become a part of the general fund of the county. The amount allowed as compensation of delinquent tax collectors shall be paid from said fund. The questions are as follows:

1. Does the interest and penalty on delinquent taxes herein spoken of, refer to all delinquent taxes whether on real or personal property?
2. Does it apply to interest on special assessments?
3. If it is held that the provisions of this law refer to penalties on all delinquent tax collections, will it be considered to apply to these collections whether collected by a delinquent tax collector or by the county treasurer?

I think an opinion in regard to this matter at an early date will bring about uniformity of practice in the county treasurers' offices of the state in regard to this matter."

Chapter 149 of the Laws of the 41st General Assembly repeals Sections 7227, 7232 and 7233 of the Code, 1924, and enacts substitutes therefor. The substitutes read as follows:

"Section 1. 'The interest and penalty on delinquent taxes collected shall be apportioned to and become a part of the general fund of the county, and the amount allowed as compensation to delinquent tax collectors shall be paid from said fund.'

Section 2. 'On or before the tenth day of each month, the treasurer shall apportion all taxes collected during the preceding month among the several funds to which they belong according to the number of mills levied for each fund, and the interest and penalties thereon to the general fund, and shall enter the same upon his cash account, and report the amount of each tax and the interest and penalties collected on the same to the county auditor, who shall charge him in each fund with the same.'

Section 3. 'Any interest or penalty on delinquent taxes apportioned or transferred to any fund other than the general fund, together with a penalty of ten per centum and interest at six per centum on the aggregate, from the time such tax is due and payable, may be recovered in civil action brought against the county treasurer and his bondsmen by any person in control of the fund affected thereby.'"

It will be observed that the statute herein quoted uses the phrase "the interest and penalty on delinquent taxes." It will also be observed that it is not limited to delinquent taxes on any particular class of property, but is broad enough to cover all delinquent taxes not only on personal property, but real property as well. It also includes all delinquent taxes whether collected by the county treasurer or by delinquent tax collectors.

We can conceive of no language that could be used that would be broader in its application than the language employed in this statute.

We are, therefore, of the opinion that the delinquent taxes referred to in the statute are not limited to any particular class of property but embrace all classes, both real and personal, whether collected by the delinquent tax collector, or otherwise.

We are also clearly of the opinion that the statute does not apply to interest and penalties on special assessments. Such assessments are levied for the purpose of paying the cost of constructing public improvements, and for the payment of special assessment certificates or bonds. The interest on such certificates and bonds belongs to the parties owning the same, and the legislature could not provide for the diversion of interest on such special assessments to the general fund or any other fund.

BUDGET LAW: An opinion answering fifteen different questions relating to the construction, meaning and effect of the Budget Law.

July 17, 1925. *Director of the Budget:* We have received your letter submiting to this department a number of inquiries relating to the construction of certain provisions of the Budget Law. On account of the number submitted, we have concluded to set forth the questions herein, with our conclusions thereon, without setting forth our reasons therefor.

1st. When the Director of the Budget makes examinations, investigations or attends hearings on municipal matters, may the expense thereof be charged to the municipality?

Section 319 provides that the director, state accountant and all assistants, employees and agents, shall be allowed their actual and necessary traveling expenses while in the performance of their duties.

Section 361 of the Code provides as follows:

"Witness fees and mileage for witnesses on hearing appeals shall be the same as in the district court; but objectors or appellants shall not be allowed witness fees or mileage. Cost of hearings and appeals shall be paid by the municipality."

It will be observed the costs on hearings and appeals only, may, under the above statute, be charged to the municipality. Mere examinations or investigations, as distinguished from hearings or appeals, may not be charged to said municipalities.

2. In what manner is the jurisdiction of the Budget Director limited?

Section 320 defines and prescribes the general power of the director. By the provisions of this section it is made the duty of such official to carry out and enforce all the provisions of the Budget Law and to conduct hearings on all matters within his jurisdiction and render decisions thereon. The only limit to the jurisdiction of the Director of the Budget is found in the statute itself. He may exercise only such authority and power as is therein granted and no more.

3. What is the definition of the word "examination" as found in Section 322? What leads to an examination? What is the distinction between an *examination*, an *investigation* and a *hearing?*

The terms "examination" and "investigation" are not synonymous. An examination is not as extensive as an investigation. It does not imply a laborious or contested inquiry. An "investigation" is a minute inquiry, a scrutiny, a strict examination. An "investigation" includes an examination but is something more comprehensive and more thorough. A "hearing" when technically considered, is nothing more than an inquiry into facts for the purpose of determining a matter at issue. It includes not only the introduction of the evidence and arguments of the respec-

tive parties, but the pronouncing of the decree, decision or ruling. *Babcock v. Wolf*, 70 Iowa 676, (679).

For the purpose of a hearing the jurisdiction of the director must be involved in the manner prescribed in the statute.

4th. What is meant by Section 324?

The provisions of this section are not unusual. The section merely provides that no witness shall be exempt from testifying to any matter in any proceeding under the provisions of the Budget Law or from producing books, papers, letters, or other documents or articles on the ground that the same will tend to render him criminally liable or to expose him to public ignominy. To render the statute constitutional, it was necessary, under the decisions of the courts, to grant absolute immunity to any person who may testify under the provisions of the statute. Under its provisions, no person so testifying may be prosecuted criminally for any matter about which he testifies in such hearing.

5th. What is a petition, as the term is used in Section 325 and can the director hold a hearing unless the objectors have complied with Section 353 and Section 354? What is meant by the phrase "the director shall promptly determine all matters submitted to him directly"?

The term "petition" as found in the statute may be defined as the application, document, or other writing by which any party to any proceeding, under the Budget Law, sets forth his claims or the facts upon which they are based. Under Chapter 23, the public contracts and bonds provisions of the Budget Law, no hearing can be had by the director unless the objectors have complied with said statutes and particularly Sections 353 and 354.

Section 325 provides that the hearing may be held by the director, the state accountant or a special agent. The provision quoted above requires the director to decide all hearings without unreasonable delay, whether submitted to him directly or on the reports of persons conducting such hearings. The word "promptly" is usually defined by the courts as meaning within a reasonable time, taking into consideration all the facts and circumstances of the case. What might be reasonable in one case would be entirely unreasonable in another. Much depends upon the facts in each case:

6th. Section 352 refers to proposed form of contract. Section 353 refers to contract for. Which is correct "for" or "form"? How can objections be made to the contract (if "for" is correct) when there has been no contract?

We believe you do not understand the part of Section 353 referred to in the above question. The portion of the statute inquired about reads as follows:

"At such hearing, any person interested may appear and file objections to the proposed plans, specifications or contract for, or cost of such improvement."

The word "for" refers to improvement, so that in effect it may be construed as though it read:

"* * * objections to the proposed plans, specifications or contract for the improvement, or cost of such improvement."

The word "proposed" modifies not only the word "plans" but "specifications" and "contract" as well.

7th. Can the question of the best interests of the municipality be involved in the hearing provided for in Section 357? Can one person only attend the hearing and object to the improvement?

The statute contains the statement "in that it is for the best interests of the municipality" meaning, of course, the proposed improvement referred to therein. Any interested person, in addition to the appellants, as provided in Section 354, may appear and be heard at the time of said hearing.

8th. To what extent is the authority of the director of the budget limited by Section 357? If the director believes it not for the best interests of the municipality, can he stop the improvement?

The statute, itself, contains a statement of what the director shall find before approving any proposed improvement. It may be stated as follows: (1) That the plans and specifications and form of contract are suitable for the improvement proposed; (2) that it is for the best interests of the municipality, and (3) that such improvements can be made within the estimates therefor. If all of these facts are found by the director, he shall approve the same. If not approved by him, he shall recommend such modifications of the plans, specifications or contracts as in his judgment shall be for the public benefit, and if such modifications are so made the director shall approve the same. We believe that if the director does not approve the project, then he shall recommend such modifications thereof as in his judgment shall be for the public benefit. His power is thus limited to recommending modifications of the plans, specifications or contract. It is not within his power to absolutely reject the improvement.

9th. In the investigation or examination referred to in Section 358 who must bear the expense of such investigation and examination?

Section 358 provides that after any contract for any public improvement has been completed and any five persons interested request it, the director shall examine into the matter as to whether or not the contract has been performed in accordance with its terms. Such an examination, or investigation, necessarily involves the introduction of testimony for the purpose of determining whether such contract has been fully performed and because thereof, such examination or investigation amounts to a hearing within the meaning of Section 361. No doubt the contractor may and probably will be represented by counsel and will present his side of the case. In our opinion, the expenses and costs thereof should be paid by the municipality. However, the salary of the director, or any other employee in his office, for the time of said hearing, should not be taxed as a part of the costs, but if the director deems it advisable to appoint a referee, or someone not employed in his office, to conduct such a hearing, then the per diem or salary of such person should be taxed as a part of the costs. The director, or any employee in his office, would, of course, be entitled to their actual and necessary travelling expenses while in the performance of their duties.

10th. Do the provisions of Section 359 limiting the amount that may be expended by any municipality include costs of grading or cost of curb and guttering or any other incidental expense which may not be included in the contract. In case of default of contract and the work is completed under bond, what then?

We think it is manifest that the total cost of the improvement, including grading, cost of curb and guttering or any other incidental costs, must not exceed the contract price and five per cent (5%) in addition thereto. In case of default of the contractor, or the work is completed under the bond, the amount paid in excess of the contract price may be recovered of the sureties on the contractor's bond. In such a contingency, the municipality may contract for a sum in excess of the amount prescribed therein. This is due to the fact that the excess over the contract price will not be paid out of public funds but by the sureties on the bond.

11th. After report of completion of a public improvement is filed, what action may be taken by the director if there appear to be irregularities?

The statute specifically points out what action must be taken by the director and by the municipality directly interested in the improvement in the event the contract has not been fully performed. Under the provisions of Section 358, if the director finds that the contract has not been performed in accordance with its terms he should report such finding to the body letting such contract. It then becomes the duty of the municipality to at once institute proceedings on the contractor's bond for the purpose of compelling compliance with the contract in all of its provisions.

12th. How does Section 372 affect the consolidated levy section of the municipal statute?

We do not believe there is any conflict, or inconsistency, between the provisions of Sections 372 and 6217, providing for a consolidated levy. Section 6217 provides for an appropriation of the estimated revenue from the consolidated levy in such ratio as the council may determine for any purpose for which such funds might have been used. This practically amounts to an itemization of the estimates provided for in Section 372. It was certainly not the intention of the legislature by enacting the Budget Law and especially Section 372, to do away with the consolidated levy as provided in Section 6217.

13th. Do Sections 375 and 6218 provide for two separate and distinct hearings?

We are clearly of the opinion that the two sections referred to must be read together and both given full force and effect, if possible. There is apparently nothing inconsistent in the provisions of the two sections and they do not conflict with each other.

Therefore, we are of the opinion that two hearings must be had.

14th. Does Section 387 require the approval of the Director of the Budget for the transfer of funds therein provided for?

There is nothing in the section that requires the transfer of funds under the provisions of this section to be approved by the director. Therefore, we are of the opinion that such approval is not necessary. The fact that the approval of the director is provided for in Section 388 and not in Section 387 renders this conclusion apparent.

15th. Do townships, school townships divided into subdistricts, drainage and road districts or rural independent school districts come within the provisions of Section 388?

Under the provisions of this section, as amended, by Chapter 86 of the Laws of the Extra Session of the 40th General Assembly, townships, school townships divided into subdistricts, drainage and road districts or rural independent school districts are exempted from the provisions of Chapter 24 of the Code, known as the local budget law, and therefore, Sections 387 and 388 do not apply thereto.

COMMISSIONER OF LABOR: The commissioner of labor is charged with the duty to supervise and enforce the provisions of the statute in regard to safety appliances. He has no special authority over elevators in hotels and establishments other than those in manufacturing, mercantile establishments, work shops and machine shops.

July 18, 1925. *Commissioner of Labor:* You have requested an official opinion from this department relative to the proper interpretation to be given Chapter 83 of the Code, 1924, as amended by Chapter 31 of the Acts of the Forty-first General Assembly. You limit your request somewhat by asking as to your powers and duties relative to the enforcement of such laws.

Chapter 83 of the Code, 1924, relates to passenger and freight elevators. It was enacted following the so-called Randolph Hotel accident in Des Moines, by the Fortieth General Assembly. The purpose of this act was to require safety in the operation of elevators throughout the State. To accomplish this purpose, provision was made for the adoption of an elevator code and the duty was imposed upon the Commissioner of Labor to enforce the provisions of such laws and the elevator code adopted in conformity therewith. Pursuant to the authority granted, the Governor of the State appointed an elevator commission for the purpose of drafting the code. The code was drafted, but before it was put in operation, the law was repealed. Necessarily, with the law the code failed. It is with this repeal that we now deal.

Chapter 83, after the repeal, is in words as follows:

"Every elevator and elevator opening and machinery connected therewith in every elevator, hoistway, hatchway, and wellhole shall be so constructed, guarded, equipped, maintained, and operated as to render it safe for the purposes for which it is used. Nothing herein contained shall be construed to apply to any elevator hoisting device and anything connected therewith coming under the jurisdiction of the State mine inspector." (Section 1678).

"Cities and towns and cities with a commission form of government are hereby empowered to enact ordinances providing for the inspections and regulation of the operation of such elevators and of the operators thereof; * * *" (Section 1683).

The legislature did not remain content, however, with leaving the law as thus quoted. A penal provision was provided in words as follows:

"Every person, firm or corporation operating an elevator in violation of any of the provisions of this chapter shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than twenty-five dollars ($25.00) nor more than one hundred dollars ($100.00) or by imprisonment in the county jail not to exceed thirty (30) days or by both such fine and imprisonment." (Section 2, Chapter 31, Laws of the Forty-first General Assembly).

It further provided as follows:

"The hoistway doors and gates of all passenger elevators shall be equipped with an approved interlock (locking device), electrical, mechanical, or electro-mechanical, which will prevent the normal operation of the elevator car; unless the hoistway door at which the car is standing is closed and locked; or unless all hoistway doors are closed and locked; and second, shall prevent opening the hoistway door from the landing side except by a key or special mechanism; unless the car is standing at the landing door; or unless the car is coasting past the landing with its operative device in the "Stop" position. The interlock shall not prevent the movement of the car when the emergency release is in temporary use or when the car is being moved by a car-leveling device." (Section 4, Chapter 31, Laws of the Forty-first General Assembly).

It will be observed from a reading of these statutes that the legislature has specifically provided that every elevator shall be so constructed as to be safe for the purposes for which it is to be used. It is, of course, understood that these laws do not apply to elevators under the jurisdiction of the State Mine Inspector; otherwise it seems to be uniform in its operation. Aside from the general provisions for safety, as contained in Section 1678 of the Code, 1924, we find only the provisions of Section 4 of Chapter 31 of the Acts of the Forty-first General Assembly. This section provides that every passenger elevator shall be equipped with a locking device, either electrical, mechanical or electro-mechanical, which locking device will prevent the normal operation of the car, unless: First, the hoistway door at which the car is standing is closed and locked, or all hoistway doors are so closed and locked; and second, shall prevent the opening of the hoistway door from the landing side except by a key or special mechanism; and third, unless the car is

standing at such landing door, or unless the car is coasting past the landing with its operating device in the "Stop" position; fourth, the locking device shall not prevent the movement of the car when the emergency release is in temporary use, or when the car is being moved by a car leveling device.

This section does not provide for the use of any particular kind of a locking device. Any locking device conforming to the requirements of the legislature is sufficient. The failure to use such an interlocking device will render those operating the elevator liable for a misdemeanor.

It is to be observed that this chapter in and of itself does not refer to the Commissioner of Labor so far as the chapter stands as amended. He would have no jurisdiction whatsoever. His jurisdiction, therefore, if present at all, exists by reason of some other statutes. The only statute which might be construed as giving the commissioner jurisdiction is Section 1514, Code, 1924, which pertains to the duties of the commissioner in general. Under the provisions of paragraph 1 of this statute the commissioner is given jurisdiction to supervise the enforcement of the following matters:

"All laws relating to safety appliances and inspection thereof and health conditions in manufacturing and mercantile establishments, workshops, machine shops and other industrial concerns within his jurisdiction."

The commissioner, under the provisions of the section just quoted, is clearly clothed with the authority and duty to supervise the use of all safety appliances upon elevators in the establishments named in this section. In no other section of the code is the commissioner specifically charged with the duty to supervise and enforce the statutes in regard to safety appliances upon elevators.

By Section 1680, Code 1924, part of Chapter 83, the Commissioner of Labor was given direct supervision over the safety appliances on all elevators wherever located. Chapter 31, Laws of the Forty-first General Assembly expressly repealed Section 1680, thus clearly expressing the intention of the legislature to deprive the Commissioner of Labor of the larger jurisdiction granted to him by its provisions and placing his jurisdiction back as it was prior to the enactment of Chapter 83.

We are of the opinion, therefore, that as Commissioner of Labor, you are specifically charged with the duty to supervise and enforce the provisions in regard to safety appliances used upon elevators in manufacturing and mercantile establishments, work shops, machine shops and other industrial concerns named in Section 1514, Code, 1924, and that your duty and jurisdiction over safety appliances used upon elevators in establishments, including hotels, other than those named in this section, is the same as that of any other peace officer or citizen charged with the enforcement of the laws of this state. If it comes to your knowledge that the provisions of Section 4 of Chapter 31, Laws of the 41st General Assembly, are not being complied with, it is then your duty to file information and see that the offender is prosecuted.

COUNTIES—EMINENT DOMAIN: A county may acquire the right to destroy a dam by condemnation proceedings only.

July 20, 1925. *Secretary, Executive Council:* We have received your letter of July 17, 1925, asking this department to prepare an opinion upon a question contained in a letter from F. H. Mann, the Assistant Chief Engineer of the Iowa State Highway Commission to your office. The letter of Mr. Mann reads as follows:

"Recently the town of Cascade, in Dubuque County, Iowa, experienced a very severe flood which as you know caused considerable damage to the town as well as loss of life. The Maquoketa River got out of its banks cutting a new channel down the main street of the town.

"The Maquoketa River normally flows under an old stone arch bridge built some sixty or seventy years ago. The bridge is inadequate to take care of unusual floods, part of the trouble being caused by the channel being restricted by a dam just below the bridge. This dam robs the bridge of perhaps four feet of the most effective opening. The dam and mill are at present owned by a Mr. Kingsley of Cascade. A movement is now under way to prevent floods of this kind from occurring in the future by building a new bridge, tearing out the dam and straightening the channel above.

"I understand that Chapter 363 of the 1924 Code places the handling of dams under the control of the Executive Council. Can you advise how we should handle the matter of removing the dam mentioned above?"

As we understand the facts stated in your letter, the dam across the Maquoketa River near the town of Cascade, in Dubuque County, was erected and maintained by one who had a legal right to do so. If this be true, then there is only one way for the county of Dubuque to acquire the right to destroy the dam and that is by condemnation proceedings. In such a proceeding the damages to the dam and the mill site must be assessed by a jury, and the damages paid by the county before it acquires the right to destroy said dam. The right of the person owning the dam and the power site cannot be taken away for a public purpose without just compensation being paid therefor. The constitution so provides.

You should understand that we are not determining the power of the state to act under the provisions of what is commonly known as the "dam site" law. (Chapter 363, Code of 1924).

HIGHWAYS: A county should not be reimbursed for right of way purchased for primary roads unless there is some record showing the county's title to said highway.

July 20, 1925. *Right of Way Engineer, Ames, Iowa:* We have received your letter dated July 7, 1925, asking this department to prepare an opinion upon the question which you have stated as follows:

"In reimbursing counties for right of way purchased for the construction of primary roads, we find in a number of cases the counties have failed to take a deed or easement for the right of way purchased prior to March 22, 1923.

These counties are now asking to be reimbursed for this right of way but have nothing to present to us giving title to the land other than a verbal agreement and a warrant showing that the county paid the property owners certain sums of money for land for highway purposes.

What we would like to know is, whether it is possible to go through the process of establishing a road under the original establishment of roads as provided for in Chapter 237 of the Code of Iowa, 1924, and in following this procedure if there were claims filed in connection with this establishment, would the warrants originally paid offset these claims? Would it be possible to institute suit against individual property owners forcing them to deliver to the county an easement for the right of way as purchased and shown as paid by warrants which are a matter of record?

Will you kindly advise whether either method could be used to secure an easement from the property owners and which method you would recommend we follow?

Pottawattamie County is one of the counties asking reimbursement and have no title to the land. The Senator and Representatives of that county are asking if something cannot be done."

It is the opinion of this department that the State Highway Commission should not order the reimbursement for right of way purchased for primary roads unless it is shown by condemnation proceedings, deed or other conveyance that the county

has acquired title to the right of way purchased for said purpose. The State Highway Commission has no means of knowing that such right of way has been purchased unless the records show that the county has acquired a right thereto.

We, therefore, suggest that the State Highway Commission should refuse to order a reimbursement of the amount paid for such right of way until there is some evidence that the highway has been purchased or condemned. If the former property owner refuses to execute a conveyance of the land in controversy to the county, an action to quiet title thereto may be brought and a demand should be made as provided in Section 12289 of the Code, 1924. We see no reason why the property owner, who has been paid for the land purchased, should refuse to execute a deed to the same. If he does, he should be subjected to the penalty provided in said section 12289.

SCHOOLS AND SCHOOL DISTRICTS: A city independent district referred to in Section 4329 is a city district with a board of directors of five members.

July 21, 1925. *Superintendent of Public Instruction:* You have requested the opinion of this department upon the following statement of facts:

"Please advise me what constitutes a city independent district as referred to in section 4329 of the Code, 1924? Would an incorporated town whose board consists of five members be so considered?

In regard thereto we call your attention to Section 4198 of the Code, 1924, which provides as follows:

"At the annual meeting in all independent districts, members of the board shall be chosen by ballot or by voting machine for the terms of three years, to succeed those whose terms expire, and shall hold office for the terms for which elected and until their successors are elected and qualified. In any district including all or part of a city of the first class or a city under special charter, the board shall consist of seven members. In all other independent city or town districts, in consolidated districts, and in rural independent districts having a population of over five hundred, the board shall consist of five members. In all other rural independent districts the board shall consist of three members."

Your attention is particularly called to that part of the section which reads "in all other independent city or town districts, in consolidated districts, and rural independent districts having a population of over five hundred, the board shall consist of five members."

Therefore, we are of the opinion that in determining what constitutes a city independent district, it would be sufficient for you to determine whether or not the district was a city district as distinguished from the rural district, and further, whether or not the board of directors of the district consists of five members.

TAXATION: Basis of taxation of agricultural lands within the limits of cities and towns, and refunding of erroneous taxes discussed.

July 23, 1925. *County Attorney, Waukon, Iowa:* You have requested the opinion of this department upon the following statement of facts:

"Dr. J. H. McCullough of this city owns a continuous tract of thirty acres of land in Waukon, which has not been laid off into lots of ten acres or less, and which is used in good faith for agricultural purposes. In other words, the tract falls within the provisions of Section 6210 of the 1924 code relative to taxation, being limited by said section to a maximum of five mills for city purposes and a tax for library purposes.

During the years 1917 to 1923, both inclusive, Dr. McCullough has paid taxes at the same rate as if it were in city lots, the various auditors having erroneously made the error. Now this party asks for a refund of $243.74 during these years. I enclose a copy of his petition to the board of supervisors.

Against this proposed refund our present auditor wishes to raise the assessment by the same percentage that 'agricultural lands' were raised in this county by the Executive Council of Iowa. This, for example, would be a 38% raise for the year 1923, and the question is whether or not this thirty acre tract should be classed with 'agricultural lands' and the raise made each year by the Executive Council of Iowa be applied. If so, we would not have to refund the $243.74 asked, but could set-off the amount of the raise ordered each year.

In addition to enclosing copy of the petition I also enclose letter written to me by C. A. Palmer, who was auditor of this county from 1921 to 1924, both inclusive.

As this is a matter which no doubt has been called to your department so that a general rule has been promulgated I would be pleased to have your opinion for which I thank you in advance."

Under the provisions of Section 6210 of the Code, 1924, agricultural lands within the limits of a city or town in excess of ten acres shall not be taxable for city or town purposes. This section was formerly Section 616 of the 1913 Supplement to the Code. Under Section 616 the exemption from taxation applied only to lands included in extensions or additions to the original town. Therefore, parcels of land located within the original town were subject to taxation for city and town purposes.

Section 616 was amended by Chapter 114 of the Acts of the 40th General Assembly and by this amendment, parcels of land in excess of ten acres used for agricultural purposes even though located within the limits of the city or town itself having a population of five thousand or less, were exempt from taxation for city or town purposes. This section was changed to read as provided by Section 6210 of the Code, by the 40th Extra Session.

From these statutes it is apparent, in our opinion, that if the land in question was within the original town of Waukon, the same would be taxable for county purposes, even though used entirely for purposes of agriculture up to the time of the enactment of Chapter 114 of the Acts of the 40th General Assembly, which became effective on July 4, 1923.

As to the basis of taxation from July 4th to date this tax would be computed under the provisions of the law as amended, and therefore, the exception would apply to the land, providing, of course, that the same comes within the provisions of the exception.

As to the question of your right to increase the assessment on agricultural land in accordance with the direction of the Executive Council, we feel that this is a matter which you should urge and properly present. However, in view of the fact that this land is apparently a part of the original town of Waukon and therefore not subject to the exemption up to the date of the enactment of Chapter 114, Acts of the 40th General Assembly, and also, for the reason that there is to be some litigation and controversy as to the right to raise the assessment on agricultural lands as directed by the Executive Council, we do not deem it expedient to give an opinion at this time upon this matter as we feel that the same will undoubtedly become involved in litigation and that it would, therefore, be properly a matter to be presented to the court for determination.

There is another question which I feel that you should raise and that is, that the tax in question not having been paid under protest that therefore the same cannot be now recovered by way of refund even though it appears that the same was erroneously assessed.

The provisions of Section 7233, Code, 1924, have been held to apply only to

assessments which are void or which are illegal, as made under a statute which is unconstitutional, but they do not apply to cases of assessments made by one having authority even though the assessment is in excess of the amount to which the taxpayer should have been assessed. We believe that this contention is of considerable merit and that the same should be urged in case this matter becomes involved in litigation.

NORMAL TRAINING SCHOOL INSPECTORS: Held that the law providing for normal training school inspectors not repealed and the expenses and salary of the same to be paid from appropriation for normal training schools.

July 25, 1925. *Auditor of State:* You have submitted a request for an opinion to this department which reads as follows:

"Your attention is invited to Section 40 of the so-called budget law enacted by the 41st general assembly, which reads in part as follows:

'For the superintendent of public instruction for *state aid* to public schools there is hereby appropriated for the biennium beginning July 1, 1925, and ending June 30, 1927, the sum of nine hundred nine thousand nine hundred dollars ($909,900.00), or so much thereof as may be necessary to be available as required during the biennium, for the following purposes:

For state aid to public schools:	
Normal training schools	$300,000.00
Consolidated schools	300,000.00
Standard schools	200,000.00
Rural mining camp schools	100,000.00
Normal institutes	9,900.00
	$909,900.00'

Section 2634-b4 SS 1913 and Section 2312 of the compiled code granted to the superintendent of public instruction the right to expend the appropriation made in Section 2634-b8 for the purpose of supervisory expense as well as state aid.

We desire your opinion on the following questions:

1. Is Section 2634-b4 (which has been omitted from chapter 194 of the code of 1924) still in effect and can the appropriation of $300,000.00 'state aid' to normal training schools, made by the 41st general assembly, be legally expended for supervisory expense as well as state aid, or is the office force of the superintendent of public instruction limited to the twelve people drawing the $24,100.00, annual appropriation contained in Section 39-a of the budget law?

2. If such supervisory expense is to be paid from the $300,000.00 biennial appropriation, shall it include the traveling expense of the supervisor of the normal training, or is the $10,000.00 annual appropriation for traveling expense contained in Section 39-b intended to cover all traveling expense of the employees of the department?

We will be most grateful for an early ruling on these questions, that it may not be necessary to withhold the payment of the July salaries of these people."

In regard thereto your attention is called to the provisions of Chapter 2 of Title 8, Code Supplement, 1913, and more particularly to Section 2634-b4, which provides as follows:

"The appropriation provided by this act for instruction of pupils in high schools in the science and practice of rural school teaching and the teaching of elementary agriculture and home economics, may be expended in part for inspection and supervision of such instruction by the superintendent of public instruction and by such person as he may designate, and the expense of such inspection and supervision shall be paid out of said appropriation on vouchers certified by the superintendent of public instruction. In accordance with the foregoing provisions of this section, the superintendent of public instruction is authorized to appoint an inspector of normal training in high schools and private and denominational schools at a salary of not to exceed two thousand dollars per year and necessary traveling expenses while in the discharge of his duties."

Section 2634-b8 provides as follows:

"That section nine of chapter one hundred thirty-one of the acts of the thirty-fourth general assembly be and the same is hereby repealed and the following enacted in lieu thereof:

For the purpose of carrying out the provisions of this act, there is hereby appropriated out of any moneys in the state treasury, not otherwise appropriated, the sum of one hundred thousand dollars, available for the period ending June thirtieth, nineteen hundred fourteen, and the sum of one hundred twenty-five thousand dollars annually thereafter."

The first question which it will be necessary to determine is whether or not Section 2634-b4, as above quoted, is still in force as a part of the law of this State. This section was amended by the 39th General Assembly by Section 52 of Chapter 209, Acts of the 39th General Assembly. This amendment, however, did not take away the provision for inspectors, but merely withdrew the provision relative to the payment of salary and left the payment of salary at the discretion of the Superintendent of Public Instruction. The section as amended appears as Section 2312 of the Supplement to the Compiled Code, 1923.

When the 40th General Asesmbly undertook the codification of the statutes of this State and the enactment of the Code of 1924, the only bill relative to normal training high schools which was presented by the code commission is the bill known as No. 89. The bill provides for the amendment, revision and codification of Sections 2313 and 2315 of the Compiled Code, 1919, and Section 2558-a2 of the supplement to the Compiled Code, 1923. Since the section providing for inspectors appears as 2312 of the Compiled Code and supplement thereto, it is at once apparent that the code commission bill in no manner altered or changed this section. And further, since the code commission bill was not intended and did not repeal, amend or revise the entire chapter on normal training high schools, we are of the opinion that the acts of the 40th General Assembly would not repeal Section 2634-b4 of the Code Supplement, 1913, by implication, and that the same would have to be repealed expressly by the legislature or the same would still be the law of this State.

We have made a search and do not find that this section has been repealed, and it therefore must be construed as an existing statute. The fact that it does not appear in the 1924 Code is not conclusive, in view of the fact that this code was enacted piece-meal and has never been adopted by the legislature in whole. Therefore, other statutes which have never been repealed are still in full force and effect.

Having reached the conclusion that Section 2634-b4, Code Supplement, 1913, is still in effect, we are then of the opinion that under the express language of this section, the expenses of such inspection are to be paid out of the appropriation made for normal training work. Section 40 of the appropriation Act passed by the 41st General Assembly provides for the appropriation to the Superintendent of Public Instruction and expressly appropriates $300,000.00 for normal training schools. We are of the opinion that inspectors provided for by Section 2634-b4 should be paid from this sum.

We believe that this will sufficiently answer the first inquiry submitted by you.

In regard to the second inquiry as to the expense of such supervision, we are of the opinion that such expense should be paid from the $300,000.00 sum appropriated by the 41st General Assembly for the normal training school work. Section 2634-b4 provides that "The expense of such inspection and supervision shall be paid out of said appropriation and vouchers certified by the Superintendent of Public Instruction." We believe this language clearly directs the payment of the expenses to be

made from this fund, and we are, therefore, of the opinion that both the salary of the inspectors and other expenses incidental to the work of supervision shall be paid from the $300,000.00 normal training school fund as appropriated by the 41st General Assembly.

SCHOOLS: The words "rural" as used in line 11, Section 40, Chapter 218, Acts of the 41st General Assembly, construed.

July 25, 1925. *Superintendent of Public Instruction:* You have requested the opinion of this department upon the following proposition:

"Your opinion is requested as to the meaning of the word 'rural' as it appears in line 11, section 40, chapter 218, Acts of the Forty-first General Assembly.

Webster's dictionary defines the word 'rural' to mean 'the country-of or pertaining to the country as distinguished from a city or town'.

Our interpretation of the word 'rural' in this section is that it means the mining camp schools in the country districts and not those in incorporated towns or cities."

In regard thereto you are advised that the use and interpretation of the word "rural" both in common parlance and in law is that the word "rural" means of or pertaining to the country as opposed to the city or town, and rural district is distinguishable from and should include no part of an urban district.

The definition of the word as given in Webster's Dictionary substantially agrees with the definitions found in the law lexicons. We, therefore, feel that you are justified in adopting in your interpretation of the sentence "rural mining camp schools" as used in Section 40 of Chapter 218 of the Acts of the 41st General Assembly, the same being the Appropriation Bill.

It is, therefore, our conclusion that rural mining camp schools entitled to share in the appropriation are only mining camp schools located in country districts as distinguished from districts within the limits of incorporated cities or towns.

WAREHOUSE CERTIFICATES: The holder of a warehouse certificate has a preferred claim in case the owner of the grain becomes a bankrupt.

July 27, 1925. *Secretary of Agriculture:* You have requested the opinion of this department upon the following statement of facts:

"I would appreciate receiving your early opinion as to whether the holder of a warehouse certificate has a preferred claim in case the owner of the grain becomes a bankrupt."

Chapter 427 of the Code, 1924, provides for the establishment of agricultural warehouses and for the issuance of warehouse certificates. Under the terms of this chapter, grain to be bonded must be placed in a suitable crib or bin, and the same must be sealed by the local sealer as designated by the Secretary of Agriculture. The seals and license placed upon the same are those designated by the Secretary of Agriculture and can only be opened under his authority by proper persons designated for this purpose.

Section 9767 provides for the form of certificates to be issued, describing the grain and the location of the same, the name of the owner or owners and the amount of liens or mortgages which would attach upon the grain.

By Section 9774, certificates in which it is stated that the grain stored will be delivered to the bearer or order are negotiable. By Section 9777, the assignment of any certificate by the owner thereof must be recorded, and by the provisions of Section 9783, the owner of the grain is bound unless presenting lawful excuse to deliver the grain for which the certificate is issued upon demand of the certificate holder and presentment of the certificate.

By Section 9805, all the provisions of the Uniform Warehouse Receipts Law are made applicable so far as possible to the negotiation, transfer, sale and endorsement of warehouse certificates. From this resume of the provisions of Chapter 427, it is apparent that the possession of a warehouse certificate is evidence of ownership of the grain represented thereby and that the transfer and assignment of the said certificate, lawfully made, transfers the title to the property represented by the said certificates.

We now come to the question as to the right of the holder of a warehouse certificate which has been pledged to him by the owner thereof to be preferred over other creditors where the owner of the grain becomes a bankrupt. In other words, would the pledgee of a warehouse certificate be entitled to establish his lien upon the goods as against the trustee in bankruptcy. In answering this question, it is only fair to state that Chapter 427 is comparatively new and that a warehouse certificate as therein provided, is, so to speak, a new instrument in the field of negotiable instruments law.

Therefore, we do not have any authorities squarely in point which may guide us in the determination of this question. However, in the case of *Pattison v. Dale*, 196 Federal Rep. 5, a distiller of whiskey deposited same in a bonded warehouse and was issued a receipt, which receipt he pledged as security. The court held that the pledgee of the receipt was entitled to the enforcement of his lien as against the trustee in bankruptcy. A case to the same effect is *In Re Miller Pure Rye Distilling Company*, 176 Federal Rep. 606.

In view of these decisions we are of the opinion that the pledgee of a warehouse certificate would be entitled to establish his lien as against the trustee in bankruptcy and for that reason he would have a preferred claim in case the owner of the grain became a bankrupt.

In support of this position you are further referred to the cases of *Love vs. Export Storage Company*, 143 Federal 1, and *Union Trust Company vs. Wilson*, 198 U. S. 530.

We have assumed as a part of this opinion that the pledge of the warehouse certificate was made at least four months prior to the act of bankruptcy and that the same was made in good faith and that the transaction was in no manner tainted with fraud and conspiracy.

These facts would be necessary to establish a valid claim, for otherwise, if fraud could be shown or if the transfer was made less than four months before the act of bankruptcy, the same could be set aside and would not avail again the trustee.

MUNICIPALITIES—BOARD OF HEALTH: A municipality has the right to compel the officers of an Iowa Fair to connect with the sewer and install plumbing fixtures.

July 30, 1925. *Commissioner—State Department of Health:* We desire to acknowledge receipt of your letter of July 17, 1925, asking this department to prepare an opinion upon a question submitted to this department by W. H. Rhoden, the Plumbing Inspector of Mason City, Iowa. The letter of Mr. Rhoden is as follows:

"There has a matter come up here that I will have to ask you for a decision on. The North Iowa Fair has their grounds here and are putting up a building for rest room purposes. Now there is sewer on two sides of the grounds but about 500 feet from where they are building.

They have constructed a pit about 5x12 and 7 feet deep to be used as a cesspool, with manhole for cleaning.

They intend constructing a cement trough in building for toilet purposes. No closets. Just a cement trough.

Now the opinion here is that I can't stop them as it is not a city institution. This whole proposition is contrary to the State Code, but it appears that I am unable to do anything.

Can you compel them to connect with sewer and install regular plumbing fixtures? The Secretary of the Board is Charles Barber, Chamber of Commerce Building, Mason City, Iowa. He seems to be the man in charge of the work and would be the one for you to write to if you see fit to do so."

It is the opinion of this department that officials of the county, including the officials of agricultural societies which are organized as county institutions, must observe the law and may not legally violate or disregard with impunity the health ordinances or regulations of either the State Board of Health or the local Board of Health. Any other rule would operate in such a way as to leave such officials outside of the pale of the law and would permit them to disregard all laws or regulations that are enacted or adopted for the public benefit.

We are, therefore, of the opinion that the city of Mason City has a right to compel the officials of the North Iowa Fair to connect with the sewer and install plumbing fixtures if required by a proper ordinance or health regulation of the city.

We have not overlooked the opinion of the Supreme Court of Iowa in the case of *State vs. Cameron*, reported in the 177th Iowa on page 379. This case, however, involves a criminal prosecution and is not conclusive or determinative of the question we have under consideration. We do not believe that the Supreme Court will ever hold that officials of an agricultural society, or any other officials of the county or state, may maintain a nuisance that is detrimental to the public health or that they will be immune from any regulations on the part of the public authorities that will properly protect the public from such a nuisance. In our opinion, public health authorities are not powerless to abate such a nuisance and to require such officials to comply with the law or health regulations.

FARM BUREAU: State aid paid under Section 2930 to be only in double the amount raised and not in the full amount authorized unless subscriptions warrant such payment.

July 31, 1925. *County Attorney, Fairfield, Iowa:* You have requested the opinion of this department upon the following statement of facts:

"In 1923 the Farm Bureau certified a list of 300 names of farmers who had subscribed the sum of $1,500 for that year. Thereafter the Board of Supervisors made an appropriation and paid to the Bureau the sum of $3,000. The books of the Farm Bureau show that it was not successful in collecting the sum of $1,500, from its members during the year 1923, but in fact secured only $1,005.

We have two rival farm organizations in this county and the one opposed to the Farm Bureau petitioned the Board to deduct from the appropriation this year the amount paid in excess of what the Bureau should have received in 1923. The Board requested an opinion from me, a copy of which I am enclosing. Before accepting this opinion the Supervisors wish that it be approved by your Department. If it therefore meets with your approval will you please so advise and in the event that you do not concur, also advise so that the Board may take the proper action."

In regard thereto your attention is called to the provisions of Section 2930 of the Code, 1924, which read as follows:

"When articles of incorporation have been filed as provided by this chapter and the secretary and treasurer of the corporation have certified to the board of supervisors that the organization has among its membership at least two hundred farmers or farm owners in the county and that the association has raised from among its members a yearly subscription of not less than one thousand dollars, the board of supervisors shall appropriate to such organization, from the general fund of the county, a sum double the amount of such subscription. Such sum shall not exceed, in any year, a total of five thousand dollars in counties with a population of twenty-five thousand or over, nor a total of three thousand dollars in counties with a smaller population."

Under the above section it is clear that the appropriation is to be made in a sum double the amount of each subscription raised among the members of the Farm Association where the membership exceeds at least 200 members. We think it is clearly the intent of the legislature that the appropriation is to be made for a sum in double the amount of the sum raised by way of subscription. Therefore, it is clear that the appropriation should not be made for any sum except where the same is actually raised by way of subscription by the members of the Farm Association.

We do not believe that it was the intent of the legislature to appropriate $3,000 to all such associations in counties having a population of less than 25,000, but rather to appropriate in an amount double the subscription raised in all such counties, but in no case to exceed $3,000.

STATE BOARD OF EDUCATION: A subcontractor must resort to the retained percentages and a suit against the bonding company to recover the amount that became due before the State Board of Education took over the work of completing the improvement.

July 31, 1925. *State Board of Education:* We desire to acknowledge receipt of your letter of July 29, 1925, asking this department to prepare an opinion upon the question which you have stated as follows:

"A part of a letter that the Vroman-Cook Company, Inc., Minneapolis, Minnesota, wrote to me on July 22, 1925, is as follows:

'We have the contract with the McDonald Engineering and Construction Company for the Sheet Metal Work for the Elementary and High School Building at the State University of Iowa at Iowa City. We have due and coming from McDonald Engineering and Construction Company the sum of $224.00 for work done and billed prior to the time he quit the job; and in addition to this amount we have furnished the ventilators on the job and made up practically all of the material for the job here in our shop ready to ship and install same. If we are permitted to finish our contract we can bill you for the amount of the contract and use the ventilators and materials already made up. Until we know what is going to be done about our finishing the work we cannot tell exactly what our claim is going to be that we wish you to file with the bonding company.

We have written to Mr. Fisk under date of July 16th but have not as yet heard from him. We are depending on you and the University to see that we are not forced to sustain a loss on this work.'

While the Vroman-Cook Company, Inc. may have made the contract with the McDonald Engineering and Construction Company, the contractor was the J. A. McDonald Construction Company. According to the letter, the McDonald Engineering and Construction Company owes the said Vroman-Cook Company $224.00 'for work done and billed prior to the time he (J. A. McDonald Construction Company) quit the job.'

Ventilators and certain material for the building are practically ready to be shipped to Iowa City. You will notice the following sentence: 'If we are permitted to finish our contract we can bill you for the amount of the contract and use the ventilators and materials already made up.'

My opinion is that we must not pay the Vroman-Cook Company, Inc., for any material furnished or labor performed prior to the date on which the Iowa State Board of Education commenced to complete the construction of the building. Am I correct?"

It is the opinion of this department that any sub-contractor dealing with the contractor, who was under contract to construct the elementary and high school building at the State University of Iowa, must resort to the retained percentages and a suit against the bonding company to recover the amount that became due

before the Iowa State Board of Education took over the work and commenced to complete the construction of said building.

TAXATION: In taxing the stock of an automobile dealer the average cars for the year should be assessed and not the cars on hand on the day assessment is made.

July 31, 1925. *Secretary of State:* You have requested the opinion of this department as to whether or not the tax assessor in assessing the automobiles on hand by a dealer should assess the number of cars on hand January first or should assess the average number of cars on hand during the year.

In regard thereto your attention is called to Section 6971 of the Code, which reads as follows:

"Any person, firm, or corporation owning or having in his possession or under his control within the state, with authority to sell the same, any personal property purchased with a view to its being sold, or which has been consigned to him from any place out of this state to be sold within the same, or to be delivered or shipped by him within or without this state, except a warehouseman as defined in Section 9718, shall be held to be a merchant for the purposes of this title."

Under this section it is clear that an automobile dealer could be construed as a merchant under the provisions of the taxing section.

Your attention is further called to the provisions of Section 6972 of the Code, which is as follows:

"In assessing such stocks of merchandise, the assessor shall require the production of the last inventory and enter the date thereof in the assessment roll. If, in the judgment of the assessor, the inventory is not correct, or if it was taken at such time as to render it unreliable as to the amount or value of such merchandise, he shall assess the same by personal examination. The assessment shall be made at the average value of the stock during the year next preceding the time of assessment, and if the merchant has not been engaged in business for one year, then the average value during such time as he shall have been so engaged, and if commencing on January first, then the value at that time."

You will note that the last sentence of this section requires the assessment to be placed on the average value of the stock during the year. We feel that it is entirely free from doubt that the assessor should assess the average value of the stock and not the actual stock which he finds on hand January first.

TAXATION: The county auditor has the authority to correct the tax list even though the same is in the hands of the county treasurer for collection and until the tax has been paid.

July 31, 1925. *Auditor of State:* We desire to acknowledge receipt of your letter of July 29, 1925, in which you request the opinion of this department upon the question which you have stated as follows:

"We are continually meeting questions concerning the matter of changes on the tax list by the county auditor after the lists are turned over and certified to the county treasurer for collection. Does the county auditor have the authority to change the tax lists in the treasurer's office in this way?

In several counties, the county auditor, at his own pleasure, goes into the treasurer's office and cancels taxes or adds taxes without consulting the treasurer. In some cases he clearly indicates what is done and why the entries are made, but in other cases the entries are made without any showing as to who made them or why they were made.

We contend that the auditor has no authority to make entries on the tax list after the same is certified and sent to the county treasurer for collection. Any changes originating in the auditor's office or any corrections that are to be made, we believe should be accomplished by having the auditor make a distinct certification to the

county treasurer authorizing the particular changes required and giving the reasons for making the change."

The right of the county auditor to correct assessments is granted by Section 7149 and Section 7152 of the Code, 1924, which read as follows:

"The auditor may correct any error in the assessment or tax list, and may assess and list for taxation any omitted property." Section 7149.

"If such correction or assessment is made after the books have passed into the hands of the treasurer he shall be charged or credited therefor as the case may be." Section 7152.

The right of the auditor to correct the assessments after the tax lists or books have been turned over and certified to the county treasurer for collection has been passed upon several times by the Supreme Court. It has been held by said court that the board of supervisors has a right to make the corrections even after the tax books have been turned over to the county treasurer, and the following authorities so hold:

Ridley v. Doughty, 85 Iowa, 420;
Smith v. McQuiston, 108 Iowa, 363;
First National Bank v. Hayes, 186 Iowa, 892;
First National Bank v. Anderson, 196 Iowa, 587.

In the case of *Ridley v. Doughty*, supra, the Supreme Court in discussing the question under consideration used the following language:

"The claim that the tax book is under the control of the treasurer is correct in the sense that the book is his warrant for the collection of the taxes, but he has no right to interfere with the auditor in making lawful corrections of errors therein. There can be no doubt that the auditor may correct any error in the assessment. *Parker v. Van Steenburg*, 68 Iowa 174."

The right of the county auditor, however, to make such a correction may not be exercised by such officer after the tax list has been completed, passed to the county treasurer and *the tax levy has been paid.*

First National Bank v. Hayes, supra;
First National Bank v. Anderson, supra.

The right to correct a mistake in an assessment necessarily includes the power to determine when a mistake has been made.

Fuller v. Butler, 72 Iowa 729;
Smith v. McQuiston, 108 Iowa 363.

The Supreme Court has dictated, however, that when the determination of the question as to whether or not there is a mistake depends upon the facts outside of the record, while it is within the power of the auditor to act, yet, it is wise for him to decline to do so until the matter has been passed upon by the court.

Smith v. McQuiston, 108 Iowa 363, 367.

The right, however, to make such correction should not be confused with the right to assess omitted property. The right of the county auditor to assess such omitted property is limited to the current tax list and cannot be exercised without limit as to the time.

Mead's Estate v. Story County, 119 Iowa 69;
Jewett v. Foote, 119 Iowa 359;
Thornburg v. Cardell, 123 Iowa 313.

It follows, therefore, that the auditor is vested with the right to correct the tax lists or books in the hands of the county treasurer at any time prior to the actual payment of the tax.

Considerable confusion has arisen as to the extent of the power thus vested in the county auditor to correct errors in the tax lists or books. The auditor does

not have the right to reclassify property, nor does he have the right to change the valuations. He can only correct manifest errors in the assessment.

Whenever the county auditor makes a correction in the tax lists or books he should indicate clearly on such tax lists or books at the very place where the correction is made the character of the change made, the reasons therefor, and the date. This is essential to the making of a perfect record and should not be overlooked. It is highly advisable that you issue instructions to the several county auditors and county treasurers as to the power vested in such county auditors and county treasurers to correct the tax lists or books.

COUNTY AUDITOR: County auditor is violating duty if he fails to correct the tax lists.

August 5, 1925. *Auditor of State:* You have requested the opinion of this department upon the following submitted proposition:

"We have a question in regard to transfers in the county auditor's office in which the practices in the various counties of the state are very irregular and in many cases the making of the tax list, particularly where we have an alphabetical arrangement, is done much to the detriment of the tax payer and the work in the county treasurer's office. Code of 1924, Section 10116, provides for transfer of deeds in the auditor's office before recording same in the recorder's office and in addition, it provides that they shall be entered upon the transfer books for taxation. Generally, these transfers are made on the plat and transfer books in the auditor's office but in a number of counties no attempt is made to correct the tax list to conform with the transfer showings.

"In a majority of the counties, however, the county auditor sees that all these transfers are made on the tax list that is in the course of preparation up to September 1 at least. In this way, when the tax lists are delivered to the county treasurer on December 31, nearly all the property is found shown in the name of the owner and matters of tax collection are much simplified thereby and where this is done good public service is rendered in the county treasurer's office, but where no attempt is made to correct these transfers until the time of making the next real estate assessment, particular difficulties are encountered in the treasurer's office and the treasurer is materially handicapped in any honest effort to give good public service.

"Is the county auditor properly discharging his duties if he fails to make proper entries to show the correct ownership on the tax lists?"

In regard thereto you are advised that we think it is clearly the duty of the county auditor to correct the tax lists as set forth in your statement, and that his failure to do so would be a disregard of the duties of his office.

COUNTIES—TUCK LAW: Unless the constitutional limit has been reached the Board of Supervisors may enter into contracts for the reconstruction of bridges that were destroyed by flood and issue warrants therefor.

August 5, 1925. *County Attorney, Manchester, Iowa:* We have received your letter of recent date submitting to this department the following proposition:

"During the recent flood, about one hundred bridges were washed out in this county, and considerable damage was done to the county and primary roads. The county will not have near sufficient funds to take care of this work, and the Board of Supervisors have requested me to take this matter up with your office, and get an opinion as to the proper procedure for them to take in the raising of these funds. Our County Engineer is of the opinion that your office outlined the plan, which was used in Linn County some time ago."

It is the opinion of this department that, unless the debt limit provided in the constitution has been reached, the Board of Supervisors may enter into contracts for the reconstruction of the bridges that were destroyed by the recent flood in Delaware County, and after the work is completed, warrants may be issued covering such expenditures and funding bonds may be issued in accordance with the provisions of the statute. (Section 5276 of the Code of 1924.)

The so-called Tuck Law, as amended, does not apply to expenditures for bridges or buildings destroyed by fire or flood or other extraordinary casualty. (Sections 5258 and 5259 of the Code, 1924.)

INSURANCE—FRATERNAL BENEFICIARY SOCIETY: A leasehold interest in land and the building erected thereon for a long time term is real estate within the meaning of the provisions of Section 8826 of the Code, 1924.

August 10, 1925. *Commissioner of Insurance:* You have requested an opinion from this department upon two propositions arising out of the pending negotiations between the Brotherhood of American Yeomen and the Liberty Building Company, wherein it is proposed by the Yeomen to purchase the lease and building known as the Liberty Building, located on the Southwest corner of Sixth and Grand Avenues in the city of Des Moines, said premises and building to be used as a home office.

Your first question is as follows:

"Is a leasehold interest and a building erected thereon, such as the leasehold interest and building proposed to be purchased by the Brotherhood of American Yeomen, such real estate as authorized by Section 8826 of the Code of Iowa, 1924, in which fraternal beneficiary societies may legally invest their legal reserve funds, or any other funds accumulated by such societies for the fulfillment of its certificates or life contracts?"

Section 8826 of the Code, 1924, provides as follows:

'Any fraternal beneficiary society, order, or association organized under the laws of this state, accumulating money to be held in trust for the purpose of the fulfillment of its certificates or contracts, shall be permitted to invest not to exceed ten per cent of the aggregate amount of such accumulation in such real estate in this state as is necessary for its accommodation as a home office, and in the purchase or erection of any building for such purpose it may add thereto rooms for rent; provided that before any association shall invest any of its funds in accordance with the provisions of this section it shall first obtain the consent of the executive council."

The only question presented, assuming that all of the other requisites have been complied with, is whether the lease on the land on which the building is erected, together with the building thereon, which was built by the lessees, and which lease is a long time lease running for some ninety-four or ninety-five years, are "real estate" within the meaning and purview of this statute. In the first place, it will be noted that the Legislature of Iowa has defined what the term "land" and the term "real estate" shall mean when used in the statutes. In Section 63, subparagraph 8, the term is defined as follows:

"The word 'land' and the phrases 'real estate' and 'real property' include lands, tenements, hereditaments, and all rights thereto and interests therein, equitable as well as legal."

It seems to us that there can be no question but what the term "real estate" as defined in the statute would include a leasehold interest in the land in question, especially in view of the exceedingly long time yet to run before the expiration of the lease.

The Legislature has gone still farther on the question and has specifically provided in Section 6959 of the Code, 1924, that buildings and fixtures erected on real estate held under a lease of longer than three years' duration shall be assessed as real estate. There is no question but what the leasehold interest in the building

involved in the proposition submitted by you should be taxed as real estate under this statute.

We have reviewed a number of the similar statutes in other states wherein the term "real estate" is defined and extended so as to include all sorts of rights and interests, equitable as well as legal, in land and find that the courts of last resorts in said states have uniformly held that a long time lease under such statutes is real property or real estate. We shall not review these cases generally but will be content with citing *Baker v. State*, 118 N. Y. Supp. 618, 620.

It is therefore the opinion of this department, in answer to the first proposition submitted, that the lease referred to, together with the building erected upon the land covered by the lease known as the Liberty Building should be considered as real estate and as belonging to the classification referred to in Section 8826 of the Code.

Your second question is as follows:

"In the event the American Yeomen purchases said leasehold interest and the building erected thereon, are they such real estate authorized under Section 8828 of the Code of Iowa, 1924, as may be legally conveyed to the commissioner of insurance by a trust deed and held by the commissioner of insurance for the purpose of covering the legal reserve upon life contracts, issued by the Brotherhood of American Yeomen, which reserve is required by statute to be invested in certain prescribed securities and deposited in this department?"

Section 8828 of the Code, 1924, referred to, provides as follows:

"Any company or association so investing its funds shall convey the real estate thus acquired to the commissioner of insurance by deed, such property to be held by him in trust for the benefit of the members of such association, the value thereof to be determined from time to time by the commissioner."

In view of what we have said in answer to your first proposition, it must necessarily follow that you would be authorized to accept a trust deed covering the premises in question from the American Yeomen in accordance with the provisions of Section 8828 and that such would be considered the same as though the real estate and the buillding were being purchased outright in fee-simple by the American Yeomen.

ANIMALS: If the provisions of the statute are complied with relative to the possession of fur during the closed season, it may be disposed of on the market.

August 11, 1925. *State Fish and Game Warden:* This department is in receipt of your letter dated August 4, 1925, which letter is in words as follows:

"Will you please give us your construction of Section 1766-a1?

The law seems plain as to the possession of fur bearing animals, their carcasses or skins during the closed season, providing the proper affidavit has been filed during the first ten days next succeeding the close of the season. We believe the intent of the legislature in making this provision was to permit the holding of furs, etc., until a propor market price could be obtained, however there seems to be no provision covering the shipment or sale of the above during that period."

You are advised that if the provisions of the statute are complied with relative to the possession of fur during the closed season, I see no reason why the fur cannot be disposed of. The purpose and intention of the law is to prevent the taking of fur during the closed season.

STATE PARKS: Board of conservation has right to improve roads through state parks. Executive council can purchase highways to connect state parks with state public highways.

August 12, 1925. *State Board of Conservation:* We have received your letter of July 13, 1925, embodying the following resolution which was unanimously adopted by the Board of Conservation at a meeting held July 10, 1925:

"Whereas, the following report has been received from Mr. M. L. Hutton of the Highway Commission, in regard to the road to be built at Pilot Knob State Park. 'When we made our survey, one entrance was already constructed and our plan provided for the construction of two of the three remaining entrances. The south entrance we did not provide for because we did not believe the cost was justifiable, and furthermore, there was no existing road to this entrance.'; therefore, be it

RESOLVED, that Mr. W. C. Merckens, Secretary of the Board be instructed to take this matter up with the Attorney General, and ascertain his opinion as to whether or not it will be necessary for the Board of Conservation to have the approval and acceptance of this highway by the Board of Supervisors in Hancock County, at Pilot Knob State Park, before the Board may complete and dedicate same."

As we understand your request, the State Board of Conservation desires to purchase or secure by condemnation a road leading to the Pilot Knob State Park, and that said road is outside of and not a part of the legally established state park.

The State Board of Conservation is empowered to improve roads through state parks. It may act without any action on the part of the board of supervisors. It is highly advisable, however, whenever such action is taken to adopt a proper resolution and to file with the county auditor a copy thereof, to the end that there may be a record in the county of the establishment and improvement of the road through a state park.

The Executive Council is further vested with power to purchase or condemn highways connecting state parks with other public highways. In this connection, your attention is invited to the provisions of Section 6, Chapter 33, Acts of the 40th General Assembly. This section is in words as follows:

"The Executive Council may, upon the recommendation of the board, purchase or condemn highways connecting such parks with the public highways. When such highways have been purchased or condemned the same shall be public highways of this state and shall be maintained as other public highways of the county."

In addition to the right thus vested in the Executive Council, the power to establish public highways as vested in the board of supervisors, would authorize such board of supervisors to establish a public highway in the regular manner.

Before leaving this subject, may I suggest that whatever the action be, a copy of the resolution establishing the road should be filed with the county auditor to the end that there may be a record in his office.

LEGAL RESIDENCE—WIDOW'S PENSION: Discussion of legal residence under Widow's Pension Law.

August 14, 1925. *County Attorney, Spencer, Iowa:* You have requested the opinion of this department on a proposition arising under the provisions of Section 3641 of the Code and involving the definition of the term "legal residence" as there used. You state that a widow was allowed a pension for the care of her child on January 28, 1924 and that she was paid said pension up to and including August 18, 1924. It appears that on June 2, 1924 she advised the county auditor to send the pension to her at Osage in Mitchell County, Iowa, which was done. Later, and on September 12, 1924, she advised the county auditor that she had changed her residence from Clay County to Mitchell County. You state further that on July 20, 1925 she was allowed a similar pension by the Court in Mitchell County and that under the statute she must therefore have claimed her residence in Mitchell County from July 20, 1924. You state that she is demanding that Clay County

pay her the pension up to July 20, 1925, or a year after she had left the county. Your proposition then is as to the liability of the county to pay the pension as demanded.

It has been generally accepted that the question of the legal residence in a particular case is dependent entirely upon the facts and circumstances involved. A resident is generally understood to be any person who is physically present at a place and is there with the intention of making that place his residence. A resident might also be absent for a period of time from the place of his residence and might in fact under certain circumstances be living at another place but still hold and continue his residence at the first place. In order to abandon a residence the party must leave that place with the intent either at that time or a later time, to abandon it as his residence. So in every case the matter will have to be determined from the conduct and statements of the party concerned and facts surrounding the case.

Under the provision of Section 3641, before a widow can receive the pension therein provided it must appear that she has been a resident of the county for one year preceding the filing of the application. Under the facts submitted you state that the widow in question left your county and filed an application for a pension from Mitchell County which was allowed on July 20, 1925. It must necessarily follow then that the Court found she had established her residence in Mitchell County one year prior thereto, or from July 20, 1924. Having therefore abandoned her residence in Clay County on July 20, 1924, it must necessarily follow that Clay County is not obliged to pay a pension to a non-resident of the County and she therefore cannot expect Clay County to pay her a pension after July 20, 1924. It appears from your statement that your county has already paid her up until August 18 1924 or approximately four weeks more than she was entitled to. The latter part of Section 3641 specifically provides that no payment shall be made if the mother has acquired a legal residence in another county.

TRAVELING EXPENSES: Traveling expenses of the members of the Board of Health to be paid from general appropriation.

August 17, 1925. *Auditor of State:* This department is in receipt of your letter dated August 10, 1925, in which you request an official opinion. Your letter is in words as follows:

"Is it your opinion that the biennial appropriation made by the forty-first general assembly at sub-section (b) of Section 24 of chapter 218, for traveling expense of the department of health is intended to include the traveling expense of the members of the *board?* You will notice there is $3,700 appropriated in line 41 on page 212, and $6,000 appropriated in line 48. There is also an unlimited appropriation contained in section 2226 of the code, for the members of the board. We are doubtful whether the code appropriation is repealed by the budget law, or whether the budget law merely provides for the traveling expense of the *department.*

A similar situation exists with reference to the board of education. That is, is the appropriation contained in Section 3941 of the code replaced by the appropriation made in line 25 of page 207 of the budget law?"

You are advised that the traveling expense of the members of the board would be paid from the general appropriation referred to by you. The members of the board of health must be distinguished from the commissioner of health and his assistants.

SCHOOLS—Warrants issued against certain funds which are due the school district under the Brookhart-Lovrien Bill on account of funds lost in a defunct bank are legal.

August 17, 1925. *County Attorney, Waverly, Iowa:* You have requested the opinion of this department upon the following proposition:

"The Frederika School District had $17,117.73 in the Frederika Bank when it closed May 29, 1925. A claim has been filed by the School District for this amount, allowed by the District Court, passed as O. K. through your office and certified by the State Superintendent of Banking to the Treasurer and Secretary of State.

Of the above mentioned deposit $11,972.17 consists of the school house building fund and the balance or $5,145.56 being in the general fund. By virtue of Section 5160 of the 1924 Code of Iowa the Board of School Directors of the Independent School District of Frederika intend to issue school warrants for the completion of the school house, now in the process of building, as per contract, and also for the purpose of paying its teachers. The warrants are to be endorsed as follows: 'Presented for payment this.....day of....., 1925, and not paid for want of funds.' The warrants are to be then cashed by a local bank and the money secured thereon used as above stated. The warrants are to be taken up and paid by the Independent School District of Frederika as soon as the Treasurer of State creates sufficient funds in the sinking fund for it by virtue of Chapter 173 of the Acts of the 41st General Assembly to be paid to the Independent School District of Frederika the sum of $17,117.73, which is the full amount of the claim.

In the issuing of bonds to the extent of $30,000.00 recently the Independent School District of Frederika, is near to its legal limit of indebtedness. The question that now arises is—can the district legally issue these warrants under the circumstances?"

You are advised that it is the opinion of this department that the warrants may be issued on the respective funds as described in the above statement and that the same will not be considered as incurring additional indebtedness within the meaning of the statute prescribing the limit of indebtedness which may be incurred by school districts. The money is already a part of the assets of the district but is not in usable form and the issuing of warrants against this money cannot therefore be considered as incurring indebtedness.

EXECUTIVE COUNCIL: Term "Custodial Engineer" construed.

August 18, 1925. *Executive Council:* This department is in receipt of your letter dated August 14, 1925, in which you request an official opinion. Your letter is in words as follows:

"At a meeting of the Executive Council held on August sixth, Mr. Ed. Tam was appointed 'Custodial Engineer,' under Chapter 218, Section 12, of the Acts of the 41st General Assembly.

The 1924 Code, under Section 272, states that 'The Council shall appoint a Custodian of Public Grounds, etc.'

An opinion is requested from your department, as to whether or not the Custodial Engineer appointed shall also be appointed as Custodian, and in the performance of these duties, if he shall be required to sign all payrolls, and requisitions for supplies. If you will note in the index of the Code, under the head of 'Custodian,' it states 'Appointment, Bond, Term, 272, 1063 (8),' reference is made to this particular part of the Code, but if you will note under Chapter 17, no reference is made to bond."

You are advised that the term "Custodial Engineer" as used in Chapter 218, Section 12, Acts of the 41st General Assembly does not mean the same as "Custodian" within the meaning of Section 272 of the Code, 1924.

The question as to whether or not you want to impose the duties of Custodian upon the Custodial Engineer is one for you to determine. In my judgment, you have a perfect right to do so.

MOTOR VEHICLES—Notice required under Sec. 2010 of the Code must be signed by a magistrate.

August 18, 1925. *County Attorney, Rock Rapids, Iowa:* You have requested the opinion of this department upon the question of whether or not the County Attorney may sign the notice required under the provisions of Section 2010 of the Code. It

will be observed that Section 2010 of the Code, 1924, contains the provisions relative to procedure to be followed in forfeiting a motor vehicle in connection with the violation of the liquor laws. It provides specifically that the notice of hearing of forfeiture shall, in addition to the service provided in Section 1973, be published once a week for two weeks in some newspaper published in the city or county in which the conveyance was seized in addition to mailing a copy to the Secretary of State.

It will be observed that in the first part of Section 2010 it is provided that the procedure for the forfeiture of the said motor vehicle shall be the same as provided for the forfeiture of intoxicating liquor seized under search warrant, with the exception of the additions required in the section. The chapter on the seizure and forfeiture of liquor provides in Section 1972 what the notice of hearing shall contain. It provides also that the said notice must be signed by the magistrate. Therefore, by direct reference the provisions of Sections 1972 and 1973 are made a part of Section 2010 and must be followed insofar as applicable to the procedure outlined in Section 2010.

CIGARETTES—Sales of cigarettes from automobiles without a permit are not permitted under the law.

August 19, 1925. *Treasurer of State:* This department is in receipt of your letter dated August 16, 1925, in which you enclose a letter received from Myers-Cox Company of Dubuque, Iowa, dated August 13, 1925. For convenience I quote both letters at length. They are in words as follows:

"Hon. Ben J. Gibson,
Attorney General,
Building.
Dear Sir:

Several days ago a representative of the Myers-Cox Company of Dubuque and myself, called at your office relative to the sale of cigarettes from an automobile at the time order is received for same.

Since our interview with you I have received a letter from the company, setting out the facts incident to the plan desired to be used in making the deliveries, and I will ask that you furnish this department with an opinion as to whether or not sales can be made as requested in their letter, which is enclosed herewith.

Thanking you for your early attention to this matter, I remain

Very truly yours,
R. E. Johnson,
Treasurer of State."

"R. E. Johnson, Treasurer of State,
Des Moines, Iowa.
Dear Mr. Johnson:

The writer will at this time express appreciation of the attention and courtesy you extended on my visit to your office last week.

Agreeable to your request, we will recite briefly a confirmation of the subject taken up with you with reference to handling cigarettes in this state.

As a general tobacco product distributor operating over this state entirely, we have deemed it advisable, and necessary to give proper service to the trade, and in competition with the local jobbers in various points of the state, that we would carry our merchandise in our automobiles for delivery upon sale.

You can appreciate this plan as well relieves us or the retail merchant a considerable saving in time and expense, as on this plan, the transaction is completed on the first call with saving of carrier charges and avoiding delay in the usual course of business of submitting an order for later shipment or delivery.

As explained in person, we believed it in line for us to take up the subject with you, realizing that the State of Iowa is interested only in securing the proper revenue on sales of cigarettes to be made.

You will recall we explained that we have an opportunity of accepting the exclusive sale agency for distribution of a heavily advertised brand of cigarettes,

which is being sold, extensively and profitably, by a controlled dealer in Illinois, one in Michigan and one in Wisconsin and with this opportunity for us to operate in Iowa and as we would expect, profitably, and necessarily must act as an exclusive agent, therefore, to compete with the sale of other established brands of cigarettes, we will be required to give the same service to the trade as we are giving in other lines of merchandise.

Therefore, if we can be permitted to handle the cigarette by placing the same in our car, operating under our license and permit to sell, making deliveries on orders as taken, delivering and selling only to dealers who have a license and permit for resale, then we believe the new cigarette can be made a popular brand in this State and if we are successful, it will follow the revenue to the State will be increased and after all it seems to us a question only if our law makers intend that we should take an order today and deliver it tomorrow instead of taking an order today and deliver it at the same time.

You will recall that I was aversed to submitting the proposition by letter, realizing the difficulty in covering the ground sufficiently and we hope you will, therefore, excuse the extensive detail we have covered in placing this subject by letter with you and if referred to the Attorney General, we trust he will recall our conversation on the subject and that he will be able to make an interpretation or ruling to permit sales of cigarettes from automobile by a licensed dealer and to retail dealers holding a permit to re-sell and in every way complying with the wording and spirit of the law.

Yours very truly,
Myers-Cox Co."

You are advised that the situation presented is no different from that presented at the time this department rendered its opinion dated May 19, 1921. Sales of cigarettes from automobiles without a local permit, whether wholesale or retail, are not permitted under the laws of this state.

The legislature at the time it re-enacted the statute in question had before it the opinion of this department relative to this very proposition. It did not see fit to change the law. Therefore in the re-enactment of the statute, the interpretation given by the department became a part of the law.

BOARD OF CONSERVATION: An island which has washed away and later reappears, belongs to the State.

August 19, 1925. *Iowa State Board of Conservation:* This department is in receipt of your letter dated August 18, 1925. Your letter is in words as follows:

"The Board of Conservation leased an island in the Iowa River to Mr. H. L. McRoberts of Columbus Junction, Iowa.

"After this island had been leased, one Alonzo Nelson filed a complaint in this office to the effect that the island belonged to him.

"I had the County Engineer of Louisa County try and locate this island whether or not it belonged to Mr. Nelson. I am now in receipt of a letter from the County Engineer, in which he states the following:

"'The island described in Mr. Nelson's deed does not correspond to what is known as Mallard Island, but Mr. Nelson claims that this is the same island but has washed down stream. He has affidavits to prove this statement.'

"Kindly inform me whether or not a piece of ground which has left its premises and has moved to another section in the river still belongs to the original owner?"

As we understand this situation, the island in question was washed away and has re-appeared down stream. This being true, the new island, for such it is, is the property of the state. Title to all islands appearing in a navigable stream or lake is in the state.

BOARD OF EDUCATION: Held that the law contained in Chapter 173 and Chapter 174, Acts of the 41st General Assembly applies to state funds which have not passed out of the control of the treasurer of state.

August 20, 1925. *Iowa State Board of Education:* This department is in receipt of your letter dated August 19, 1925. Your letter is in words as follows:

"The purpose of this letter is to ask you whether or not chapters 173 and 174, Acts of the Forty-first General Assembly, apply to the institutions that are under the control and supervision of the Iowa State Board of Education.

I want to thank you in advance for the information."

The law as it is contained in Chapters 173 and 174, Acts of the Forty-first General Assembly, applies to state funds which have not passed out of the control of the Treasurer of State. If the funds referred to by you have passed out of the control of the State and are under the control of the several institutions in question and under the sole supervision of your board, then it will be necessary for your board to protect itself by proper security.

WORKMEN'S COMPENSATION: The language of Section 1386, Code, 1924, cannot be construed so as to give it a retrospective effect and does not apply to claims for compensation that occur prior to its taking effect. Neither does the general statute of limitations apply to workmen's compensation which are specialties.

August 20, 1925. *Industrial Commissioner:* We wish to acknowledge receipt of your request for an opinion from this department, which is in substance as to whether or not Section 1386, Code, 1924, applies to claims for compensation which accrued prior to the time this section became the law; and if not, whether the provisions of Section 11007, Code, 1924 (the general statute of limitations) applies to claims filed under the Workmen's Compensation Law, as contained in Chapter 70, Code, 1924.

Section 1386, supra, was enacted by the Fortieth Extra General Assembly of Iowa, as a part of House File No. 42, and became effective in its present form as part of Chapter 70, Code, 1924, upon the 28th day of October, 1924. The statute referred to is as follows:

"No original proceedings for compensation shall be maintained in any case unless such proceedings shall be commenced within two years from the date of the injury causing such death or disability for which compensation is claimed."

House File 42, Fortieth Extra General Assembly, is entitled:

"An act to amend, revise and codify Chapter Three (3) of Title Five (5) of the compiled Code of Iowa, as amended by Sections Eight Hundred Twenty-three a one (823-a1), Eight Hundred Thirty-two (832) and Eight Hundred Forty-three (843), of the supplement to said Code, relating to employers' liability and workmen's compensation."

Prior to the revision of the so-called Workmen's Compensation Law, there was no statute limiting the time within which proceedings for compensation might be maintained, unless it can be said the provisions of the general statute of limitations apply.

The proposition, therefore, as presented by you, requires us to determine whether or not the limitations imposed for the commencement of proceedings for compensation in Section 1386 are retroactive and thus applicable to claims which accrued prior to the taking effect of this statute.

Statutes, as a general rule, are construed so as to be given only a prospective operation, unless the intention of the legislature to make them retrospective in effect is expressly declared or necessarily implied from the language used in the statute itself; and in all cases of doubt, it must be solved against the retrospective effect. This general rule of statutory construction is applicable to statutes of limitation as well as to other statutes. (25 Cyc. 991.) The courts have generally held that a

statute limiting the time for bringing actions is not to be given a retrospective effect.

Birmingham v. Lehigh & W. B. Coal Co., 95 Atl. (N. J.), 242;
Baur v. Court of Common Pleas, 95 Atl. (N. J.), 627;
State ex rel. Anderson v. General Accident etc. Insurance Co., 158 N. W. (Minn.), 715.

The Supreme Court of New Jersey in the cases cited, held that a claim for compensation under the Workmen's Compensation Act was not barred by an amendment to that act fixing a limit of time within which actions might be brought for compensation where the accident occurred before the amendment, and even after the limit as fixed thereby had expired when the petition was filed.

It is the rule in this state that statutes are not to be given a retrospective effect The Supreme Court of this State saying in *Thoeni v. City of Dubuque*, 115 Iowa, 482, at 484:

"Nor will a statute of this kind be given retroactive effect, unless it appears by express provision or necessary implication that such was the legislative intent. (Citing cases) * * *

"Code, section 1050, went into effect October 1, 1897. Plaintiff's cause of action having accrued in August, 1896, it was manifestly impossible to comply with the provisions of said section; and to hold that plaintiff is bound by the amendment is to take away from him at once all remedy. Appellant seeks to avoid the force of this objection by the suggestion that although more than three months had already elapsed after the cause of action accrued, and before the code became effective, yet for the purposes of this case, the time must be considered as beginning to run with the advent of the code (October 1, 1897), and, having failed to begin his action within three months thereafter, his right is barred. It is sufficient answer to this argument to say that such is not the language of section 1050, upon which counsel relies, and to give it any such interpretation requires us to read into the act of the legislature a meaning which is neither expressed nor necessarily implied."

The language of Section 1386, Code, 1924, cannot be construed so as to give it a retrospective effect; neither is it to be implied from the language of this section, or from the title to the act of which it is a part.

We are, therefore, of the opinion that the provisions of Section 1386, Code, 1924, are not to be given a retrospective effect and do not apply to claims for compensation that accrued prior to its taking effect.

We next turn to the question as to whether or not the general statute of limitations of this State, as contained in Section 11007, Code, 1924, applies to claims for compensation under the provisions of the Workmen's Compensation Law. (Chapter 70, Code, 1924).

If the claim to compensation is a specialty, then the general statute of limitations most certainly does not apply. The test as to whether or not the claim is a specialty is whether, independent of the statute, the law implies an obligation to do that which the statute requires to be done, and whether independently of the statute such a right exists. (Wood on Limitations, 4th Edition, Vol. 1, Section 39). We do not believe it can be contended that a like right to compensation on the part of an employe would exist against his employer, were it not for the statutes of this state giving such right. Therefore, the claim for workmen's compensation is a special proceeding analogous to the proceeding to assess damages for the taking of private property by a railway company for use as a right-of-way. The Supreme Court of this State has held in Hartley v. Keokuk & Northwestern Railway Company (85 Iowa, 455), that the provisions of the general statute of limitations do not apply to special proceedings,—as for instance, proceedings to assess damages for the taking of land for a railway right-of-way. This ruling has been followed by the

Supreme Court of Iowa in *Gates v. Railway Company* (177 Iowa, 690, 715), wherein the Hartley case is quoted with approval. The courts have universally held, and we believe without exception, that the general statute of limitations does not apply to specialties or to special proceedings. (Angell on Limitations, 6th Edition, page 80; Wood on Limitations, 4th Edition, Vol. 1, Sections 36 to 40).

We are, therefore, of the opinion that the general statute of limitations, as contained in Section 11007, Code, 1924, does not apply to claims for workmen's compensation.

SCHOOLS: The wife of a school director may legally contract with the board to operate a school bus.

August 21, 1925. *Superintendent of Public Instruction:* We wish to acknowledge receipt of your favor of the 14th requesting the opinion of this department on the following proposition:

"May the wife of a school board member legally contract to operate a school bus, receiving compensation for same from district funds?"

Section 4376, Code, 1924, providing for the transportation of children, reads:

"When there will be a saving of expense and children will also thereby secure increased advantages, the board may arrange with any person outside the board for the transportation of any child to and from school in the same or another corporation, and such expense shall be paid from the general fund."

Under the laws of this State a married woman is entitled to receive the wages for her personal work or labor and to maintain an action therefor in her own name, and to hold the same in her own right, the same as if unmarried. Section 10461, Code, 1924.

Under the provisions of Section 4376, quoted above, the only limitation placed upon those who may contract for the transportation of children is that such person must be "outside the board". A married woman being entitled to her own earnings and a person "outside the board" of school directors, we are of the opinion that she could legally contract to operate a school bus and receive pay therefor from district funds, even though her husband be a member of the Board of Directors of that district.

SMALL LOANS: A person making small loans under the provisions of the Small Loan Act, and whose license is revoked or expires may collect interest upon loans made during the life of his license but which mature subsequent to its expiration. Legality of the contract being determined by law at the time it is made.

August 22, 1925. *Superintendent of Banking:* I wish to acknowledge receipt of your favor of the 18th requesting our opinion upon the following proposition:

"May a commercial lender licensed by the state under the Small Loan Act of 1921, collect interest at 3½% on notes executed during the life of his license, but maturing after the expiration of the license year, or after the surrender of his license?"

Chapter 419, Code, 1924, contains the provisions governing loans of less than $300.00, and Section 9420 thereof reads:

"Every person, co-partnership, and corporation licensed hereunder may loan any sum of money not exceeding in amount the sum of $300.00, and may charge, contract for, and receive thereon interest at a rate not to exceed 3½ per cent per month."

The section quoted is an exception to the general statute fixing the maximum rate of interest upon contracts at 8 per cent per annum, Section 9406, Code, 1924.

A promissory note is a contract or agreement by which the maker binds himself to pay a fixed sum at a definite and certain date. Contracts are governed by the law in existence at the time of their execution, and in the case presented by you the notes given to a commercial lender, under the provisions of Chapter 419, Code, 1924, and at the time such lender was licensed under its provisions, would be governed by the law at the time the contract was made. The interest provided therein of 3½ per cent being legal at the time the contract was made, could not by reason of the lender's surrendering his license subsequently, make the contract illegal. The authorities all hold that the character of a contract with respect to usury is determined as of the time it is made; and if it is then legal, it cannot be rendered illegal or usurious by subsequent transactions. (39 Cyc., 918).

We are, therefore, of the opinion that the interest rate of 3½ per cent on such contracts may be collected after the license of a commercial lender has expired, or after it has been surrendered by him, in the event such obligations mature subsequent to the expiration of his license or its surrender.

CHILD PLACING: Under the definition of the word "person" or "agency" used in section 1 of Chapter 182, Code, 1924, as amended, include all individuals as well as institutions, etc., to place children for adoption, and they are placed under the supervision of the Board of Control, and must obtain a license before they can place children. A police matron must comply with these provisions.

August 24, 1925. *Superintendent, Child Welfare Department:* We wish to acknowledge receipt of your favor of the 18th requesting the opinion of this department. Your request in substance is as to whether or not a police matron has authority, under the law at this time, to place children in homes for adoption without first procuring a license from the Board of Control.

Section 5659, Code, 1924, fixes the duties of police matrons. This section is as follows:

"Police matrons shall have charge of all the women and children under arrest, accompanying to court such as may require such aid. They shall be subject to the authority of the marshal and the rules and regulations prescribed by his authority, and in stations, when on duty, shall be subject to the authority of the officers in command. In cities where workhouses are established for the detention of women, or where there are houses of detention, they shall have at all times the right of entering such establishments, and shall visit them whenever in their judgment such visits may be necessary. A suitable place shall be provided for the police matrons, when not on duty, for rest and refreshment."

It is to be noted that there is no provision in this section or elsewhere in the code, specifically authorizing the police matron to place children in homes or other institutions for adoption. She has charge of all women and children arrested, but only in the capacity of an officer charged with their safe-keeping.

Chapter 80, Laws of the 41st General Assembly, amends and repeals a number of the sections contained in Chapter 182, Code, 1924, concerning child-placing agencies. Section 1 of this Chapter is as follows:

"The words 'person' or 'agency' where used in this act, shall include individuals, institutions, partnerships, voluntary associations and corporations other than institutions under the management of the Board of Control or its officers or agents. Any agency, public, semi-public or private, which represents itself as placing children, permanently or temporarily in private family homes or as receiving children for such placement, or which actually engages, for gain or otherwise, for such placement, shall be deemed to operate a child-placing agency."

Section 2 of this chapter requires a license for any 'person' or 'agency' that places children. The latter part of this section reads as follows:

"* * *. No person shall conduct a child-placing agency or solicit or receive

funds for its support without an unrevoked license issued by the Board of Control within the twelve months preceding to conduct such agency. No such license shall be issued unless the person applying shall have shown that he and his agents are properly equipped by training and experience to find and select suitable temporary or permanent homes for children, and to supervise such homes when children are placed in them, to the end that the health, morality, and general well-being of children placed by them shall be properly safeguarded. * * *"

This chapter further requires a showing before a license will be issued, provides for reports and inspection and for the enforcement of the provisions thereof.

Under the definition of the words "person" or "agency", contained in Section 1, hereinbefore quoted, it is plain that the act includes within its provisions all individuals as well as institutions, partnerships, etc., who place children in homes for adoption. It was clearly the intention of the legislature to place such individuals or associations under the supervision of the Board of Control; and all individuals or associations not already under the supervision of the Board of Control must obtain a license and submit to its supervision before they can place children for adoption.

There is nothing in the statutes concerning the duties of a police matron, as we have pointed out, that give her any greater rights than other individuals in respect to the placing of children for adoption. We are, therefore, of the opinion that a police matron before she can legally place children for adoption, must procure a license from the Board of Control, and submit to its supervision under the requirements of Chapter 80, Laws of the 41st General Assembly.

This opinion is not to be construed as applying in any way to the jurisdiction of juvenile courts to place children.

HIGHWAYS—WEEDS: In event a railway right of way is obtained subsequent to the establishment of a highway and thus no part of the land used and occupied as a railway right of way was taken for the highway, the railway company is not required to cut or destroy the weeds outside of its right of way. The owner of land abutting upon a highway is required to cut and destroy noxious weeds in the highway to the line to which his land would extend in case no highway existed.

August 24, 1925. *Iowa State Highway Commission:* We wish to acknowledge receipt of your favor of the 17th requesting the opinion of this department upon the following proposition:

"We have had a question come up to us from several counties in regard to the responsibility of railroads for cutting weeds along their right-of-way. The question is 'If a railroad right-of-way lies adjacent to the highway, is it the duty of the railroad company to cut the weeds in the highway from their right-of-way line to the center line of the highway, or should the property owner adjacent to the other side of the highway cut all of the weeds on the highway right-of-way?'"

Chapter 246, Code, 1924, as amended, defines certain weeds as noxious weeds, and it is therein provided that such weeds shall be destroyed. Section 4819, Code, 1924, reads in part as follows:

"Each owner and each person in the possession or control of any lands, including railroad lands, shall:

1. Cut, burn, or otherwise destroy all noxious weeds thereon, as defined in this chapter, * * *

2. Cause all weeds on the streets or highways, adjoining such lands to be cut and destroyed in the manner and at the time prescribed by the Board of Supervisors.* * *"

Section 4820, Code, 1924, limits the duty imposed as follows:

"The duty of one who owns, controls, or occupies land to destroy weeds within a public highway, shall only extend to the line in the highway to which the abutting line would extend in case no highway existed."

In view of the sections we have just quoted, it is apparent that the manner in which the railway right-of-way was obtained is important. It is also material whether or not the highway was established subsequent to the acquisition of the railway right-of-way; and if so, whether or not the land used as a highway was taken in whole or in part from the land acquired for the railway right-of-way.

We shall assume for the purpose of this opinion that the railway right-of-way was obtained subsequent to the establishment of the highway, and that therefore no part of the land used and occupied as a railway right-of-way was taken for the highway. With this state of facts in mind, the provisions of Section 4820, supra, are controlling and the duty to destroy noxious weeds would not require the railway company to cut weeds outside of its right-of-way. The owner of abutting land on the opposite side of the highway would be required to cut or destroy the noxious weeds in the highway to the line in the highway to which his land would extend in case no highway existed. This land would no doubt in most instances be the line of the railroad right-of-way.

This opinion is to be strictly construed and is applicable only to the facts herein stated.

SCHOOLS: It is essential to have the concurrence of the county superintendent before the boards of school corporations may attach or restore certain territory. If the county superintendent refuses to concur an appeal may be taken to the Superintendent of Public Instruction.

August 24, 1925. *County Attorney, Clinton, Iowa:* We wish to acknowledge receipt of your favor of the 21st requesting our opinion upon the following proposition:

"Will you please give me a written opinion as to the interpretation of Section 4132 of the Code? The facts over which the dispute has arisen are as follows:

"The Lyons Independent School District and a part of Spring Rock Township have been under the one independent district for some time past. The Spring Rock people decided to separate from the Lyons School District and have made their written application and appeal to the County School Superintendent after having secured two thirds of the electors residing in the territory whose names are attached to the petition asking for this separation.

"The School Board of the Independent Lyons District have refused to accept this application. The County Superintendent does not see fit to concur with the Spring Rock Citizens in their application for the separation. The County Superintendent believes that it is best for the interest of the school children to be and remain in one district as it is at present.

"What we wish your opinion upon particularly is whether or not the lack of the county superintendent's concurrence will hold the matter up and what the Spring Rock people will have other than an appeal to the State Superintendent of Schools after they cannot secure the consent of the County Superintendent in this separation."

Section 4132, Code, 1924, referred to by you reads as follows:

"Where territory has been or may hereafter be set off to an adjoining school township in the same or another county, or attached for school purposes to an independent district so situated, it may be restored to the territory to which it geographically belongs upon the concurrence of the respective boards of directors, and shall be so restored by said boards upon the written application of two-thirds of the electors residing upon the territory so set off or attached, together with a concurrence of the county superintendent and the board of the school corporation which is to receive back the territory."

It will be noted from a reading of the section quoted that the territory may be restored upon the concurrence of the respective Boards of Directors, and if

such concurrence is not obtained the territory is to be restored by the boards upon the written application of two-thirds of the electors residing upon the territory so set off or attached, together with the concurrence of the county superintendent and the board of the school corporation which is to receive back the territory. Thus the concurrence of the county superintendent is essential before the boards can be compelled to turn back the territory. If the county superintendent refuses to concur in the application, then an appeal may be taken to the State Superintendent of Public Instruction, under the provisions of Section 4302, Code of 1924. We do not know of any other right to which those affected may resort in the case presented by you, except appeal, and until the appeal is perfected and decided, if the two boards do not concur, the territory cannot be returned.

ELECTRIC TRANSMISSION LINES: Board of Railroad Commissioners has power to cancel charter of transmission line company which violates law and persists in the violation.

August 25, 1925. *Secretary, Board of Railroad Commissioners:* Your letter of August 7th, 1925, with reference to the proceeding known as the *Iowa Railroad Commission of Des Moines v. Haverhill-Laurel Electric Company*, Haverhill, Iowa, which involves what is known as overbuilding by said electric company in Marshall County, Iowa, together with copies of letters written by you to the president of said electric company, were received.

We have given the matter submitted to us careful consideration and we desire to call your attention to certain statutes of the state. Chapter 383 of the Code, 1924, contains the provisions of the statute relating to electric transmission lines. Section 8330, which is a part of said statute, provides as follows:

"If any person, company, or corporation shall violate the provisions of this chapter or any rule established for the construction, maintenance, or operation of such electric transmission line, and shall fail for ninety days after notice from the board to comply therewith, such board shall have power to cancel and annul such franchise and order the removal of such line."

We therefore recommend that the Board of Railroad Commissioners proceed, under the provisions of the section just quoted. A notice directed to the company to show cause why their franchise should not be cancelled and annulled for its failure to comply with the order of the Board should be served upon the said company, and a date should be fixed for a hearing thereon. If at such hearing no satisfactory reason is given for the failure of such company to comply with the order, or if the company fails to appear, then the Board should cancel and annul its franchise and the matter should be called to the attention of this department for such action as we may deem it advisable to take.

MUNICIPALITIES: The compensation of a city official may not be fixed by motion. A city official is entitled to the salary prescribed by ordinance and if a lesser amount be paid, he may recover the difference between what he was paid and the salary prescribed by ordinance. The claim of a city official for salary may be barred by the statute of limitations.

August 25, 1925. *County Attorney, Audubon, Iowa:* We desire to acknowledge receipt of your letter of August 23, 1925, submitting to this department a question relating to the right of a city clerk to recover the difference between the salary for such official as fixed by ordinance and a lesser amount actually paid to him. The facts with relation thereto as stated by you are as follows:

"On October 15, 1918, Mr. B. E. Rice was appointed City Clerk of Audubon, Iowa, to fill an unexpired term caused by a resignation of the former Clerk, whose term commenced the April previous. On March 3rd, 1918, the City Council passed an Ordinance fixing the term of the Clerk at two years from and after the first Monday in April in each even numbered year and fixing his salary at $600.00 per year payable $50.00 per month. This ordinance was passed with one of the councilmen acting as clerk pro-tem and the original ordinance cannot be found. The record in the ordinance book is signed by the mayor but there is no certificate of publication attached nor any attesting signature of the clerk pro-tem nor any one purporting to act as clerk.

Mr. Rice was paid a salary in an amount less than the amount described in the ordinance as the salary of such officer. A motion was made, seconded and carried fixing the salary of such officer in the amount paid each year but no other action was taken and the ordinance above mentioned has not been repealed or amended. The ordinance above referred to was as a matter of fact duly published and the proof of publication shows the attesting signature of the councilman who was acting pro-tem as clerk. No demand has been made by Mr. Rice prior to the filing of his claim on August 3, 1925, and he resigned on Aug. 17, 1925."

The question submitted is as to whether or not the claim of the city clerk is valid in law for all or any part thereof. Your inquiry also contains the further question as to whether or not the claim or any part thereof is barred by the statute of limitations.

Section 5671 of the Code, 1924, reads in part as follows:

"All officers elected or appointed in any city or town, whose compensation is not fixed by law shall receive such salary, compensation, or fees for their services as the council may by ordinance from time to time prescribe."

Section 5672 contains the following provisions:

"No member of any city or town council shall, during the time for which he has been elected, be appointed to any municipal office which has been created or the emoluments of which have been increased during the term for which he was elected, *nor shall the emoluments of any city or town officer be changed during the term for which he has been elected or appointed, unless the office be abolished.*"

It will be observed that the salary, compensation or fees of any county officer must be such as is prescribed by ordinance from time to time and that said compensation, salary or fee shall not be changed during the term for which the official was elected.

We think it is clear that the compensation of the city official may not be fixed by motion and that a city clerk or any other city officer is entitled to the salary prescribed by ordinance, and that if paid a lesser amount, he may recover the difference between what he was paid and the salary prescribed by ordinance. The following authorities fully support this statement of the law.

Bodenhofer v. Hogan, 142 Iowa, 322;
Purdy v. City of Independence, 75 Iowa, 356;
Hawkeye Insurance Co. v. Brainard, 72 Iowa, 130;
Peters v. City of Davenport, 104 Iowa, 625;
Daniels v. City of Des Moines, 108 Iowa, 484.

As it is our opinion that it was illegal for the city to pay the city clerk less than the salary of such officer, as fixed by ordinance, we must determine the question as to whether or not the statute of limitations applies to such claim. We are constrained to answer this inquiry in the affirmative.

It is provided in Section 11011 of the Code, 1924, as follows:

"When there is a continuous, open, current account, the cause of action shall be deemed to have accrued on the date of the last item therein, as proved on the trial."

Does the claim of the city clerk, under the facts stated by you, constitute a continuous, open, current account within the meaning of the phrase as found in the above quoted section? It has been held by the Supreme Court in the case of Griffin v. Clay County, 63 Iowa, 414, that each term for which an officer was elected con-

stitutes a separate service of employment, and his compensation is in no sense in the nature of an account.

The same ruling was applied to an officer of a corporation for services rendered by virtue of various resolutions adopted by the governing board of the corporation, each fixing his compensation for a definite term. It was held in this case that the salary of such officer was not in the nature of a continuous, open and current account within the exception of the statute of limitations in favor of open accounts.

Porter v. Chicago, Iowa and Dakota Ry. Co., 99 Iowa, 350.

In our opinion these authorities are determinative of the question submitted and we hold that the statute of limitations does apply to such a claim.

TAXATION: Buildings erected on leased land assessed as real estate if leased longer than three years and assessment may be equalized by executive council.

August 25, 1925. *Auditor of State:* This department is in receipt of your letter dated August 20, 1925, in which you request an official opinion. Your letter is in words as follows:

"Code Section 6959 provides that buildings erected on leased land shall be assessed *as real estate* if the lease is for longer than three years. We are confronted with a question as to whether or not these buildings on leased land for longer than three year periods, shall take the changes made by the Executive Council in equalizing real estate assessments.

"A prompt reply from you in regard to this matter will enable us to inform county auditor and secure uniformity of practice in regard to this matter."

You are advised that buildings on leased premises for periods of more than three years are to be assessed as real estate. Code Section 6959.

You are further advised that all real estate, including buildings on leased premises for more than three years, is, for assessment purposes, finally valued by the Executive Council under its power as a Board of Review. Code Sections 7139, 7140, Code, 1924.

Therefore, the adjustments made by the Executive Council will be carried as to buildings on leased premises for more than three years in the same manner as though such buildings were town lots.

SHERIFFS: The expense of sheriffs in attending state convention cannot be paid from the county funds.

August 25, 1925. *Governor of Iowa:* This department is in receipt of your letter dated August 21, 1925, in which you request an official opinion. Your letter is in words as follows:

"Enclosed I hand you copy of letter I received from P. T. Beardsley, Sheriff, Sioux City, Iowa. In your judgment, could the expense of attending the Sheriffs' Conference at Des Moines be paid by the various counties as an expense of the sheriff? Please let me have your opinion."

We also quote the letter enclosed. It is in words as follows:

"After leaving your office yesterday our committee prepared a tentative program and left it with your secretary. This program, of course, will be subject to change and has already been changed slightly. I sincerely trust that it is comprehensive and in your judgment a good program.

We had some further discussion as to the question that would arise in the minds of a large number of sheriffs thruout the State regarding a possibility of a controversy with their board of supervisors over the expenses of attending the school of instruction. Under the statute the order to attend the meeting should be charged to criminal expense and the sheriff should be paid his expenses by the county and the bill allowed by the board of supervisors.

In order to insure a 100% attendance the committee felt that an opinion from the Governor's office or one issuing from the attorney general's office stating that the expenses of the sheriffs should be allowed by their boards of supervisors in case of a call from the governor to attend a law enforcement meeting and that said expenses should and could be charged as criminal expense to the county.

If we are right in our conclusions on this point and such an opinion could be forthcoming it would be of great assistance to us in effecting a good attendance at the meetings."

You are advised that the expense of sheriffs in attendance at this convention cannot be paid from the county funds. I regret that I must render this opinion, but knowing as I do what the purpose and intention of the legislature was, I cannot do otherwise.

CLERK OF THE DISTRICT COURT: Clerk of the District Court shall certify changes of title growing out of proceedings in his office and charge a fee for the auditor. If fee cannot be collected auditor should enter a change anyway.

August 25, 1925. *Auditor of State:* This department is in receipt of your letter dated August 21, 1925, in which you request an official opinion. Your letter is in words as follows:

"Code 1924, Section 10836, provides that the Clerk of the District Court *shall* certify to the county auditor changes of title growing out of proceedings in his office, and Section 5155 provides for a fee of 25c in the auditor's office for making transfers. In order that property appear in the correct name for taxation, these transfers should be made. In a great many of our clerks' offices these changes of title are not certified to the auditor, probably because of the fact that no fee is available for the auditor.

1. Should the Clerk of the District Court tax the 25c fee as costs in the case and certify these changes in every instance?

2. In a great many instances where estates are closed and no fee provided, and no change of title has been certified, what can be legally done to get these transfers properly shown of record in the Auditor's office?

An early reply in regard to this matter will be appreciated and I feel sure will help clear the situation so that the tax list can be more perfectly prepared by the county auditor."

It is clearly the duty of the Clerk of the District Court to certify to the County Auditor changes of title growing out of proceedings in his office. This is a mandatory provision and must be complied with by the Clerk. The Clerk should charge the expense as a part of the cost and require payment to be made to him.

This is the only means whereby proper changes may be made in the Auditor's office and properties properly listed for taxation. To hold that the Clerk of the District Court is not required to do this would result in many difficulties in connection with the proper assessment of property for taxation.

Referring to your second inquiry may I say that if the proceedings are not closed so that the fee can be secured then of course the Clerk should secure the fee and pay the same to the County Auditor at the time the change of title is made. If the proceedings are old and in such shape that the fee cannot be collected then the Clerk should make the certificate and file the same with the Auditor and the Auditor enter the same of record making a notation to the effect that the proceedings in the Clerk's office are closed and the fee cannot be secured. Nither the Auditor nor the Clerk would be under any financial obligation to the County by reason of this correction of the records.

PUBLIC HEALTH—QUARANTINE: The State Department of Health is required to supervise and regulate contagious and infectious diseases which may be quarantined. The item of "quarantine expenses" in the budget law, under the

Department of Health, may be used for any legitimate purpose in connection with the establishment of quarantines, which it is necessary for the department to incur in order to perform the duties imposed upon it by statute.

August 25, 1925. *Commissioner of Public Health:* We wish to acknowledge receipt of your favor of the 19th. You request our opinion upon the following proposition:

"In the appropriation bill passed by the last General Assembly, the sum of $10,000 'was set out for Quarantine.' No further designation was made as to the purpose of this item.

"The State Auditor tells me that he is in doubt as to his authority in authorizing the payment of any bills from this fund until it is more fully defined.

"The Budget Director and I had a thorough understanding on the purposes of this item at the time it was presented and passed by the General Assembly. It was our idea at the time and still remains that this money was to be used for the establishment, the supervision, the maintenance, enforcement, instruction and any and all other purposes having to do with quarantining of communicable diseases within this State.

"If this money can be made available for the above outlined purposes, this department will be in a position to furnish adequate service in the enforcement of quarantine."

Section 2191, Code, 1924, enumerates the powers and duties of the State Department of Health. Paragraph 16 thereof in part reads as follows:

"Establish and maintain such divisions in the department as are necessary for the proper enforcement of the laws administered by it, including a division of contagious and infectious diseases, a division of venereal diseases, * * *."

Paragraph 17 provides:

"Establish, publish and enforce rules not inconsistent with law for the enforcement of the provisions of this title and for the enforcement of the various laws, the administration and supervision of which are imposed upon the department."

Paragraph 1 of this section imposes upon the department the following duties:

"Exercise general supervision over the public health, promote public hygiene and sanitation, and, unless otherwise provided, enforce the laws relating to the same."

Paragraph 4 thereof also provides:

"Make investigations and surveys in respect to the causes of diseases and epidemics, and the effect of locality, employment and living conditions upon the public health * * *."

In paragraph 12 the department is required to

"exercise general supervision over the administration and enforcement of the venereal disease law, Chapter 109."

In Chapter 108, Code, 1924, physicians are required to make reports concerning contagious and infectious diseases, according to rules of the State Department and local board.

Section 2252 of said Chapter in part provides:

"* * * All quarantines and isolations ordered under the authority of this section shall be executed in accordance with the rules of both the State Department and the local board."

Thus all through the provisions of Title VII, Code, 1924, the State Department of Health is required to supervise and regulate contagious and infectious diseases, which, under the statute, must be quarantined.

Section 24, Chapter 218, Laws of the 41st General Assembly, known as the Budget Law, in sub-paragraph B thereof, makes the following appropriation:

"The sum of Thirty-four Thousand Seven Hundred Dollars ($34,700.00), or so much thereof as may be necessary, for the biennium, to be available as required during the biennium, for the following purposes:

DEPARTMENT OF HEALTH

For miscellaneous purposes:	
Traveling expenses	$ 3,700.00
Quarantine expenses	10,000.00
Antitoxin	4,000.00
Laboratory supplies, medication	9,000.00
	$26,700.00"

The question then is whether the word "expenses" used in this section, would authorize the expenditure of the $10,000.00, or any part thereof, for the establishment, supervision, maintenance, enforcement, instruction, and any or all other purposes in connection with quarantining of communicable diseases within this State.

The Supreme Court of Connecticut in *Keefe vs. Town of Union*, 56 Atl. 571, 574, in defining the word "expense," as used in connection with a statute authorizing a public health officer to incur expense in the prevention of contagious or infectious diseases, says:

"They were such services as under the statute the health officer had power to order to be performed, and as were intended to be performed under his direction."

The Supreme Court of Wisconsin, in *Rust vs. Fitzhugh*, 112 Northwestern, 508, 513, speaking of the meaning of the word "expense" in connection with a statute concerning the sale of land, held that it included all outlays both of money and labor.

The Supreme Court of Maine, in *Hurley vs. Inhabitants of South Thomaston*, 74 Atl., 734, 736, held that the word "expense" included all damage to landowners under a statute requiring railway companies to pay the "expense" of construction and maintenance of grades and roads.

The Court of Claims of the United States, in *Dunwoody vs. United States*, 22 Ct. Cl. 269, 280, held that the word "expenses," used in the act appropriating money for salaries and expenses of the national Board of Health, included those expenses which are necessarily incident to the work directed to be done.

The Department of Health, under the statutes of Iowa, as we have pointed out, is required to supervise and regulate quarantinable diseases. The legislature, with full knowledge of this fact, appropriated "for miscellaneous purposes" the sum of $10,000.00 to be used for "quarantine expenses." It was clearly contemplated that this appropriation should be used for any legitimate purpose in connection with quarantine, thus enabling the Department of Health to perform the duties imposed upon it by the law.

Under the authorities cited herein, we are of the opinion that the term in question should be so construed that the funds appropriated may be used for the establishment, supervision, maintenance, enforcement, and any other legitimate expense incident and necessary to the performance of the duties imposed upon the Department of Health in the enforcement and regulation of quarantinable or communicable diseases within this State.

COUNTY ATTORNEY: In foreclosure proceedings in which the state is a party, notice should be served upon the county auditor and attorney general. The county attorney should represent the county in such proceedings.

August 25, 1925. *County Attorney, Sioux City, Iowa:* This department is in receipt of your letter dated August 21, 1925, in which you request an official opinion. Your letter is in words as follows:

"It very frequently occurs that actions are brought to foreclose mortgages against property upon which there is a lien in favor of the State of Iowa by reason of a criminal bond which was signed by the owner in fee subsequent to the execution of the mortgage sought to be foreclosed. In those cases it is the desire of the holder of the mortgage to include in the decree of foreclosure a finding that his lien is prior to the lien of the State upon its bond (which is in fact true) and for that reason the foreclosing party finds it necessary to make the State of Iowa a party to the action. Sometimes notice is served upon the County Auditor in an effort to make the State a party to actions of this kind, and at other times the foreclosing party has requested the appearance of the County Attorney on behalf of the State in order that the decree may establish the priority of the mortgage.

There is some doubt in our minds regarding the authority of the County Attorney to appear in actions of this kind and by his appearance bind the State to the findings set forth in the decree of foreclosure. It would seem only fair and just that the foreclosing party should be entitled to a decree establishing the priority of his mortgage over the lien of the outstanding bond which had been executed subsequent to the execution of the mortgage, and we do not feel that we should be contrary and refuse to appear and permit them to obtain the relief they seek, if it is within the scope of our authority to make such an appearance.

Might not the better procedure be to have the notice served upon the proper state authority at Des Moines, and the appearance of the Attorney General entered rather than the appearance of the County Attorney?

We will appreciate your instructions in this matter, and will in the future govern ourselves by those instructions."

You are advised that it is the opinion of this department that in all foreclosure proceedings where the State of Iowa is a necessary party, notice should be served upon the County Auditor and the Attorney General. This has been my advice repeatedly and for several reasons. The Attorney General is the representative of the State in all proceedings for or against the State. Service upon him is service upon the State. The lien is a lien for a fund due the school fund of the county and this fund if collected would be paid to the County Auditor and he is in our judgment a necessary party to serve. The policy of this department has been, when such notice has been served upon us, to refer it to the County Attorney for representation in the proceedings.

CITIES AND TOWNS: Total levy of cities and towns including particular levy under Section 6600 of the Code, 1924, must not exceed 48 mills on the dollar on the taxable property subject to assessment.

August 28, 1925. *Director of the Budget:* This department is in receipt of your letter dated August 26, 1925, in which you request an official opinion. Your letter is in words as follows:

"This office is in receipt of an inquiry from the county auditor of Webster County, as follows:

'Please give me your interpretation of Section 6600 of the Code, 1924. Is this an obsolute limitation on the total levy of cities, or does it mean only that that particular tax cannot be levied if the total levy exceeds 48 mills.'

As this is a matter which concerns tax levies now being made an early reply will be appreciated."

Section 6600 to which you refer is in words as follows:

"Tax for fire department. The council of any city specified in section 6596 shall have the power to levy a special tax upon all taxable property in said city, not exceeding six mills on the dollar each year, for the purpose of acquiring property for the use of the fire department and equipping and maintaining such department. But the levies of general and special taxes in such cities shall not exceed, in the aggregate, forty-eight mills on the dollar of the taxable value of the property therein."

Section 6596 is in words as follows:

"Transfer of powers. All cities which have heretofore been organized and acting under special charters and which have heretofore, or shall hereafter adopt the plan of government provided in this chapter, and in which river front improvement commissions have been or shall hereafter be organized, under chapter 294, shall have and may exercise all the rights and powers conferred by said chapter on the said river front improvement commission, and all such right and powers are hereby transferred to and vested in the city council of any such city or cities. Said council shall have the power to elect and shall elect a commission of three persons, to be known as the river front improvement commission, whose duties shall be to carry out the powers and duties with respect to the beds and banks of streams in such cities, herein conferred upon said city council, or such limited powers in respect thereto as the council may prescribe by ordinance. Said commission shall be elected biennially on the first Tuesday in May, and shall hold office for a term of six years and until their successors are elected and qualify. The members of the river front improvement commission shall be elected, one for two years, one for four years, and one for six years."

You are advised that the total levy, including the particular levy referred to, must not exceed forty-eight mills on the dollar of the taxable value of the property subject to assessment therein.

TAXATION—CITIES AND TOWNS: The pipes, plant and mains of a water company are real estate.

September 3, 1925. *Auditor of State:* You have submitted the following proposition for an opinion which was presented to you by the County Auditor of Clinton County.

"While increasing our values on town lots, the question arose as to whether or not the Water Works Company's assessment on Plant and Mains should be increased the same as town lots.

"In this particular case the Water Company does not own the real estate upon which the plant is located, as same is owned by the City. They do own a few scattered lots other than where the plant is located.

"The question I would like you to answer is this:—Shall the 20% increase on town lots be added to the Water Company's assessment on Mains and Plant?"

The first question necessary to be determined is whether or not the Mains and Plant of the Waterworks Company located within a town or city limits is real estate and is taxable as real estate. The question has been before the courts of this state and in a number of cases it has been quite clearly determined that the plant, pipes and mains of a water company, insofar as our law is concerned, are considered to be real estate. This is so even though the waterworks company does not own the land upon which or under which the system is constructed. *Oskaloosa Water Co. vs. Board*, 84 Iowa, 407.

The statute does not classify the land located within a city or town and subject to taxation. It merely refers to such land as real estate located within a city or town. In view of that situation and in view of the fact that the Executive Council has, as a part of its work of equalization, ordered an increase in the assessed value of real estate located within the town of Clinton, it is the opinion of this department that the plant and mains of the waterworks company at Clinton is subject to the increase the same as other real property.

GASOLINE TAX: Refunds to state departments on account of gasoline tax paid should be credited to the appropriation from which the original expense was paid.

September 5, 1925. *Treasurer of State:* This department is in receipt of your letter dated July 15, 1925, in which you request an official opinion. Your letter is in words as follows:

"It is requested that you give us your opinion as to whether or not the reimbursement of the license fees paid on gasoline purchased by the various departments of State Government should be credited to the appropriation account from which the original expense was paid or to the general state revenue."

You are advised that the amount of refunds made to the various departments of the State Government for license fees paid on gasoline used by such departments should be credited to the appropriation account from which the original expense was paid. In other words, the money should be restored to the appropriation account equal in amount to that paid therefrom. The reason for this is apparent, the theory of the refund for gasoline taxes paid being to restore to the individual paying the same the amount which in the first instance should not have been collected but which is collected for the purpose of conveniencing the collections of the whole tax. This being true, the refund simply places the parties in status quo.

CRIMINAL LAW—SENTENCES: The District Court does not have jurisdiction to sentence one convicted of crime to a period of imprisonment less than the minimum prescribed by statute.

September 1, 1925. *The Men's Reformatory:* This department is in receipt of your letter dated August 28, 1925, in which you request an official opinion.

The facts submitted are substantially as follows:

On the 11th day of August, A. D. 1925, the Honorable D. F. Coyle, Judge of the District Court of Kossuth County, Iowa, entered a judgment and sentence in the cause of the *State of Iowa v. Sylvester Heinsinger*. The portion of the judgment important to the determination of the question submitted by you is in words as follows:

"It is the sentence of the Court that the defendant be confined in the Reformatory at Anamosa at hard labor for four years."

The information upon which the judgment and sentence was entered, charged the defendant with the crime of rape. The defendant entered a plea of guilty to the crime of rape. The Court refers to the information and plea in the judgment entry.

The situation presented then is that the District Court of Kossuth County, Iowa, has sentenced this defendant for four years for the crime of rape. The real question as submitted by you is as to the period of sentence to be considered by you in confining this prisoner.

Chapter 197 of the Acts of the 41st General Assembly, provides in words as follows:

"If any person ravish and carnally know any female by force or against her will, or if any person carnally know and abuse any female child under the age of sixteen years, or if any person over the age of twenty-five years carnally know and abuse any female under the age of seventeen years he shall be imprisoned in the penitentiary for life, or any term of years, not less than five, and the court may pronounce sentence for a lesser period than the maximum, the provisions of the indeterminate sentence law to the contrary notwithstanding, and when a lesser than the maximum sentence is pronounced, the prisoner shall be subject to the jurisdiction of the board of parole."

This Act became effective July 4, 1925, and was therefore the law of this State at the time this sentence was imposed. The minimum sentence which the court might prescribe was five years. The sentence pronounced being less than the minimum, it must be assumed that the court intended to and did sentence the defendant for the minimum period of five years. This defendant should be received by you and confined as a prisoner sentenced for a term of five years.

BANKS AND BANKING: A bank may incorporate in its articles of incorporation and by-laws a provision to the effect that such corporation may acquire a lien on its share of stock for debts due to the corporation from the stockholder thereof.

September 14, 1925. *Superintendent of Banking:* We have received your letter of August 4, 1925, asking this department to prepare an opinion upon the question which you have stated as follows:

"We desire an opinion as to whether or not a bank under state supervision in this state, may legally acquire a lien on its shares of stock, for debts due it from stockholders, by incorporating in its articles of incorporation a provision to that effect."

While there is a conflict in the authorities upon this question, the Supreme Court of this state is committed to the doctrine that a corporation may incorporate in its articles of incorporation or by-laws a provision to the effect that such a corporation may acquire a lien on its shares of stock for debts due to the corporation from a stockholder thereof. This rule also applies to banks incorporated under the laws of the State. The following authorities so hold:

Farmers & Merchants Bank of Lineville v. Wasson, 48 Iowa 336;
Farmers & Traders Bank v. Haney. 87 Iowa 101;
Des Moines National Bank v. Warren County Bank, 97 Iowa 204;
Des Moines Loan & Trust Co. v. Des Moines National Bank, 97 Iowa 668;
Dempster Manufacturing Company v. Downs (Ia.) 101 N. W. 735;
Jewell v. Nuhn (Ia.) 138 N. W. 457.

A careful search of the statutes fail to disclose any provisions thereof prohibiting a bank incorporated under the laws of the State from embodying in its articles of incorporation or by-laws a provision giving to such a corporation a lien on its shares of stock for the debts due to the corporation from the stockholders.

In the preparation of this opinion we have not overlooked the provisions of Section 9184 of the Code, 1924, which absolutely prohibit savings banks from purchasing, holding or making loans upon the shares of its capital stock. This opinion should not be construed as being inconsistent with the provisions of said section.

SCHOOLS—GASOLINE TAX: A school district is a municipality within the meaning of Section 8, Chapter 6, Laws of the 41st G. A. when upon proper application it is entitled to a refund for gasoline tax paid.

September 15, 1925. *Superintendent of Public Instruction:* We wish to acknowledge receipt of your favor of the 3rd requesting our opinion upon the following proposition:

"Is a school district entitled to a gasoline tax refund on gasoline used for the operation of school busses owned by the district and used exclusively for the transportation of children to and from school?"

In reply, we wish to call your attention to Section 8, Chapter 6, Laws of the 41st General Assembly which in part provide:

"Any person who shall buy or use any gasoline for the purpose of operating or propelling stationary gas engines, tractors used for agricultural purposes, motor boats, airplanes or aircraft, motor vehicles, trucks and tractors owned and operated by the state of Iowa, or by a municipality for municipal purposes within the state, * * * shall be reimbursed and repaid the amount of such license fee paid by him. * * *"

A school district is a municipality and under the provisions of the statute just quoted is clearly entitled to a refund upon making the proper statement.

FISH & GAME: A person accused of violating the provisions of Section 1715 may not secure a return of the net or seine by the execution of a bond.

September 15, 1925. *State Fish & Game Warden:* We have received your letter

of September 11, 1925, submitting to this department for an opinion the following question:

"Recently one of our wardens arrested a man in Union County for illegal possession of seines. The county attorney of that county advised the warden that if the defendant put up a bond on the nets seized by the State that the nets would have to be given back to him until the case might be decided by the District Court. Will you kindly advise if there is a provision of this kind in the Code?"

Section 1715 of the Code, 1924, reads as follows:

"Any nets, seines, traps, spears, contrivances, materials, and substances whatever, while in use or in possession or kept or maintained for the purpose of catching, taking, killing, trapping, or deceiving any fish, birds, or animals contrary to any of the provisions of this chapter; are hereby declared to be a public nuisance; and it shall be the duty of the state game warden, his assistants and deputies, sheriffs, constables, and police officers of the state, without warrant or process, to take or seize any and all of the same, and confiscate and sell or destroy any and all of the same without warrant or process, and no liability shall be incurred to the owner or any other person for such seizure and destruction, and said warden or his assistants or deputies, or other peace officers, shall be released from all liability to any person for any act done or committed, or property seized or destroyed, under or by virtue of this section."

We find no provision in the above quoted section, or any other section of the statute, which gives to the owner of a net or seine, who has been charged with illegally using the same, the authority to execute a bond and require the said net or seine to be returned to such owner.

We are, therefore, of the opinion that any person, who has violated the provisions of Section 1715 of the Code, may not secure a return of the net or seine to him by the execution of a bond.

PRIMARY ROADS: It is the duty of the Board of Supervisors to reimburse said cities the entire amount paid to secure right of way for primary roads in condemnation proceeding; including the cost of attorneys fees.

September 15, 1925. *Director of the Budget:* We desire to acknowledge receipt of your letter of September 12, 1925, submitting to this department the question which you have stated as follows:

"This department is in receipt of a request for an interpretation of Section 4691 of the Code, relative to reimbursement of cities and towns by the Board of Supervisors for the cost of right of way for roads.

We enclose a copy of a contract entered into, between the town of Monroe, Iowa, and the Board of Supervisors of Jasper County.

The road in question was of sufficient width but in establishing the boundary lines, the town was involved in damage suits which with costs are as follows:

Amount of damage recovered	$535.00
Amount of costs	272.90
Total	$807.90

There was also, Attorneys fees and expense amounting to $810.40 additional.

Does the law make it mandatory for the Board of Supervisors to reimburse this town for any or all of the amount expended, or is it optional with them?

Is the town of Monroe bound by the agreement entered into, to assume the cost as set out above regardless of the provisions of section 4691?"

Section 4691 of the Code, 1924, reads as follows:

"Where any town or city, including special charter, commission plan and manager plan cities, having a population of less than twenty-five hundred has heretofore, and since the enactment of this chapter procured at its own expense right of way for a primary road, the board of supervisors is authorized to reimburse said city or town from the primary road fund for the cost of such right of way."

It is apparent that the determination of the question you submitted depends upon the definition of the phrase "cost of such right of way." In securing the right of way for primary road, the town of Monroe was obliged to pay the total sum of $1,618.30. The word "cost" is defined in Webster's International Dictionary, as follows:

"The amount paid, charged, or engaged to be paid, for anything bought or taken in barter; charge, expense, hence, whatever, as labor, self-denial, suffering etc., is requisite to secure benefit."

It is apparent, we think, that it was necessary for the town of Monroe to institute condemnation proceedings to secure the right of way and that such condemnation proceedings necessarily involved the cost of the proceeding, together with attorney's fees. The town could not have secured the right of way without incurring each and all of the expenses specified in your letter. We believe it was the intention of the legislature to provide for the payment to towns and cities coming within the provisions of the statute, the entire amount that was incurred by them in securing the right of way.

A careful search of the authorities has failed to reveal any authority directly in point. We are, therefore, of the opinion that it is the duty of the Board of Supervisors to reimburse the city for the entire amount expended in the sum of $1,618.30.

We are also of the opinion that insofar as the resolution or agreement between the town of Monroe and the Board of Supervisors of Jasper County, Iowa, conflicts with the provisions of Section 4691, it is absolutely void and of no effect or force.

TAXATION—MUNICIPALITIES: The mayor is not a member of the city council when sitting as a board of review and is, therefore not entitled to compensation while presiding over said council when sitting as a board of review.

September 16, 1925. *Auditor of State:* We have received your letter of September 8, 1925, asking this department to prepare an opinion upon the following question:

"I have a letter from the county auditor of Poweshiek County, in which he asks whether the mayor of a town is a member of the board of review, and if so, whether or not he is entitled to the same pay as is a councilman when acting as a member of the board of review? In other words can a mayor draw the per diem fixed by law for meetings of the board of review over which he presides?"

Section 5639 of the Code, 1924, makes the mayor the presiding officer of the council, with the right to vote only in case of a tie.

Section 7129 of the Code, 1924, makes the city or town council a board of review in taxation matters for such city or town.

Section 5631 of the Code, 1924, provides how the city or town council shall be constituted. It reads as follows:

"Councils shall be composed in towns, of five councilmen at large, and in cities, except as otherwise provided, of two councilmen at large and one councilman from each ward; but if any city embraces within its limits the whole or part of two or more townships, two of which parts contain one thousand or more electors, only one councilman at large shall be chosen from any one township."

It will be observed that the above section does not make the mayor a member of the city council. He is, in our opinion, merely the presiding officer thereof. The city council may, however, when sitting as a board of review, select another than the mayor as presiding officer. *Hawkeye Lumber Company vs. Board of Review*, 161 Iowa, 504.

Section 5664 of the Code, 1924, prescribes the compensation of councilmen. It reads as follows:

"Councilmen in cities of the first class shall be paid an amount prescribed by ordinance, not in excess of two hundred fifty dollars per annum, which shall be in

full compensation of all services of such councilmen of every character connected with their official duties, except when acting as members of the board of review, for which service they shall receive not more than two dollars a day for each day when acting as a board of review, to be paid out of the county treasury; and in all other cities and towns they shall receive not to exceed one dollar each for every regular or special meeting, and in the aggregate not exceeding fifty dollars in any one year; but in such cities and towns the members shall be paid in addition to the foregoing, for services as members of the board of review, an amount not exceeding one dollar for each session of not less than three hours, and the compensation for services as members of the board of review shall be paid out of the county treasury."

It will be noted that the above section fixes the compensation to be paid to members of the city council, when acting as a board of review. It does not attempt to fix the compensation for the mayor as presiding officer of the board of review. In the absence of such a provision, and in view of the fact that the mayor is not a member of the city council, we are of the opinion that he is not entitled to any compensation for presiding at the meetings of the city council when sitting as a board of review. The salary provided for the mayor was intended, no doubt, to be in full compensation for all services rendered by the mayor as presiding officer of the city council, not only when sitting as a council, but also when holding meetings as a board of review.

HIGHWAYS—PRIMARY ROAD FUND: Attorney fees incurred by the county in connection with primary road improvement work must be paid from the county general fund and not the primary road fund.

Sept. 16, 1925. *Iowa State Highway Commission:* We wish to acknowledge receipt of your favor of the 5th requesting the opinion of this department upon the following proposition:

"The contractor on a primary road improvement defaults, the board of supervisors deem it necessary and to the best interests of the county to employ an attorney to assist the county attorney in advising the board as to procedure in connection with the re-letting of the work, obtaining a settlement with the contractor's surety, etc.

Assuming that the fees charged by this assistant counsel are reasonable, is the claim one that may properly be paid from the primary road funds or should it be paid from the county general fund from which the cost of maintaining the county attorney's office is paid?"

Section 4690, Code, 1924, specified the uses for the primary road fund. It will be noted from a reading of this section that the fund in question is to be used

"in the establishment, construction and maintenance of the primary road system including the drainage, grading, surfacing, the construction of bridges and culverts, the elimination or improvement of railroad crossings, the purchase of additional right-of-way, and the damages incident thereto connected with the establishment, construction and maintenance of the primary road system. * * *"

Clearly the legislature intended that this fund should be used only for the actual improvement, construction and maintenance of primary roads. Nowhere in the statute is there any intimation that the legislature intended that attorney fees should be paid from this fund. We are of the opinion that the attorney fees in question are to be paid from the county general fund and not the primary road fund.

NATIONAL GUARD: The child of one deceased, who was formerly a member of the National Guard is not a soldier's orphan within the meaning of Chapter 185, Code, 1924.

September 16, 1925. *Board of Control:* We wish to acknowledge receipt of your favor of the 5th requesting our opinion on the following proposition:

"Some children were recently admitted to this institution (Iowa Soldiers' Orphans' Home, Davenport, Iowa) from Linn County. Their father was a member of the Iowa National Guard and Mr. Treat wants to know whether or not he was a soldier. It, no doubt, has something to do with the way in which the keep of the children should be paid.

"Will you please let us know as soon as possible, whether or not a member of the National Guard is a soldier, and return the letter, and oblige."

The question submitted does not deal with the general definition of the word "soldier," or whether or not a member of the National Guard is a "soldier" in the generally accepted meaning of this word. The question is, whether or not, within the meaning of Chapter 185, Code, 1924, the child of the deceased, who was formerly a member of the Iowa National Guard, is to be considered the orphan of a "soldier."

Section 3708, Code, 1924, concerning the admission to the Iowa Soldiers' Orphans' Home, reads in part as follows:

"Admission to said home shall be granted to resident children of the state under eighteen years of age, as follows, giving preference in the order named:

1. Destitute children, and orphans unable to care for themselves, of soldiers, sailors or marines. * * *"

Section 3713, Code, 1924, both sections being a part of the chapter in question, provides in part as follows:

"The assessor in each odd numbered year shall take an enumeration of the children of deceased soldiers who were in the military service of the government, naming the company or organization to which the soldiers belonged, with the age and sex of the children. * * *"

The section thereafter provides in substance that these lists shall be retained by the auditor of the county and revised from time to time.

Section 3720, Code, 1924, provides that the counties shall be liable for the support of the children from the county in the Soldiers' Orphans' Home, other than the children of soldiers.

It was the apparent intent of the legislature to limit the provisions of this chapter in reference to soldiers' orphans, to children whose fathers were in the military service of the government. A member of the Iowa National Guard need not necessarily be in the military service of the government. He may be called into federal service, however, and in that event would clearly be in the service of the government. This is a question of fact to be determined in each case, and if the facts disclose that the father of the orphan in question was not in the military service of the government, then the child would not be a soldier's orphan, within the meaning of Chapter 185, Code, 1924.

TAXATION: Any personal property not exempt from taxation may be sold to secure the payment of the taxes thereon. A mortgage on personal property executed before the property is seized under distraint will take priority over the claim for the taxes.

September 16, 1925. *County Attorney, Leon, Iowa:* We have received your letter of August 24, 1925, asking this department to prepare an opinion upon the question which you have stated as follows:

"A question has arisen with our County Treasurer as to the collection of certain delinquent taxes which are of record on his books against the co-partnership which has advertised the personal property stock for sale and the taxes for the years 1922-23-24 are delinquent against these horses and cattle that are to be sold. A part of this stuff is admitted to be the original stuff that these parties owned for the years assessed tax. However, it has been mixed with other stuff of like kind and is to be sold in bulk or by the head.

Our Treasurer has issued a distress warrant against this property. The question

has arisen whether or not chapter 346 would create such a lien against personal property in the form of horses and cattle as to be subject to sale by the distress warrant by the Treasurer when, as a matter of fact, this same stock is being sold to satisfy a mortgage which is property of record and which was placed on this stock prior to the time of the assessment for taxation.

For your further information I wish to state that this personal property will not sell for the amount of the mortgage that is of record against the same. We are desirous of knowing just how far the lien on personal property goes and upon what property, if any, section 7189 of the code applies. I kindly ask you to give me this information as promptly as possible as parties have agreed to abide by your decision in this matter."

Under the laws of this state, the taxes on personal property are not a lien on the personal property of the taxpayer, with the exception of stocks of merchandise, until distraint therefor is made in the manner pointed out in the statute. Therefore, under the facts stated in your letter, there was no lien on the personal property described therein for the years 1922, 1923 and 1924.

Maish v. Bird, 22 Fed. Rep. 180.

The statute provides that the treasurer shall collect all delinquent taxes by distress or sale of personal property. Section 7189 of the Code provides in part as follows:

"The treasurer shall collect all delinquent taxes by distress or sale of *any personal property belonging to the person to whom such taxes are assessed*, and not exempt from taxation, or any real or personal property upon which they are a lien, * * *"

It will be observed that the provisions of the statute just quoted are not limited to the personal property upon which the taxes are due but is broad enough to cover any personal property that is owned by the taxpayer and not exempt from execution.

It is, therefore, the opinion of this department that the treasurer may seize any personal property that belongs to the taxpayer for the collection of the taxes, with the exception of exempt property.

However, if the taxes are not a lien on personal property, a mortgage lien on such property executed before the property was seized under distraint by the county treasurer will have priority over the claim of the county for taxes. It was held in two cases by the Supreme Court that taxes on personal property, which became a lien upon real estate after the lien of a mortgage has attached thereto are junior and inferior to the mortgage lien.

Smith v. Sknow, 97 Iowa 640;
Bibbons v. Polk Co., 104 Iowa, 493.

These two cases, together with the case of *Maish vs. Bird*, 22 Federal 180, in our opinion, are determinative of the question submitted. In the last case it was held that a person purchasing personal property, before distraint has been made for taxes, is protected against a subsequent distraint for taxes assessed against his vendor, and that a mortgagee of personal property who takes possession under his mortgage and sells the property, either directly or through a decree or order of the court, before any distraint is made is entitled to the proceeds of such sale so far as they may be necessary to pay his claim as against the taxes assessed against the mortgagee.

We are, therefore, of the opinion that the mortgage lien would take priority over the claim for taxes.

MORTGAGES: A real estate mortgage with chattel mortgage clause must be recorded at length and county recorder may not accept such instrument for filing and indexing under a chattel mortgage statute without its being recorded at length.

September 16, 1925. *County Attorney, Spencer, Iowa:* We have received your letter of August 1, 1925, asking this department to prepare an opinion upon the following question:

"If a farm lease, properly executed and acknowledged, which has the usual chattel mortgage clause, is presented to the County Recorder for filing and indexing as a chattel mortgage, may the County Recorder refuse to file the same?"

Section 10032 deals with the recording of a real estate mortgage with chattel mortgage or receivership clause and is the one that must be construed in determining the question you have submitted. It reads in part as follows:

"Real estate mortgages which create an incumbrance on personal property or which provide for a receivership, shall, after being recorded at length, be indexed, if requested by the holder, in the chattel mortgage index book. * * *."

The above language of the statute is plain, unambiguous and easily understood. Under its provisions the real estate mortgage must be recorded at length before it may be indexed because of the chattel mortgage provision therein. We are, therefore, of the opinion that the county recorder may not, under the provisions of the statute, accept such instrument for filing and indexing without its being recorded at length.

MUNICIPALITIES: A city may pay for the service of an audit of an account of city officials by other examiners than those furnished by the Auditor of State.

September 16, 1925. *Auditor of State:* We desire to acknowledge receipt of your letter of August 25, 1925, asking this department to prepare an opinion upon the question which you have stated as follows:

"I am desirous of securing your opinion as to whether city officers could be authorized under the laws of this state to pay for services of an audit of their accounts by other auditors than those supplied by the Auditor of State, and if the City Council should employ persons to make such an audit, would they have the right to pay for such services out of the city funds?"

The provisions of the statute relating to the examination of the financial condition and transactions of county and city officials are contained in Sections 113 and 126, both inclusive, of the Code. Section 113, which forms a part of said statute as amended, by Chapter 123, Laws of the 41st General Assembly, reads as follows:

"The auditor of state shall cause the financial condition and transactions of all county offices to be examined at least once each year, by a state examiner of accounts, and shall cause a like examination to be made at least once each two (2) years, of all offices of all cities and towns having a population of three thousand or more, including offices of cities acting under special charter."

There is no provision in the statute making such examination exclusive or prohibiting the board of supervisors or the city council, as the case may be, from employing auditors or examiners to make an examination in addition to the one provided for by statute.

Section 5738 of the Code is the one granting general rights, authority and powers to cities and towns. It is quite comprehensive in character and covers a wide range of rights and powers. It reads as follows:

"Cities and towns are bodies politic and corporate, under such name and style as may be selected at the time of their organization, with the authority vested in the mayor and a common council, together with such officers as are in this title mentioned as may be created under its authority, and shall have the general powers and privileges granted, and such others as are incident to municipal corporations of like character, not inconsistent with the statutes of the state, for the protection of their property and inhabitants, and the preservation of peace and good order therein, and they may sue and be sued, contract and be contracted with, acquire and hold real and personal property, and have a common seal."

We believe that the above quoted statute is sufficiently comprehensive and broad in its provisions to authorize cities and towns, acting through their councils, to

employ auditors and examiners to audit and examine the books of any or all city officials notwithstanding the fact that a public audit or examination has been made under the provisions of the statute hereinbefore referred to. The councils manage and control the property and finances of cities and towns and are the fiscal agents of such municipalities. To deprive the council of the right to secure an examination or audit of the books of any of the city officials at any time would deprive it of a valuable right that in a measure might hamper or hinder the operations of the city. As the statute only contemplates the examination of the books of such municipalities once each two years, an imperative necessity for the examination of the books of a city official might exist and the municipality should not be deprived of the right to secure such an audit or examination without a plain or positive prohibition in the statute.

We are, therefore, of the opinion that city and town councils are authorized under the laws of the state to pay for the service of an audit or examination of the accounts of city officials by other examiners or auditors than those furnished by the Auditor of State.

HIGHWAYS: Where a boundary of a township is coterminous with those of a city, they do not constitute part of the township road system. Therefore, township trustees have no authority to fill or grade.

September 17, 1925. *Iowa State Highway Commission:* You have requested the opinion of this department upon the following statement of facts:

"We would request an opinion from your Department on the situation outlined herein which has arisen over the filling of a culvert constructed by Mahaska County in the City of Oskaloosa.

Where the boundaries of a township are coterminous with those of a city as provided in Section 5529 of the Code and the offices of township clerk and township trustees are abolished as provided in Sections 5553 and 5554 of the Code, and the city council neglects or refuses to fill over a culvert constructed by the county within the city, shall the board of supervisors of the county proceed to fill over such culvert and charge the cost of such filling not to exceed the sum of $150 to the city as provided in Section 4675 of the Code for filling bridges and culverts on the township road system. In this connection we would refer you to Section 4780 of the Code, which defines the township road system."

In regard thereto we call your attention to the provisions of Section 5529, which read as follows:

"Where the boundaries of any city have been changed, the board of supervisors of the county in which the same is situated shall have power to change the boundary lines of townships so as to make them conform to the boundaries of the city, and to make such other changes in township lines, and the number of townships, as it may deem necessary; but no action shall be taken affecting the boundaries or existing conditions of school districts."

We next call your attention to Section 4675 which reads as follows:

"Upon the completion by the board of supervisors of any bridge or culvert situated upon the township road system, it shall be the duty of the township trustees to properly fill over all such culverts and uniformly grade the approaches to all such bridges, and make payment therefor from the township road fund. Should the trustees fail for a period of two weeks after notification to perform such work, the board of supervisors shall proceed to perform the same and the engineer shall report the actual cost of so doing, and such amount, not exceeding one hundred fifty dollars, for any such bridge or culvert, shall be certified by the board of supervisors to the county treasurer who shall transfer said amount to the county road fund from the first collection of road funds belonging to said township. The township trustees shall, at township expense, do all necessary filling of temporary culverts installed by them on the township road system."

The question then is whether or not the provisions of Section 4675 would apply in a township which is coterminous with the limits of a city or town as provided by Section 5529 so that the board of supervisors could proceed under the authority delegated in Section 4675.

Section 4780 defines the township road system as follows:

"The township road system shall embrace all highways of the township which are outside the limits of cities and towns and which are not a state road or a part of the primary road system or of the county road system."

You will note that Section 4780 expressly provides that the township road system shall embrace all highways outside the limits of cities and towns, and since Section 4675 by its express language provides for the completion of bridges or culverts situated upon the township road system we are of the opinion that where a township is coterminous with a city, that the highway therein does not constitute part of the township road system, under the definition of Section 4780, and for that reason we reach the conclusion that the authority to grade and fill as granted in Section 4675 would not apply to a township highway where the same is embraced with the city limits under the provisions of Section 5529.

We are, therefore, of the opinion that the board of supervisors would have no authority to grade and fill the culverts in question and charge the same to the city of Oskaloosa.

MOTOR VEHICLES: 1. Owner of automobile driving passengers for hire required to secure chauffeur's license. 2. Owner of truck hauling produce for hire not required to secure license.

September 17, 1925. *Member House of Representatives:* You have requested our opinion upon the following questions:

"1. Is the owner of an automobile who uses the same for the transportation of passengers, receiving pay therefor, at all times driving his own car, required to obtain a chauffeur's license?

2. Is it necessary for the owner of a truck and who is engaged in the transportation of freight, mostly farm products, charging regular customary rates for such service, to procure such license, he at all times operating his own truck?"

In regard to your first question we wish to advise that we are of the opinion that such persons must obtain a license.

Section 4863 of the Code, paragraph 6, defines a chauffeur, as follows:

"'Chauffeur' shall mean any person who operates an automobile in the transportation of persons or freight and who receives any compensation for such service in wages, commission or otherwise, paid directly or indirectly, or who as owner or employee operates an automobile carrying passengers or freight for hire, including drivers of hearses, ambulances, passenger cars, trucks, light delivery, and similar conveyances; provided, however, that this definition shall not include manufacturers' agents, proprietors of garages and dealers, salesmen, mechanics, or demonstrators of automobiles in the ordinary course of their business, nor to employees operating motor trucks for parties engaged in agricultural enterprises, nor to any individual owner actually driving and operating his own motor vehicle in the business of transferring and drayage of baggage, trucking, and cartage for hire."

We think clearly that the definition of "chauffeur" as set forth in this Section covers an individual operating as set forth in your statement. This being true, we believe that a license would be required of this person as provided by Section 4943 of the 1924 Code.

In regard to your second question, we are of the opinion that this person is not required to secure a chauffeur's license. Paragraph 6 of Section 4863 expressly

excepts persons actually owning their own motor vehicle and engaged in the business of trucking.

It is our understanding that the legislature expressly desired to exempt persons operating their own trucks as set forth in your second question. We therefore believe that a license would not be required in this case.

COUNTY FAIRS: County fairs required to account for appropriation under Section 2905 as well as for aid under Section 2909.

September 24, 1925. *County Attorney, Maquoketa, Iowa:* You have requested the opinion of this department upon the following statement of facts:

"Referring to Sec. 2905, 2909-10-11, of the Code of Iowa, 1924, quaere as to whether Sec. 2911 refers to the appropriation under Sec. 2905 as well as the appropriation provided for in Sec. 2909 and 2910, or whether it pertains only to the last named sections.

Our Fair Secretary reports that they were advised at the State Convention of Fair Managers that Sec. 2911 applied only to Sec. 2909 and 2910. I am of the contrary opinion.

Quaere, where the $1,000.00 provided for in Sec. 2905 has been paid to the Fair Association last year and no report on its expenditure reported to the Board of Supervisors would the Board be within the law in making the appropriation for this year?

As we have a very critical situation pending here at the present time, an early opinion from you would be very greatly appreciated by the Board of Supervisors, Fair Association and myself.

Section 2905 is the section providing for county aid to be granted by the board of supervisors to county fairs or agricultural societies. Section 2909 provided for a tax for the purpose of raising a fair ground fund to be paid to county and district fairs owning real estate. Section 2911 provides as follows:

"Each society receiving an appropriation from the county shall through its secretary, make to the board of supervisors a detailed statement, accompanied with vouchers, showing the legal disbursement of all moneys so received."

Your question is whether or not a county fair receiving county aid under Section 2905 must account for the expenditure of the same as provided by Section 2911. We call your attention to the fact that Section 2911 provides that each society receiving an appropriation from the county shall account for the same, and we are of the opinion that the county aid provided by Section 2905 would be an appropriation within the purview of Section 2911, and therefore, that it would be the duty of the society receiving such aid to account for its expenditure under Section 2911.

You will note that Section 2911 appeared originally as Chapter 264, Acts of the 39th General Assembly, and under this chapter the society was required to account only for state aid. However, the entire title relating to county and district fairs and the State Fair Board was revised, amended and codified by the 40th Extra General Assembly, and Section 2911 appears as House File 66, paragraph 38, in the form as set out in Section 2911. We are, therefore, of the opinion that Section 2911 as it appears in the 1924 Code would apply to Section 2905.

In regard to your second question as to whether or not the board of supervisors would have authority to make an appropriation this year providing no report was filed as regards the expenditure of the appropriation made last year, you are advised that we are of the opinion that the board would have the authority to make such an appropriation and that the same would not be illegal because of the fact that the society failed to make its report. However, we think that the board of supervisors should take into consideration the expenditure of the sum and the failure of the society to report such expenditure and account for the same in determining whether or not the appropriation should be made for the ensuing year.

TRADE SCHEME: Held giving of phonograph to person holding lucky key or number in trade scheme or gift enterprise where person is not required to purchase any article to secure key or ticket, legal.

September 26, 1925. *County Attorney, Primghar, Iowa:* You have requested the opinion of this department upon the following statement of facts:

"I would appreciate an opinion on the following situation.

During the last month the Sheriff of this County seized a Radio Set and a Columbia Phonograph under the section requiring such seizure when there is a violation of the trade scheme law.

The Radio set was being given away under conditions and terms identical with the case in the Report of the Attorney General of Iowa 1919-1920 on Page 832 in a letter written to W. H. Tedrow, of Corydon, Iowa. The Columbia Phonograph was being given away under a similar scheme with the exception that in that case no purchase was required—the receiver of the key being only required to appear at the store and, whether a purchase were made or not, such caller received a key.

My question therefore, is this: Is it necessary that a pecuniary consideration be given in order that there be a violation of the trade scheme law.

Corpus Juris Vol. 38, Page 291, being Paragraph 7 of Essential Elements 11, in speaking of lotteries, says that the consideration may be money or other thing of value—that it is only necessary that the person entering the competition shall do something or give up some right, or that some benefit may accrue to the persons conducting the scheme. Under Foot Note 54 thereto is a Georgia decision holding that 'attracting of custom to one's business may constitute a consideration.' There is a contrary decision also given as coming from the State of Colorado. When our Legislature passed the trade scheme law, as an addition to the lottery law, did it not intend that the essential element of consideration should be less strictly construed? 38 Corpus Juris Page 309, Paragraph 46 K, Gift Enterprises, 'and the effect of such statute may be to eliminate one or more elements of a 'lottery' within the strict meaning of that term.'

The Radio Set Scheme, as above stated, is clearly within the above named Attorney General's opinion. The Phonograph scheme is the same with the exception that the person conducting the sale required no purchase—only requiring that the receiver of the key come to his store in person.

Is the Radio scheme unlawful and the Phonograph scheme lawful because of this small difference or was I right, in your opinion, when, as County Attorney, I proceeded on the theory that the consideration paid by the receiver of the key might be services and labor as well as money and that both schemes are therefore unlawful?

I would appreciate a prompt reply as I am having the prospects of a fight over the proposition with the Columbia Phonograph Company."

In regard thereto you are advised that we agree with you that the radio set is being given away under conditions which are a violation of the law.

In regard to the phonograph, we are of a contrary opinion. In view of the facts submitted we believe that the owner of this phonograph is merely giving the same away and that he can choose any method he desires to determine the person who shall be the recipient of this gift, and there does not appear to be any element of gift enterprise or a gambling devise or lottery from the facts submitted and we do not feel that the same is illegal.

BOVINE TUBERCULOSIS: After the date of the hearing on the petition for the enrollment of a county, no names may be removed therefrom.

September 28, 1925. *Secretary of Agriculture:* You have orally requested us to prepare an opinion upon the question as to whether or not names may be removed

from Bovine Tuberculosis Eradication petitions after the date of hearing thereon before the board of supervisors.

Your attention is directed to Section 2684 of the Code of 1924, as amended by Section 1 of Chapter 54, Acts of the 41st General Assembly, which reads as follows:

"If, after such published date of hearing, or if no objections are filed to such petition on or before such date, the petition shall be found sufficient, the board shall make application to the Secretary of Agriculture for the enrollment of the county under such plan. The application shall be accompanied by a copy of the petition and agreements, together with the action of the board thereon, duly certified by the county auditor. The secretary of agriculture upon receiving the application, shall enroll the county under such plan."

It will be observed that under the plain provisions of the above statute objections must be filed on or before the published date of hearing and may not be filed after such date. In our opinion, this statute is determinative of the question you have submitted. After the date on which such hearing is had no objections may be filed and no names may be removed from the petition. There must be some time when the limit for removing names has been reached. Some date must be fixed for the determination of the sufficiency thereof. If after the hearing and before the final determination thereof, names may be removed, then there would be no finality to such proceedings and the board might be forced to reconsider their findings as to the sufficiency thereof before it is finally announced or made of record. Such a condition would be intolerable and we believe that the legislature did not so contemplate.

We desire to say in conclusion, however, that the board may take time to make a thorough and complete canvass of said petitions and may remove therefrom any names that appear on the petitions more than once, and only count such names on one of such petitions, but that in no other event may names be removed therefrom after the hearing thereon. If, however, objections filed relate to the signature of any parties whose names appear on the petition, then the board has the right and it is its duty to determine the questions raised by such objections and if it concludes that such names were not properly signed to the petition then they may be removed by the board; but no objections may be considered by the board that were not filed on or before the published date of the hearing.

BRIDGE AND CULVERT: If a city of the first class does not control its own bridge fund, the Board of Supervisors have authority under the provisions of Section 4635, Code, 1924, to levy a bridge tax upon the property in the city.

September 28, 1925. *County Attorney, Dubuque, Iowa:* We wish to acknowledge receipt of your favor of the 24th requesting our opinion in substance as to whether or not the Board of Supervisors of Dubuque County would have authority to levy a tax upon the property in the city of Dubuque for bridge and culvert purposes, under the provisions of Section 4635, Code, 1924. You have informed us that the city of Dubuque does not levy a bridge tax upon property in the city, as certain cities are authorized to do under the provisions of Section 6209, Code, 1924.

Confirming our conversation over the telephone last week, we wish to say that this department is of the opinion that the Board of Supervisors may levy a county bridge tax upon property in the city of Dubuque, under the provisions of Section 4635, Code, 1924, which in part reads:

"A county bridge and culvert tax of not to exceed five mills on all the property of the county, except on property within cities controlling their own bridge matters."

It being provided in the Code of 1897 that the county Board of Supervisors could not levy such a tax upon property within any city of the first class; subsequently, the legislature changed the law so that the supervisors could levy this tax, provided the city did not control their own bridge levy.

HIGHWAYS: In the improvement of highways, board of supervisors must move the waste material therefrom.

September 29, 1925. *County Attorney, Spirit Lake, Iowa:* We desire to acknowledge receipt of your letter of September 12, 1925, submitting to this department a question relating to the highway laws of the state. The question submitted, briefly stated, is as follows:

When the Board of Supervisors improves a highway by grading, and waste material such as stone and dirt is placed along the side of the highway by the Board of Supervisors, must this waste material be removed therefrom by the Board of Supervisors or must it be removed by the property owner?

It is well settled in this state that the titles to the highways outside of cities and towns are vested in the abutting property owners subject to the easement of the public therein.

Dubuque v. Maloney, 9 Iowa 450;
Overman v. May, 35 Iowa 89;
Kitzman v. Greenhalgh, 164 Iowa 166;
Davis v. Pickerell, 139 Iowa 186;
Dierksen v. Pahl, 194 Iowa 713.

The establishment of highways and the improvement of certain highways is vested exclusively in the Board of Supervisors. The members thereof determine, subject to certain supervisory powers in the State Highway Commission, the plans for the improvement thereof, and enter into contracts therefor. The improvement of such highways not only involves the actual grading thereof, but also the removal of any waste material that results from such improvement. To make the improvement complete it is necessary to have such waste material removed from the confines of the highway. It is the duty of the board not only to grade but also to do whatever is necessary to make the improvement complete and to make the highway available for travel. This means not only the traveled part of the road but the entire width thereof.

It is, therefore, our opinion that such waste material must be removed by the board, and that it is not the duty of the property owner to do so.

DRAINAGE: Drainage warrants may be outlawed in ten years from the date of issuance.

September 29, 1925. *Superintendent of Banking:* We have received your letter of August 31, 1925, asking this department to prepare an opinion upon a question submitted to your department by H. L. Strong, the Cashier of the Peoples State Bank of Humboldt, Iowa. The letter of Mr. Strong is as follows:

"We are at this time having considerable discussion with our County Board of Supervisors over the status of certain drainage warrants issued by the county and which are long past due—that is, long past the time when they should have been paid, as of course there is no due date on them.

We are of the opinion that these warrants will legally become outlawed if not paid within ten years from date of issue, or a legal extension of time made. Our Board maintains that while there is a possibility of construing the law in this way, there is still the moral obligation of the County to meet its debts and that no Board of Supervisors would repudiate such debts."

Section 11007 of the Code, 1924, contains the portion of the statute of limitations relating to written contracts. This portion of the statute reads as follows:

"* * Those founded on written contracts, or on judgments of any courts except those provided for in the next subdivision, and those brought for the recovery of real property, within ten years."

The above quoted portion of the statute is identical with the language contained in the 7th subdivision of Section 3447 of the Code of 1897, the statute which was in force and effect at the time the warrants referred to in the letter of Mr. Strong were issued. We are of the opinion that the above portion of the statute applies to drainage warrants and that the action on such warrants must be brought within ten years from the date of the issuance thereof by the county. However, if drainage warrants have been presented to the county treasurer for payment and payment refused because of lack of funds, and the warrants are stamped "not paid for lack of funds," the statute of limitations will not run during the period that the warrants are not paid for want of funds but will run only after the treasurer issues notice of his intention to pay such warrants as the law provides. When a warrant is presented under such circumstances, the non-payment thereof is not the fault of the holder of the warrant, and his rights cannot be prejudiced because of the failure of the treasurer to pay the same on account of the lack of funds. The statute, however, begins to run as soon as the treasurer issues notice that he will pay the warrants when presented.

TAXATION: Section 1391 of the Supplemental Supplement, 1915, not retrospective so as to allow collection of penalty and interest on taxes for first four years.

September 30, 1925. *County Attorney, Iowa City, Iowa:* You have requested the opinion of this department upon the following statement of facts:

"I request an opinion from your department concerning the following question regarding the collection of penalties on delinquent taxes.

The taxes in question became delinquent in the year 1908, and have never yet been paid. Section 1391 of the 1897 Code Supplement of 1913 provides:

'No penalty or interest shall be collected upon taxes remaining unpaid four years or more from the 31st day of December of the year in which the tax books containing the same were first placed in the hands of the County Treasurer.'

This section has been interpreted by the Supreme Court to mean that if the Treasurer does not collect the interest and penalty within 4 years, that then the interest and penalty cannot thereafter be collected. The case of *Collins Oil Company vs. Perriene*, 176 Northwestern 303, holds that after 4 years the penalty is wiped out, and the burden is decreased instead of increased.

Hence, if in 1913 the Treasurer had sought to collect this penalty and interest, he would have been unsuccessful. Section 1391 of the old Code would prevent him from so collecting. This law was amended in 1915 to read as follows:

'No penalty or interest, except for the first 4 years, shall be collected upon taxes remaining unpaid 4 years or more from the 31st day of December of the year in which the tax books containing the same were first placed in the hands of the County Treasurer. * * *'

This Section appears now as Section 7194 of the 1924 Code. Since 1915 interest and penalties can be collected for the first 4 years that taxes are delinquent, but not thereafter. Does Section 1391 of the Supplemental Supplement of 1915 have a retroactive effect, so that the interest and penalty for the years 1908, 1909, 1910 and 1911 of this tax can be collected? In case a contest were made on the collection of interest and penalty of this tax, would the Court apply the law that was in effect 4 years after the tax books containing this tax were first placed in the hands of the County Treasurer, or would the Court apply the law that is now in force? In other words, can the interest and penalty for the years 1908-1912 be now collected?"

The rule is well settled in this State that statutes will be given a prospective construction rather than a construction which will make the statute retrospective in their effect, and the rule is equally well settled that only in cases where the intention of the legislature is clear as expressed upon the face of the enactment will the act be held to be retrospective. Otherwise, it shall be deemed to commence in futuro.

Bartruff v. Remey, 15 Iowa 257.

The Section to which you refer, being Section 1391 of the Supplemental Supplement of 1915, reads as follows:

"No penalty or interest, except for the first four years, shall be collected upon taxes remaining unpaid four years or more from the 31st day of December of the year in which the tax books containing the same were first placed in the hands of the county treasurer * *"

The only change so far as pertinent made by the legislature in repealing the old section and enacting the section just quoted are the words "except for the first four years." We are of the opinion that this language does not on its face express an intention on the part of the legislature to make this statute retrospective. It may well be construed as applying to taxes becoming due after the enactment of the statute and providing for the collection of interest and penalty for four years thereafter. It does not express an intent to make the provisions for the interest and penalty for four years apply to the taxes which have been delinquent for a period of four years or longer prior to the enactment of this statute. We do not feel that the legislature has clearly expressed the intention to make the statute retrospective. Therefore, under the rule of statutory construction we must construe the statute as being prospective, and we are, therefore, of the opinion that the interest and penalty for the years 1908, 1909, 1910 and 1911, as set out in your letter could not be collected at this time.

In support of this we call your attention to the fact that in the case of *Collins vs. Perriene*, 188 Iowa, 295, the court at page 299, refers to the change in the statute enacted by the 36th General Assembly, the same being Section 1391 of the Supplemental Supplement of 1915, but in no manner applies this statute to the case before the court. We are of the opinion that had the Supreme Court felt that this section was retrospective that it would have applied the statute to the case then before the court, and held that the statute was controlling of the question involved and that the interest and penalty could be collected under the facts submitted. This was not done and we think it is a fair deduction that the court did not construe the statute to be retrospective, and therefore, that the statute had no application to the case then pending.

COUNTIES: A permanent transfer of money may not be made from the insane fund to the general fund.

September 30, 1925. *County Attorney, Ottumwa, Iowa:* We have received your letter of September 19, 1925, asking this department to prepare an opinion upon the question which you have stated as follows:

"I will be pleased to have your opinion on construction to be placed on Section 388 of the Code of 1924 under the Budget Law on the following matter.

Where funds have been transferred from one fund to another as provided by Section 387 and the money so transferred is no longer necessary in the fund from which it was taken, would it then be necessary for the amount transferred from said fund to be returned thereto. The reason I am asking your opinion on this matter is because at the present time the county general fund is overdrawn about $17,000.00, and in the State Insane Fund of the county they have about $30,000.00 on hand. The yearly expense payable out of the fund is about $18,000.00. The last half of the tax for 1924 to be apportioned to this fund is yet available and the Board of Supervisors have by resolution and application to the State Budget Director asked authority temporarily to transfer from the State Insane Fund of the county to the

General Fund of the county the sum of $15,000.00. Section 388 at the close of the section provides: 'Provided that it shall not be necessary to return to the Emergency Fund or to any other fund no longer required any money transferred therefrom to any other fund.' This is the part of the section on which I desire your opinion, whether or not if the money is no longer necessary in the fund from which transferred, although the fund is not discontinued, it would be necessary for the fund so transferred to be returned into said fund."

Section 387 contains the provisions of the statute relating to the permanent transfer of money from one fund to another when the necessity for maintaining any fund of the municipality has ceased to exist and a balance remains in said fund. It is apparent that this section does not authorize or warrant the transfer of money from the insane fund to the general fund of the county for the reason that the necessity for the insane fund has not ceased to exist.

Section 388 reads as follows:

"Subject to the provisions of law relating to municipalities, and upon the approval of the director, it shall be lawful to transfer money from one fund of a municipality to another fund thereof, and the certifying board or levying board, as the case may be, shall provide that money so transferred must be returned to the fund from which it was transferred as soon as may be, *provided that it shall not be necessary to return to the emergency fund or to any other fund no longer required, any moneys transferred therefrom to any other fund.*"

We are of the opinion that a permanent transfer of funds may be made under the latter section only in the event there is no longer any need for the fund from which the money was transferred.

As the insane fund is a permanent fund that is used at all times, we do not believe that a permanent transfer may be made from said fund to the general fund.

BOVINE TUBERCULOSIS: The deductions provided for by the statute should be from the total appraised value of all of the animals slaughtered and not from the appraised value of each animal slaughtered.

October 1, 1925. *Secretary of Agriculture:* We have received your letter of September 18, 1925, asking this department to prepare an opinion upon the question which you have stated as follows:

"A question on the method of figuring indemnity in the office of the Animal Industry Division of the State Department of Agriculture has been brought to the attention of Dr. J. A. Barger, in charge of the federal co-operative work in Iowa, by the U. S. Bureau of Animal Industry, who has submitted the enclosed correspondence, which we are forwarding you for your opinion.

The Bureau maintains that in case an owner has more than one reactor, each animal must be computed separately—the salvage deducted and the pro rata five per cent deduction being made from the remaining difference.

Due to the great mass of claims, which are computed in our office, a simpler method of calculation has been followed—that of taking the 5% deduction from the total difference remaining after the deduction of the total salvage from the total appraised value and then dividing the result three ways—amount to be paid by the State, Federal and loss owner sustains.

It has been our contention in this method of figuring that the 5% deduction, as originally intended by the legislature, which created it, was intended to help pay for the 'free test' and should be taken from the total difference, rather than individually.

If the five per cent deduction was not required by our law, the Federal would pay a like indemnity as the state, providing that the indemnity did not exceed fifty dollars for a pure bred animal or twenty-five dollars for a grade.

The question involved is merely the difference in methods of computing the 5% deduction and will vary equally for and against the loss sustained by the owner in case either method is adopted."

To place a proper construction on the present statute we deem it advisable to consider a section of the former statute. We refer to Section 1740-a12, Supplement to the Compiled Code of Iowa, 1923, which reads as follows:

"Any owner who shall sign an agreement with the commission of animal health for testing in any county under the county area plan, whose loss as determined under the provisions of section seventeen hundred forty of this supplement shall be five per cent or less of the *total appraised value of the animals tested*, shall, in consideration of the free test as herein provided, be considered to have waived all claims to indemnity as provided in such section and any owner, where the loss shall exceed five per cent of the *appraised value of his animals tested*, shall first deduct the said five per cent in consideration of such free test and shall then receive indemnity for the excess of such loss as provided in section seventeen hundred forty of this supplement."

Section 2671 of the Code of 1924, as amended by Chapter 55 of the Laws of the 41st General Assembly, reads as follows:

"When *breeding animals are slaughtered* following any test there shall be deducted from their *appraised value* the proceeds from the sale of salvage. When *breeding animals are slaughtered* following a first test under this chapter, *there shall also be deducted five per cent of the appraised value of the breeding animals tested.* The owner shall be paid by the state one-third of the sum remaining after the above deductions are made.

The state shall in no case pay to such owner a sum in excess of fifty dollars for any registered pure bred animal or twenty-five dollars for any grade animal."

It will be observed that the former section contains the phrases "total appraised value of the animals tested" and "the appraised value of his animals tested." The latter section contains the phrases "breeding animals are slaughtered," "their appraised value" and "there shall also be deducted five per cent of the appraised value of the breeding animals tested." It will be observed that in both sections the word "animals" is used. The statute does not provide that the deduction shall be made from the appraised value of an *animal* or breeding *animal*, but the plural thereof is used in both sections. We believe this manifests an intention on the part of the legislature that the deduction should be from the total appraised value of all of the animals that are slaughtered, and not from the appraised value of each animal slaughtered. Considering the language used, we can see no escape from this conclusion.

VENEREAL DISEASE: Should return to the institution any person released having venereal disease even though person is released on conditions that cure would be taken where it appears that person is not entirely cured.

October 1, 1925. *Iowa State Board of Parole:* This department is in receipt of your letter dated September 30, 1925, which letter for convenience we quote at length. It is in words as follows:

"On December 22, 1924, Lorain Siberling, an inmate of the Women's Reformatory at Rockwell City, Iowa, was paroled to her husband, Frank Siberling, 803 Baltimore Ave., Waterloo, Iowa. This action was taken, of course, by the Board of Control who had charge of the Institution and the paroling of the inmates at that time.

At the time she was released from the prison, on parole, she was afflicted with Venereal Disease but the parole, as we understand it, was granted upon the promise that she would make arrangements with a Doctor at Waterloo to take treatments until a permanent cure was effected. This woman is reporting, of course, to this Board and has been written to several times requesting that she make a showing that she has complied with the conditions of her release.

She first, gave us a certificate of a doctor in Waterloo with a local examination, but this Board does not recognize any treatment only through a laboratory Wasser-

man test and this was requested and after some time, she finally had this Wasserman test made and the result was Positive 4 plus with Reaction.

The situation now, that confronts this department is whether or not this Board should permit this woman to remain out on parole with such a condition which of course is absolutely against the law, that no one has a right to release a person afflicted with Venereal Disease in a communicable stage. Of course, the other angle presents itself that she has not violated any rule of the Board laid down to her by the Board of Control who made this parole, and the Board of Parole is reluctant to take action in the case because of the fact that it was not a parole that was made by this Department.

Of course, this Department will not certify her to the Governor for a final release with those conditions existing and she would be entitled to a discharge next December.

I am in charge of this work, and I am interested to know what should be done and I therefore, request an opinion from your department as to the law of this case."

You are advised that in my opinion the Board of Parole should take steps at once to see that this woman is returned to the institution or other steps taken to protect the public of this state. There is no doubt as to the authority of the Board of Parole under such circumstances.

COUNTY ATTORNEY: County attorney allowed reasonable expenses for use of his car when attending preliminary hearings in other towns than county seat.

October 1, 1925. *County Attorney, Knoxville, Iowa:* This department is in receipt of your letter dated September 30, 1925, which letter for convenience we quote at length. It is in words as follows:

"Calling your attention to Sec. 5228, Code of 1924.

I wish you would write and tell what charges a County Attorney can make when he furnishes his own car in attending on preliminary hearings at towns other than the County seat. What is your construction of the statute as to what shall be included in the expense account.

Kindly let me hear from you at your earliest convenience, and oblige."

You are advised that you are entitled to your reasonable expense in attending hearings at towns other than the county seat. If you use your own car, then you are entitled to the reasonable expense thereof, that is, a reasonable charge for the use of your car.

You should file your bill with the Board which in the ultimate is to determine upon the amount to be allowed.

BOARD OF SUPERVISORS: Boards of Supervisors have authority to designate a depository for public funds coming into the hands of the county treasurer and the amount thereof. The amount may be fixed by basing it upon the capital of the bank, together with other matters. They do not have authority to compel the county treasurer to make withdrawals from banks previously designated by them as legal depositories. The manner in which funds thus deposited may be withdrawn is controlled by the statute under the direction of the county treasurer, and not the Board of Supervisors.

October 1, 1925. *County Attorney, Estherville, Iowa:* We wish to acknowledge receipt of your favor requesting the opinion of this department on the following proposition:

1. Does the Board of Supervisors have any authority to direct the deposit of funds by a County Treasurer in any other manner than to designate depository banks and fix the maximum amount which may be deposited in each bank so designated?

2. Is a direction by the Board of Supervisors that deposits of the County Treasurer in depository banks be pro-rated according to capital and surplus, binding upon the County Treasurer?

3. Does the Board of Supervisors have authority to direct a County Treasurer to withdraw funds from one or more depository banks and deposit them in one or more other depository banks?

4. Is a direction by the Board of Supervisors through a resolution that officers of banks shall refuse to cash checks or orders of a County Treasurer upon County funds in such bank, binding upon either the officers of the bank or the County Treasurer?"

In considering the question submitted by you, consideration should be given to the provisions of the statute concerning the duties of the county treasurer as found in sections 5156 to 5169, Code, 1924. An examination thereof will show that the county treasurer is responsible for all public funds and moneys received by him in his official capacity. He is required to charge himself with funds collected and credit himself with disbursements made. He is required to account to the Treasurer of State for state funds, and upon the presentation of a proper warrant drawn by the auditor of the county to pay the amount thereof, or to endorse the payment made thereon or that it is not paid for want of funds.

It is provided in Section 7404, Code, 1924:

"The county treasurer shall, with the approval of the Board of Supervisors as to place of deposit, by resolution entered of record, deposit state, county, or other funds in any bank or banks in the state to an amount fixed by such resolution at interest at the rate of at least 2½ per cent per annum on ninety per cent of the daily balances payable at the end of each month, all of which shall accrue to the benefit of the general county fund."

It is apparent, therefore, that the county treasurer who is charged with the care and custody of public funds may deposit such funds in depository banks with the approval of the Board of Supervisors. This approval is as to the place of deposit and to the amount which may be deposited in such bank. There are many things which may be considered by the Board of Supervisors in selecting the depository. We believe it is proper that they should consider the capital and surplus of the proposed depository as well as other matters that determine whether or not the bank in question would be a safe and suitable depository for public funds. It is not necessary that the supervisors fix a definite certain amount in their resolution. They may fix the amount of the deposit by providing that it be in proportion to the capital and surplus of the proposed depository. The resolution should definitely designate the proposed depository and the amount which may be deposited therein, fixing the amount at so many dollars or fixing it in an amount determined by the capital and surplus of the bank. The amount thus fixed by the Board of Supervisors is binding upon the treasurer and a deposit by him in such depository of more than the amount thus fixed would be at his own peril.

The statute does not give the Board of Supervisors authority to compel the county treasurer to make withdrawals from the banks designated as depository banks and deposit such funds in other designated depositories. The only authority of the Board of Supervisors concerning the deposit of county funds is that contained in the section hereinbefore quoted. After the depository is legally designated by the supervisors, they have no authority to control or order the depository bank to refuse to cash checks or orders of the treasurer properly drawn upon such funds. The manner in which funds so deposited may be withdrawn is controlled by the statutes and is under the direction of the county treasurer and not the Board of Supervisors.

HOTELS: An increase in rates due to a change from European plan to American plan comes within the provisions of Section 2841 of the Code, 1924, requiring posting of increase in rates.

October 1, 1925. *Secretary of Agriculture:* You have requested the opinion of this department upon the following submitted statement of facts:

"The question has arisen whether it is possible for hotels to make a change in their rates of rooms without a sixty days' notice with the Department of Agriculture—the change in rates being made for the reason that meals are to be included. In other words, can the hotel change from European to American plan without a sixty day notice?

The Julien Dubuque Hotel has requested permission to change their rates to include meals—which will mean a three dollar raise, per room. They do not wish to wait the sixty day time—consequently, your opinion is requested."

We refer you to Section 2841 of the Code, 1924, which reads as follows:

"A complete list of rooms by number, together with the number of the floor and the rate per diem per person for each room, shall be kept continuously and conspicuously posted on the wall near the office in the lobby of every hotel in such a way as to be accessible to the public without request to the management. The rate per diem per person for each room shall also be posted in the same manner in the respective rooms. No greater charge than the one thus posted shall be made.

Section 2842 provides as follows:

"The rate posted under the preceding section shall not be increased until sixty days' notice of the proposed increase has been given to the department."

You will note that Section 2842 provides that the rate per room as required to be posted under Section 2841 shall not be increased without a sixty day notice as provided by Section 2842. We think it is clear that the rate to be paid per room is being increased under the facts submitted in your letter. We believe that it is immaterial that this increase is due to the fact that the hotel is undergoing a change from the European plan to the American plan, and that the increase is to cover the cost of meals. The statute contemplates a posting of notice for an increase in rates, and we think that any increase, regardless of the cause for such increase, is an increase within the purview of the statute, and that when a hotel undertakes to raise its rates for any purpose that they must publish a notice thereof for a period of sixty days as prescribed by Section 2842.

VETERINARIAN: The facts in each particular case must determine whether or not a person who sells patent medicine or drugs for animal ailments or diseases is engaged in the practice of veterinary medicine or not. If the services are gratuitous he is not engaged in this practice.

Oct. 5, 1925. *Secretary of Agriculture:* We wish to acknowledge receipt of your favor of the 23d requesting our opinion upon the following propositions:

"1. What authority under the Iowa laws have county agents for engaging in the handling or acting as agents, for or without profit, of commercial products, thus using their time and that of their office force which is paid for from public funds in part?"

"2. Can any person not qualified under the Iowa laws to practice veterinary medicine, administer treatments to animals consisting of drugs which he has sold and for which he has received a commission? In other words, does the taking of a commission constitute a fee for services if the person administers the product sold?"

Answering your first question we refer you to the opinion of this department given to your predecessor in office, Honorable R. W. Cassady, dated May 20, 1924. This opinion, we believe, answers the first proposition.

Concerning the second question submitted, you have stated the facts to be that peddlers or vendors plying their trade in this state sell patent medicines or drugs which are represented to cure certain animal ailments and diseases; that upon the sale of these medicines or drugs the vendor administers them to the animal. We believe that the question is purely one of fact.

Section 2764, Code, 1924, defines what persons shall be considered to be engaged in the practice of veterinary medicine. Paragraphs 2 and 3 thereof provide as follows:

"2. Persons who profess to be veterinarians, or who profess to assume the duties incident to the practice of veterinary medicine.

"3. Persons who make a practice of prescribing or who prescribe and furnish medicine for the ailments of animals.

Section 2765, Code, 1924, defines what persons are not engaged in the practice of veterinary medicine. Paragraph 3 thereof provides:

"Persons who treat diseased or injured animals gratuitously."

Section 2766, Code, 1924, requires that a person engaged in the practice of veterinary medicine shall first procure a license; a fee for the license is subsequently provided and a penalty for failure to procure the license.

If the facts, therefore, disclose that the person is in fact receiving compensation for administering the drug or treatment, even though the charge purports to be only for the drug or medicine administered, then he would be engaged in the practice of veterinary medicine. If, however, the facts show that he does not receive any compensation for the treatment, but is in fact treating the diseased or injured animal gratuitously, then he would not be engaged in the practice of veterinary medicine and no license would be required. The facts in each particular case would control and must be first determined before it can be definitely ascertained whether or not the person is in fact engaged in the practice of veterinary medicine.

GAME WARDEN: The deputy or assistant game warden is entitled to be paid the same fees as any peace officer in the service of warrants. The amount thereof is fixed by statute, and when paid to the justice of the peace may be remitted by him directly to the assistant or deputy game warden. When remitted to the county treasurer, the Board of Supervisors should direct such fees to be paid to the assistant or deputy game warden upon filing a proper claim.

October 5, 1925. *State Game Warden:* We wish to acknowledge receipt of your favor of the 23d ult. requesting our opinion on the following proposition:

"1. Should a justice of the peace turn over to the deputy game warden the fees due him when the costs are paid, or must the justice remit the costs to the county so that the board of supervisors can pass upon claims for fees by the deputy wardens?

2. In cases where the defendant is unable to pay fine and costs assessed and is committed to jail, must the county pay the fees of the deputy game warden?

3. What can be done when a justice has collected fees for deputy game warden and remitted same to county, and the board of supervisors has refused to allow claim for the warden fees?"

Section 1713, Code, 1924, provides in part as follows:

"Assistant and deputy game wardens may arrest without warrant any person violating the provisions of this chapter. They may serve and execute any warrant or process issued by any court in enforcing said provisions, in the same manner as any peace officer might serve and execute the same, and they shall receive the same fee therefor. * * *"

Section 1717, Code, 1924, provides in substance that the assistant and deputy game wardens shall pay to the State game warden on certain dates—

"all license fees, penalties, and forfeitures from other sources, * * * shall constitute the state fish and game protection fund, which shall be kept separate by the state treasurer, and out of which shall be paid the compensation, traveling, contingent, and office expenses of the state game warden, his assistants and deputies, * * *, and all expenditures necessary for the enforcement of the provisions of this chapter; * * *"

Section 13405, Code, 1924, enumerates what are "peace officers," and includes sheriffs, constables, marshals and policemen, special agents of the Department of Justice, and such other persons as may be otherwise designated by law.

We assume that the fees in criminal cases concerning which there is some question, are earned by assistant and deputy game wardens when acting in the capacity of a constable from the office of a justice of the peace. This being true, the fees that may be charged are fixed by the provisions of Section 10637, Code, 1924, and may not be any other amount.

Under the statutes hereinbefore referred to, it is clear that an assistant or deputy game warden serving a warrant or process from the office of the justice of the peace is entitled to receive the same fees for this work as the constable, which fee is fixed and determined by the statute. If the fees are actually earned and subsequently paid to the justice of the peace, we are of the opinion that the justice may properly turn over to the assistant or deputy game warden such fees as are legally due him.

Section 10638, Code, 1924, provides:

"The fees contemplated in the two preceding sections, in criminal cases, shall be audited and paid out of the county treasury in any case where the prosecution fails, or where such fees cannot be made from the person liable to pay the same, the facts being certified by the justice and verified by affidavit."

This section clearly answers your second question. If the defendant is unable to pay the costs and is committed to jail, where these facts are certified by the justice and verified by affidavit, they are to be paid out of the county treasury.

When fees have been paid to the justice of the peace, which are in fact due the assistant or deputy game warden, and the justice remits these fees to the county, it is the duty of the Board of Supervisors upon a claim properly presented and verified, to order them paid to the assistant or deputy warden. We do not believe there will be any controversy concerning the payment of such fees upon a proper showing to the supervisors. If there is any difficulty in this matter, we would suggest that the county attorney of the county involved be consulted and requested to advise the Board of Supervisors as to their duty in the matter.

BOARD OF SUPERVISORS: The Board of Supervisors should designate depositories for public funds and the maximum amount which may be deposited therein, complying with the provisions of Chapter 173, Laws of the 41st G. A. This does not prohibit them from accepting additional security.

October 6, 1925. *County Attorney, Burlington, Iowa:* We wish to acknowledge receipt of your favor of the first requesting our opinion upon the following proposition:

"Does Chapter 173 (Laws of the 41st General Assembly) give the treasurer of these various organizations an election, or are they compelled to follow this chapter."

The provisions of the chapter referred to by you have been co-ordinated with the provisions of the law as contained in the Code of 1924, concerning the deposit of public funds by the treasurers of counties, cities, and other municipalities. It is, therefore, the duty of the board of supervisors, concerning whom you especially inquire, to follow the provisions of Chapter 173, supra. The fact that they follow the provisions of this chapter does not prohibit them from accepting or requiring additional security by way of depository bonds.

Under the provisions of the chapter in question, we are of the opinion that the various boards representing the municipalities do not have an election and cannot lawfully disregard the provisions of this chapter.

In the event that the provisions of Chapter 173 are not taken advantage of, the county or municipality is not released from liability for the payment of the interest therein diverted.

COUNTY HOSPITAL: The county cannot sell or lease to a private organization a county hospital.

October 6, 1925. *County Attorney, Boone, Iowa:* We wish to acknowledge receipt of your favor of the 25th ultimo requesting our opinion in substance upon the following proposition:

The Boone Hospital was damaged by fire on July last, consequently an expenditure of an amount larger than the insurance paid is necessary to put the hospital in suitable condition for use. The replacement figure of the hospital is $100,000.00. However, the approximate sale value is about $25,000.00. The hospital has been operated at an annual loss of approximately $10,000.00 to the county. It is now proposed by the Swedish Lutheran Church to take over the hospital, tear down the old building and replace it with a new fire proof structure to be operated by them as a public hospital, provided the county will transfer to them the hospital building and grounds and the insurance money of $20,000.00 collected after the fire. You inquire whether the Board of Supervisors have authority to deed the hospital premises in question to the Swedish Lutheran Church or to lease the premises to them for 99 years, and turn over the insurance money in consideration for the rebuilding and operation of the hospital by this organization.

Chapter 269 of the Code, 1924, provides for the establishment of a county hospital and defines the powers and duties of the hospital trustees. Nowhere in the provisions of this chapter, or elsewhere in the Code, is there authority granted to the Board of Supervisors to lease a county hospital for any period of years.

Chapter 254 of the Code, 1924, defining the powers and duties of the Board of Supervisors, in paragraph 13, Section 5130, contains this provision: "When any real estate, buildings, or other property are no longer needed for the purpose for which the same were acquired by the county, to sell the same at a fair valuation." In no other place is there any provision which might in the slightest indicate that the Board of Supervisors had authority to dispose of this property. Under the facts stated by you, we are of the opinion that although the transaction in question might seem profitable to the county, the Board of Supervisors would not have authority, under the provisions of the statute just quoted, to sell the property to the Swedish Lutheran Church, or any other organization. The supervisors would clearly not have authority to turn over the insurance money amounting to $20,000.00, collected by the county, to the organization in question, or any other organization.

Considering the proposition as a whole, this department is of the opinion that the plan proposed cannot be legally carried out.

BOARD OF SUPERVISORS: The Board of Supervisors have authority to employ such necessary clerical help as may be required in the conduct of the affairs of the county. They cannot delegate to this employe, however, any of the duties imposed upon them by statute. Neither can they delegate any discretion to an employe. Such employe called a purchasing agent cannot interfere with the records in the auditor's office or with the duties of the auditor.

October 7, 1925. *Auditor of State:* We wish to acknowledge receipt of your favor of the 21st ult., requesting our opinion in substance as to whether or not a Board of Supervisors have authority to employ what is called a purchasing agent, and pay such agent for his services. You further inquire that providing the purchasing agent may be legally employed by the supervisors, whether or not this employe in his work can interfere with the duties of the county auditor by keeping records, bids and files of the Board of Supervisors in his office, rather than in

the office of the county auditor. We understand that the purchasing agent attends to the procurement of bids, purchasing supplies and other matters of a similar nature.

Section 5130, Code, 1924, enumerates the general powers of the Board of Supervisors. Paragraph 6 thereof is as follows:

"To represent each county and have the care and management of the property and business thereof in all cases where no other provision is made."

Nowhere in the statutes are there any provisions referring to what may be termed "a purchasing agent." The duties which it is proposed to entrust to this employe must be purely clerical and ministerial. He cannot exercise any discretion in the acceptance of bids or in the purchase of material and supplies. The Board of Supervisors are charged with the duty and responsibility of letting contracts and purchasing supplies and materials. They cannot delegate any discretion that they have in such matters. The Board does have authority to employ such clerical help or assistance as may be necessary to properly manage and conduct the county's business. If it is necessary and expedient to employ someone to attend to the details of securing bids for material and supplies and matters of this nature,—that is to look after the clerical work incident thereto, the Board may employ such a person. The Board, however, are responsible at all times for the full performance of the duties imposed upon them by statute, and must purchase supplies, let contracts and receive bids as a Board. They cannot delegate the discretion and desponsibility which the law thus imposes upon them.

Section 5141, Code, 1924, concerning the duties of the county auditor, provides in substance that the auditor shall keep all records and proceedings of the board, preserve and file all accounts acted upon by them. The auditor is required to keep proper books for this purpose, and is charged with the legal custody and preservation of the records and files enumerated in Chapter 255, Code, 1924. We are of the opinion that the purchasing agent cannot interfere with the auditor in the performance of any duties imposed upon the latter by statute.

LIBRARIES: Library Board may borrow money or issue warrants for the cost of equipping the library for heating purposes provided such loans or warrants are not in excess of the estimated levied revenue for the fund.

October 9, 1925. *Library Commission:* We have received your letter of October 2, 1925, enclosing a letter from Isabella Powers, Librarian at New Hampton, Iowa, in which Miss Powers asks you to secure an opinion from this department. The letter of Miss Powers is too lengthy to set forth in this opinion, but we gather from the contents thereof that the city of New Hampton is without funds with which to heat the Library building.

Subdivisions 19, 20 and 21 of Section 6211, as amended, provides for the assessment of three library taxes, as follows:

(1) library maintenance fund not exceeding five mills;
(2) library building fund not exceeding three mills; and
(3) library contract fund not exceeding one mill.

The cost of equipping the library building for heating purposes should be paid out of the library building fund. The cost of the heat, however, should be paid out of the maintenance fund.

Section 6223 empowers municipalities to make loans, or issue warrants, in anticipation of its revenues for the fiscal year in which such loans are negotiated, or warrants issued, but the aggregate amount of such loans and warrants shall not exceed the estimated revenue of such corporation for the fund or purpose for which the taxes are to be collected for such fiscal year.

We are of the opinion that the library board may borrow money or issue warrants for the cost of equipping the library for heating purposes, provided such loans or warrants issued are not in excess of the estimated levied revenue of such corporation for the fund from which said loans or warrants are paid. If this cannot be done within the limit specified, then we know of no way that such equipment may be purchased.

GASOLINE TAX: (1) Reimbursement of the license fee purchased for cooking and lighting purposes must be made to the ultimate consumer and not the retailer. (2) Reimbursement of the fee paid should not be made to individuals operating their own tractors in grading or maintaining public highways.

October 9, 1925. *Treasurer of State:* We desire to acknowledge receipt of your letter of October 2, 1925, submitting to this department the following two inquiries:

(1) Whether or not reimbursement of the license fee paid on gasoline purchased should be made to retailers of gasoline used only for cooking and lighting purposes and on which the license fee has not been collected by the dealer from the purchaser or user thereof.

(2) Whether or not reimbursement of the license fees paid on gasoline purchased should be made to individuals operating their own tractors, or other motor vehicles, in grading or maintaining public highways in the state, or streets of cities and towns therein.

The section of the statute providing for refunding of the fee paid on gasoline under certain conditions is Section 8 of Chapter 6, Laws of the 41st General Assembly. The part thereof which is material in the solution of the questions you have submitted reads as follows:

"Any person who shall buy or use any gasoline for the purpose of operating or propelling stationary gas engines, tractors used for agricultural purposes, motor boats, airplanes or aircraft, motor vehicles, trucks and tractors owned and operated by the state of Iowa, or by a municipality for municipal purposes within the state, or who shall purchase or use any gasoline for cleaning or dyeing, or for any other commercial use except for propelling motor vehicles operated in whole or in part upon the public highways of the state or upon the streets of any city or town in the state, shall be reimbursed and repaid the amount of such license fee paid by him, upon presenting to the treasurer of state a statement accompanied by the original invoices showing such purchase which statement shall set forth the total amount of gasoline so purchased and used by such consumer other than for propelling motor vehicles operated or intended to be operated in whole or in part upon any of the public highways of this state or upon the streets of any city or town of this state and the treasurer of state, shall, upon the presentation of such invoice, cause to be repaid from the funds operated by the license fee collected on the use of gasoline as herein provided, the amount of such license fee paid by such consumer on gasoline used for purposes other than propelling motor vehicles as hereinbefore provided. * *"

For the purpose of ascertaining just what is covered by the provisions of the statute just quoted, we shall analyze its provisions. Reimbursement thereof shall be made when any person buys or uses gasoline for the following purposes: (1) Operating or propelling stationary gas engines; (2) tractors used for agricultural purposes; (3) used in motor boats; (4) airplane or aircraft; (5) motor vehicles; (6) trucks and tractors owned and operated by the State of Iowa, or by a municipality for municipal purposes within the state; (7) gas used for cleaning or dyeing; (8) or for any other commercial use except for propelling motor vehicles operated in whole or in part upon the public highways of the state or upon the streets of any city or town in the state.

It is apparent that in solving the first question you have submitted, we must eliminate all of the above uses of gasoline with the possible exception of the last one. Manifestly, gasoline used for cooking and lighting purposes does not come within the meaning of the phrase "gasoline for cleaning or dyeing." Does gasoline used for cooking and lighting purposes come within the designation of "commercial use?" If the gasoline sold is used for cooking or lighting in a hotel, cafe or restaurant, it would clearly come within the definition of this term. We are also of the opinion that gasoline used for cooking and lighting purposes in the home also would come within the meaning of this term.

However, the amount paid as tax on gasoline should be refunded not to the retailer but to the ultimate user or consumer. As the tax was not paid to the retailer by the ultimate consumer, such consumer is not entitled to the repayment of any part of the amount paid by him to the retailer.

II.

The solution of your second question depends upon the meaning of the phrase "motor vehicles, trucks and tractors owned and operated by the State of Iowa, or by a municipality for municipal purposes within the State,".

It will be observed that the above phrase relates to trucks and tractors owned and operated by the state, or by a municipality for municipal purposes within the state. The right to reimbursement does not attach to one who has a contract with the state or a municipality under the terms of which the contractor agrees to perform certain services or to erect a structure for either the state or a municipality. The right merely attaches to the state or to one of its subdivisions. To apply the provisions of the above quoted portion of the statute to a contractor, for the state or a municipality, would have the effect of writing into the statute something that is not there by reasonable inference and conclusion from the language used.

We are, therefore, of the opinion that your second question must be answered in the negative.

WAREHOUSE RECEIPTS: Warehouse certificates or receipts issued under Chapter 427 are Warehouse Receipts within the meaning of subdivision 4, Section 8352.

October 13, 1925. *Secretary of Agriculture:* We desire to acknowledge receipt of your letter of October 9, 1925, submitting the following inquiry to this department:

"Your opinion is requested as to whether the 'certificate' issued under Chapter 427, Code of 1924, particular reference being made to the last paragraph of Section 9752 is a warehouse receipt within the meaning of sub-section 4, Section 8352, Code of 1924."

Chapter 427, referred to in your letter, contains the statute relating to unbonded agricultural warehouses. The solution of the question you have submitted will require consideration of a very small portion of the statute.

Section 9752 contains the definitions of various terms used in the statute. The word "certificate" is twice defined therein, as follows:

"The word 'certificate' shall refer to any certificate or receipt evidencing the storage of grain under the provisions of this chapter, and any rules or regulations promulgated thereunder."

"Where the word 'certificate' is used in this chapter, it shall be construed to be used in the same connection as the word 'receipt' is used in the uniform warehouse act."

Turning to the chapter on Warehouse Receipts Law (425) we find that Section 9662 contains the provisions governing the form of receipt and the essential terms thereunder. It reads as follows:

"Warehouse receipts need not be in any particular form, but every such receipt must embody within its written or printed terms:

1. The location of the warehouse where the goods are stored;
2. The date of issue of the receipt;
3. The consecutive number of the receipt;
4. A statement whether the goods received will be delivered to the bearer, to a specified person, or to a specified person or his order;
5. The rate of storage charges;
6. A description of the goods or of the packages containing them;
7. The signature of the warehouseman, which may be made by his authorized agent;
8. If the receipt is issued for goods of which the warehouseman is owner, either solely or jointly or in common with others, the fact of such ownership; and
9. A statement of the amount of advances made and of liabilities incurred for which the warehouseman claims a lien. If the precise amount of such advances made or of such liabilities incurred is, at the time of the issue of the receipt, unknown to the warehouseman or to his agent who issues it, a statement of the fact that advances have been made or liabilities incurred and the purpose thereof is sufficient.

A warehouseman shall be liable to any person injured thereby, for all damages caused by the omission from a negotiable receipt of any of the terms herein required."

Therefore, the word "certificate," as used in Chapter 427, refers to any certificate or receipt evidencing the storage of grain under the provisions of said chapter, and is essentially the same as the receipt described in Section 9662.

Having determined the nature and effect of warehouse receipts or certificates, we now turn to Section 8352 of the Code of 1924, for the solution of the problem you have submitted.

Section 8352 reads, in part, as follows:

"The provisions of the last preceding section shall not apply:

4. To liabilities incurred through federal intermediate credit banks organized under the provisions of the act of Congress of March 4, 1923, known as the Agricultural Credit Act of 1923, relating to agricultural credits, when such liabilities are secured by warehouse receipts for agricultural products or chattel mortgages of live stock."

The section from which the above quotation is taken is a part of the statute relating to corporations for pecuniary profit. The section just preceding contains the provisions of the statute requiring corporations to fix in their articles of incorporation the highest amount of indebtedness or liability to which the corporation may at any time be subject, which, in no case, with certain exceptions, shall exceed two-thirds of the capital stock thereof.

It is manifest that, in answering your interrogatory, we must consider what is meant by the phrase "when such liabilities are secured by warehouse receipts for agricultural products." We are of the opinion that the definition of "warehouse receipts or certificates" as found in Section 9752, when read in connection with Section 9662, is broad enough to bring the same within the provisions of subdivision 4, of Section 8352.

We are, therefore, of the opinion that warehouse certificates or receipts issued under the provisions of Chapter 427 are warehouse receipts within the meaning of subdivision 4, Section 8352, and that they clearly come within the provisions thereof.

SMALL LOAN BANKS: Opinion construing the provisions of certain notes and mortgages used by banks engaged in small loan business. Also holding that it is lawful to include the provisions for statutory attorney's fees in such note, and that it is unlawful to include a stipulation authorizing the mortgagor to collect exceeding ten per cent of the borrower's wages. Neither is it lawful to provide for the collection of 3½% a month upon interest and expense incurred in making the collection. The mortgage may provide that the mortgagee may take possession of the chattels without court proceedings and sell the same upon notice and sale. A judgment merges the obligation or indebtedness and draws interest as provided under Section 9405, Code, 1924. Telegraph and telephone calls are not legitimate charges that can be made against the borrower.

October 17, 1925. *Superintendent of Banking:* We wish to acknowledge receipt of your favor of the 11th ult., requesting our opinion upon the following proposition, to-wit:

"1. The instrument numbered 1 contains divisions at "A" and "B" as to the legality of which I shall be pleased to have your opinion.

"2. The instrument numbered 2 at "A" provides for interest at 3½% per month in case the proceeds of a sale of a collateral note "shall not cover the principal, interest and said expenses". May interest at 3½% per month be received upon any sum not provided for in the original contract?

"3. This is a chattel mortgage in use by the various branches of the Beneficial Loan Society. Please refer to the portions marked at A and B in red, and let me know whether these provisions are legal.

"4. May a judgment rendered for money due on a 3½% note carry the same rate of interest or must it conform to Section 9405 of the Code of 1924? Does rendition of judgment cancel the note sued upon?

"5. A loan company specializing in loans to teachers in this state and in many distant states, such loans being secured upon salary assignments of the borrowers, makes much use of the telegraph and long distance telephone in collecting interest and principal installments, charging the telegraph and telephone fees to the borrower. Is this a violation of Section 9422 of the Small Loan Act?"

The instrument referred to in your first question is a combination note and chattel mortgage. The provisions marked "A" and "B", that you question, are as follows: Division "A" appears in the promissory note, and reads:

"Should this note not be paid when due, the makers and endorsers agree to pay all costs of presentation and collection of the same, including plaintiff's attorney's fees."

This is the ordinary provision contained in promissory notes generally. The provisions of Section 2492, Code, 1924, limiting the charges that may be made in addition to the interest charge upon loans of this nature, does not contemplate the expense of suit for the collection of the obligation, but refers to the charges that may be made in connection with the making of the loan and taking of security. Section 11644, Code, 1924, authorizes the assessment of an attorney fee in favor of the plaintiff's attorney when suit is started for the collection of a promissory note, provided the note contains an agreement to pay such a fee. The sentence referred to by you is in compliance with the statutory provisions last referred to, and we think is a legal charge.

That part of the instrument referred to, marked "B", is contained in the chattel mortgage and reads as follows:

"And in addition thereto the said mortgagors or either of them, specifically authorize the said Guaranty Loan Company, to collect any money or wages now due or which may hereafter become due, for work and labor performed or which may hereafter be performed and said mortgagors or either of them hereby specifically authorize their employer or employers whoever they may be to pay unto said Guaranty Loan Company the amount of money due the said Guaranty Loan Company or any part thereof and it is further agreed that a receipt by said Guaranty Loan Company to such employer or employers shall have the same force and effect as if given by the said mortgagors or either of them, and shall forever foreclose said mortgagors' rights against said employer or employers to the amount of said receipt whether said mortgagors owe the said Guaranty Loan Company the amount of the receipt or not."

The provision just quoted is unlimited and would on its face authorize the employer to pay the mortgagee all of the wages or salary which might be due the mortgagor. Section 9428, Code, 1924, places a limit that may be collected under assignment of wages at a sum not exceeding ten per cent of the borrower's salary, wages, commission or other compensation for services. The stipulation authorizing a collection of an amount exceeding the ten per cent referred to would be unlawful.

The instrument referred to in your second question is a combination note and mortgage. The part marked "A", concerning which you inquire, reads as follows:

"* * *; and in case the said proceeds shall not cover the principal, interest and said expenses, the undersigned promise to pay the deficiency immediately after such sale, with interest thereon at 3½ per cent per month."

This provision, if legal, would authorize the charge and collection of 3½ per cent per month, not only upon the principal sum borrowed, but upon interest and expenses which might be incurred in making the collection. Section 9420, Code, 1924, providing for the rate of interest upon loans of this nature, reads as follows:

"Every person, co-partnership and corporation licensed hereunder may loan any sum of money not exceeding in amount the sum of $300.00, and may charge, contract for and receive thereon interest at a rate not to exceed 3½ per cent per month."

Section 9421, Code, 1924, provides:

"Interest shall not be payable in advance nor compounded, and shall be computed on unpaid balances."

Section 9423, Code, 1924, provides that a loan made in violation of the provisions of the sections last quoted shall be forfeited, and the licensee's have no right to collect.

We are of the opinion that under the provisions of these statutes referred to, interest may only be charged upon the unpaid balance of the principal sum due, and interest upon interest, which of course is compound interest, is clearly in violation of the statute, and interest upon expenses is not authorized upon loans of this nature.

In your third question you refer to a chattel mortgage used by the Beneficial Loan Society, and particularly to that part thereof marked in red, which reads as follows:

"* * *; for all of which these presents shall be liberally construed as full authority without any previous court proceedings or judge's decree of foreclosure unless required by law.

(a) If the State law regulates such foreclosures differently, as to notice or other procedure, or requires a public official to act in connection therewith, then and in that case, the preceding terms are to be modified in accordance with the law and full asset is given thereto."

We assume you question the legality of providing that the mortgagee may take possession of the chattels mortgaged and sell the same by notice and sale, as provided by the terms of this mortgage. We are of the opinion that this may legally be done. The statutes of this State provide that chattels may be sold in the manner provided in this mortgage, by agreement of the parties.

Referring to your fourth question, you are advised that a judgment merges the

obligation or indebtedness upon which the judgment was procured. Moreover, as a general rule, all the peculiar qualities of the claim are merged in the judgment, which then stands on the same footing as all other judgments. This principle has been held to apply to promissory notes, contracts, bonds, etc. (34 C. J., 752; *Hereford v. Street*, 46 Iowa, 594.) A judgment is in fact a new liability and becomes the claim itself. Section 9405, Code, 1924, referred to, fixes the rate of interest that may be charged upon a judgment at six per cent, and in no event to exceed eight per cent,—the latter only when expressly agreed as a part of the contract on which the judgment or decree is rendered. We are, therefore, of the opinion that a judgment could not legally draw interest at the rate of 3½ per cent per month, but draws interest only as authorized under the provisions of Section 9405, supra.

In your fifth question you inquire whether or not the practice therein stated is a violation of Section 9422, Code, 1924. Telegraph and telephone calls are not legitimate charges that can be made against the borrower. Such charges are not authorized under the provisions of the Small Loan Act, nor elsewhere in the statutes of this State. We assume that there is no provision in the contract between the borrower and lender providing for this charge. We are, therefore, of the opinion that charges of this nature are in violation of the Small Loan Act.

BOARD OF SUPERVISORS: The Board of Supervisors have authority to employ an auditor or accountant to assist in the procurement of evidence of the violation of the banking statute.

October 20, 1925. *County Attorney, Rock Rapids, Iowa:* I wish to acknowledge receipt of your favor of the 15th and also your telephone communication concerning the authority of the Board of Supervisors to employ an accountant to make an examination to be used in connection with the grand jury investigation of an insolvent bank in your county. The Board of Supervisors are in effect the managers of the county's business and have general supervision and control over its affairs when not otherwise limited or specifically directed by statute. We understand that the matter in question not only involves the criminal responsibility of certain officers of a defunct bank, but also certain funds deposited therein belonging to the county.

Paragraph 6 of Section 5130, Code, 1924, concerning the general power of the Board of Supervisors, provides:

"To represent its county and to have the care and management of the property and business thereof in all cases where no other provision is made."

There is no provision regarding the employment of an accountant by the Board of Supervisors and we are of the opinion, therefore, that it is clearly within their general power in the management and control of the business of the county, to employ an accountant for the purpose contemplated.

You inquire as to whether or not the district court has authority to enter an order directing the Board of Supervisors to employ an accountant for this purpose. We fail to see how the court would have any jurisdiction over the Board of Supervisors to make such an order. The board is not in court or before the court and any order made by the court or judge thereof, without jurisdiction, would be clearly null and void, and we do not believe that any judge would consent to make such an order.

TAXATION: Chattel mortgage executed in good faith prior to the establishment of personal tax is superior unless fraud can be shown in its execution.

October 21, 1925. *Auditor of State:* This department is in receipt of your letter dated October 16, 1925, in which you refer to the question of delinquent tax collections. This letter is quoted at length. It is in words as follows:

"We are confronted with a question in regard to delinquent tax collection on which we would like your advice. A certain taxpayer has delinquent personal taxes of about $1,000. The delinquent tax collector in the county sends him two written notices and in response he calls at the office but simply laughs in their faces in regard to the matter, and before they can make distress sale, he rushes home and makes out a chattel mortgage to his father-in-law, presumably with the avowed purpose of avoiding this tax payment.

Briefly stated the question is, can a person owing delinquent taxes mortgage the property after he has received a notice to call and pay his taxes and thereby avoid being forced to make payment?

An early reply in regard to this matter will be appreciated."

You are, of course, acquainted with the law to the effect that a prior chattel mortgage executed in good faith and for a valuable consideration is superior to the lien subsequently established for personal taxes.

This, of course, is not true as to stocks of merchandise and other similar articles of personal property which are by statute subject to a lien. The question, therefore, really centers down to the proposition as to whether or not the mortgage in question was executed in good faith and for a valuable consideration. It would appear that it was not.

Our suggestion in this matter would be for the county attorney to take action to subject the property in question to the payment of the taxes.

SCHOOLS: The distance referred to in Section 4274, Code, 1924, is the distance from the place of a child's residence to the school, and not the distance from a child's residence to the nearest transportation.

Oct. 23, 1925. *Superintendent of Public Instruction:* We wish to acknowledge receipt of your favor of the 20th requesting our opinion upon the following proposition:

"Section 4274 of the Code, 1924, provides that if a child resides nearer a school house in an adjoining corporation and one and one-half miles or more from any public school in the corporation of his residence, he may by complying with the provisions of this section attend the school in the adjoining district.

"A pupil lives two and seven-tenths miles from the school in his home district and three and one-tenth miles from the nearest school in an adjoining district. The bus operated by the school in the adjoining district comes within a quarter of a mile of the residence of the pupil. Would this be considered that the pupil lives a quarter of a mile from the school to which the bus belongs or should the distance be figured as the actual distance to the school which is three and one-tenth miles?"

Section 4274, Code, 1924, referred to by you contains no reference to transportation and only refers to the place of residence of the child. We do not believe that the language of this section can be interpreted to mean the distance from the child's home to the nearest transportation, but must refer clearly to the distance from the child's home to the school. We are, therefore, of the opinion that under the facts stated by you, it could not be considered that the pupil lives a quarter of a mile from the school to which the bus belongs, but the distance to the school must be figured as the actual distance from the child's residence to the schoolhouse.

STATE HIGHWAY COMMISSION—HIGHWAYS: The State Highway Commission is given authority to settle disputes between city councils and boards of supervisors only as to the location of primary roads through cities and towns and the commission has no jurisdiction to settle disputes as to drainage, grading, graveling or hard surfacing.

October 23, 1925. *Iowa State Highway Commission:* We desire to acknowledge receipt of your letter of October 21, 1925, in which you have asked this department to prepare an opinion upon the question which you have stated as follows:

"We have a number of cases about the State where the Board of Supervisors and town councils have been unable to agree upon the location of the primary road running thru the town.

We have one case in particular in mind, at Thompson, Iowa, in Winnebago County, where Primary Road No. 9 comes into the town from the east and makes a right angle turn at a corner and continues north. The M. & St. L. railroad angles across the corner in a northeasterly direction causing traffic to cross their tracks twice within the limits of the town. The Board of Supervisors and the council cannot agree upon a location which would be desirable and also eliminate the two railroad crossings.

Under Section 4731 of the 1924 Code, we find in case there is a disagreement regarding the location of a primary road within a town the matter shall be referred to the State Highway Commission whose decision shall be final. I recently talked this over with Mr. O'Brien of your office and he stated it was his opinion we had the right to construct the road if the matter had been properly presented to the Highway Commission and their decision given as to the location. What we would like to know is, does this section give the Highway Commission and the Board the right to locate the road, but not the right to grade, drain and purchase right of way, or whether the right to improve and purchase right of way is covered in this section."

Section 4731 of the Code, 1924, as amended by Chapter 111, Laws of the 41st General Assembly, reads as follows:

"The board of supervisors is hereby given plenary jurisdiction subject to the approval of the council to purchase or condemn right of way therefor and grade, drain, bridge, gravel, or hard surface any road or street which is a continuation of the primary road system of the county and which is:

1. Within any town, or
2. Within any city, including cities acting under special charter, having a population of less than twenty-five hundred, or
3. Within that part of any city, including cities acting under special charter, where the houses or business houses average not less than two hundred feet apart.

The primary road fund shall not be charged with the cost of hard surfacing within the cities and towns specified above in excess of the cost of hard surfacing which is eighteen feet in width.

After the completion of such improvement the same shall be maintained by the city or town and such city or town shall rest under the same obligation of care as to such improvements as is now provided by law for roads and streets generally.

Any such city or town through its council and each county of the state through its board of supervisors are hereby authorized to enter into written agreements subject to the approval of the state highway commission to determine the location of such improvements within such cities or towns. In case of disagreement the matter shall be referred to the state highway commission, whose decision shall be final. The board of supervisors shall not drain, grade, gravel, or hard surface any highway within the limits of cities other than those specified herein."

It will be observed that, under the provisions of the statute, the board of supervisors is granted plenary jurisdiction, subject to the approval of the council, to do two things,—first, to purchase or condemn right of way for primary roads, and second, to grade, drain, bridge, gravel or hard surface such primary roads. The primary authority is granted to the board of supervisors, subject to the approval of the council. The last paragraph thereof grants joint authority to cities and towns, through their councils, and counties, through the board of supervisors, to enter into written agreements subject to the approval of the Highway Commission, to determine the location of such improvements within such cities or towns. In case of a disagreement, the matter of location shall be referred to the State Highway Commission, whose decision shall be final. It is apparent, we think, that it was the intention of the legislature to grant to the State Highway Commission the authority to settle any disputes or disagreements between the city council and the boards of supervisors only as to the location of such highways, through cities and towns and that the Highway Commission has no jurisdiction to settle disputes as to draining, grading, graveling, bridging or hard surfacing any highway within the limits of cities and towns.

BANKS AND BANKING: A state savings bank has authority to invest in the bonds of a joint stock land bank.

October 24, 1925. *Superintendent of Banking:* This department is in receipt of your letter dated October 5, 1925. This letter is in words as follows:

"You are quite familiar with James F. Toy and his string of banks in the northwest part of the state. He also has the Iowa Joint Stock Land Bank. His banks are well managed and have at the present time a surplus of cash. Mr. Toy is anxious to put a large volume of these Joint Stock Land Bank Bonds in his banks. They have a ready market nearly equal to Liberty Bonds, and there is probably very little question, if any, of the desirability of the investment.

What kind of a ruling should this Department make in regard to the amount of these bonds that a bank should be allowed to invest in?"

Chapter 175, Laws of the Forty-first General Assembly, concerning the investment of trust funds, is as follows:

"An Act to authorize guardians, administrators, trustees, receivers, state and savings banks, trust companies and insurance companies to invest in bonds issued under and by virtue of the federal farm loan act, approved by the president of the United States July 17, 1916.

Be it enacted by the General Assembly of the State of Iowa:

Section 1. Section ninety-one hundred eighty-three (9183), code, 1924, is amended by adding to paragraph one (1) the following: 'or in farm loan bonds issued under the act of congress approved July seventeenth (17), nineteen hundred sixteen (1916), as amended, where the corporation issuing such bonds is loaning in Iowa."

Sec. 2. Section eighty-seven hundred thirty-seven (8737), code, 1924, is amended by adding to paragraph one (1) the following: 'or farm loan bonds issued under the act of congress approved July seventeenth (17), nineteen hundred sixteen (1916), as amended, where the corporation issuing such bonds is loaning in Iowa."

Sec. 3. Section eighty-eight hundred twenty-nine (8829), code, 1924, is amended by adding to paragraph one (1) the following: 'or farm loan bonds issued under the act of congress approved July seventeenth (17), nineteen hundred sixteen (1916), as amended, where the corporation issuing such bonds is loaning in Iowa."

With reference to this matter, you are advised that the sole question is as to the value of these securities. There is nothing in the law to prevent the taking of securities such as these securities unless it be said that Mr. Toy by reason of his being connected with both the Iowa Joint Stock Land Bank and the banks may prevent the investment. It seems to me that if these securities are good and if the board of directors of both institutions approve by specific action, that there should be no difficulty about the matter. Ordinarily it is ill-advised to take securities of an institution under the control of certain officers into a bank under the control of the same officers. Such a practice is bad.

As I understand it, this is a joint stock land bank operating under the laws of the United States relating to such banks. If this is true, then you have a different condition from that ordinarily prevailing and the ordinary criticisms lodged would not be applicable.

BOARD OF CONTROL: The Board of Control does not have authority to loan a town money for the purpose of repairing its water plant; loan to be repaid by water furnished a state institution.

October 24, 1925. *Board of Control of State Institutions:* We wish to acknowledge receipt of your favor of the 8th requesting our opinion in substance as to whether or not the Board of Control has authority to make a loan to the town of Mitchellville for the purpose of improving their water supply system, which is used by the training school for girls in that town; this loan to be paid in water furnished by the town of Mitchellville.

You are advised that the state and boards or commissions representing the state are not authorized without specific act of the legislature to loan money to municipalities or individuals for any purpose whatever. There is no statute authorizing a loan of the nature inquired of. We are, therefore, of the opinion that the Board of Control cannot loan the town of Mitchellville the amount requested or any amount.

MOTOR CARRIERS: The term "public transportation of freight" in section 2 of Chapter 4, Laws of the 41st General Assembly refers to those engaged in carrying freight for the public in general and not those engaged to carry freight for certain persons exclusively.

October 24, 1925. *Board of Railroad Commissioners:* We wish to acknowledge receipt of your favor of the 7th requesting our opinion on the following proposition, to-wit:

"A person is operating a motor vehicle for transporting merchandise for compensation from two wholesale houses exclusively. Such merchandise is delivered to various retail merchants, the service necessitating trips over three or four different routes on that many days of each week; that is on Monday of each week, a trip is ordinarily made to certain towns, on Tuesday of each week, a trip is made to certain other towns, etc.

"The carrier is reimbursed for such service in the majority of cases by the wholesale house, who in turn charges the consignee. In a few cases the carrier collects the transportation charge direct from the person to whom the freight is delivered. The agreement or understanding between the two wholesale houses and the carrier is purely oral, the carrier reserving the right to carry other freight as the occasion may arise.

"The question arises, however, as to whether, inasmuch as the freight is taken from only the two wholesale houses, who guarantee and ordinarily pay the transportation charge, the carrier is operating for the 'public transportation of freight' within the meaning of the statute referred to.

"It is, therefore, respectfully requested that you advise as to whether a person operating in the manner set out is amenable to the provisions of Chapters 4 and 5, Laws of the Forty-first General Assembly."

The chapters referred to by you in their definition of the term are almost identical. In Section 2 of Chapter 4, Laws of the 41st General Assembly, defining the term, it is said:

"The term 'motor vehicle,' when used in this act, shall mean any automobile, automobile truck, motor bus, or other self-propelled vehicle, not operated upon fixed rails or track, used for the public transportation of freight or passengers for compensation between fixed termini, or over a regular route, even though there may be occasional, periodic or irregular departures from such termini or route; * * *"

To be engaged "in public transportation" one must in fact be a "public or common carrier" of freight or passengers. A common carrier has been defined as "one who undertakes for hire or reward to transport the goods of such as choose to employ him to transport goods and merchandise from place to place." (10 C. J., 39). A common carrier is one who holds himself as ready to engage in the transportation of goods for hire as a public employment and not as a casual occupation. It is true that persons who engage in the business of draymen, or of transporting goods and merchandise, holding themselves out as willing to serve all who apply and pay their charges, are common carriers in respect to the carriage of such goods and merchandise as they make a business of carrying, but persons of this character, who do not hold themselves out as willing to carry goods for the public generally, are not common carriers. (10 C. J., 49). Thus where the carriage is in pursuance of an accepted contract to serve one person only, the employment being therefore private and not public, the person so employed is not a common carrier of goods.

If, therefore, the person engaged in transporting merchandise is employed exclusively by certain persons and does not hold himself out to the public in general as being willing to carry that particular kind of goods or merchandise, is not a common carrier, and in our opinion is not engaged in "the public transportation of freight" within the meaning of the chapter referred to.

Each case must be determined upon its particular facts, applying the general legal principles hereinbefore stated.

TAXATION: Consolidated levy in cities and towns. A city or town may make a consolidated tax levy under the provisions of Sections 6217 and 6218, Code, 1924, and the budget of such consolidated levy may be filed as an assessment under the provisions of section 375. A city or town may thus appropriate for the use of the general fund an amount in excess of ten mills.

October 24, 1925. *Director of the Budget:* We wish to acknowledge receipt of your favor of the First, in substance requesting our opinion as to whether under the provisions of Section 6217, Code, 1924, it is permissible for a city to make a consolidated tax levy and appropriate therefrom to the general fund an amount in excess of the ten mill levy which could have been made for the general fund.

Section 6217, supra, provides as follows:

"In lieu of any or all of the separate annual levies for the general fund, grading fund, the improvement fund, and the gas or electric light or power fund, cities and towns may levy one tax which shall not in the aggregate exceed the total amount of taxes which such municipality might have levied therefor.

"The city or town making such consolidated levy shall, prior to the first day of April thereafter, appropriate the estimated revenue from such consolidated levy, in such ratio as the council may determine, for any purpose for which such funds might have been used, but no part thereof shall be used for any other purpose."

Section 6218, Code, 1924, provides in substance that when the provisions of Section 6217, supra, are exercised by a city, it is the duty of the city council, prior to April 1st of each year, to prepare an annual budget based on the estimates of all expenses of the several city departments; the purpose of the budget being to show in itemized form the expenditures from the consolidated levy for the ensuing year. This budget is to be published in one or more newspapers in the city or town, or by posting, if no newspapers, and a time fixed for hearing of protests.

Under the provisions of Section 383, Code 1924, part of Chapter 24 concerning the "Local Budget Law," it is provided in substance that the budget for various municipalities shall be certified to a levying board not later than August 15th of each year.

Section 375, Code, 1924, requires that municipalities shall file with the clerk thereof, twenty days prior to the date fixed for certifying assessments to the levying board, to-wit: August 15th of each year, estimates of the amount of tax to be required, and that a date for hearing thereof shall be fixed and the estimates published, and the notice of the time and place where the hearing shall be held.

Under the provisions of the statute hereinbefore referred to, we are of the opinion that a city or town may make a consolidated tax levy under the provisions of sections 6217 and 6218, supra, and that the budget of such consolidated levy may be filed as an estimate under the provisions of Section 375, and that the publication thereof shall be as provided in the section last referred to.

We are further of the opinion that the city or town may thus appropriate from the consolidated levy for the use of the general fund, an amount in excess of ten mills.

HIGHWAYS: State Highway Commission has control of primary roads for construction and maintenance purposes. County has control for police purposes.

October 26, 1925. *County Attorney, Fort Dodge:* This department is in receipt of your letter dated October 24, 1925. For convenience we quote your letter at length. It is in words as follows:

"The State Highway Commission, as I understand it, takes over the control of the primary roads, within a short time. In this county, the Board of Supervisors has employed a patrolman to arrest violators of the traffic laws on the primary roads of the County. Will the transfer of the control of the primary roads to the Highway Commission affect, in any way, the Board hiring patrolmen to watch for and arrest violators of the traffic laws?

My personal view on the matter is that such patrolmen may still be employed by the Board of Supervisors, even though the control of the highways is in the Highway Commission; but I would like to have your view of the matter."

You are advised that the control of the primary road by the State Highway Commission has to do with construction and maintenance. The county still retains its control for police purposes.

GASOLINE TAX: Held that naptha and cleaner's naptha to be a gasoline product upon which the gas tax, as provided for by the 41st G. A., is collectible.

October 26, 1925. *Treasurer of State:* This department is in receipt of your letter dated October 22, 1925. For convenience your letter is quoted at length. It is in words as follows:

"It is requested that you advise us as to whether or not the license fee provided by Chapter 6, Laws of the 41st G. A., is imposed on the products known commercially as Naptha, cleaner's Naptha and Gas Machine gas. For your information you are informed that we have been advised by some distributors that all of the above products may be used in a combustion engine, although on account of the difference in price between these products and standard gasoline, it is improbable that much of same is so used.

We have also learned that some distributors are selling standard gasoline as Naptha and collecting the current price of the latter on such sales.

It is desired by the department that the matter be definitely determined in order that uniform instructions may be promulgated with reference to the matter."

I am informed that Naptha can be used in motor vehicles. This is especially true as to commercial Naptha. It would seem to be impossible to distinguish between Naptha and cleaner's Naptha so as to permit the sale of one and not the sale of the other without the payment of the tax. Naptha being a gasoline product, it is clearly covered by the statute and the tax should be collected upon the same. No one can lose by reason of the collection of the tax and much good will result from the prevention of the sale of any product susceptible of use in motor vehicles upon the public highways without the payment of the tax.

For the purpose of sustaining the position which I have here taken, I have communicated with a number of Senators and Representatives in the 41st General Assembly. They uniformly informed me that Naptha was intended to be covered as were all gasoline products susceptible of use in motor vehicles upon the public highways.

BOARD OF CONSERVATION: Board of Conservation has authority to pay assessment levied by Board of Supervisors for road maintenance upon property owned as state parks.

October 26, 1925. *Secretary Executive Council:* You have requested the opinion of this department upon the following statement of facts:

"The Executive Council, at a meeting held this date, requested the Secretary to secure from you an opinion regarding the following:

The Board of Supervisors of Calhoun County graveled the road known as Road District No. 30, against land in what is known as Brushy or Tow Head Lake in Williams Township, Calhoun County; and the assessment on same is $96.00.

I wish to refer you to Chapter 246, Acts of the 40th General Assembly, as the Board of Conservation is in control of these lakes, and the council desires to know if same could be paid from this Chapter, or will it be necessary to have it taken before the legislature and have an appropriation made?"

In regard thereto I call your attention to Section 4634 of the Code which reads as follows:

"When a city, town, special charter city, or county shall drain, oil, pave, or hard surface a road which extends through or abuts upon lands owned by the state, the state, through the executive council, shall pay such portion of the cost of making said improvement through or along such lands as would be legally assessable against said lands were said lands privately owned, which amount shall be determined by said council, or board."

We believe that the language of this section is clear and plain and that under it there can be no question but what the Board of Conservation would have the authority to pay the assessment of $96.00, referred to in your letter, and we believe that the payment of an assessment of this character was contemplated by the legislature in the enactment of this section.

CORPORATIONS: Under Section 8369, Code, 1924, the fee of $25.00 provided by Section 8368 is the fee referred to and the one to which the exemption applies.

October 26, 1925. *Secretary of State:* You have requested the opinion of this department upon the following statement of facts:

"A decision with reference to the fees in connection with the renewal of a domestic building and loan association is requested. Section 8369, Chapter 384, Code of 1924, provides 'Farmers' mutual co-operative creamery associations, domestic and domestic local building and loan associations, and corporations organized for the manufacture of sugar from beets grown in the State of Iowa, shall be exempt from the payment of the incorporation fee, provided in the preceding section.'

The preceding section, namely Sec. 8368, provides for a renewal fee of twenty-five dollars for ten thousand dollars capital stock and one dollar for each thousand in excess of ten thousand dollars; this in addition to a recording fee at the rate of ten cents per one hundred words.

A decision is requested as to whether or not Section 8369 intends to remit or rather pass the entire filing fee indicated in Section 8368 or whether it refers only to the excess filing fee on capital stock in excess of ten thousand dollars."

For your convenience I call your attention to Sections 8368 and 8369 of the Code of 1924, which are as follows:

"Upon filing with the secretary of state the said certificate and articles of incorporation, within ten days after they are filed with the recorder, and upon the payment to the secretary of state of a fee of twenty-five dollars, together with a recording fee of ten cents per one hundred words and an additional fee of one dollar per thousand for all authorized stock in excess of ten thousand dollars, the

secretary of state shall record the said certificate and the said articles of incorporation in a book to be kept by him for that purpose, and shall issue a proper certificate for the renewal of the corporation." Section 8368.

"Farmers' mutual co-operative creamery associations, domestic and domestic local building and loan associations, and corporations organized for the manufacture of sugar from beets grown in the State of Iowa, shall be exempt from the payment of the incorporation fee, provided in the preceding section." Section 8369.

You will note that Section 8368 makes provision for the payment of a *fee* of $25.00, together with a *recording fee* of 10c per hundred, and an *additional fee* of $1.00 per thousand, for all authorized stock in excess of $10,000.

Section 8369 exempts certain associations from the payment of the incorporation fee.

We are of the opinion that the incorporation fee referred to is the fee of $25.00, and we do not believe that the legislature meant to exempt the recording fee or the additional fee, provided for in Section 8368.

PUBLIC FUNDS: Where a mistake has been made in computing the amount of interest due the treasurer of state upon deposit of public funds and the erroneous amount paid to the treasurer of state, the auditor of state cannot make a refund of the amount erroneously paid. The matter must be referred to the legislature.

October 26, 1925. *Auditor of State:* We wish to acknowledge receipt of your favor of the 19th requesting our opinion upon an inquiry submitted to you by the county treasurer of Fremont County. His inquiry is as follows:

"I am in receipt of a letter from the First National Bank in Hamburg, Iowa, wherein they state, and truly, that they made a mistake in remitting interest for September on one of the Rural Ind. School Districts.

"The total of daily balances for that month was $1,988.56 and they remitted $1.24 when it should have been 12c. As this had been sent in to the Treasurer of State, I was wondering if you would make a refund direct to the bank for this amount of $1.12 that was sent in in excess of what it should have been."

You are advised that if the money in question has been sent in to the state treasurer and has become an integral part of the state funds that it cannot be refunded. All of these matters should be gathered together by you and held until we can get an order of the Legislature for the refund.

There is no doubt but that this order can be secured but it will take some time.

COUNTY ENGINEERS: Assistant county engineers or additional county engineers should be paid from the county general fund.

October 26, 1925. *Auditor of State:* We wish to acknowledge receipt of your favor of the 8th requesting our opinion upon the following proposition:

"We have recently been asked to give an opinion concerning the payment of assistant engineers in counties where by reason of extra work that is being done in road and bridge matters, it is found necessary to employ some times as many as three or four assistant engineers.

Under such circumstances, could the salaries of these assistants be paid from the road or bridge funds?"

Section 4641, Code, 1924, provides as follows:

"A Board of Supervisors may, at its discretion, employ one or more county engineers, and shall fix their term of employment, which shall not exceed one year, and their compensation, which shall be paid from the county fund * * *"

The terms of the statute just quoted are plain. It provides expressly that the salary of the county engineer or engineers, if more than one, shall be paid from the county general fund. In view of this expressed declaration of the legislative intent, we are of the opinion that the salary of the county engineer or assistant county engineers must be paid from the funds specified.

BOARDS OF SUPERVISORS: The Board of Supervisors have authority to employ detectives or "spotters" to assist in the enforcement of the liquor laws.

October 26, 1925. *County Attorney, Algona, Iowa:* We wish to acknowledge receipt of your favor of the 8th requesting our opinion on the following propositions, to-wit:

"1. Are the Boards of Supervisors of a county given any jurisdiction or authority over the matter of law enforcement within the county, and if so what duties devolve upon them?

"2. Can the Board of Supervisors legally employ detectives to aid in locating violators of the liquor law and pay them out of public funds?

"3. What authority, if any, has the Board of Supervisors of a county to employ spotters of liquor violators without the knowledge or consent or authority of either the sheriff or county attorney?"

The statutes of this state do not specify any particular criminal statute that the Board of Supervisors shall enforce. However, it is their duty, in administering the affairs of the county generally, to assist insofar as possible with the enforcement of all the laws of their county. They should co-operate and work with the other law enforcing officials of the county to this end. However, if such co-operation is not possible, the board, under their general authority in the management and control of the county's business, may employ detectives or other persons if they deem necessary to ferret out crime and procure evidence leading to the prosecution and conviction of those guilty. These men may be paid for services rendered from county funds, upon claims properly allowed by the Board of Supervisors. We do not believe it to be the best practice for supervisors to employ what you term "spotters of liquor violators" without co-operating with the county attorney and sheriff. However, there is nothing in the statute to prevent them from doing so if they believe it necessary and for the best interests of the county. The powers of the Board of Supervisors are broad indeed, and when they act in good faith and for the interest of the county, their powers are almost unlimited. We believe the Board of Supervisors and the law enforcing officials of the county should have an understanding and co-operate in every respect in the enforcement of the law. Without this co-operation much duplication of effort will result and needless expense be incurred. Better results will also be obtained through co-operation between these officers.

It has been the custom in this state for the Board of Supervisors in a county to do the things inquired of by you. This custom has extended over a long period of years, with the full knowledge of the legislature and law enforcing bodies of the state. Were we in doubt as to the legality of such proceedings we would not feel justified in disturbing this custom. However, we feel that the actions of the board in these matters have been within the law.

COUNTY ATTORNEYS: County Attorney or attorney for the plaintiff in a liquor injunction, contempt or nuisance case is only entitled to fees when the plaintiff is successful, and not when the prosecution fails. The proceeds derived from the sale of condemned vehicles used in transporting intoxicating liquor may not be classed as a fine, and the county attorney is not entitled to a percentage upon such moneys.

October 29, 1925. *County Attorney, Osage, Iowa:* I wish to acknowledge receipt of your favor of the 23d requesting our opinion on the following proposition:

"I have had a question propounded to me sometime ago as to whether or not Section 13967 refers also to attorney's fees that are allowed in prosecutions where the prosecution fails * * *.

"I got the impression that this section entitled the county attorney to his regular attorney's fees in liquor injunctions, contempt of court, and nuisance prosecutions if such prosecution failed, and that the attorney's fee allowed in those proceedings have to be paid by the county if prosecution failed. Was this interpretation of the section correct, and is the county liable for the attorney's fees allowed in those sections if prosecution is started and then fails?

"I still have one other question that has been argued pro and con by attorneys as to whether or not county attorneys are entitled to their regular ten per cent out of the funds paid to the county attorney for the school fund by the sheriff from money received from cars sold under the forfeiture clause, where such cars are used in the transportation of intoxicating liquor * * *"

We believe your first question is fully answered by the wording of the statute fixing the attorney fees in liquor injunction, contempt of court and nuisance cases. We refer you to the provisions of Chapter 48, Laws of the 41st General Assembly. You will note that an attorney fee is only to be allowed by the judge "if the plaintiff be successful." If the plaintiff is successful, prosecution, of course, does not fail. An attorney fee could not be allowed in cases of this kind where the prosecution fails or the plaintiff is not successful.

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, school fund mortgages foreclosed, and attorney fees allowed in criminal cases."

It is a well established rule of statutory construction that when the statute specifies particularly certain things or objects that this is exclusive of all other things not included in the statute. The provisions of the statute regarding the forfeiture of conveyances used in the transportation of intoxicating liquor provides for the distribution of the proceeds of the sale of such vehicles and any balance remaining is required to be paid by the sheriff to the county treasurer who credits the same to the county school funds. The forfeiture provisions are not a fine but are the returns from an action in rem against the vehicle, and we are of the opinion that these funds cannot be considered as a fine and a fee based upon the provisions of Section 5228, supra, in favor of the county attorney assessed thereon.

MAYOR: The office of mayor and that of superintendent of the Water Works are incompatible. The mayor may resign however and be appointed superintendent of water works.

October 29, 1925. *Auditor of State:* This department is in receipt of your request for an official opinion. For convenience we quote your letter at length. It is in words as follows:

"I have a communication from the mayor of a city in Iowa, which stated briefly is: Can the mayor of a city resign his office and be appointed superintendent of the waterworks at a salary larger than he is entitled to receive under the ordinance fixing his salary as mayor?

"Can a mayor of a city, while acting as mayor and receiving a salary under the ordinance for that position, be appointed as superintendent of the waterworks and draw a salary as such superintendent?"

You are advised that the office of mayor of a city and the office of superintendent of the waterworks are incompatible and both offices cannot be held at the same time by the same individual.

You are further advised that any citizen may be appointed to the office of superintendent of the waterworks and this would apply to one who has been previously a mayor, even though he has resigned and is subsequently appointed during the same term for which he was elected. The sole proposition is that he must not take part in his own election nor can he serve in both offices at the same time.

TAXATION: A member of a co-partnership is liable for the entire tax on the partnership property and should be required to pay the same.

November 2, 1925. *Auditor of State:* We desire to acknowledge receipt of your letter of October 31, 1925, asking this department to prepare an opinion upon a question submitted to your department by Mr. F. J. Todd, one of your examiners. The letter of Mr. Todd is as follows:

"The treasurer of this county has asked me to obtain the advice of the Accounting Department on the question herein set out. I enclose a copy for the Attorney General's office.

"The landlord and the tenant owned personal property in partnership. The tenant has left the farm and none of the personal property tax for 1923 and 1924 has been paid. The landlord asks the treasurer to accept his half of the tax and release the lien on the real estate. The treasurer does not wish to do this, as he will not be able to collect the other half. What are the rights of the treasurer and the landlord in this case?"

The question submitted is entirely free from doubt. The statute itself is determinative of this question. It reads as follows:

"Any individual of a partnership is liable for the taxes due from the firm." Section 6970, Code, 1924.

It was held by the United States District Court for the Northern District of Iowa, in the case of *In Re Green*, 116 Federal Reporter, 180, that under the provisions of the Code of Iowa just quoted, which was a part of Section 1317 of the Code of 1897, taxes levied against a firm became an individual debt of a partner. Considering the provisions of the statute no other conclusion can be reached.

We are, therefore, of the opinion that the county treasurer should not accept half of the tax from the landlord and release the lien on the real estate. The landlord, being a member of the partnership, is liable for the entire tax and should be required to pay the same.

HIGHWAYS: COUNTIES: Board of Supervisors has no authority to purchase a gravel bed inside of the corporate limits of cities and towns.

November 4, 1925. *Iowa State Highway Commission:* We have received your letter of November 2, 1925, asking this department to prepare an opinion upon a question which you have stated as follows:

"Please let us have the opinion of your department upon the following question:

"Does the Board of Supervisors have the right and authority to purchase a gravel pit within the limits of a corporate city or town?

"Under Section 4657 of the Code it appears that the board may not condemn a gravel pit within corporate limits, but it would seem that the supervisors should have the right to buy material for road building purposes wherever such material may be available, whether it be within corporate limits, within the county, within the state, or outside the state, and surely the statute does not attempt to prohibit the owner of land or lands lying within corporate limits from selling his property to the county should he so desire.

"Assuming that a county has either purchased outright certain land within corporate limits, or has purchased from the owner of the land the right to remove gravel from the premises, could abutting or other property owners enjoin the county from opening the pit and removing the gravel? Inasmuch as we have a case at the present moment in which the county desires to purchase gravel within the corporate limits, but hesitates to do so for fear they are without authority, an early reply will be greatly appreciated."

Section 4657 of the Code, 1924, reads as follows:

"The board of supervisors of any county, may, *within the limits of such county and without the limits of any city or town, purchase or condemn* any lands for the purpose of obtaining gravel or other suitable material with which to improve the highways of such county, including a sufficient roadway to such land by the most

reasonable route, and to pay for the same out of the primary or county road funds, or the board may purchase such material outside the limits of their county."

It will be observed that the authority granted to boards of supervisors by the above section is to purchase or condemn, and the right thereto is limited to acquiring by either method gravel beds outside of the limits of any city or town. We believe that the authority granted by this section is exclusive and that the board of supervisors has no right or authority to purchase gravel beds within corporate limits of cities and towns.

TUCK LAW: Board of supervisors may not authorize the expenditure of money in excess of the collectible revenue for the year by the transfer of money from one fund to another. (2) Legal expenditures, under the Tuck Law, may be paid out of the revenues collected during the next year, or funding bonds therefor may be issued.

November 5, 1925. *County Attorney, Centerville, Iowa:* We have received your letter of November 2, 1925, requesting this department to prepare an opinion upon the questions which you have stated as follows:

"As you are aware the General Fund of Appanoose County is exhausted. Several of the County's funds have sufficient remaining so that enough could be transferred to pay the claims on the General Fund for the balance of the year.

"If the proposed transfer were made would the County officers be relieved of liability for allowing claims and issuing warrants 'which would result * * * in an expenditure * * in excess * * of the collectible revenues in said fund for said year'?

"If a claim is filed with the County Auditor for a legal indebtedness (as county officials claim for salaries, and expenses) and the county is unable to pay said claim because of lack of funds, can this claim be paid the following year out of the collectible revenues for that year?"

I.

A mere reference to the statute will answer your first question. Section 5258 of the Code, 1924, reads as follows:

"It shall be unlawful for any county, or for any officer thereof, to allow any claim, or to issue any warrant, or to enter into any contract, which will result, during said year, in an expenditure from any county fund in excess of an amount equal to the collectible revenues in said fund for said year, plus any unexpended balance in said fund for any previous years.

"Any officer allowing a claim, issuing a warrant, or making a contract contrary to the provisions of this section, shall be held personally liable for the payment of the claim or warrant, on the performance of the contract."

It will be noted that the statute absolutely prohibits and makes unlawful the allowance of any claim, or the issuance of any warrant, or the entering into any contract, which will result, during the year, in an expenditure in excess of an amount equal to the collectible revenues in the fund for said year, plus any unexpended balance in said fund for any previous year. Any officer, who participates in any act, which is a violation of the section, is made personally liable for the payment of the claim or warrant or the performance of the contract.

We are, therefore, clearly of the opinion that the board of supervisors of Appanoose County may not, by transferring money from one fund to another, authorize the expenditure of more money than is authorized by the statute. The prohibitions of the statute are plain, and must be observed. Therefore, if any member of the board of supervisors violates the statute, as herein construed, he will be personally liable for any expenditure in excess of the collectible revenues in any fund for the year.

II.

If the board of supervisors is without authority to allow any claim, or issue any warrant, or to enter into any contract, which results in the creating of an indebtedness in excess of the collectible revenues in a fund for the year, such claims in excess thereof may not be allowed and paid out of the revenues for the next year unless the expenditures come within one of the nine exceptions to Section 5258, which are contained in Section 5259 of the Code. If the expenditure is authorized by the statutes, then the claim may be allowed, marked "not paid for want of funds" and may be paid out of the revenue in the fund upon which it is drawn collected during the next year, or funding bonds may be issued to cover such expenditures, as provided in the statutes. This question is fully covered by the opinion prepared by this department on September 28, 1923, for Honorable Glenn G. Haynes, Auditor of State, in which twenty-six specific questions are answered. A copy of this opinion was forwarded to the county attorneys. A careful reading of this opinion will answer practically all of the questions that may arise with reference to the construction of the statute.

INTOXICATING LIQUOR: Discussion of what constitutes forfeiture under the provisions of Chapter 42, Acts of the 41st General Assembly.

November 10, 1925. *County Attorney, Sioux City, Iowa:* You have requested the opinion of this department upon the following statement of facts:

"We have been requested to secure your opinion on the following propositions, to-wit:

"Section 1924 of Chapter 94, of the Code of Iowa, 1924, is in reference to manufacturing, selling or keeping for sale intoxicating liquors. This Chapter was amended by the 41st General Assembly to include the words 'or have possession of any intoxicating liquors.' Under Chapter 42, Section 1, of the 41st General Assembly, possession of intoxicating liquors is made prima facie evidence only when the liquor had been finally adjudicated and declared forfeited by the court.

"First, is it your opinion that the court can instruct that possession itself is only prima facie evidence when the liquor has been finally adjudicated and declared forfeited by the court?

"Second, what is meant by the finaly adjudication and forfeiture by the court? Does this mean that the person against whom the forfeiture is ordered can demand a jury in justice court, and in the event that the court rules that the liquor or utensils should be forfeited that an appeal can be taken to the district court and a jury trial be had on the same question, and that this must be done if demanded before the court can instruct the jury in the main case that the possession is prima facie evidence of violation of the law relating to intoxicating liquor?"

In regard to your first inquiry we are of the opinion that the court can instruct that possession itself is only prima facie evidence when the liquor has been finally adjudicated and declared forfeited by the court.

Section 1, Chapter 42, Acts of the 41st General Assembly reads as follows:

"That in all actions, prosecutions and proceedings, criminal or civil, under the provisions of title six (6) of the code of Iowa, 1924, the finding of intoxicating liquors or of instruments or utensils used in the manufacture of intoxicating liquors, or materials which are being used, or are intended to be used in the manufacture of intoxicating liquors, in the possession of or under the control of any person, under and by authority of a search warrant or other process of law, and which shall have been finally adjudicated and declared forfeited by the court, shall be prima facie evidence, in any action, criminal or civil, of maintaining a nuisance or bootlegging, or of illegal transportation of intoxicating liquors, as the case may be, by such person."

You will note that this section says that in prosecutions for violation of the liquor

statute, materials, liquors, etc. "which shall have been finally adjudicated and declared forfeited by the court" shall be prima facie evidence of bootlegging or of illegal transportation, as the case may be.

We believe it was the clear intent of the legislature to require that such liquor should be adjudicated and forfeited before the same would be construed as prima facie evidence.

In regard to your second inquiry, it is our opinion that what is meant by final adjudication and forfeiture is an order of such forfeiture of the liquor, utensils, materials, etc., said order to be entered by the justice of the peace or by the magistrate before whom the accused is arraigned.

Section 1922 of the Code, 1924, provides "courts and jurors shall construe this title so as to prevent evasion." We believe that the section should be construed to authorize an order of forfeiture to be entered by the justice of the peace or the magistrate, and that the defendant would not be entitled to a trial by jury, unless, of course, he has waived preliminary hearing and is indicted by the grand jury, in which case it is our opinion that the petit jury on the trial of the case should bring in the fact of the forfeiture of the utensils, materials, etc., in case they find the defendant guilty, and that an order of forfeiture should be entered of such utensils, materials, etc. along with the pronouncement of sentence upon the defendant.

However, where the accused demands preliminary hearing, then the magistrate, if he binds the defendant over, should enter an order of forfeiture of materials seized.

We are of the opinion that if such an order of forfeiture has been entered by the magistrate, then the materials would be prima facie evidence in the trial of the case.

BUILDING AND LOAN ASSOCIATIONS: Upon renewal of the Articles of such association they are not required to pay the incorporation fee, but only to pay the recording fee.

November 10, 1925. *Secretary of State:* We wish to acknowledge receipt of your letter requesting our opinion upon the following proposition:

"A decision with reference to the fees in connection with the renewal of a domestic building and loan association is requested. Section 8369, Chapter 384, Code of 1924, provides 'Farmers' mutual co-operative creamery associations, domestic and domestic local building and loan associations, and corporations organized for the manufacture of sugar beets grown in the State of Iowa, shall be exempt from the payment of the incorporation fee, provided in the preceding section.'

"The preceding section, namely Sec. 8368, provides for a renewal fee of twenty-five dollars for ten thousand dollars capital stock and one dollar for each thousand in excess of ten thousand dollars; this in addition to a recording fee at the rate of ten cents per one hundred words.

"A decision is requested as to whether or not Section 8369 intends to remit or rather pass the entire filing fee indicated in Section 8368 or whether it refers only to the excess filing fee on capital stock in excess of ten thousand dollars."

Sections 8368 and 8369 referred to by you, are as follows:

"Upon filing with the secretary of state the said certificate and articles of incorporation, within ten days after they are filed with the recorder, and upon the payment to the secretary of state of a fee of twenty-five dollars, together with a recording fee of ten cents per one hundred words and an additional fee of one dollar per thousand for all authorized stock in excess of ten thousand dollars, the secretary of state shall record the said certificate and the said articles of incorporation in a book to be kept by him for that purpose, and shall issue a proper certificate for the renewal of the corporation." (Section 8368).

"Farmers' mutual co-operative creamery associations, domestic and domestic local building and loan associations, and corporations organized for the manufacture of sugar from beets grown in the state of Iowa, shall be exempt from the payment of the incorporation fee, provided in the preceding section." (Section 8369).

In addition to the sections referred to by you we believe that there should also be kept in mind the provisions of sections 8349 and 8350, Code, 1924. The first section last referred to requires a filing fee, for Articles of Incorporation, of $25.00 upon each $10,000.00 capital, and $1.00 per $1,000.00 in excess thereof. The last section referred to provides exemptions from the filing fee. This section is as follows:

"Farmers' mutual co-operative creamery corporations, whose articles of incorporation provide that the business of the association be conducted on a purely mutual and co-operative plan, without capital stock, and whose patrons shall share equally in expenses and profits, domestic and domestic local building and loan associations and incorporations organized for the manufacture of sugar from beets grown in the state, shall be exempt from the payment of the incorporation filing fee provided herein in excess of $25.00."

Section 8369, above quoted, providing for the exemptions in the renewal of articles of incorporation, exempts domestic local building and loan associations from the payment of the incorporation fee provided for the renewal of articles of incorporation in Section 8368. The incorporation fee referred to is the fee of $25.00 upon corporations whose capital stock is $10,000.00 or less, and $1.00 per thousand for each thousand dollars of stock in excess of $10,000.00. In addition to the incorporation fee, the statute referred to provides for a "recording fee of ten cents per one hundred words."

We are of the opinion that the legislature intended to require domestic local building and loan associations to pay an initial incorporation fee of not exceeding $25.00, and upon renewal of their articles to exempt them from the payment of any incorporation fee whatsoever based upon the capital of the company, but to require them to pay the recording fee, which cannot be considered as a part of the incorporation fee.

SCHOOLS AND SCHOOL DISTRICTS: Use of school building for religious purposes discussed.

November 12, 1925. *Superintendent of Public Instruction:* This department is in receipt of your letter dated October 29, 1925, in which you submit to us the following inquiry:

"Your opinion is requested as to whether a school board has authority to allow the school house to be used for religious instruction on secular days."

The question submitted to us involves some consideration as to the powers of the Board of Directors of a school district as well as the powers of the electors. The power of the Board of Directors, in the absence of authority from the electors to permit the use of the school house and its grounds, seems to be found in Section 4371 of the Code of 1924, which reads as follows:

"The board of directors of any school corporation may authorize the use of any schoolhouse and its grounds within such corporation and not within the limits of a city or town for the purpose of meetings of granges, lodges, agricultural societies, and similar rural secret orders and societies, and for election purposes; such use to be for such compensation and upon such terms and conditions as may be fixed by said board for the proper protection of the schoolhouse and the property belonging therein, including that of pupils."

It is a well settled proposition that the enumeration of certain specific things in a statute operates as an exclusion of things not mentioned therein. *Talbott v. Blackledge*, 22 Iowa, 572; *State v. Santee*, 111 Iowa 1.

The power to permit the use of a school house for religious purposes rests in the

electors. See *Townsend v. Hagan*, 35 Iowa 194; *Davis v. Boget*, 50 Iowa 11; *Nichols v. School Directors* (1879) 93 Ill. 61, 34 Am. Rep. 160; *School Directors v. Toll* (1909) 149 Ill. App. 541; *Hurd v. Walters* (1874) 48 Ind. 148; *Baggerly v. Lee* (1905) 37 Ind. App. 139; 73 N. E. 921; *State ex rel. Gilbert v. Dilley* (1914) 95 Neb. 527, 50 L. R. A. (N. S.) 1182, 145 N. W. 999; *Greenbanks v. Boutwell* (1870) 43 Vt. 207; *Lagow v. Hill* (1909) 238 Ill. 428, 87 N. E. 369. The use of a school house for religious purposes seems to be very limited, and a careful reading of these cases by you must be had in order that you may understand the limitations of these cases.

SCHOOLS AND SCHOOL DISTRICTS: Where roads are impassable to a school, this is sufficient justification for county superintendent to act under Section 4131 of the Code, 1924.

November 16, 1925. *Superintendent of Banking:* You have requested the opinion of this department upon the following statement of facts:

"In regard to your letter of November 3d, our County Superintendent of Schools in Ottumwa, Miss Bell, wanted me to ask you in regard to Sec. 4131 of the Code of 1924. As you will remember from our conversation, there are ten or twelve children in a certain section two and one-half miles distant from the school house in a district outside of Ottumwa. The road to this school is very bad; there are no sidewalks and the children are compelled to go through mud and snow a good part of the time, as there are no means of transportation. In our talk the other day you said this undoubtedly provided sufficient reason, under this section, for the transferring of this property to the Ottumwa Independent School District. Both districts are willing, as I understand it, for this change to be made."

For your convenience we quote Section 4131 of the Code of 1924:

"In any case where, by reason of natural obstacles, any portion of the inhabitants of any school corporation in the opinion of the county superintendent can not with reasonable facility attend school in their own corporation, he shall, by a written order, in duplicate, attach the part thus affected to an adjoining school corporation, the board of the same consenting thereto, one copy of which order shall be at once transmitted to the secretary of each corporation affected thereby, who shall record the same and make the proper designation on the plat of the corporation. Township or county lines shall not be a bar to the operation of this section."

Under the above section, the county superintendent must find as a fact that the way to the school is impeded. Unless the facts actually exist justifying such a finding, the action of the superintendent is without jurisdiction and is a nullity.

School Township of Newton v. Independent District of Newton, 110 Iowa, 30.

However, we believe that under the facts submitted in your letter that the road to the school would be considered as a sufficient obstacle and impediment and that the superintendent would be justified in acting under Section 4131, and in transferring the district, with the consent of the boards.

JUSTICE OF THE PEACE: 1. Justice of the Peace has no authority to charge a trial fee of $1.00 when defendant appears and pleads guilty. 2. Justice of the Peace can charge 50 cents dismissal fee where case is settled out of court.

November 18, 1925. *Auditor of State.* You have requested the opinion of this department upon the following statement of facts:

"In our examination of Fayette county we were requested to investigate the accounts of one of the Justices of Peace. It seems that the party making the complaint is perhaps trying to find something to complain about in the acts of a Justice who defeated him in a political campaign. The particular questions that have arisen concerning which we would appreciate an opinion at an early date, are as follows:

1. Can a Justice of Peace charge $1.00 for trial fee when the defendant appears and pleads guilty?

2. Can a Justice of Peace charge $0.50 for dismissal where the case started was settled before it came to trial?

Trusting these matters can have your immediate attention and that we may be able to be favored with a reply in a short time."

In reply to your first question I quote paragraph 21 of Section 10636:

"Justices of the peace shall be entitled to charge and receive the following fees:

21. For trial of all actions, civil or criminal, for each six hours or fraction thereof, one dollar."

Your request is whether or not a Justice of the Peace can charge $1.00 for trial fee when the defendant appears and pleads guilty. This has been decided by the Supreme Court in the case of *Mathews v. Clayton County*, wherein the court held that where the defendant appeared and plead guilty, there was no trial, within the meaning of paragraph 21 of Section 10636, and that the Justice of the Peace would not be entitled to charge the trial fee of $1.00.

In regard to your second inquiry, we are of the opinion that it would be the duty of the Justice of the Peace to enter a dismissal of the case where no judgment is to be entered, because of the fact that the case has been settled out of court. This being true, we are of the opinion that he would be entitled to the 50c dismissal fee. However, it is apparent that he would not be entitled to a judgment fee since no judgment would be entered. The case of *McGuire v. Iowa County*, 133 Iowa, 636, sustains this latter proposition.

JUSTICES OF THE PEACE: A justice of the peace elected in one township may hold court in other townships of the county in which his jurisdiction is coextensive.

November 19, 1925. *County Attorney, Rock Rapids, Iowa:* We wish to acknowledge receipt of your favor requesting the opinion of this department as to whether or not a justice of the peace elected in Riverside township may hold court in criminal matters in Rock township of your county.

We have looked into this matter with some care and after examining the authorities and statutes of this state, we are of the opinion that a justice of the peace may hold criminal court in any of the townships of the county in which he was elected other than the township of his residence.

Section 10502, Code, 1924, in regard to the jurisdiction of a justice of the peace, provides:

"The jurisdiction of justices of the peace, when not specially restricted, is coextensive with their respective counties' * * *".

Section 13557, Code, 1924, 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 $100.00, or imprisonment thirty days."

Section 13559, Code, 1924, prescribes what shall be contained in the information that is to be filed before a justice of the peace, and in regard to the allegation of jurisdiction reads:

"The name of the county and of the justice where the information is filed."

Section 13461, Code, 1924, in the chapter relating to preliminary information and warrants of arrests, prescribes the form of the warrant, which shall contain the following provision:

"You are commanded forthwith to arrest the said A..... B....., and bring him before me at (naming the place), or, in case of my absence or inability to act, before the nearest or most accessible magistrate in this county."

Section 13481, Code, 1924, requires that the officer making the arrest in the case of one accused of a felony, take the person before the magistrate issuing the warrant "at the place mentioned in the command thereof; or in the event of his absence or inability to act, before the nearest or most accessible magistrate in the county in which it was issued." This is also true in case of the arrest of one charged with a misdemeanor, unless the arrest be made in another county than the county where the warrant was issued. In which event, the prisoner may require the arresting officer to take him to the nearest magistrate in the county where the arrest is made for the purpose of giving bail; or if he cannot give bail, then he is again taken before the magistrate issuing the warrant at the place named therein. (Section 13482 and 13485, Code, 1924.) The statutes do not require that a justice of the peace shall maintain an office or court in the township wherein he is elected, and in fact from a reading of the statutes hereinbefore referred to it is apparent that the legislature did not intend that his activities be restricted to a particular township, but rather that he might hold criminal court in any township of the county. In the chapter relating to examination on preliminary information, Chapter 626, Code, 1924, there is no provision requiring the prisoner to be taken before a magistrate in the township of the magistrate's residence, but, on the contrary, the statute provides that he be taken before the magistrate at the place named in the warrant. It is apparent, therefore, from an examination of the statutes of this state that the justice of the peace is not required to have a fixed place for holding court within the township of his residence.

The Supreme Court of this State has held that the jurisdiction of the justice of the peace is coextensive with the county and is not limited by the division of the county for judicial purposes. (*Deere v. Council Bluffs*, 86 Iowa, 591; *Coffman v. Trimble*, 90 Iowa, 737.)

The Supreme Court of Minnesota in *State v. Bowel*, found in 47 N. W., 650, had before it for consideration the question of whether or not a judgment renderd by a justice of the peace in a township other than the township of his residence was valid. The Supreme Court of Minnesota found that the judgment was valid and that the justice of the peace had jurisdiction.

The Supreme Court of Nebraska in *Jones v. Church of the Holy Trinity*, 15 Neb., 81, had for its consideration the question of whether or not a judgment rendered by a justice of the peace outside of the precinct in which he was appointed to hold his office although within the county of his jurisdiction, was valid. The court, at page 83, said:

"The justice of the peace, although appointed for Capitol precinct, where he ought to have held his office, had jurisdiction coextensive with the limits of Lancaster county, which necessarily covered Midland precinct, and but for the policy of the law respecting the convenience of suitors, witnesses, and others having business with him, could doubtless perform his official duties anywhere therein. The holding of his office or place of business within the particular precinct for which the justice is elected or appointed, so long as he keeps within the county, is not a matter respecting his jurisdiction, but one of policy and convenience merely, which those interested therein may disregard. If the jurisdiction of a justice of the peace were confined to the particular precinct for which he is elected, it would doubtless be otherwise."

This case is followed in *State v. Moores*, 70 Neb., 55, and *Rema v. State*, 72 N. W. (Neb.), 476.

In England a justice of the peace had jurisdiction to hear and determine crimes throughout the whole country. (5 Bacon Abr. 409.) It has generally been held that whenever a justice of the peace sits as an examining court he has jurisdiction coextensive with the limits of his county. (16 C. J., 159.) In states where the statutes expressly require the justice to maintain a court at a particular place, or limit his jurisdiction to crimes committed within his township, the courts have held that he does not have jurisdiction in other townships of the county. We have failed to find a case, however, holding that the justice of the peace may not hold court in other townships of his county where his jurisdiction is coextensive with the limits of the county, and where he is not required to maintain an office in the township of his residence.

BOARD OF REVIEW: The city or town clerk is required by statute to act as clerk of the Board of Review. No additional compensation is provided.

November 19, 1925. *Auditor of State:* We wish to acknowledge receipt of your favor of the 12th requesting our opinion on the following proposition:

"Is a town or city clerk entitled to compensation in the way of per diem for the time spent in connection with the equalization of assessments by the town or city council?"

We assume, of course, that the city or town council is meeting as a Board of Review, and the question is whether the clerk is entitled to compensation for acting as their clerk.

Section 7129, Code, 1924, provides for the organization of the local Board of Review. This board is composed of the city or town council in cities and towns. Section 7130, Code, 1924, provides that the clerk or recorder of the city or town shall be the clerk of the Board of Review and keep a record of its proceedings. A clerk of a city or town is not a member of the council. Section 5640, Code, 1924, enumerates his duties other than those hereinbefore mentioned in attending meetings of the Board of Review. The clerk's compensation or salary is to be fixed by ordinance, and is to be in full for services he is required to render because of his official position. These services, of course, include his duties as clerk of the Board of Review. Section 5664, Code, 1924, providing for the compensation of councilmen, provides for their pay while acting as a Board of Review. Nowhere in the statutes is there any provision for additional salary for compensation to be paid the clerk while performing his duties with the Board of Review.

We are, therefore, of the opinion that the city or town clerk is not entitled to additional compensation by way of per diem for the time spent while acting as clerk of the Board of Review. The salary fixed by ordinance is full compensation for these services.

COURT EXPENSE FUND: The commission on fines cannot be paid out of the court expense fund; nor can the expense of boarding prisoners.

INSANITY COMMISSION: The Insanity Commission are not entitled to expenses in compensation for visiting state institutions not within their jurisdiction.

November 20, 1925. *Auditor of State:* We wish to acknowledge receipt of your favor of the 18th requesting our opinion upon the following proposition:

"1. Can the commission on fines be paid out of the court expense fund?"
"2. Can the board and care of prisoners be paid out of the court expense fund?"
"3. Can the county insane commission visit and inspect the State Insane Hospital and charge their expense and per diem to the county?"

Section 7172, Code, 1924, provides for the court expense fund. This section reads in part as follows:

"In any county where, by reason of extraordinary or unusual litigation the receipts herein fixed for ordinary county revenue are found to be insufficient to pay

the same, the Board of Supervisors may create an additional fund to be known as court expense fund, and may levy for such fund such rate of taxes as may be necessary to pay all court expenses chargeable to the county. Such fund shall be used for no other purpose. * * *"

Section 5151, paragraph 2, Code, 1924, in reference to the financial report to be made by the county auditor, provides as follows:

"2. The amount of warrants drawn on the county fund for various court expenses, which are included among other items the salary paid the county attorney and the amounts received by him as commission on fines and from other sources and the amount paid to assistant counsel."

Section 5228, Code, 1924, providing the compensation for the county attorney in part reads as follows:

"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, and school fund mortgages foreclosed, and attorney fees allowed in criminal cases."

It is to be noted in the section last quoted that the percentage upon fines collected is classed with the fees allowed the county attorney for suits upon written instruments and fees upon school fund mortgages. In paragraph 2 of Section 5151, supra, it will be seen that the legislature specially required that the salary of the county attorney and the fees received by him as commission on fines is to be reported with court expenses, indicating that this salary and percentage on fines collected would not be considered ordinarily as part of the court expenses. Section 7172, supra, expressly provides that the court expense fund "shall be used for no other purpose." The purpose for which this fund was provided was the payment of actual court expenses, and not the salary of the county attorney, or the additional compensation allowed him by way of a percentage upon fines collected. We are of the opinion that the commission on fines collected cannot be paid out of the court expense fund.

Section 5191, Code, 1924, paragraph 11, enumerating fees that the sheriff may charge, provides:

"For boarding a prisoner a compensation of twenty cents for each meal, and not to exceed three meals in twenty-four consecutive hours, and fifteen cents for each night's lodging, but the amount allowed a sheriff for lodging prisoners shall in no event exceed in the aggregate the sum of $250.00 for any calendar year."

As we have heretofore pointed out, the court expense fund is particularly restricted in its use. The section authorizing the charge for board and lodging of prisoners does not provide that it shall be paid as part of the court expense, neither is it chargeable as court expense. We are of the opinion that this expense cannot be paid from the court expense fund.

The Commission of Insanity is organized as provided in Chapter 176, Code, 1924. The compensation of the members of this commission is fixed by Section 3541 of said chapter, which in part provides:

"1. To each member of the commission $3.00 for each day actually employed in the duties of his office as such member, and necessary and actual expenses, not including charges for board."

The question arises under the provisions of this section, whether or not it is a part of the duty of the Commission of Insanity to visit and inspect state hospitals for the insane. Section 3540 of the chapter referred to, in effect provides the duty of this commission. The section referred to is as follows:

"Said commission shall, except as otherwise provided, have jurisdiction of all

applications for commitment to the state hospitals for the insane, or for the otherwise safe keeping of insane persons within its county, unless the application is filed with the commission at a time when the alleged insane person is being held in custody under an indictment returned by the grand jury or under a trial information filed by the county attorney."

It will be noted that there is no provision in this section for the visitation of state hospitals. Chapter 177, Code, 1924, provides the manner and method of commitments of insane persons and their discharge. In this chapter, as part of the provisions of Section 3571 to 3576, inclusive, there is provision made for a special commission to be appointed by the district court whose duty it is to proceed to the place where the alleged insane person is confined, and to there hold a hearing and make an examination. For these duties they are to receive compensation. The sections referred to, however, provide, as we have stated, for a special commission and does not make this the duty of the county insane commission. The only time it is made the duty of the Insanity Commission to visit or inquire outside of the boundaries of their county is when the warden of the penitentiary notifies the commissioners that a prisoner in his charge, under sentence of death, is in his opinion insane or pregnant, in which case they must visit the penitentiary and make the examination. Sections 13982 and 13983, Code, 1924, so provide. The State Hospital for the Insane is under the supervision of the Board of Control of State Institutions, and the county insane commission is vested with no power or authority whatever over such institutions. Clearly visits by the county insane commission to a state hospital for the purpose of inspection is without their duties, and their expense and per diem should not be paid by the county.

WORKMEN'S COMPENSATION: Right of special peace officer to compensation.

November 21, 1925. *Iowa Industrial Commissioner:* You have requested the opinion of this department as to the right of Frank W. Longley to compensation.

The facts of the case appear to be that Mr. Longley was employed as a special officer during the time of the Kossuth County Fair; that he was stationed in front of the entrance to the fair grounds, directing the traffic; that he ordered a driver of an automobile to turn north along the road, but that the driver ignored his directions, and in order to avoid being hit, Mr. Longley jumped from the front of the car directly in the path of another car and was struck, receiving the injury complained of and for which he seeks compensation.

Section 1422 provides for compensation to be paid peace officers receiving injuries, under the provisions of the Workmen's Compensation Act. This section reads as follows:

"Any policeman (except those pensioned under the policemen's pension fund created by law), any sheriff, marshal, constable, and any and all of their deputies, and any and all other such legally appointed or elected law-enforcing officers, who shall, while in line of duty or from causes arising out of or sustained while in the course of their official employment, meaning while in the act of making or attempting to make an arrest or giving pursuit, or while performing such official duties where there is peril or hazard peculiar to the work of their office, be killed outright, or become temporarily or permanently physically disabled, or if said disability result in death, shall be entitled to compensation, the same to be paid out of the general funds of the state for all such injuries or disability.

Where death occurs, compensation shall be paid to the dependents of the officer, as in other compensation cases. Such compensation shall be the maximum allowed in compensation cases. The industrial commissioner shall have jurisdiction as in other cases."

I call your attention particularly to the following phrase: " * * * meaning while in the act of making or attempting to make an arrest or giving pursuit, or while performing such official duties where there is peril or hazard peculiar to the work of their office".

It is apparent that the Legislature undertook to define the cases in which compensation should be allowed to peace officers. Unless the injury complained of comes within the provisions of the definition as set forth, we do not believe he would be entitled to compensation.

It is clear that he was not at the time of the injury, making or attempting to make an arrest, or giving pursuit. Therefore, he must recover because injured in the course of his official duties, while engaged in a perilous and hazardous undertaking in the course of the work of his office.

We are of the opinion that a traffic officer performing duties such as this officer was performing, is not engaged in a peculiarly perilous or hazardous employment. We believe that this section contemplates payment for the injury or death of an officer resulting from the peril of a particular work, as for instance, injury or death resulting from resistance to arrest. We do not believe that the work of a traffic officer is peculiarly hazardous or perilous, within the purview of Section 1422 of the Code, 1924.

Having reached this conclusion, we are of the opinion that Mr. Longley would not be entitled to compensation from the State.

NATIONAL GUARD: The statutes of this State do not authorize the payment of compensation or reimbursement for doctor bills to a member of the National Guard injured while engaged in an armory drill.

November 21, 1925. *Adjutant General of Iowa:* We wish to acknowledge receipt of your favor of the 9th requesting the opinion of this department upon the following proposition:

"Attached hereto are copies of correspondence relative to injury received by a member of Troop "A", 113th Cavalry, Iowa National Guard, Iowa City, Iowa. The soldier was under orders from his commanding officer, to attend mounted drill; he was obeying competent orders when he received his injury. Section 452, Code of Iowa, 1924, provides for 'Compensation, transportation, subsistence and quarters, injured men, hospital service, loss of property, appropriations'.

"The provisions of this section are not clearly understood by this office, and creates a doubt as to the intent of the legislature when they say 'caused by participation in encampments, maneuvers and other outdoor exercises'.

"Had the injury occurred inside the Armory or other building in which military training was being conducted, this office would rule the claim as not coming under the law. In this case, however, the injury occurred at mounted drill, which is an outdoor exercise, although not in encampment or maneuver, consequently this office is in doubt on the matter."

The letter referred to in the above from Captain Hayek to yourself, states in substance that Private Stephens was injured while at drill with Troop "A", 113th Cavalry, Iowa National Guard, at Iowa City. The injury resulted from a girth breaking and throwing Private Stephens to the ground, breaking his ankle. It appears that the break was a serious one and incapacitated the soldier for several months.

The only provisions in the law of this state which might be construed to authorize the payment of compensation are contained in Section 452, Code, 1924, referred to by you. This section must all be read together and its meaning interpreted when read as a whole. The section in the first instance provides for the pay of officers and men when called into the service of the State by the governor. Immediately following the provisions regarding the pay is the provision in question, which reads as follows:

"Officers and enlisted men of the Guard incapacitated by injury or illness, caused by a participation in encampment, maneuvers or other outdoor exercises, which extends beyond the period of time covered by the order during the duty to be performed, shall receive from the state, * * *

When in actual service of the State, pursuant to the order of the governor, the compensation and expenses of the guard and claims of the members thereof for injury or illness incurred in line of duty, shall be paid out of any funds in the State Treasury not otherwise appropriated, upon warrants drawn by the auditor of state; the claims for such services shall be audited and allowed by the governor."

The section thereafter continues and provides that any payment made by the Government of the United States for such injuries, shall be credited on the amount due the soldier under the provisions thereof. It is last provided in this section for the pay of officers while on certain duty to be fixed by the governor, and for a stoppage in pay of either officers or enlisted men because of damage or loss of military property. The section clearly deals with the status of soldiers of the State while on duty ordered by the governor. These duties are ordinarily encampments, maneuvers or other outdoor exercises continuing over several days' period of time. That part of the statute we have referred to and set out in this opinion must be construed with the other provisions thereof. The term "or other outdoor exercises" must refer to outdoor exercises similar to encampments and maneuvers that are held upon the call of the governor. A drill held by an organization is not held upon the order of the governor and is clearly not an encampment or maneuver. Interpreting the clause in question, in view of the meaning that must be ascribed to it because of the other language in the section, brings us to the conclusion that an injury occurring to a soldier while attending an ordinary drill is not within the meaning of the section hereinbefore referred to, and he is therefore not entitled to compensation.

MUNICIPALITIES: If a city or town owning an electric light plant and transmission lines desires to purchase current from another plant, either private or municipal, an election must be held and a majority of the electors voting thereon must vote in favor thereof.

November 24, 1925. *Auditor of State:* We have received a letter from Mr. Sam Sweedlund, Mayor of the town of Stratford, Iowa, submitting to this department a certain inquiry. As the inquiry relates to the municipal laws of the state and is of some importance to such municipalities we have concluded to prepare an opinion for your department and mail a copy thereof to Mr. Sweedlund. The letter from Mr. Sweedlund reads as follows:

"We would like to have your decision on Secs. 6130 and 6131 of the latest code in regard to electric light. We have built an electric light line from Webster City to our town, and a distributing system in our town, owned by the town. We had an election in January and it carried by about 85% of the voters. We have the line completed and are using the current now.

"The Iowa Light & Power Company is also in this town and doing business. The question is, do we have to call another election to see if the people will give the council permission to buy the current from Webster City.

"Some attorneys hold that we must hold another election to comply with the above named Section of the code. I am enclosing a sample of the ballots we used when we voted last January.

"If we have to call another election how long would it have to be advertised before

election, and how many weeks would it have to be published, would we have to circulate a petition for the election?"

Accompanying the letter of Mr. Sweedlund was a sample ballot used at the election on January 8, 1925. The two propositions submitted were stated as follows:

"Shall the Town of Stratford, Iowa, establish a municipal electric light system, including the necessary transmission lines therefor?"

"Shall the Town of Stratford, Iowa, construct a municipal electric light system within said Town, and the necessary transmission lines therefor, and contract an indebtedness for such purpose not exceeding $15,000, and issue bonds for such purpose not exceeding $15,000, and levy a tax annually upon the taxable property in said Town of Stratford, Iowa, not exceeding Sixteen (16) mills per annum for the payment of such bonds and the interest thereon?"

The question of purchasing electric current from the plant at Webster City was not submitted to the electors at said election.

Section 6127 of the Code empowers cities and towns to purchase, establish, erect, maintain and operate within or without their corporate limits electric light or power plants with all the necessary appliances to be used in connection therewith. In the determination of the question you have submitted we must consider the provisions of Sections 6130, 6131 and 6132:

"They may enter into contract with persons, corporations, or municipalities for the purchase of heat, gas, water, or electric current for either light or power purposes, for the purpose of selling the same either to residents of the municipalities or to others, including corporations, and shall have power to erect and maintain the necessary transmission lines therefor, either within or without their corporate limits, to the same extent, in the same manner, and under the same regulations, and with the same power to establish rates and collect rents, as is provided by law for cities having municipally owned plants." Sec. 6130.

"No such works or plants shall be authorized, established, erected, purchased, leased, or sold, or franchise granted, extended, renewed, or amended, or contract of purchase provided for in the preceding section shall be entered into unless a majority of the legal electors voting thereon vote in favor of the same." Sec. 6131.

"The council may order any of the questions provided for in the five preceding sections submitted to a vote at a general or municipal election or at one specially called for that purpose, or the mayor shall submit said question to such a vote upon the petition of twenty-five property owners of each voting precinct in a city, or of fifty property owners of any incorporated town." Sec. 6132.

Under the provisions of Chapter 312, cities and towns have the following options: (1) to purchase, establish, erect, maintain and operate electric light or power plants; (2) to grant to individuals or private corporations the authority to erect and maintain electric light or power plants; (3) to enter into contracts with persons, corporations or municipalities for the purchase of electric current for either light or power purposes for the purpose of selling the same either to residents of the municipality or to others, and shall have power to erect and maintain the necessary transmission lines therefor, either within or without their corporate limits.

None of the above powers or rights shall be exercised by any city or town unless a majority of the legal electors voting thereon vote in favor of the same. Under the provisions of Section 6132 the council may order any or all of the questions above stated submitted to a vote at a general or municipal election or at one specially called for that purpose. The mayor shall, under the provisions of the statute, submit such question to a vote of the electors residing in the municipality upon the petition of twenty-five property owners of each voting precinct in a city, or of fifty property owners of any incorporated town. It is quite apparent that under the provisions of the statute these rights are considered separate and distinct propositions and none of them may be exercised by the city unless the electors vote in favor thereof.

We are, therefore, clearly of the opinion that if the town of Stratford desires to purchase electric current for either light or power purposes of the plant at Webster City an election must be called and a favorable vote of the electors obtained.

In answer to your last inquiry we will say that under the provisions of Section 6135 a notice of the election shall be given by publication once each week for four consecutive weeks in some newspaper published in the county and of general circulation in the city or town.

TAXATION: A failure to publish the notice of tax sale for the time required by the statute will not invalidate the sale.

November 24, 1925. *Auditor of State:* We have received a letter from Mr. Clyde L. Erskine, Treasurer of Appanoose County, Iowa, in which he submits to this department an inquiry relating to the law relative to tax sales. On account of the importance of the question we deem it advisable to prepare an opinion for your department rather than for the county treasurer. The facts, as disclosed by the letter from Mr. Erskine, are as follows:

The county treasurer delivered to the publishing company the delinquent tax list on Saturday, November 14, with instructions to publish the same on November 16th, 23rd and 30th. The publisher failed to publish the same until November 18th. The question as to the validity of the tax sale under such publication of the notice was raised by one of the publishing companies in the county. Will the failure to publish the notice in exact accord with the statute in any way affect the validity of the annual tax sale?

Section 7246 of the Code provides that the notice of tax sale shall be published in some newspaper in the county, once each week, for three consecutive weeks, the last of which shall be at least one week before the day of sale, and by also immediately posting a copy of the first publication thereof at the door of the court house, if there be one; if not, at the door of the place where the last term of district court was held.

Section 7251 of the Code is as follows:

"No irregularity or informality in the advertisement shall affect the legality of the sale or the title to any real estate conveyed by the treasurer's deed under this and the two following chapters, and in all cases its provisions shall be sufficient notice to the owners of the sale thereof."

It will be observed that the quoted section provides that the provisions of the statute contained in Chapter 347 relating to tax sale, 348 with relation to tax redemption and 349 containing the provisions of the statute in regard to tax deeds shall be sufficient notice of such sale to the owners of the land sold. No irregularity or informality in the advertisement or publication of the notice shall under the provisions thereof affect the legality of the sale or the title to any real estate. We believe the statute sufficiently answers your inquiry. It is, therefore, the opinion of this department that the failure to publish the notice in exact conformity to the provisions of the statute will, in no way, affect the validity of the tax sale.

The following authorities sufficiently support the rule we have adopted:

Davis v. Magoun, 109 Iowa 309 (327);
Hoskins v. Iowa Land Co., 121 Iowa 299.

ADOPTION: The provisions of Chapter 8, Laws of the 41st General Assembly do not modify the adoption laws of this State.

November 27, 1925. *Board of Control of State Institutions:* We wish to acknowledge receipt of your favor of the 28th ult. requesting the opinion of this department on the following proposition:

"The question is: Is it legally possible to hold that Sec. 8, Chapter 80, Laws of the Forty-first General Assembly in any way modifies or affects the Statutes relating to Adoptions as set forth in Chapter 473, Code, 1924?

"Under the provisions of Chapter 473, Code of 1924, 'Any person competent to make a will is authorized to adopt as his own the minor child of another.' There is nothing required to be shown as to the character of the fitness of the party to raise the child properly and there are many instances of record in this state where parties of low character and moral unfitness have adopted the child of another to the great damage of the child.

"Now, if Sec. 8, Chapter 80, above referred to, can be construed as effecting the matter of adoptions when it says that 'No person other than the parents or relatives of the child within the fourth degree may assume the PERMANENT CARE AND CUSTODY of a child under fourteen years of age except in accordance with the provisions of this act, and NO PERSON MAY ASSIGN, RELINQUISH, OR OTHERWISE TRANSFER TO ANOTHER HIS RIGHTS, OR DUTIES WITH RESPECT TO THE PERMANENT CARE OR CUSTODY OF A CHILD UNDER FOURTEEN YEARS OF AGE unless specifically authorized or required to do so by an order or decree of Court, or—through a written attested release given to a Licensed Child Placing Agency,—' then we would have a medium through which the rights and interests of the child could be reasonably safeguarded and much of the present deplorable traffic in young children be prevented.

"This may be a fine point, and may be even impossible to so hold, but it is a matter that is sadly needed and if it can possibly be so held, would be of immediate and great value to the children of our State."

The title of Chapter 80, Laws of the 41st General Assembly, referred to by you, is as follows:

CHILD PLACING AGENCIES

"An Act to define, license and regulate child-placing agencies, to regulate the surrender or commitment of minors to such agencies and to repeal Sections Thirty-six hundred sixty-two (3662), Thirty-six hundred sixty-three (3663), Thirty-six hundred sixty-four (3664), Thirty-six hundred sixty-five (3665), Thirty-six hundred sixty-nine (3669), Thirty-six hundred seventy (3670), Thirty-six hundred seventy-two (3672), Thirty-six hundred seventy-three (3673) Thirty-six hundred seventy-four (3674), Thirty-six hundred seventy-five (3675), and Thirty-six hundred eighty-four (3684), of the Code, 1924, relating thereto."

The sections referred to in the title of this act just quoted were contained in Chapter 182, Code, 1924, and had to do with the regulation and control of private institutions for neglected, dependent and delinquent children. Chapter 80, Laws of the 41st General Assembly was enacted as a substitute for the sections referred to in the title, and contained in Chapter 182, Code, 1924.

Section 8, particularly referred to by you, provides as follows:

"No person other than the parents or relatives of the child within the fourth degree may assume the permanent care or custody of a child under fourteen years of age, except in accordance with the provisions of this act, and no person may assign, relinquish, or otherwise transfer to another his rights or duties with respect to the permanent care or custody of a child under fourteen years of age unless specifically authorized or required so to do by an order or decree of court, or unless the parent or parents sign a written release attested by two witnesses, of the permanent care and custody of the child to an agency licensed by the Board of Control. Neither parent may sign such release without the written consent of the other, unless the other is dead or hopelessly insane, or for one year immediately preceding has been under indictment for abandoning the family, or is imprisoned for crime or is an inmate or keeper of a house of ill fame, or has been deprived of the custody of a child by judicial procedure because of unfitness to be his guardian, or unless the parents are not married to each other. If the parents are not married to each other, the parent having the care and providing for the wants of the child may sign the release. Children so surrendered may not be recovered by the parents except through decree of court based upon proof that the child is neglected by its foster parent, guardian or custodian, as neglected is defined by the statute relating to neglected children."

From a reading of this section alone, it would seem to modify the provisions of the statutes relating to the adoption of children. However, the provisions of Section 8, just quoted, must be defined according to the intent and meaning of the legislature. Section 1 of Chapter 80 defines the terms and words used in the provisions thereof. This section reads as follows:

"The words 'person' or 'agency,' where used in this act shall include individuals, institutions, partnerships, voluntary associations, and corporations, other than institutions under the management of the Board of Control or its officers or agents. Any agency, public, semipublic, or private, which represents itself as placing children permanently or temporarily in private family homes or as receiving children for such placement, or which actually engages for gain or otherwise in such placement, shall be deemed to operate a child-placing agency."

The word "person," therefor, as used in Section 8, hereinbefore referred to, must refer to child-placing agencies, either individuals or organizations, and the limitations imposed in Section 8 refer to the manner in which such agencies shall place children.

The provisions of Section 8, quoted herein, cannot be construed to modify the law relating to the adoption of children, authorized in the provisions of Chapter 473, Code, 1924. The provisions of Chapter 473, supra, deal with the direct adoption of children from those primarily responsible for them and without the use of an intermediate or intervening agency such as the child-placing agencies referred to in Chapter 80, Laws of the 41st General Assembly. The provisions of these two chapters are separate and distinct and the intention to modify the provisions of Chapter 473 through the enactment of Chapter 80, Laws of the 41st General Assembly, must be clearly evident or necessarily implied from the terms of the last named chapter.

Before it might be held that the provisions of Chapter 80, Laws of the 41st General Assembly, modify the provisions of the adoption law, as contained in Chapter 473, Code, 1924, we are confronted with the question of whether or not such a modification if contained in the provisions of Chapter 80 would be constitutional and valid. This question is presented because of the title to Chapter 80 that is hereinbefore set out. The subject of Chapter 80, as expressed in the title, is clearly the regulation of child-placing agencies.

Section 29 of Article III of the Constitution of Iowa is as follows:

"Every act shall embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."

This provision of our constitution has been repeatedly defined by the courts of this State. As a general proposition, it may be stated that this provision of the constitution is intended to prohibit the insertion in an act of incongruous matter having no connection or relation with the general subject as expressed in the title.

Sissons v. Board of Supervisors, 128 Iowa, 442;
State v. Edmonds, 127 Iowa, 339.

It has furthermore been held that the title must afford a fair key to the contents of the act.

State v. Fairmont Creamery Co., 153 Iowa, 702.

Our court has also held that under the provisions of the constitution quoted herein, an act is void if it embraces more than one subject, and also that subjects embraced in the act are not expressed in the title.

Des Moines National Bank v. Fairweather, 191 Iowa,; 124
State v. Gibson, 189 Iowa, 1221.

Our court in the case of *State vs. Gibson*, supra, said:

"The purpose of such constitutional provision is to prevent hodge podge or log rolling legislation (Cite cases); to prevent surprise or fraud upon the legislature by means of provisions of which the titles give no intimation, and which might therefore be overlooked and carelessly and unintentionally adopted."

In the very recent case of *State v. Manhattan Oil Company*, 203 N. W. (Iowa) 301, at 302 our Court said:

"But it is quite universally recognized that there must be no incongruity between the act and its title." (Citing cases).

In determining, therefore, whether Chapter 80, Laws of the 41st General Assembly, modifies the adoption laws of this state, the title to said chapter must be measured by the authorities cited herein and according to the rules established by the supreme court of this state. Could it be said that the public or any legislator by reading the title to the act would have surmised that it was intended to cover the ordinary case of adoption? The language used in the title is plain and will submit to no such interpretation. The title refers only to those engaged in the child-placing business or vocation. It does not refer to individuals who adopt children as their own, or who relinquish their own children to such individuals who seek to become their foster parents. Were the act to be interpreted to include cases of adoption, it would include more than one subject,—that is the regulation of child-placing agencies, and the regulation or limitation upon the adoption of children by private individuals. Were the act to be so interpreted, it would clearly be unconstitutional, for the reason that the title does not express the subject matter of the act, nor even afford a fair key by which it might be inferred that the legislature intended to include the adoption of children by private individuals within its terms.

We are, therefore, of the opinion, for the reason set forth herein, that the provisions of Section 8, Chapter 80, Laws of the 41st General Assembly cannot be construed to modify the provisions of the adoption laws of this State as contained in Chapter 473, Code, 1924.

BOARD OF SUPERVISORS have authority to authorize the construction of a building to be used by the county when the cost to the county will not exceed $4,500.00.

December 1, 1925. *County Attorney, Iowa City, Iowa:* We wish to acknowledge receipt of your favor of the 25th requesting our opinion upon the following proposition:

"Section 5261 of the 1924 Code of Iowa provides that the Board of Supervisors shall not erect a court house, jail or county home when the probable cost will exceed $10,000.00, or any other building, except as otherwise provided, when the probable cost will exceed $5,000, until said proposition is submitted to the legal voters of the county. Our board of supervisors contemplates erecting a building for the housing of its machinery and equipment for working the roads, and for storing necessary supplies. According to the plans and specifications, such a building will cost about $6,500.00. The state highway commission has offered to contribute $2,000 towards the erection of this building, provided sufficient space be reserved in said building for their highway equipment. The money to be contributed by the highway commission comes from the primary road funds. The citizens of this county indirectly contribute to the primary road fund. Under the above set of facts, can the board of supervisors order the erection of said building when they will be appropriating less than $5,000 from their funds for the erection of said building?"

Section 5261, Code, 1924, is as follows:

"The Board of Supervisors shall not order the erection of a court house, jail or county home when the probable cost will exceed $10,000.00, or any other building except as otherwise provided, when the probable cost will exceed $5,000.00, nor the purchase of real estate for county purposes exceeding $10,000.00 in value, until a proposition therefor shall have been first submitted to the legal voters of the county and voted for by a majority of all persons voting for and against such proposition at a general or special election, notice of the same being given as in other special elections."

The cost referred to in the section just quoted is the cost of the proposed building to the county, that is the cost which is to be paid from county funds. Under the facts presented by you, it is apparent that but $4,500.00 of the cost will be paid from county funds. This being true, we are of the opinion that the Board of Supervisors may order the erection of said building and enter into contracts therefor not obligating the county to exceed $5,000.00.

SCHOOLS: The Board of Directors may fix the amount of tuition to be charged non-resident pupils, only limited to the maximum authorized by the statutes; the charge to include such course of instruction as the student elects.

December 3, 1925. *County Attorney, Iowa City, Iowa:* We wish to acknowledge receipt of your favor of the 18th, requesting our opinion on the following proposition:

"The school district of Coralville, Iowa, does not maintain a four year high school course. Many of the students belonging to the Coralville Independent District are taking their high school work at the University High School in Iowa City, Iowa. Section 4277 of the Code provides that the school corporation in which such student resides shall pay from the general fund to the Secretary of the corporation in which he shall be permitted to enter a tuition fee of not to exceed twelve dollars per month. The tuition fee at the University High School is fifty dollars per year. The University High School has special fees for typewriting, piano, and art classes. These special fees together with the tuition fee will not exceed one hundred eight dollars per year, which is the maximum allowed by 4277 for one year. The particular question that I would like to have an opinion on is this: Does the term 'Tuition Fee' as used in Section 4277 include the special fees as outlined above? Those special fees are for additional courses which are not required for graduation. In other words, can the corporation of Coralville be required to pay the special fees of students who take this additional work?"

Section 4277, Code, 1924, referred to by you is as follows:

"The school corporation in which such student resides shall pay from the general fund to the secretary of the corporation in which he shall be permitted to enter a tuition fee of not to exceed twelve dollars per month during the time he so attends, not exceeding a total period of four school years. Such tuition shall not exceed the average cost of tuition in such high school. * * *"

The only limitation placed upon the tuition which shall be charged and paid is that it shall not be paid for a period exceeding four years, and not to exceed $12.00 per month, providing the amount charged does not exceed the average cost of tuition in such school. The charges made for instruction in the courses referred to by you are part of the tuition fee, and if the total amount charged a student, including the charge for the courses referred to, does not exceed the average cost of tuition in such high school and $12.00 per month, they may be properly included and charged against the corporation in which the student resides.

WEIGHTS AND MEASURES: There is no conflict between the provisions of Section 3037, paragraph 2 and Section 3244 of the Code.

December 4, 1925. *Secretary of Agriculture:* You have requested the opinion of this department upon whether or not there is a conflict between the provisions of Section 3037, Paragraph 2 and Section 3244 of the Code, 1924, and whether under the provisions of Section 3244 the vendor and the vendee may otherwise agree on

the weight or measure of the commodity bought or sold without regard to the provisions of Section 3037.

Section 3037 of the Code is a part of the division of the regulation chapter relating to the labeling of articles contained in package or wrapped form which are to be sold to the public. It is there provided:

"All articles in package or wrapped form which are required by this title to be labeled, unless otherwise provided, shall be conspicuously marked in the English language in legible letters of not less than eight-point heavy gothic caps on the principal label with the following items:

1. * * *

2. The quantity of the contents in terms of weight, measure, or numerical count. Under this requirement reasonable variations shall be permitted, and small packages shall be excepted in accordance with the rules of the department. * * *"

It will be observed that the provisions of the section just referred to and of the portion of the law wherein it is contained relate only to the labeling of packages of commodities which are for sale to the public in package form already put up, such as spices, breakfast foods, etc. The purpose of these provisions of the law is to protect the buyer so that he may know exactly what he is getting and how much for the unit price paid.

Section 3244 is a part of the chapter of the Code relating to and specifying standard weights and measures on various commodities. It provides:

"All commodities bought or sold by weight or measure shall be bought or sold only by the standards established by this chapter, unless the vendor and vendee otherwise agree. Sales by weight shall be by avoirdupois weight unless troy weight is agreed upon by the vendor and vendee."

It will be noted that the chapter specifies the units of measure and weight which shall be recognized as standard in this state. Section 3236 provides the weight per bushel of a great many commodities. Other sections prescribe what shall constitute the respective units of measure by volume. The whole purport of the chapter is to the effect that the commodities described therein shall be sold only by those standard weights or measures prescribed unless the "vendor and vendee otherwise agree." That is to say a buyer of potatoes might buy them by the wagon load or that the vendor and vendee might otherwise agree that they shall be sold by the wagon load or by the bin full. The point being that the buyer must know and understand exactly the unit of measure or weight that is being used. The purpose of these provisions is to prevent fraud upon the public and to prevent unscrupulous hucksters and vendors from selling any commodity by a certain unit of weight or measure when in fact it does not come up to the requirements for that unit.

We can find no conflict between the two sections of law referred to. The first refers to the labeling of commodities sold in packages so that the buyer may be advised as to what and how much he is buying for the price paid. The latter section refers to commodities bought and sold by weight or measure and not by the package and requires that when so sold the weight or measure must come up to the standards prescribed. Each applies to different classes of sales and they do not conflict in any manner.

I trust that the foregoing discussion of these provisions of law will settle the questions presented to you by certain persons engaged in the business of selling the various commodities referred to and described in the provisions of law referred to herein.

HIGHWAYS: Discussion of validity of the rental of road machines by township or county.

December 5, 1925. *Auditor of State:* We desire to acknowledge receipt of your letter of November 23, 1925, submitting to this department the following inquiry:

"A question has arisen in regard to expenditures for road tools and equipment where the funds of the municipality (township or county) are nearly exhausted and there is a desire on their part to purchase some additional machinery in order to maintain their roads and make necessary improvements. Briefly stated, the questions are as follows:

"If a municipality (township or county) has a small sum of money in the road fund, say three or five hundred dollars, could they make a contract for new road machines that will be used some this year and which will be necessary for next year's use, by purchasing the desired equipment on a rental basis at a certain fixed amount per day for the use of the tools with the provisions that at any time during the period of the rental contract the board is to have the option to purchase the machinery in question with the amounts paid as rental to be applied on the purchase price. If such a contract is made, could the balance on hand in the fund be applied as an insurance against damages that might be sustained by the machinery while under this rental contract with the provision that the amount so paid should apply on the purchase price if that option were taken advantage of by the municipality?

"We are informed that some municipalities are making such contracts with concerns engaged in the selling of road tools and we would appreciate your advice in regard to the legality of such contracts, at an early date."

It seems to us that the method prescribed in your letter is a clear attempt to evade the plain provisions of the statute. In other words, it is an attempt to do indirectly that which the statute provides shall not be done directly. Therefore, we have no hesitancy in condemning as illegal the plans specified in your letter.

BANKRUPTCY—TAXATION: Taxes are preferred claims in bankruptcy proceedings.

December 5, 1925. *Auditor of State:* We have received your letter of November 30, 1925, submitting to this department certain inquiries contained in a letter to your department written by Ed Madigan, County Treasurer of Black Hawk County, Iowa. Mr. Madigan's letter submits the following inquiries:

"In case of a bankrupt, does the county treasurer have to accept such tender as made by the referee in bankruptcy or trustee, either on personal, real estate or specials, in case there are funds enough in the hands of the referee or trustee?

Are taxes preferred in such a case?

"In event of a shortage of funds and a tender is made of less than the treasurer's just claim how should the collection be handled or apportioned?"

The Bankruptcy Statute, enacted by the Congress of the United States, specifically provides that the trustee in bankruptcy shall pay all taxes legally due and owing without distinction between the United States and the state, county, district or municipality.

New Jersey v. Anderson, 203 U. S. 483 (489); 7 Corpus Juris, 328, Section 548.

Section 64-A of the Bankruptcy Act of 1898 reads as follows:

"The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court."

The provisions of the statute apply to all taxes irrespective of the question of lien and although they were not payable until after the adjudication of bankruptcy

or were levied on property which did not pass into the hands of the trustee. 7 Corpus Juris, page 328 Section 548 and authorities cited. The actual and necessary expenses of administering and preserving the estate must be paid in priority to taxes. 7 Corpus Juris, page 329, Section 548; *In Re Oxley*, 204 Fed. 826; *New Jersey v. Lovell*, 179 Fed. 321 (31 L. R. A., n. s. 986).

We, therefore, answer your inquiries in the following way:

(1) Taxes are preferred claims in bankruptcy proceedings, subject to the limitations hereinbefore stated.

(2) In case there are funds enough in the hands of the referee or trustee after satisfying the claims that are prior to the claim for taxes to satisfy said taxes, the county treasurer is under no obligation to accept a tender of less than the actual amount of taxes due.

(3) In the event of a shortage of funds to pay the taxes in full the county treasurer should accept the amount tendered and issue a receipt in partial payment thereof. The taxes so collected should be apportioned the same as other taxes.

STATE TREASURER: State Treasurer entitled to receive actual cash from county treasurer and a remittance by worthless check is not a satisfaction to the State Treasurer.

December 7, 1925. *County Attorney, Estherville, Iowa:* The State Treasurer, Honorable R. E. Johnson, has called the attention of this department to an opinion of yours dated December 5, 1925, which seems to be causing some embarrassment. I quote your opinion as given me by Mr. Johnson at length.

"Replying to your inquiry relative to a check of $464.80, drawn by you in favor of R. E. Johnson, Treasurer of State, upon the Iowa Savings Bank of Estherville, Iowa, under date of November 14, 1925, I would say that this check apparently passed through regular channels and was returned to the Iowa Savings Bank and cancelled and charged against your account.

"You state that it is your understanding that the Iowa Savings Bank made a remittance to some other bank for an amount, which included this check, but that before this remittance was collected, the bank closed. I presume a claim will be filed against the Receiver of the Bank based upon this uncollected remittance, and you could not file a claim against the Receiver, including the check in question, expecting to have it approved by the Court, since there would then be two claims based upon this item.

"It is my opinion that you should file a claim against the Receiver for the amount of your balance, and that you could not therefore make a new remittance to the Treasurer of State to cover the amount of this check."

It is of course elementary that a public officer is not paid until the cash or funds actually come into his hands. In other words, before Mr. Johnson would be paid the amount of money due from the county treasurer, it would be necessary that he receive the acual cash. If he does not receive the actual cash, the account is not paid. It is imperative therefore that the county treasurer remit the state treasurer this fund. This being true, the only relief which the county treasurer can get is to establish the claim as against the bank. The bank clearly has not remitted the money and is liable for the full amount as a depositor's claim. What the county treasurer should do is to be sure at the time of filing his claim that all items are in.

We wish you would take this up with the county treasurer, to the end that the matter may be cleared up and the treasurer not be put in an embarrassing position of having to pay something with no hope of ever recovering it back.

Of course, the county treasurer will be protected under the so-called provisions of the Brookhart-Lovrien bill and all that is necessary is to include the amount in the

claim filed by the county. If you should have any trouble with the courts on this point, let us know.

TUCK LAW—BUDGET LAW: Board of Supervisors have no authority to allow bills in excess of the collectible revenue for the year. Contracts entered into but completed in the following year must be paid from the collectible revenue of the year in which they are entered into.

December 8, 1925. *Auditor of State:* You have requested the opinion of this department upon the following statement of facts:

"The county auditor of Shelby County has presented the following questions upon which he requests an opinion from you:

"'Under the Tuck Law and the Budget System can a Board of Supervisors contract or allow bills in excess of the collectible revenue for that year?

"'Will it have any bearing on the matter if a contract states that the work is to be finished on or before Jan. 1, 1926. If the contract is not finished on account of weather conditions and the securing of material until some time the fore part of 1926 would this contract all be chargeable to the collectible revenue of 1925, in other words when an auditor is taking into consideration the payment of bills, should he deduct the amount of any contract for that year from the collectible revenue of that said year regardless, if the time for completion of said contract would be extended into the following year?

"'In the matter of a contract awarded for cement culverts and bridges let early in the season and the contract was to be finished I think, by Nov. 1, 1925, but an extension of time was granted until May 1926, would the unfinished balance and the 10% retained on all work still be counted out of the 1925 collectible revenue or that collected in 1926, and is the county auditor held liable on his bond for writing warrants when he knows, if the bills for work, material and contracts were all in and paid in December or at the first meeting in Jan. would exceed the collectible revenue for 1925, also if part of these contracts are carried over until after the 1st of Jan. 1926, we will say for instance, paid any time during the fore part of the year 1926, is he still liable?'

"You will note from the nature of the questions that an early reply thereto is quite essential and this department will greatly appreciate your giving this matter as prompt consideration as possible."

For your convenience we quote Section 5258 of the Code of Iowa, 1924, which provides as follows:

"It shall be unlawful for any county, or for any officer thereof, to allow any claim, or to issue any warrant, or to enter into any contract, which will result, during said year, in an expenditure from any county fund in excess of an amount equal to the collectible revenues in said fund for said year, plus any unexpended balance in said fund for any previous years.

"Any officer allowing a claim, issuing a warrant, or making a contract contrary to the provisions of this section, shall be held personally liable for the payment of the claim or warrant, or the performance of the contract."

We believe that it is quite apparent under the provisions of this section that the Board of Supervisors have no authority to allow bills in excess of the collectible revenue for the year.

In case where contracts are entered into for completion before the first of January of the succeeding year and are not finished, or for some reason extension of time is granted, we are of the opinion that the bills payable under such contract must be deducted from the collectible revenue for the year in which the contract is entered into.

Section 5259 of the Code provides the exceptions from the provisions of Section 5258, but none of such exceptions apply to the case which you have submitted.

Having reached this conclusion we are of the opinion that the county auditor would have no authority to issue warrants when he knows that if the bills were all

in they would exceed the collectible revenue, and we are also of the opinion that if he did issue such warrants he would be liable upon his bond.

SPECIAL ASSESSMENTS: Where several installments have been paid at one time and another installment will not become due for several years the interest on the unpaid installments must be paid each year.

December 8, 1925. *Auditor of State:* We have received your letter of November 30, 1925, submitting to this department a request for an opinion which you received from A. Langhout, County Treasurer of Plymouth County. The letter of Mr. Langhout is as follows:

"I would like to have the matter of payment of Special assessments, paving, sewer, etc. cleared up so it can be understood. I have the opinion of the Attorney General sent out by you some time during the summer.

"I refer to Sections 6033 and 6035 of the Code of 1924. It is the desire of both the auditor's office and this office to live up to the Code, but in order to do so we must understand the Code.

"If I understand the law correctly a person wishing to pay one, two or three installments can do so, and save the interest on the installments that are paid in advance. This, of course, can be done only during the month of March. On the other hand if he wishes to pay all the remaining installments he may do so at any time, and the Treasurer will figure interest from the first day of April up to the date of payment.

"I notice by the schedule to be filed by the City of Remsen that some of the property owners have paid as high as six installments, this would make the next installment due March, 1930, *how are we going to get at the interest, will these parties have interest due each year, or will the interest be figured on the installment due in 1930 this will be interest for about five and one-half years.*

"If figured on the 1930 installment, and this party should come in next March and wishes to pay one installment, will interest have to be figured over or will he be obliged to pay the interest computed for 1930, which is the due date of that particular installment.

"I do not know whether I have made myself clear or not, but hope that I have. I will set up an example as our Special Tax Book is made.

Total Tax	How Paid		Int. Paid City Treas.
$100.00	1st Inst.	$10.00	
	2nd	10.00	5.40 Due March 1926
	3rd	10.00	4.80 Due March 1927
	4th	10.00	4.20 Due March 1928
	5th	10.00	3.60 Due March 1929
	6th	Etc.	
	7th	Etc.	
	8th		
	9th		
	10th		

"You will note that interest is computed on remainder due each year. Now if this party comes in during or before March and wishes to pay the 1926, 1927, and 1928 installment, does he have to pay only $5.40 interest, or must he also pay interest computed for the other years; as computed. If only the $5.40 then the interest on the remainder will have to be figured again, and then if he should come in again say in March 1927 and wants to pay another installment, which will be the installment that does not become due until 1929 how should interest be figured on that?"

Sections 6033 and 6035 of the Code of 1924 read as follows:

"The first installment, with interest on the whole assessment from date of levy by the council shall mature and be payable thirty days from the date of such levy, and the others, with interest on the whole amount unpaid, annually thereafter at the same time and in the same manner as the March semi-annual payment of ordinary taxes.

"Any or all installments not yet paid together with accrued interest thereon may be paid on the due date of any installment.

"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.

"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 April following." Section 6033.

"The owner of any property against which a street improvement or sewer assessment has been levied, shall have the right to pay the same, or the unpaid installments thereof, with all interest, as the case may be, up to the time of said payment, with any penalties and the cost of any proceedings for the sale of the property for such special assessment or installments." Sec. 6035.

It will be observed that, under the provisions of Section 6033, interest on the whole amount unpaid shall be payable annually thereafter at the same time and in the same manner as the March semi-annual payment of ordinary taxes. It is the opinion of this department that under the facts stated in your letter, where several installments have been paid and another installment will not become due until 1930, the interest on the unpaid installments must be paid each year at the time the first semi-annual payment of ordinary taxes shall be made even though no installment thereof must be paid at that time.

It is also the opinion of this department that, if certain installments are paid before the time for payment thereof, interest on the installments paid must be computed up to the time of the payment thereof and it is not necessary for the taxpayer to pay the interest due on the installments remaining unpaid at that time. The interest thereon is not due until the March semi-annual payment of ordinary taxes and the interest on the installments remaining unpaid must be computed up to that time and paid by the property owner.

We desire to call your attention to an opinion prepared on February 25, 1925, for your department, construing Sections 6033 and 6035 of the Code, 1924. That opinion should be read in connection with this opinion.

POLL TAX: Under the statutes a poll tax may be imposed upon one male resident in one district only for a certain year.

December 8, 1925. *County Attorney, Spencer, Iowa:* We have received your letter of November 24, 1925, asking this department to prepare an opinion upon the proposition which you have stated as follows:

"I would like some word or opinion from the department on the following proposition:

A man lived in the town of Webb, in this county, when said town imposed a poll tax in the amount of $3.50, which was in the month of February, this year. About the first of March he moved out into the country into Garfield Township, in which township the town of Webb is located. The Code provides that a poll tax should be levied in the townships by the trustees the first of April, or afterwards and at that time he was residing in Garfield Township. The poll tax imposed there was the sum of $5.00. The Road Superintendent of said Township in collecting said poll tax, notified him on October 19, 1925 that he should pay his poll tax and he agreed to do so. In the next few days, however, he went into the town of Webb and paid the town officials the tax of $3.50. The Road Superintendent of the township is now desirous of either making him pay the $5.00 tax in the township as long as he resided there at the time same was imposed, or recover the same from the town of Webb. Can the township collect the tax either from him or the town?

I have advised him that I do not believe the man could be compelled to pay poll tax in two places for the same year and if he has already paid one, he could not be compelled to pay the other."

A careful search of the Digest has failed to disclose any case in which the Supreme Court has passed upon the question you have submitted. Section 4813 of the Code of 1924, reads as follows:

"All able bodied male residents, including the male officers and employees of any state institution, if any, but not including any committed inmate of such institution, between the ages of twenty-one and forty-five who are residents of the township outside the corporate limits of cities and towns shall between the first day of April and the first day of September of each year pay to the road superintendent a sum not to exceed five dollars, said sum to be fixed by the township trustees at the April meeting. Provided that the township trustees of each township may at the regular April meeting provide whether or not each person may at his option perform two days' labor in lieu of payment of money as provided in this chapter. All money received by the road superintendent under provisions of this chapter shall be immediately paid to the township clerk for the benefit of the general township road fund. The tax and money so collected shall be expended upon the township road system under the supervision of the road superintendent."

Section 6231, the section granting authority to cities and towns to levy a poll tax, reads as follows:

"Any city or town shall have the power to provide that all able bodied male residents of the corporation, including the male officers and employees of any state institution situated within such city or town, but not including any committed inmate of such institution, between the ages of twenty-one and forty-five shall, between the first day of February and the first day of October of each year, and within fifteen days after receipt of the demand for payment by the clerk, pay in money to the street commissioner or city or town clerk a sum to be fixed by the city or town council on or before February first of each year, not exceeding five dollars."

It will be observed that the general statute, Section 4813, provides that the poll tax in townships outside of cities and towns shall be paid between the first day of April and the first day of September. Section 6231 provides that the poll tax in cities and towns shall be paid between the first day of February and the first day of October. If it were not for the difference in the dates specified in the two statutes, there would be no difficulty in solving the question submitted. We believe that all able-bodied male residents of cities and towns, who reside in the municipalities on the first day of February, if ordinances so provide, must pay the poll tax therein. Section 4813 provides that all able-bodied male residents who reside in townships outside of cities and towns on the first day of April must pay the poll tax therein. We are of the opinion that it was not the intention of the legislature that one who comes within the provisions of the poll tax statutes should be required to pay a poll tax in more than one district or municipality and that when a poll tax has been legally levied in one district another poll tax may not be levied against the same person in another district. Therefore, we answer your question in the following way: As the man lived in the town of Webb on the first day of February, he became subject to the payment of the poll tax therein and no other district could levy such a tax against him for the same year.

Therefore, notwithstanding the fact that he lived in Garfield Township on the first day of April, he could not be required to pay a poll tax in such township as the payment of a poll tax in the town of Webb would exempt him from the requirement of paying the tax in Garfield Township.

BUILDING AND LOAN ASSOCIATIONS: Such associations do not have the right to contribute to a Community Chest for charitable purposes.

December 8, 1925. *Auditor of State:* We have received a letter from J. B. Northcott of Cedar Rapids, submitting to this department an inquiry which he stated as follows:

"Tomorrow evening we start the annual drive to raise funds for such institutions which are included in our Community Chest. We are asking a gift from the Cedar Rapids clearing house association. When we presented the matter to them they made their giving conditional on our securing gifts from the building and loan associations. We have presented this proposition to the associations and they seem to be willing to subscribe provided the law will permit them. We, therefore, ask your opinion as to the legality of the building and loan associations subscribing to such fund."

On account of the fact that this question may be raised again, we deem it advisable to prepare an official opinion on the question submitted. Therefore, we prepare an opinion for your department. At the outset we will say that we fully appreciate the importance of the work carried on by the Cedar Rapids Community Chest, and we are fully aware of the benefits to be derived from such work. However, we cannot permit our sentiment to override what we believe to be the plain mandate of the statute. We are of the opinion that such associations have no power or authority under the statutes to contribute to the Community Chest. We shall briefly state our reasons therefor.

We do not have in our possession copies of the Articles of Incorporation of the associations located in Cedar Rapids but for the purpose of preparing this opinion we are assuming that the Articles of Incorporation of these associations are the ones customarily used by such associations. It is well settled in this state that a corporation can have no power to do any act without legislative authority and its power and authority are limited to such acts as are expressly given to it by its charter, or such as are necessarily implied from the powers expressly given. In the case of corporations organized under general laws the articles of incorporation, together with the general incorporation laws, create the same relation between the state and corporations which would exist if such general laws and articles of incorporation were embodied in a special act of the legislature creating the corporation and defining its powers.

State v. Central Iowa Rd. Co., 71 Iowa 410.

A corporation is presumed to be clothed with the usual powers necessary and proper to enable it as such to carry out the purposes of its existence.

Home Insurance Co. v. N. W. Packet Co., 32 Iowa 223.

It is also well settled that in the absence of restriction corporations have the implied power to do what is necessary or proper to carry on the business for which they were organized.

Berry v. Anchor Mutual Fire Ins. Co., 94 Iowa, 135.

With these rules of law in mind, we will now proceed to a consideration of the statutes for the purpose of determining whether such associations have the authority to contribute to a fund for the purpose specified in your letter.

Section 9340 of the Code of 1924 contains the following sentence: "*All funds*, except those necessary to defray the expenses of the association, shall be invested for the benefit of the shareholders."

Section 9345, 9346 and 9348 of the Code of 1924, relate to expenditures and expenses of such associations. Section 9347 relates to the net earnings of such associations and the payment of dividends. We find no statute which authorizes the expenditure of money for the purpose specified in your letter. We believe that the provisions of Section 9340 of the Code of 1924, hereinbefore quoted, place a limit upon the use of the funds of such associations. The contributing to a Community Chest is not one of the purposes for which such associations are organized or incorporated.

We are, therefore, of the opinion that your inquiry must be answered in the negative.

LOTTERIES: A lock box to which keys are given to purchasers of commodities, one of which may unlock the box and obtain a prize, is a lottery.

December 8, 1925. *County Attorney, Audubon, Iowa:* We wish to acknowledge receipt of your favor of the 4th requesting our opinion upon the following propositions:

"Is the following plan unlawful in the State of Iowa? Company operates the business, may be any business; it has in its window a lock box, and advertises that all persons buying goods from such company to the extent of one dollar or more will receive a key, and that one and only one of the keys so given out will unlock the box in the window; that the person receiving the key which will unlock the box will receive a radio set free.

"Can this be construed as a lottery?

"There is also submitted the following question based on a somewhat similar situation: A concern gives away a numbered ticket with each five gallon purchase of oil. Upon the sale by them of a stated quantity of oil, there is a drawing of numbers corresponding identically to the numbers given out, and the person holding the winning number receives a new Ford car. I do not know the exact method by which the number is determined, but understand that it is either by a drawing or in some manner selecting the number from those which have been issued during the period of time preceding the sale of the specified quantity."

In reply we wish to say that we believe there is no question but that both of the propositions submitted by you are lotteries and clearly prohibited by the statutes of this state. You are also referred to the provisions of the code authorizing the sheriff to seize and take possession of the property offered as a prize in such transactions.

TAXATION: (1) The five year period for the assessment of omitted personal property dates from the first day of April and in cities of over 10,000 on the first day of May. (2) The interest on personal property omitted from assessment remains a part of the tax and does not become a part of the general fund under Chapter 149, Laws 41st General Assembly.

December 11, 1925. *Auditor of State:* We have received your letter of December 9, 1925, in which you ask this department to prepare an opinion upon two questions which you have stated as follows:

"We are in receipt of a letter from the county auditor of Polk county asking us to take up with you and secure an official opinion on some questions relative to making assessment of omitted property. The questions proposed, we are quoting verbatim from the letter of Mr. Cook as follows:

"'First: In making an assessment of omitted property under section 7155 of the code of 1924 which provides for an assessment being made "at any time within five years from the date at which such assessment should have been made" what date would you consider as the date such assessment should have been made? Would you consider January first or the first Monday in April of the year in which such assessment should have been made as the proper date? In other words can an assessment be made after Jan. 1st, 1926 for the tax of 1921?

"In case it is held that the assessment for 1921 could be made up to the first Monday in April, 1926, could the same assessment be made up to the first Monday in May in cities having a population of ten thousand or over? See paragraph 2 of section 7129, Code of 1924.

"Second: Should the six per cent interest collected by the county treasurer on omitted property tax (see 7155 Code of 1924) be put into the General County Fund (Chapter 149 Acts 41st General Assembly) or should it be apportioned to the various funds.'".

"Section 7155 of the Code of 1924 reads as follows:

"When property subject to taxation is withheld, overlooked, or from any other cause is not listed and assessed, the county treasurer shall, when apprised thereof, *at any time within five years from the date at which such assessment should have been made*, demand of the person, firm, corporation, or other party by whom the same should have been listed, or to whom it should have been assessed, or of the administrator thereof, the amount the property should have been taxed in each year the same was so withheld or overlooked and not listed and assessed, together with six per cent interest thereon from the time the taxes would have become due and payable had such property been listed and assessed."

It will be observed that the assessment of omitted property may be made "at any time within five years from the date at which such assessment should have been made." The Supreme Court in three cases has construed this particular portion of the statute. It was held in these cases that the five year limitation for the assessment and collection of omitted personal property taxes commences to run the first Monday in April, the time provided for turning the assessment rolls over to the local board of review.

Siberling v. Cropper, 119 Iowa 420;
Thornburg v. Cardell, 123 Iowa, 313;
Schoonover v. Petcina, 126 Iowa, 261.

Under the provisions of the second subdivision of Section 7129 of the Code of 1924, in cities having a population of ten thousand or over, the boards of review shall meet on the first Monday of May. The five year period of limitation for assessing omitted personal property in such cities, therefore, begins to run on the first Monday of May instead of the first Monday in April.

We deem it advisable to call your attention to the fact that Sections 7157 and 7158 of the Code of 1924 relate to the assessment of omitted real property and that the right to make such assessment by the county treasurer is limited to four years after the tax list shall have been delivered to the treasurer for collection.

II.

Section 7155 of the Code of 1924 provides that when personal property omitted from assessment is assessed by the county treasurer the amount of the tax shall be the amount the property should have been taxed in each year the same was so withheld and overlooked and not listed and assessed, together with 6% interest thereon from the time the taxes would have become due and payable had such property been listed and assessed.

Section 7156 of the Code of 1924 gives to the taxpayer thirty days within which to pay the tax on such personal property omitted from taxation, even though it draws interest during said period. It is manifest, we think, that the taxes on such omitted property do not become delinquent until the end of the thirty day period. Chapter 149, Acts of the 41st General Assembly, relates entirely to the interest and penalty on delinquent taxes, and not to the interest on taxes on property omitted from assessment. The word "delinquent" as used in the statutes relating to taxation has been held to mean nothing more than *overdue* and *unpaid*.

Genswold v. Minn. Canal Co., (Minn.) 101 N. W. 603.

To constitute a legally delinquent tax, three things are necessary: (1) that the property is subject to tax; (2) that a tax authorized by law has been levied on the property in the manner provided by law; (3) that the tax remains unpaid after the time appointed by law for its payment. To make a tax delinquent each of these things must be shown—each one is as essential as either of the others.

Chauncey v. Wass. (Minn.) 30 N. W. 826 (830).

A tax cannot be called a "delinquent" tax until it has been assessed and placed upon the tax list and the taxpayer given an opportunity to pay.

Redwood Company v. Winona & St. Peter Land Co., (Minn.) 42 N. W. 473 (477);

Gallup v. Schmidt, (Ind.) 56 N. E. 442; (450).

A consideration of the provisions of Section 7156 will confirm our conclusion on this question. This section provides that upon failure to pay the omitted tax on personal property within thirty days, *with all accrued interest,* the county treasurer shall cause an action to be brought to recover the amount due. The section contains the following sentence:

"* * * The amount thus recovered shall be by the treasurer apportioned ratably as the taxes would have been if they had been paid according to law."

What is meant by "the amount thus recovered?" Obviously, the amount due, with all accrued interest, as specified in this section.

We are, therefore, of the opinion that the taxes on omitted property do not become delinquent until thirty days after the treasurer makes the assessment of such property and the interest thereon up to that time, in reality, becomes a part of the tax and not a part of the general fund, under the provisions of Chapter 149, Laws of the 41st General Assembly.

VOTING CONTEST IS NOT PROHIBITED BY THE STATUTES.

December 12, 1925. *County Attorney, Ida Grove, Iowa:* We wish to acknowledge receipt of your favor of the 10th requesting our opinion upon the following proposition:

"A certificate of purchase is given with each purchase of merchandise in Ida Grove of $1.00 or more. At the time of making the purchase the name of the purchaser or any other person whom he may desire is written upon the certificate and the same dropped in a container. A meeting is held at a designated place on the 2nd day of January, 1926, at which time and place all of the certificates are removed from the containers and placed in the hands of certain persons previously selected as judges of the contest. The judges at said time and place count the number of certificates of purchase of each person and report the number each person is entitled to at this meeting, as evidenced by the names appearing upon the face of the certificate. The person whose name appears upon the largest number of certificates of purchase is by this fact alone entitled to the first prize, a five-tube radio set; the person whose name appears upon the next largest number of certificates of purchase becomes entitled to the second prize, and so on in this manner until each of the fifteen prizes are disposed of.

"The certificates of purchase are simply small cardboard, about one and one-half inches wide, and three inches long, bearing thereon only the words "Certificate of purchase" and "To" and a blank line underneath upon which is written the name of the person who makes the purchase or any other person whom the purchaser of the merchandise desires to place upon the certificate. A delegation from the local Chamber of Commerce has asked me to procure the opinion of your department as to the legality of this contest and whether or not the details of the contest as I have outlined them to you may be legally advertised in the newspapers and transmitted through the mails. I have no advertising matter as yet since they are desirous of knowing whether or not a plan of this kind will comply with the law before going to any expense in the matter."

We are of the opinion that the proposition submitted by you does not fall within the prohibition of the statutes of this state in regard to lotteries or gift enterprises but is in the nature of a voting contest, the person receiving the highest number of votes to receive a certain prize, and those in order following to receive certain prizes.

We do not pass upon the question as to whether or not advertising matter of this nature may be transmitted through the United States mail. This department has no jurisdiction over the United States mails, or the interpretation of the federal criminal statutes. No doubt the United States district attorney for your district will be able to advise you upon the federal question.

BUILDING AND LOAN ASSOCIATIONS: Such associations have authority to borrow money to carry out the powers specifically granted by the statute.

December 14, 1925. *Auditor of State:* We have received your letter asking this department to prepare an opinion upon a question which you have stated therein as follows:

"I have an inquiry from an officer of a Building and Loan Association, as follows:

" 'Can a Building and Loan Association in Iowa amend its articles of incorporation so that it may borrow money for use in the regular course of business, if the amendments set forth that at no time shall the funds borrowed exceed ten per cent of its assets; or any certain stated limit?' "

Title XXII of the Code, containing Sections 9306 to 9402, is the portion of the Code relating to building and loan associations. Sections 9390 to 9402, both inclusive, relate to unincorporated associations and the other portion of the statute to corporations transacting a building and loan business.

We have carefully examined these statutes and we find nothing therein that specifically permits, authorizes or empowers such associations to borrow money. Section 9313 is the section of the statute providing what the articles of incorporation shall contain. There is no provision therein permitting such corporations to borrow money. The powers of such associations or corporations are such as are granted in Section 9329 of the Code of 1924, which reads as follows:

"All building and loan or savings and loan associations, upon receiving the certificate from the auditor, shall have power, subject to the terms and conditions contained in their articles of incorporation and by-laws:

"1. To issue stock to members to be paid for in single, stated or monthly payments.

2. To assess and collect from members such dues, membership fees, fines, premiums, and interest on loans as may in the articles of incorporation and by-laws have been provided, and the same shall not be held to be usurious.

3. To permit members, other than holders of guarantee stock, to withdraw all or a part of their stock deposits upon such terms and at such times as the articles of incorporation and by-laws may provide.

4. To acquire, hold, incumber and convey such real estate and personal property as may be necessary for the transaction of their business.

5. To make loans to members on such terms, conditions, and securities as the articles of incorporation and by-laws provide; said loans to be made only on real estate security, or on the security of their own shares of stock, not to exceed ninety per cent of the withdrawal value thereof."

It is our opinion that if it becomes necessary for such associations or corporations to borrow money to carry out any of the above specially granted powers or rights that they may do so. It is a well settled rule of statutory construction that whatever powers are necessary to carry out an express power granted will be implied.

The rule is stated in 14-a Corpus Juris, page 564, in the following language:

"The authority of a corporation to contract is measured by its charter or organic law, although its powers may be conferred either expressly or by implication, the implied powers being as fully granted, however, as those which are expressed, and the power of the corporation to contract is restricted to the purposes for which it is created, whether the corporation is one de jure or de facto. With this qualification and to this extent, corporations have the same power as natural persons to make contracts. . . . A corporation, therefore, may make any contract, generally speaking, which may be regarded as properly incidental to the lawful prosecution of its chartered activities."

It has been expressly held that as there is no statute of this state denying to building and loan associations the power to borrow money and in the absence of such

restrictions the power to do so is implied from the general nature of the business they are organized to carry on.

Bohn v. Loan Association, 135 Iowa, 143.

This authority is determinative of the question under consideration. Therefore, it is our opinion that such associations may borrow money to carry out the powers specifically granted by the statute. Any previous opinions of this department contrary to the provisions hereof are recalled.

COUNTIES: (1) With the approval of the director of the budget money may be transferred from the county fund to the tuberculosis fund. (2) However, where no levy has been made for the Eradication Fund a transfer from the county fund may not be made to this fund because a re-transfer thereof may not be made during the year.

December 18, 1925. *Secretary of Agriculture:* We have received a letter from Mr. C. T. Mercer, County Auditor of Adams County, in which he submits to this department a certain inquiry with reference to the transfer of not to exceed $2,000.00 from the county fund to the Tuberculosis Eradication Fund. On account of the probability that this question may again be submitted to this department, we prefer to prepare an opinion for your department so that it may operate as an official opinion. A copy thereof will be sent to the county auditor. The letter of the county auditor reads as follows:

"At the time of making up our budget for county taxes to be advertised last July the matter of making a levy for Tuberculosis Eradication Fund was discussed and as there was considerable cash on hand in that fund and as the matter was in litigation there was no levy made for that fund.

Now since the Supreme Court decision on this case and owing to the fact that the county is nearly through testing cattle, some are thinking it would be better to clean the balance up now rather than to wait a year or two and then have it all to do over again.

Would it be possible to transfer one or not to exceed two thousand dollars from the County Fund to the Tuberculosis Eradication Fund, which together with what is now in this fund and what the state helps would finish the testing. The same amount would be transferred back another year by a levy next summer. Would it be contrary to law to do this?"

Section 388 of the Code of 1924 reads as follows:

"Subject to the provisions of law relating to municipalities, and upon the approval of the director, it shall be lawful to transfer money from one fund of a municipality to another fund thereof, and the certifying board or levying board, as the case may be, shall provide that money so transferred must be returned to the fund from which it was transferred as soon as may be, provided that it shall not be necessary to return to the emergency fund or to any other fund no longer required, any moneys transferred therefrom to any other fund."

It will be observed that there is in the statute just quoted no limitation as to the funds from which a transfer may be made, or of the funds to which it may be made, and neither is there any limitation as to the amount. The statute provides for merely a temporary transfer of the county funds. We are, therefore, of the opinion that under the provisions of this statute a temporary transfer of money from the county fund may be made to the county Tuberculosis Eradication Fund. It will also be noted that the statute makes the exercise of the power therein conferred subject to the provisions of law relating to municipalities. We know of no statute in this state, aside from the one in question, that regulates or relates to the transfer of money from the county fund to the county tuberculosis eradication fund.

However, even though the law permits the transfer of such funds, we believe that under the facts stated in your letter, this may not be done. The statute provides for a temporary transfer only, and as no tax was levied for tuberculosis eradication work, no retransfer can be made until after a tax is levied therefor.

Therefore, we are clearly of the opinion that no transfer may be made at this time.

TAXATION: At scavenger sale the property must be sold not only for the year in which the property has been advertised and carried forward but for the year immediately preceding the tax sale.

December 21, 1925. *County Attorney, Mapleton, Iowa:* We have received your letter of December 12, 1925, in which you submitted to this department the following inquiry:

"The writer has been asked by Mr. A. L. Brown, representative of the Western Asphalt Paving Corporation of Sioux City, Iowa, to write you and ascertain if your opinion given November 23, 1921, and published in report of Attorney General for the year 1922, page 148, has been changed.

"You state in this opinion, as follows: 'This section provides for the sale of property which has been previously advertised for sale and on which there were no bidders for the full amount of the taxes. It is commonly called the "Scavenger's sale." The amount of the taxes due at the time of the sale is the base, and therefore, the property would be sold for the taxes for all of the years, not only for which the property had been advertised and carried forward, but also for the year immediately preceding the tax sale. Our Supreme Court, while not directly passing upon this question, has in substance approved the same and has in effect held that the base is the amount due at the time of the sale.'

"This paragraph covers the situation that we have at hand here completely, and will be pleased to have you advise if there would be any change in your opinion in this matter at this time. My contention is that the base is the amount due at the time of sale."

The opinion referred to was prepared by the present Attorney General. In this opinion it was held that "the amount of the taxes due at the time of the sale (meaning the scavenger's sale) is the base, and, therefore, the property would be sold for the taxes for all of the years, not only for which the property had been advertised and carried forward, but also for the year immediately preceding the tax sale."

You are advised that this department still adheres to the rule therein announced and will not recede therefrom.

TAXATION: Discussion of when property may be offered for sale at scavenger sale.

December 21, 1925. *Auditor of State:* You have orally requested us to prepare an opinion as to whether or not the conclusion stated in your letter of December 10, 1925, to Mr. Jens M. Clemmensen, County Treasurer of Monona County, Iowa, was a correct statement of the law of this state. Your letter to Mr. Clemmensen reads as follows:

"I have your letter of December 9th inquiring concerning when property can be sold by you at scavenger sale, and in reply will say that I think tax offered at scavenger sale must be for property that has been offered at two previous sales on which the treasurer has been unable to secure bids to make a regular sale, for instance, 1922 tax regularly advertised and offered in the year 1923 and again in the year 1924. This would be advertised, offered and sold at scavenger sale in 1925. Of course, the advertisement would not vary from the regular form of advertisement.

In this connection I would call your attention to the provisions of Code Section 7255, particularly that portion where it states that it must have been previously advertised, offered for two years or more, and *remained unsold.* I think the tax of 1923 you speak of could not be considered to have remained unsold until the time of the tax sale for the year 1926."

Section 7255 of the Code of 1924 reads as follows:

"Each treasurer shall, on the day of the regular tax sale each year or any adjourn-

ment thereof, offer and sell at public sale, to the highest bidder, all real estate which remains liable to sale for delinquent taxes, and shall have previously been advertised and offered for two years or more and remained unsold for want of bidders, general notice of such sale being given at the same time and in the same manner as that given of the regular sale."

It will be observed that the requirement is that the real estate shall have been previously advertised and offered for two years or more and remaind unsold for want of bidders. Therefore, to use the illustration found in your letter, the taxes for the year 1923 become payable in 1924, and if not paid before the first day of December the property on which the taxes were due was offered for sale, and if there were no bidders at such sale, then the property would be reoffered for sale in 1925 and could not be sold for less than the taxes remaining unpaid thereon until the year 1926.

We are, therefore, of the opinion that you correctly interpreted the statute in your letter to Mr. Clemmensen.

FIRE DEPARTMENT: Pension fund is required when a city or town has a paid fire department.

December 21, 1925. *Director of the Budget:* You have orally requested our opinion upon the following proposition, to-wit:

The city of Shenandoah has a fire department consisting of fifteen members, one chief and one driver. The driver is paid the sum of $150.00 per calendar month, and devotes all of his time to this work. The chief is paid $200.00 per year, and the other members of the department $100.00 per year. The chief and members of the department other than the driver are paid semi-annually. Under these circumstances, you inquire whether or not the city of Shenandoah is required to comply with the provisions of Chapter 322, Code, 1924, providing a pension fund for disabled and retired firemen.

Section 6310 of this Chapter is in part as follows:

"Any city or town having an organized fire department may, and all cities having an organized police department or a paid fire department shall, levy annually a tax not to exceed one-half mill for each such department, for the purpose of creating firemen's and policemen's pension funds; * * *"

A tax is thereafter provided for to be levied upon the property of the city or town for this purpose.

Under the facts stated by you it is clear that the department in question is a "paid fire department" within the meaning of the provisions of the section hereinbefore quoted. We are, therefore, of the opinion that the city of Shenandoah is required to comply with the provisions of the chapter referred to.

TAXATION: Personal property taxes are a lien on the real estate of the owner only, even though the deed to the real estate is not recorded.

December 23, 1925. *Auditor of State:* We have received your letter of December 10, 1925, submitting to this department a question which was submitted to your department by the county treasurer of Tama County. The question, as stated by the county treasurer, is as follows:

"I have advertised real estate for sale Dec. 7th upon which personal taxes of the owner of record January 1, 1925, appear unpaid. In one case a bank comes in and claims to have bought this land and secured deed prior to January 1, 1925, but did not record the deed until after that date. They claim to be free from that personal tax on the ground that the date of deed and not date of recording same determines the tax lien. On another piece, another bank makes the same claim, although they have not even yet recorded their deed, wishing, I presume to avoid publicity. If they are free from this personal tax, from whom is the county to collect the advertising costs on this land? If I do sell the land either knowing or not knowing of a claim of the existence of a deed, what is the position of the buyer of the tax certificate? I have held that the delay of a vendee in recording his deed was at his own risk as to liens, including tax liens. I am however beginning to fear I may be mistaken, so ask your advice."

The question submitted is not easy to solve. So far as we are able to discover, the statutes do not definitely settle this question and the courts have never been called upon to pass upon said question. We must, therefore, resort to some general rules for the solution thereof.

Section 6956 of the Code of 1924, provides that every inhabitant of this state, of full age and sound mind, shall list for the assessor all property subject to taxation in the state, of which he is the owner, or has the control or management, in the manner therein directed. Section 6960 of the Code of 1924 reads as follows:

"When the name of the owner of any real estate is unknown, it shall be assessed without connecting therewith any name, but inscribing at the head of the page the words 'owners unknown,' and such property, whether lands or town lots, shall be listed as nearly as practicable in the order of the numbers thereof."

It will be observed that the phrase "when the name of the owner of any real estate is unknown" appears in this section. It is, therefore, our opinion that real property must be assessed in the name of the real owner at the time the assessment is made and that it is the duty of the owner to list his real property for assessment. The statute does not provide that real property shall be assessed in the name of the owner as it appears on the records in the county auditor's office or in the recorder's office. The requirement is that it shall be assessed in the name of the owner.

Section 7203 of the Code of 1924 reads as follows:

"Taxes due from any person upon personal property shall be a lien upon any and *all real estate owned by such person* or to which he may acquire title."

It will, therefore, be observed that the personal property taxes are made a lien only upon the real estate owned by the person who owns the personal property. We are of the opinion that the personal property taxes of the former owner are not a lien upon the land owned by the bank, even though the deed was not recorded and the treasurer did not know that the former owner thereof had conveyed the title thereto. It follows from this conclusion that the county may not collect from the owner of the land the portion of the cost of publishing the notice that was assessed against the land.

However, we believe that on account of the fact that the real estate in question was included in the delinquent tax sale notice because of the failure of the bank to have its deed recorded or to list this property for taxation in its name, the bank should pay this portion of the cost as a matter of mere justice and right.

As the land has not been sold we do not deem it advisable to render any opinion upon the rights of a buyer of a tax certificate under such conditions.

AGRICULTURAL SOCIETY: An agricultural society is not required to actually collect the money subscribed before they are entitled to receive aid from the county, under the provisions of Section 1930, Code 1924. The term "subscription" means the contract or obligation to pay.

December 28, 1925. *County Attorney, Fairfield, Iowa:* Reference has been made to the opinion of this department dated July 31, 1925, concerning the interpretation of Section 2930, Code, 1924, regarding the appropriation which may be made by the Board of Supervisors for farm associations. In the opinion referred to it was said:

"We do not believe that it was the intent of the legislature to appropriate $3,000

to all such associations in counties having a population of less than 25,000, but rather to appropriate in an amount double the subscription raised in all such counties, but in no case to exceed $3,000."

The question has now arisen as to what was meant by the term "subscription," as used in the opinion and as contained in the section referred to. In other words, we are asked whether or not this term means the amount which is subscribed by various members of farm aid associations but not actually paid in, or to the amount which is actually paid to the association.

Section 2930, Code of 1924, reads as follows:

"When articles of incorporation have been filed as provided by this chapter and the secretary and treasurer of the corporation have certified to the Board of Supervisors that the organization has among its membership at least two hundred farmers or farm owners in the county and that the association has raised from among its members a yearly subscription of not less than one thousand dollars, the board of supervisors shall appropriate to such organization, from the general fund of the county, a sum double the amount of such subscription. Such sum shall not exceed, in any year, a total of five thousand dollars in counties with a population of twenty-five thousand or over, nor a total of three thousand dollars in counties with a smaller population."

The term "subscription" has been defined by numerous courts of this country, but we fail to find a definition of the term by the Supreme Court of this State. It has been held, however, that the term "subscribed capital stock," as used in the statute prohibiting the directors of a corporation from creating duties beyond their subscribed capital stock, means "all subscribed capital stock, whether paid in or not, and regardless of the disposition made of it."

Moore v. Lent, 22 Pac. (Cal.), 875, 877.

It has also been held that the term is never more than a contract by which the subscriber is bound to pay.

Downie v. Hoover, 78 Am. Dec. (Wis.) 730;
Waters v. Union Trust Company, 89 N. W. (Mich.), 687, 688.

And it has also been held that a subscription to corporate stock is insofar a completed contract as to prevent a withdrawal of the subscription before the corporation is organized and the subscription accepted.

Bryant's Pont Steam Mill Co. v. Felt, 32 Atl. (Me.), 888.

We fail to find a single authority holding that the term "subscription" means the actual payment of the amount designated.

We are therefore of the opinion that if actual bona fide subscriptions are obtained by which the various subscribers agree among them to raise the sum of one thousand dollars or more per year, then the Board of Supervisors are required to appropriate to such organization, as provided in the statute. It is not necessary that the amount subscribed be paid before the Board are required to make the appropriation. However, good faith and absence of fraud are essential. The subscriptions must be bona fide and made with the intention of paying.

POOL HALLS: Minors not allowed in so-called barber shops which are run in connection with pool halls in the same room and not partitioned off.

December 29, 1925. *County Attorney, Humboldt, Iowa:* You have requested the opinion of this department upon the following statement of facts:

"We have been having some trouble in our county with barber shops having pool and billiard halls in connection, and I have been wondering just what is necessary to make a division between a barber shop and a pool hall where they are run in the same building. Most parties who attempt to make a division simply have a railing two and one-half feet high, with a sort of gate between. This, of course, makes a division line between the pool hall and barber shop, but does not obstruct the view, and it would seem that the framers of the law must have intended an obstruction of view."

In regard thereto you are advised that we are of the opinion that where a pool hall is housed in the same building as a barber shop and is under the same management, being separated only by a small railing, that the place would come within the definition of a pool hall and that minors should not be permitted to enter therein. An ordinary case such as you mention is one where the principal part of the business is the pool or billiard hall and for the convenience of customers a barber chair is an accessory. We believe that the statute contemplated such places of business and that it would be your duty to construe that as a pool hall and to prevent minors from admission to such a place.

WORKMEN'S COMPENSATION: Held on statement of facts that night watchman killed by bandits entitled to compensation.

December 29, 1925. *Industrial Commissioner:* This will acknowledge receeipt of your favor of the 26th inst. enclosing the files in the case of John Wesley Armstrong of Logan. It appears from the facts in the case that Mr. Armstrong was employed as a night watchman in the town of Logan; that his employment was in all respects regular; that while engaged in the course of his employment as such watchman, on the morning of October 14, 1925, at 2:30 A. M., he was shot by three bandits who had held him up, and who had been at work in the town of Logan. Your request is as to whether or not the State is liable.

For your convenience I quote Section 1422, Code, 1924, which provides as follows:

"Any policeman (except those pensioned under the policemen's pension fund created by law), any sheriff, marshal, constable, and any and all of their deputies, and any and all other such legally appointed or elected law-enforcing officers, who shall, while in line of duty or from causes arising out of or sustained while in the course of their official employment, meaning while in the act of making or attempting to make an arrest or giving pursuit, or while performing such official duties where there is peril or hazard peculiar to the work of their office, be killed outright, or become temporarily or permanently physically disabled, or if said disability result in death, shall be entitled to compensation, the same to be paid out of the general funds of the state for all such injuries or disability.

"Where death occurs, compensation shall be paid to the dependents of the officer, as in other compensation cases. Such compensation shall be the maximum allowed in compensation cases. The industrial commissioner shall have jurisdiction as in other cases."

We are of the opinion that under this section the State would be liable for the death of Mr. Armstrong. It is apparent from the facts that he was killed while attempting to ward off the escape of the bandits. It also appears that the reason for his being held up and shot was that he was a police officer and a night watchman and therefore one liable to pursue the bandits and to frustrate any of their schemes for escape. We believe that he was killed while in the performance of his official duty and because of the fact that he was a peace officer performing such duty. Therefore, we are of the opinion that the State would be liable within the provisions of Section 1422.

We are returning to you the files which you sent this department.

MOTOR CARRIERS: The tax provided by law against the property of motor carriers is a first lien and entitled to priority over purchase money mortgages or a lien created by conditional sales contract.

December 31, 1925. *Board of Railroad Commissioners:* We wish to acknowledge

receipt of your favor of the 24th requesting our opinion upon the following proposition:

"1. Section 7, Chapter 4, Laws of the 41st General Assembly, which relates to taxation of motor carriers provides 'If payment is not made on or before sixty (60) days from the date when the tax is payable, the property of the carrier, or so much thereof as may be necessary, may be sold to satisfy the said taxes and penalty, interest and costs of sale.' In case a motor carrier is operating with equipment which he is buying on contract, and the ownership of which is in the selling agency, is such equipment subject to sale to satisfy delinquent taxes?

"2. Section 12, Chapter 5, Laws of the 41st General Assembly, which provides for the filing by motor carriers of liability bonds 'to protect the interest of the public * * *' also provides that 'no other or additional bonds shall be required of any motor carrier by any city, town or agency of the state.' Under this provision of the law is the Commission:

(a) Prohibited from requiring a bond to insure the payment of taxes?

(b) Would a bond voluntarily filed to protect the state against failure to pay taxes be good in the event of delinquency in payment of such taxes?"

Chapter 4, Laws of the 41st General Assembly, which provides for the levy and collection of the tax to be paid by motor carriers, in Section 7 reads as follows:

"On or before the last day of each month, the commission shall notify all motor carriers of the amount of the tax due from them for the preceding month, which shall be computed by multiplying the total number of ton-miles operated by the appropriate rate of taxation as herein prescribed and shall be paid to the commission on or before the fifteenth (15) day of the following month. If payment is not made upon the said date there shall be added as a penalty a sum equal to one-fourth of the amount of the original tax, if paid within thirty (30) days of such delinquency. Taxes and penalties shall be a first lien upon all the property of the motor carrier. If payment is not made on or before sixty (60) days from the date when the tax is payable, the property of the carrier, or so much thereof as may be necessary, may be sold to satisfy the said taxes and penalty, interest and costs of sale."

The statute thereafter provides for the enforcement of the collection by distress and sale of the motor carrier's property.

It is competent for the legislature to make taxes a paramount lien upon the property of the taxpayer; the consequence of such legislative action being that the lien for taxes takes precedence over every other lien or claim upon the property of whatsoever kind and however created, and whether attaching before or after the assessment of taxes. (*Paulson v. Rule*, 49 Iowa, 576; 37 Cyc. 1143).

In this state a general tax lien has priority over the lien of a prior mortgage, and a lien for special taxes has been held, under the express provisions of the statute, to have priority to prior mortgages. (*Fitchpatrick v. Botheras*, 150 Iowa, 376).

In *Fitchpatrick v. Botheras*, supra, at page 378 the Supreme Court of this State said:

"The legislature might properly provide therefor, as it has done (In Code Supp. 1907, Section 1989-a45), that the special assessment for drainage purposes when levied shall be a lien upon the premises upon which it is assessed to the same extent and in the same manner as taxes levied for county and state purposes. See Code, Section 1400. And although the mortgagee of the premises has not had notice of the proceeding, such an assessment takes priority over the lien of his mortgage. The statute so expressly provides, and it is conceded that a general tax lien has priority over the lien of a prior mortgage.

"This question has often arisen in other states, and it seems to have been uniformly held that, if the statute provides for a superior lien as the result of special assessments, the mortgagee has no ground of complaint although he is not by notice or otherwise made party to the proceedings in which the assessment is levied. (Citing cases)."

The statute before us provides expressly that "taxes and penalties shall be a first lien upon all the property of the motor carrier." The language, we believe, is plain and unambiguous. We are, therefore, of the opinion that the lien for taxes and penalties provided in Chapter 4, Laws of the 41st General Assembly, is as the statute provides, "a first lien," and entitled to priority over any prior mortgage upon the same property.

Turning to the question of priority between the lien for taxes and penalties upon property sold to a motor carrier on conditional sales contract, we fail to find any decision of the Supreme Court of Iowa and must, therefore, resort to the decisions in other states where this question has been passed upon. The Supreme Court of Alabama in a recent decision entitled *State v. White Furniture Company*, 206 Ala., 575, had before it for consideration the question of priorities in the case of personal property sold on conditional sales contract in which the legal title was reserved in the vendor until all of the purchase money was paid, and taxes assessed upon the same personal property against the vendor as owner. The Alabama statutes in regard to taxation in general are quite similar to our own and in substance require that all property shall be assessed to the owner thereof. Section 7, which we have hereinbefore quoted, merely provides that the taxes and penalties shall be a first lien "upon all the property of the motor carrier." It will be seen that the language in this statute is not as strong as the Alabama statute requiring that property shall be assessed to the owner. The Alabama court in determining this question, in part said:

"So, when a statute requires that property be assessed to the owner, we think it means the general and beneficial owner—that is, the person whose interest is primarily one of possession and enjoyment in contemplation of an ultimate absolute ownership—and not the person whose interest is primarily in the enforcement of a collateral and pecuniary claim, and does not contemplate the use or enjoyment of the property as such."

"It is well settled that when the vendee of real property is in possession under an executory contract of sale, he is liable to be taxed as the owner. (Citing cases).

"In 27 A & E Ency Law (2 Ed.) 678, it is said that:

"'Assessments in the name of a person as owner who holds the equitable title to property and is in possession, have been generally upheld as valid."

—for which many authorities are cited.

"It is, of course, to be conceded that the equitable ownership of an executory purchaser of realty is of a higher nature than is a like interest in personalty and is more favored by law; but for the purpose of taxation it is difficult to find any valid distinction.

"* * * *

"Nevertheless, the retention of title by a vendor of personalty does not make him the absolute owner of the property. (Citing cases). It is, at most, a form of security for the payment of the purchase money. (Citing cases). * * *

"These cases lend support to the view that a conditional vendor's title before default in payment by the vendee and before election by the vendor to reclaim the property and thereby release the debt is a special property, and that the general and beneficial ownership is in the vendee; and hence that the vendor's taxable interest, if not exempted by law, is the money value of the purchase money debt, regarded as a solvent credit, while the vendee's taxable interest is the general property right." The court holding that the property was taxable to the vendee.

We find that a very similar case was presented to the supreme court of California and determined in a recent decision entitled *Houser & Haines Manufacturing Company v. Hargrove*, 129 Cal., 90. In the California case the property, a harvester, was sold and delivered to the purchaser under a sales contract. The Supreme

Court of California held that the harvester was properly taxed to the vendee. It is said in Cooley on Taxation, 4th Edition, paragraph 1097:

"In cases of conditional sale, personal property is generally assessed to the buyer."

In paragraph 1240 of this same work, Cooley says:

"When a preference is given the lien does not stand on the same footing with an ordinary encumbrance, but attaches itself to the res without regard to individual ownership." Also citing *Osterberg v. Union Trust Company*, 93 U. S. 424; *California Loan & Trust Company v. Weis*, 50 Pac., 697; *Smith v. Cassidy*, 23 Southern (Miss.) 427.

Under the statute before us for consideration, we are clearly of the opinion that the personal property used by the motor carrier in its business is subject to assessment and to the lien for taxes and penalties, as therein provided. If the property is held by the motor carrier under conditional sales contract, it is the beneficial owner and the property is that of the motor carrier insofar as liability for assessment is concerned. It was clearly the intention of the legislature to subject property of this nature to the payment of the taxes and penalties incident to the business. If it were to be held that the property was assessable to the vendor, then the very purpose of the legislature would be defeated and no taxes could be levied against the property used in the business, and which was sold by the vendor with full knowledge that it was subject to the first lien for taxes.

Turning next to the second question submitted by you, we quote Section 12, Chapter 5, Laws of the 41st General Assembly:

"No certificate shall be issued until and after the applicant shall have filed with the commission a liability insurance bond, in form to be approved by the commission, issued by some company authorized to do business in this state, in such penal sum as the commission may deem necessary to protect the interests of the public with due regard to the number of persons and amount of property involved, which liability insurance bond shall bind the obligators thereunder to make compensation for injuries to persons for loss of, or damage to property resulting from the operation of such motor carriers. No other or additional bonds shall be required of any motor carrier by any city, town or other agency of the state."

A reading of the section above quoted will show that this statute concerns liability insurance and the bond therein referred to is only for the purpose of securing the payment of indemnity. The legislature provided what should be required of an applicant coming within the provisions of this chapter before a certificate to operate upon the public highways could be issued. Nowhere in the provisions of the statute is there reference to a bond to secure the payment of the license fee or tax. The legislature provided a remedy for the collection of delinquent taxes in Chapter 4, Laws of the 41st General Assembly, and provided that the delinquent tax shall be a first lien upon all of the property of the motor carrier, and that the property may be sold to satisfy such taxes and penalties. This remedy, we believe, is exclusive and the commission cannot, as a condition precedent to the issuance of a certificate, require a bond as security for the payment of the taxes due, under the provisions of this act.

SCHOOLS: Discussion of what is embraced within the meaning of the word "tuition" in the statute providing that a pupil may attend a high school in an adjoining district.

January 4, 1926. *Superintendent of Public Instruction:* We desire to acknowledge receipt of your letter of December 14, 1925, submitting to this department the following question:

"What items should be considered in figuring tuition for non-resident pupils as provided in section 4277 of the Code, 1924? Should tuition cover only the actual cost of instruction received by such persons or would the interest on bonds, permanent improvements, insurance on buildings, and fixtures be included in determining the tuition?"

Section 4277 of the Code of 1924 reads as follows:

"The school corporation in which such student resides shall pay from the general fund to the secretary of the corporation in which he shall be permitted to enter a tuition fee of not to exceed twelve dollars per month during the time he so attends, not exceeding a total period of four school years. *Such tuition shall not exceed the average cost of tuition in such high school.* The secretary shall deliver to the treasurer such tuition fees with an itemized statement on or before February fifteenth and June fifteenth of each year."

It will be observed that the statute above quoted provides that "such tuition shall not exceed the average cost of tuition in such high school" which evidently means the actual cost of the instruction given in such high school. We desire to call your attention to the fact that Section 4273 of the Code of 1924, which must, of course, be read in connection with Section 4277, contains the following sentence.

"Every person, however, who shall attend any school after graduation from a four-year course in an approved high school or its equivalent shall be charged a sufficient tuition fee to cover the cost of the instruction received by such person."

We think it is apparent that it was not the intention of the legislature, in enacting the two sections just referred to, to permit any school corporation to derive a profit from another school corporation for instruction in a high school given to the students of the other district but that it was intended to only cover the actual cost of giving such instruction.

It is, therefore, our opinion that interest on bonds, the cost of insurance on buildings, and the cost of constructing permanent improvements, or the depreciation thereon and the purchase of fixtures for such school should not be taken into consideration in determining the cost of tuition. The actual annual cost of such instruction, such as the purchase of stationery, the salaries of school teachers and janitors, the cost of fuel, light and heat and any other expenses that are annual or usual, as distinguished from fixed charges on permanent improvements, should be taken into consideration in determining the cost thereof. The tuition to be charged each student should, in our opinion, be determined in the following manner: The total actual cost of the instruction, as above defined, should be used as the basis and this should be divided into as many parts as there are students attending the high school, including the students from other districts, and the result obtained would be the average cost of such tuition.

HIGHWAYS: Neither the county nor its agents are liable in damages for negligence in the improvement of highways.

January 5, 1926. *County Attorney, Waukon, Iowa:* We have received your letter of December 18, 1925, asking this department to prepare an opinion upon the following inquiry:

"During the process of placing one of our state roads up to grade the cutting down of an embankment along a farmer's premises so exposed the roots that many arbor vitae trees were injured. Some of these trees were right on the line, while others were entirely on his premises, and some again were out in the public highway. I gave the board of supervisors against whom claim has been filed, the opinion that the road workers might cut roots up to the line (*Herndon v. Stultz*, 124 Iowa 440, 100 N. W. 329, 1 C. J., page 1232) and that as to those trees directly on the line they would be responsible for damages (*Musch v. Burkhart*, 83 Iowa 301, 48 N. W. 1025). Mr. Ryan feels that I am not interpreting the law correctly as he thinks the earth which protected the roots before should have been left, he having given the trees especial care by manurance and mulching, and the result-

ant exposure by taking away the bank in its natural state has greatly injured him. I feel I am correct as to the trees standing on Mr. Ryan's premises, namely that the road workers had a right to cut to the line, but in view of the importance of the matter am passing it on to you."

As we understand your inquiry, the trees referred to were destroyed in the exercise of the government right to improve the highway and that the improvement thereof was done in compliance with the provisions of the statutes. It has been held by the Supreme Court of the state that the maintenance of public roads and highways is a public purpose and the exercise of a governmental function.

McLeland v. Marshall County, 199 Iowa 1232 (1244), 201 N. W. 401 (405).

It is our opinion that the county would not be liable to the property owner for damages resulting from the improvement of the highway, even though the agents of the county, in making such improvement, were negligent, provided, of course, such agents were acting entirely within the scope of their authority. The immunity from suit also attaches to the employees or agents used by the state in carrying out its governmental functions which, of course, include the the establishment, maintenance and improvement of highways. It has been so held in the following cases:

Kincaid v. Hardin Co., 53 Iowa 430;
Packard v. Voltz, 94 Iowa 277;
Beeks v. Dickinson County, 131 Iowa 245;
Wood v. Boone Co., 153 Iowa 92;
Snethen v. Harrison Co., 172 Iowa 81;
Gibson v. Sioux County, 183 Iowa 1006;
Cunningham v. Adair Co., 190 Iowa 912;
Green v. Harrison Co., 61 Iowa 311;
Post v. Davis County, 196 Iowa 183.

Of course, we want the rule herein adopted to be distinguished from the taking of property for a public purpose without making an adequate payment therefor. If, in the improvement of a highway, the county, or its agents, takes the property of the adjacent owner or goes beyond the limits of the highway and takes property not belonging to the county, then the county would clearly be liable in damages for the property actually taken. Any other construction would be contrary to and in violation of the provisions of the constitution requiring just and adequate compensation to be paid for property taken for a public purpose but, as already stated, the county or its agents would not be liable for damages resulting to the property owner through the mere negligence in the construction and improvement thereof.

COUNTY AUDITOR: Plats shall be entered into the ordinary plat book for which the auditor may make no charge.

January 5, 1926. *Auditor of State:* We have received a letter from John W. Strohm, the county auditor of Clinton County, in which he submits to this department a certain inquiry with reference to the construction of the statutes relating to the filing of plats in the auditor's office. We have concluded to prepare an opinion for your office so that it may operate as an official opinion. The letter of Mr. Strohm reads as follows:

"Wolfe, Wolfe & Claussen have today filed for record plat and abstract. Heretofore these have been filed and recorded in the Recorder's office.

Section 6277 of the Code says that these should be filed in the Auditor's office and made a part of the records in this office. I would like to know if these can be placed on our regular plat books and if the Auditor is entitled to charge a fee for the same. There is nothing in the Code that I can see whereby the Auditor can make a charge for this work."

The portion of Section 6277 of the code of 1924 referred to in your letter which is material in the consideration and determination of the question submitted reads as follows:

"The signed and acknowledged plat, the abstract, and the attorney's opinion, together with the certificates of the clerk, recorder and treasurer and the affidavit and bond, if any, together with the certificate of approval of the council, shall be entered of record in the plat book in the auditor's office."

A mere reading of the statute will answer the first question propounded by the county auditor. Manifestly, the phrase "plat book," as found in the quoted portion of the statute, means the regular plat book kept on file in the office of the county auditor.

Section 5155 of the code of 1924 reads as follows:

"The county auditor shall be entitled to charge and receive the following fees:
1. For transfers made in the transfer books, for each deed, or transfer of title certified by clerks of district courts, twenty-five cents.
2. For issuing certificate of redemption of land sold for taxes, twenty-five cents.
3. For each certificate issued by the treasurer for lands sold for nonpayment of taxes, fifteen cents."

It will be observed that Sections 6277 and 5155 of the code of 1924 do not provide for the payment of a fee for filing or entering a plat in the plat book in the auditor's office. We are, therefore, clearly of the opinion that no fee may be exacted therefor.

CITIES AND TOWNS: City under commission form of government may authorize the use by its officers and employes of privately owned automobiles in official business, and pay such employe or officer for the reasonable expense necessary in the operation of such automobile.

January 9, 1926. *Auditor of State:* We wish to acknowledge receipt of your favor of the 31st ult. requesting our opinion upon the following proposition:

"We have a report from the examination made of a city under the commission form of government in which a number of claims are allowed by the city for the use of privately owned automobiles, i. e. automobiles owned by city officials or employes of the same, and apparently used in transacting business for the city. * * *

"Will you kindly give this department an opinion as to whether cities under the commission form of government can legally allow compensation which would in any way change the emoluments of city officials or employes during the term for which they have been elected or appointed, and for which salaries have been fixed by law or by ordinance?"

Section 6517, Code, 1924, referring to the government of cities by commission form, is in part as follows:

"The mayor and councilmen shall have an office in the city hall and their total compensation shall be as follows:"

The statute then fixes the compensation in cities by commission and provides, after the salary is fixed, that, —

"Thereafter the salary of any such officer shall not be increased or decreased during the term for which he shall have been elected or appointed."

It will be noted that the statute uses the word "salary" and not "compensation" or "emoluments," as used in your inquiry, although upon occasions the words "salary" and "compensation" are treated as synonomous. In its ordinary acception "compensation" applies to a payment for services rendered and "emolument" is more comprehensive than salary and includes the meaning of "gain" or "profit."

Scharrenbroich v. Lewis & Clark County, 83 Pac. (Mont.), 482;
Frizzell v. Holmes, 115 S. W. (Ky.), 246;
State v. Sheldon, 111 N. W. (Neb.), 372.

The term "salary" has been defined as a periodical allowance made as compensation to a person for his official services or for his regular work.

Board of Commissioners v. Trowbridge, 95 Pac. (Colo.), 554.

The general rule sustained by a large number of authorities is that a municipality may, when not specifically prohibited by its charter or ordinance, reimburse one of its officials for money actually and necessarily expended by him in the discharge of a duty pertaining to his office.

28 Cyc. 454.

McQuillin Municipal Corporations, says:

"Usually the municipal corporation is liable to officials for legitimate expenses made in connection with their official duties, and such sums may be recovered of the city."

It has been held that auto hire may be allowed to a city commissioner who was required to inspect property of the city providing it be a reasonable charge. (Re: Bensel, 130 N. Y. S., 689).

The Supreme Court of Kentucky in city of Ludlow v. Richie, 78 S. W., 199, held that a city attorney was entitled to recover his expenses incurred while traveling to and from court while attending to the city's business. It was held in *McCreddie v. City of Buffalo*, (2 How. Prac. [N. S.], 336), that an officer of a municipality was entitled to be indemnified for expenses necessarily incurred in the bona fide discharge of his duties; and in *Burns v. City of Nashville* (221 S. W. [Ky.], 828), it was held that it was discretionary with the commissioners of the city of Nashville to determine whether or not trips made by them to New York for the purpose of delivering bonds to bankers therein were proper and necessary, so that their expenses were properly chargeable to the city, and were not recoverable in an action brought by taxpayers. In the last cited case it appears that the city of Nashville, in its charter, had a provision which was in substance that no commissioner should receive any compensation other than that expressly provided, nor extra pay during his term of office. The commissioners of the city purchased a number of automobiles for the use of various heads of the departments, including the mayor and commissioners, and it was claimed in the action that this was in effect additional compensation or pay and therefore was prohibited by the provision referred to.

The court as to this contention, said:

"We are of the opinion that such is not the proper interpretation and meaning of said section. Of course, the commissioners could not purchase with funds of the city automobiles for their own private use. The question to be determined here is whether or not they could legally exercise their discretion and purchase automobiles at the expense of the city for official use in looking after the city's affairs."

The court further said:

"We are of the opinion that it was within the power of the city commissioners to determine whether or not automobiles were necessary for the official use of themselves and the heads of the various departments under them, and, having exercised their discretion in this matter, without any fraudulent or corrupt motives, their action cannot be reviewed by the courts."

Referring to the trips made by the commissioners to New York, the court said:

"We are of the opinion that the chancellor committed error in decreeing a recovery for the expenses of these trips to New York. We think it was within the discretion of the city commissioners to determine whether these trips were proper and necessary."

The Supreme Court of this State has held that a city may properly reimburse or pay the office expense of the mayor, although no express provision for the payment of this expense was made in the law or ordinance.

Hill v. City of Clarinda, 103 Iowa, 409.

Your inquiry does not state in what manner the allowance was made for the use of the automobile in question, nor upon what basis reimbursement was computed. We are of the opinion, however, under the authorities cited and the statutes of this state, that the city council or commissioners may properly provide for the reimbursement of any of the commissioners for the expenses incurred because of the use of his automobile while engaged in the city's business. The amount paid the official should not be in excess of the actual expense incurred by him. The expense of operating and using an automobile may properly be determined by the commissioners, and if reasonable and fair, their finding in this respect will not be disturbed by the courts.

It is our opinion, therefore, that the city may provide for the payment of the reasonable expense incurred by its officers in the performance of their official duties, even though such expense be in the use of an automobile owned by the officer. We do not pass upon the reasonableness of the expense, nor do we pass upon the necessity for the expense; these are questions for the city council to determine in the exercise of that discretion which is vested in it by the statutes of this state. The money refunded to a city official for the expense incurred by him in the use of his automobile while engaged in the city's business would not be "salary" or additional compensation, but merely the return to him of expenses actually incurred. The commissioners cannot, under the statutes of this state, increase their salaries during the term of office for which their salary has previously been fixed according to law.

AGRICULTURE: Amount of State aid for poultry associations discussed.

January 11, 1926. *Secretary, Department of Agriculture:* This will acknowledge receipt of your letter of the 29th ultimo requesting the opinion of this department upon the following statement of facts:

"We would like to ask for a ruling relative to the state aid for poultry associations.

"The law was changed at the last legislature in that it requires 'The annual income in cash of the association, exclusive of state aid, shall be at least one hundred dollars, and the total expenditures in cash shall be one hundred, in addition to state aid.'

"In section 2957, it also provides for the division of such aid between associations which qualify. In other words, if two associations qualify, each will receive $50 of state aid.

"In granting the state aid, two questions have arisen. First, in counties where only one show makes a report where they have raised over $100 but where their expenditures are not $200, shall they be entitled to the amount of state aid above $100 expenses or shall they be refused state aid? Second, in counties, where two or more shows qualify, where their income is $100 and the total expenditures in cash less than $200, shall they be given their share of the state aid, providing the state aid does not exceed the total amount of their expenditures, minus $100?

"In the framing of this law, it was the purpose of the poultry association to grant the state aid as specified in the above questions, to the amount of expenditures, minus $100. However, there seems to be some question in regard to this matter so we are asking for your opinion before certifying such aid.

"If we can answer any further questions to you relative to this situation, we trust you will call upon us."

For your convenience we quote Section 2954 as amended by the Acts of the 41st General Assembly so far as that section is pertinent to your inquiry. Said section in part reads as follows:

"Every poultry association which complies with the following conditions shall be entitled to the aid herein provided:

1. * * * * * * *
2. * * * * * * *
3. * * * * * * *

4. The annual income in cash of the association, exclusive of state aid, shall be at least one hundred dollars, and the total expenditures in cash shall be one hundred dollars, in addition to the state aid."

Your first question is as follows: "In counties where only one show makes a report where they have raised over $100 but where their expenditures are not $200, shall they be entitled to the amount of state aid above $100 expenses or shall they be refused state aid?" We are of the opinion that state aid should be refused in such cases.

You will note that the section above quoted, as amended, provides that such associations shall have expenditures of $100.00 in addition to the state aid. The state aid provided for in such cases is in the sum of $100.00 and under the plain language of the statute, this must be added to the $100.00 expenditures before the association is entitled to receive the state aid. In other words, the association must first raise $100.00 for the poultry show and must, in the second place, expend $200.00 or more before they are entitled to the state aid.

Your second question is as follows: "In counties where two or more shows qualify, where their income is $100 and the total expenditures in cash less than $200, shall they be given their share of the state aid, providing the state aid does not exceed the total amount of their expenditures, minus $100?"

In cases where two associations qualify we are of the opinion that they must first have an annual income for the purposes of the poultry show of $100.00, and that they must have an expenditure of $100.00 plus the amount of state aid which they would receive if they became entitled thereto.

To illustrate, if two associations qualified in the same county by raising the $100.00 they would then have to have an expenditure of $150.00 each before receiving the $50.00 state aid to which they would be entitled.

COUNTIES: Deputy county officers are not entitled to extra compensation for working overtime in the discharge of the prescribed duties of the office.

January 13, 1926. *Auditor of State:* We have received your letter of January 9, 1926, in which you request this department to prepare an opinion upon the following question:

"Just recently some questions have come to us concerning the allowing of additional pay to regularly employed deputy county officers on account of their doing overtime work. We have always contended that this was an illegal allowance and should be refunded to the county. I thought you had given us an opinion in regard to this matter, but searching our opinion files, I do not find any opinion covering this matter.

"Kindly inform me at your earliest convenience if a deputy county officer whose salary has been regularly fixed by the board of supervisors at less than the maximum amount allowed by law for such service, can in addition file bills and be allowed for extra overtime work?"

We are assuming that the services rendered by the deputy county officer, to which reference was made in your letter, were such services as the law requires to be performed by said officers. It is our opinion that placing the construction upon the question just stated, the deputy county officer is not entitled to any additional compensation for the services rendered. The fact that a county officer, or his deputy, may be required to work overtime to perform and discharge the duties of the office will not entitle the official to any compensation other than the amount prescribed by the statute, or the board. The services required of the officer must be compensated for by the salary prescribed by law and no subterfuge may be resorted to for the purpose of increasing this amount. We do not deem it necessary to cite any authorities in support of this conclusion. However, the case of *Burlingame v. Hardin County*, 180 Iowa 919, inferentially, at least, supports this conclusion. It was held in this case that compensation received by a public officer for the performance of duties, which are in no wise imposed upon him as a part of his official duties, belongs solely to the officer, and not to the public. Therefore, it follows as a necessary corollary from the rule therein announced that while a county officer may receive extra compensation for services rendered outside of the duties vested in him by the law, he may not be paid extra compensation for performing the prescribed duties of his office.

BUDGET: A municipality is restricted in its expenditures under the budget system to the amount estimated and appropriated.

January 13, 1926. *Director of the Budget:* This department is in receipt of your letter dated January 11, 1926. For convenience, we quote your letter at length. It is in words as follows:

"The city of Clinton estimated in its budget, August 12, 1924, expenditures on account of its general fund, at $82,385.16.

"In March, 1925, its council adopted an ordinance, chapter 435, fixing the appropriations to meet the general fund expenditures for the fiscal year ending March 31, 1926, at $78,150.00.

"City receipts from other than taxation were estimated by the budget at $26,885.16.

"It now finds that its receipts from sources other than taxation will fall about $16,000 under this figure.

"Warrants have already been drawn for $86,023.21. There is practically no balance in the general fund. Unless warrants can be issued to the amount of the budget estimate and appropriation the city of Clinton declares it will be unable to pay its firemen, policemen and other officers, its courts and other expenses, etc.

"The question is:

Can the auditor of the City of Clinton legally issue warrants to the full amount of the estimate and appropriations, or so much as may be necessary, under section 380?"

Section 380 of the Code, 1924, to which you refer, is in words as follows:

"Tax limited. No greater tax than that so entered upon the record shall be levied or collected for the municipality proposing such tax for the purpose or purposes indicated; and thereafter no greater expenditure of public money shall be made for any specific purpose than the amount estimated and appropriated therefor, except as provided in sections 373 and 381."

The amount which the city may expend for a given purpose depends not upon the amount which is to be raised by taxation or from other sources, but upon the amount which is actually estimated and appropriated. It follows that the city may properly expend an amount equal to the amount estimated and appropriated.

It must be understood that a municipality in estimating the amount to be derived from other sources must estimate in good faith. If the governing board of the municipality fraudulently estimates an amount grossly in excess of the amount which the municipality may reasonably expect to collect from such other sources, then the estimate is a nullity.

From what has been said, we see no reason why the City Auditor cannot issue warrants up to and including the amount estimated and appropriated.

CITIES AND TOWNS: (1) Cities have no authority to condemn property under the Flood Protection Statute until after the improvement has been ordered

and approved by the Director of the Budget. (2) The cost of the property condemned must be included in the cost of the improvement. (3) Damages must be paid or secured before the city takes possession of the property. (4) Railway companies must construct railway bridges which are rendered necessary by the construction of the improvement.

January 14, 1926. *Director of the Budget:* We have received your letter of January 8, 1926, submitting to this department four inquiries which you have stated as follows:

"In pursuance of the discussion of a few days ago with respect to the flood protection project at Rockingham, undertaken under Chapter 310 of the code of Iowa, 1924, I will appreciate your opinion with respect to certain phases of the matter, following:

1. The plan for the project having been made, specifications prepared and an estimate of the cost partially arrived at, but approval of the project not yet having been given by the Director of the Budget, can condemnation proceedings be immediately started against the railroad company or other owners of property to acquire a right of way?
2. Will judgments in condemnation proceedings become a liability on the town in case the project is abandoned or is disapproved by the Director of the Budget?
3. Will judgment awards have to be met by cash payment or can same be financed as a part of the project?
4. Under Section 6094 can the town compel the railroad company to build and to pay the entire cost of a bridge over the district?

You have full knowledge of the conditions relative to this project and we will be pleased to have your observations with respect to any other phase of it not covered by the inquiries submitted."

Chapter 310, embracing Sections 6080-6103, both inclusive, referred to in your letter, relates to the protection of cities and towns from floods. This section is a portion of the statute entitled "City and Town Government" and is known as Title XV. This is a material consideration in the solution of the questions you have submitted. Section 6081, as amended by Chapter 152 of the laws of the 41st General Assembly, provides for the filing of a petition and the preparation of a plat and schedule for the improvement provided for in said chapter. Section 6082 relates to the resolution of necessity therefor, and Section 6083 to the notice, objections, amendment to the resolution of necessity and the passage thereof. The said chapter, or statute, provides for the advertisement for bids, the action thereon, the execution of a bond by the contractor and the assessment of benefits against the property in the district. Section 6096 relates to condemnation of land for such purposes, and reads as follows:

"Such cities may purchase or condemn, and appropriate, such private property, including railroad right of way and property, as may be necessary to carry into effect the provisions of this chapter, and the costs of such property shall be included in the cost of the improvement."

Having in a general way discussed the provisions of the statute upon the subject in question, we shall now proceed to answer your questions in the order in which they appear in your letter. We do so in the following manner:

Condemnation proceedings may not be started, or any proceedings had thereunder, until after the improvement has been finally ordered by the city council and approved by the director of the budget. In other words, the ordering of the improvement in the manner provided by the statute is a condition precedent to the right to condemn property and to proceed to construct the improvement. (2) The statute quoted in this opinion, Section 6096, provides that the costs of such property (meaning the condemned property) shall be included in the cost of the improvement. The statute, therefore, provides a method for paying the damages sustained by property owners in the condemnation proceedings and is, in our opinion, exclusive of all other methods. We might say in concluding this portion of the opinion that in condemnation proceedings judgments are never entered against the public or private corporation constructing the improvement. A mere allowance is made and the corporation constructing the improvement may not take possession of the property until the damages have been paid or secured. (3) The constitution of the state provides as follows:

"Private property shall not be taken for public use without just compensation first being made, or secured to be made to the owner thereof, as soon as the damages shall be assessed by a jury, who shall not take into consideration any advantages that may result to said owner on account of the improvement for which it is taken." Art. I, Sec. 18.

A mere reading of this constitutional provision will answer your third inquiry. Damages must be paid or secured to the owner thereof before the city or town may take possession of the property. The issuance of a warrant therefor, however, will be a sufficient compliance therewith because the warrant will draw interest if not paid for want of funds and may be sold for a reasonable amount at any time.

Section 6094 of the code of 1924 reads as follows:

"Upon receiving such notice it shall be the duty of such railroad or street railway company, to provide the necessary temporary structure to carry its tracks during the constructing of the channel, and to construct the necessary permanent bridge, or bridges, within the time specified in said notice."

The section in question relates to the building of railway bridge or bridges, which is rendered necessary by the construction of the improvement provided for in said chapter. We, therefore, answer your fourth question in the affirmative.

BUDGET. A municipality may expend the amount estimated and appropriated for any specific purpose, even after additional funds are obtained from sources not contemplated or used in computing the amount estimated and appropriated.

January 16, 1926. *Director of the Budget:* We wish to acknowledge receipt of your favor of the 15th requesting the opinion of this department upon the following proposition:

"This office is in receipt of a request from the county auditor of Shelby county for an interpretation of Section 380 of the Code, as it applies to expenditure of public money.

"The Board of Supervisors of Shelby County, in their budget estimate published on July 15, 1925, estimated the expenditures for 1926 for county road purposes to be $33,000 with a tax levy of approximately $28,000, the difference to be made up from receipts from other sources. They now find that they failed to take into consideration the collections from the gasoline tax and the tax on moneys and credits, both of which will amount to more than $24,000, which will increase the amount available to expend in 1926 to about $57,000.

"This county would like to do considerable road work during the present year and want to know if they must confine the expenditures to $33,000 as estimated and published or may they include the actual amount of receipts from other sources which will be considerably in excess of the amount estimated in July.

"* * * * * * *

"Is the tax on moneys and credits included in the 5% additional, or does the 5% apply only to general property tax other than moneys and credits."

Sections 380 and 381 of the Code of 1924 are as follows:

"No greater tax than that so entered upon the record shall be levied or collected for the municipality proposing such tax for the purpose or purposes indicated; and thereafter no greater expenditure of public money shall be made for any specific purpose than the amount estimated and appropriated therefor, except as provided in Sections 373 and 381." (Section 380).

"No tax shall be levied by any municipality in excess of the estimates published and five per cent additional, except such taxes as are approved by a vote of the people, but in no case shall any tax levied be in excess of any limitation imposed thereon now or hereafter by the constitution and laws of the state." (Section 381).

Section 373, referred to, has to do with the emergency fund and does not enter into the determination of the question presented.

This department has held, and it is the plain meaning of the statute, that the municipality may expend the amount which has been estimated and appropriated for any specific purpose,—this, regardless of the fact that in some instances the amount estimated and appropriated will not be forthcoming. The provisions of Section 380, supra, as modified by Section 381, are the exact limits to which a municipality may go in their expenditures through the taxation of any particular class of property, whether moneys and credits or any other of the numerous classifications. By making no exception the statute is inclusive as to all levies that may be raised, and includes the revenue to be derived from moneys and credits as well as that derived from other classes of property.

The so-called gasoline tax is not derived by a levy, but is raised from the collection of a percentage of the selling price of gasoline and is thus in effect a sales tax. The statute authorizing and providing for the gasoline tax is a subsequent enactment to Sections 380 and 381, supra, of the budget law. It cannot be, therefore, that this fund was in the contemplation of the legislature when the limit which might be expended by a municipality from any specific fund was fixed by the statutes referred to. In addition thereto it must be kept in mind that the gasoline tax is to be used for a particular purpose, and not to pay the expenses of conducting the business of a municipality. We are, therefore, of the opinion that the special fund thus derived from the tax upon the sale of gasoline may be used by the municipality for the particular purposes enumerated in the statute without regard to levies estimated and appropriated by the municipality under the budget law.

COUNTY OFFICERS—SCHOOLS: County Superintendents may not expend money to purchase prizes to be offered in the rural schools for proficiency and attendance.

January 18, 1926. *Auditor of State:* We desire to acknowledge receipt of your letter of January 12, 1926, submitting to this department the following inquiry:

"We are in receipt of a letter from the county auditor of Story County in regard to expenditures of the County Superintendent's office. I will enclose a copy of the letter and trust we may be favored with an opinion at an early date in answer to the question proposed. We find that a large number of the County Superintendents are expending money for prizes of various sorts to be offered in the rural schools for proficiency along certain lines of study and sometimes for perfect attendance. These are distributed and used in the schools to stimulate and promote interest among the pupils. I am not surprised that some boards of supervisors are taking exception to these expenditures. Several matters of this kind have come to our attention recently."

We have examined the statutes relating to the office of county superintendent and the duties of the incumbent thereof, and we have been unable to find any section therein that warrants or authorizes the county superintendent to expend money to purchase prizes to be offered in the rural schools for proficiency along certain lines of study and for perfect attendance.

We are, therefore, of the opinion that such an expenditure is not authorized.

WAREHOUSE RECEIPTS: A warehouse receipt issued before the commencement of a suit to foreclose a real estate mortgage takes priority over the rights of the holder of the mortgage upon the real estate pledging rents and income as security.

January 18, 1926. *Secretary of Agriculture:* We desire to acknowledge receipt of your letter of January 11, 1926, requesting this department to prepare an opinion upon the question which you have stated as follows:

"Due to the fact that real estate mortgages are indexed in the chattel mortgage records in county offices, they are shown as prior liens to the warehouse certificates. Consequently, the managers of the recently organized National Agricultural Corporation refuse to accept warehouse certificates as collateral for loans, where a real estate mortgage appears in the chattel records, unless waiver of lien is given by the mortgagor.

In most all of these cases, the insurance companies and loan agencies have refused to sign these waivers.

"I would like to have your opinion, consequently, upon the following question:

Does a straight chattel have preference over a lien on crops, which is established through a real estate mortgage being listed in the county recorder's book as a chattel?

In view of the unexpected development given the financing of the warehouse certificate through this objection, I respectfully urge that you give us a prompt opinion."

It is, of course, a well settled proposition of law that the holder of a Warehouse Receipt is entitled to the delivery of the grain evidenced by such Warehouse Receipt at any time he makes demand therefor. A condition to the delivery of the grain is the payment of the lien of the Warehouseman. The holder of the receipt takes the same, subject to any and all liens on the grain stored in the warehouse that were recorded prior to the delivery of the grain to the warehouse and the issuance of the warehouse receipt. For the purpose of deciding the question you have submitted, we assume that the so-called chattel provision in the real estate mortgage pledges the rents, income and profits therefrom and also provides for the appointment of a receiver of the rents, income and profits in the event of the foreclosure of the mortgage. It is well settled in this state that the rights of a holder of a mortgage upon real estate pledging the rents and income as security for the payment of the debt due the mortgagee do not arise until action has been commenced to enforce the collection of the debt. Therefore, the lien of a chattel mortgage which was executed and recorded prior to the commencement of proceedings to foreclose such real estate mortgage, will take priority over the lien of such real estate mortgage upon the crops. It was so held in the following authorities:

Des Moines Gas Company v. West, 44 Iowa 23;
Paine v. McElroy, 73 Iowa 81;
Swan v. Mitchell, 82 Iowa 307;
Hubbell v. Avenue Investment Co., 97 Iowa 135;
Stetson v. No. Investment Co., 101 Iowa 435;
First National Bank v. Security Bank, 191 Iowa 842 (844).

There is a comprehensive annotation upon the validity, construction and effect of such provisions in real estate mortgages as to rents and profits, in the 4th American Law Report at page 1405. The authorities cited in this report support the rule herein announced.

We are, therefore, of the opinion that under the facts stated in your letter the lien of a warehouse receipt, executed prior to the time the real estate mortgagee brings action to foreclose the mortgage and to have a receiver appointed, takes precedence over the lien of said real estate mortgage on the crops grown thereon, even though the real estate mortgage is prior in time to the issuance of the warehouse receipt.

SCHOOLS: If school house bonds are due, the Building Fund should be used in the payment of such bonds and such funds should not be used in making additions to school building.

January 18, 1926. *Superintendent of Public Instruction:* We have received your letter of January 7, 1926, submitting to this department an inquiry which you received from A. T. Erwin, President of the Board of Education at Ames, Iowa. The letter of Mr. Erwin is as follows:

"You may recall the writer as a party who called at your office Monday. At the close of our conference, you gave the lady in the outer office instructions to give me an opinion on the questions raised. I find, however, that the opinion furnished me does not cover the point at issue. She probably misunderstood just what I wanted so I will appreciate it if you will kindly send me an opinion on the following point.

We are planning to make some additions to our school buildings and have sufficient money in the Building Fund to take care of these improvements. The particular question which I have in mind is this. Can we submit a proposition to the voters at the spring election requesting approval to spend a specified sum for certain specified improvements from moneys now in the Building Fund or is it necessary to use the money now in the Building Fund to pay off bonds and then reissue bonds to an equivalent amount with the approval of the voters to cover these improvements?"

It was held by this department in an opinion prepared for your department on January 28, 1925, that all building programs of school districts must have the approval of the electors before they can be carried out. If the bonds, or any part thereof, referred to in your letter, are due, then the building fund should be used in the payment of these bonds. If the bonds are not due, then the proposition of using the money in the building fund for the purpose of making additions to your school buildings may be and should be submitted to the electors at the annual meeting in March. We do not, however, approve of the plan to use the money in the building fund to make the additions to your school buildings and permit the bonds to remain unpaid. Of course, as already indicated, if the bonds are not due there is no imperative necessity of using the building fund in payment thereof.

TAXATION. An administrator is personally liable for taxes which were not paid where the Estate has been closed.

January 18, 1926. *County Attorney, Leon, Iowa:* You have requested the opinion of this department upon the following statement of facts:

"The question has been presented me by the Treasurer of Decatur County as to the liability of an executor or administrator of an estate that has been closed about three years in this county upon which there is taxes due Decatur County, Iowa.

"The estate has been closed, the administrator or executor discharged and his bondsmen exonerated.

"Now our question is whether or not this administrator is personally liable and what course is to be pursued by the Treasurer to collect this tax?

"For your further information I will state that the administrator failed and neglected to list the property of the estate for taxation in violation of Section 6956 of the Code and we are in a quandry whether this administrator is personally liable for this or his bondsmen or anyone else, if so, I would appreciate your immediate reply."

You are advised that we have not found any cases squarely in point upon this proposition. There are, however, a number of decisions by the Supreme Court of this State holding the administrator personally liable in cases where he has acted wrongfully and where he has been discharged as administrator. Cases of this character are as follows:

Adkinson v. Breeding, 56 Iowa, 26;
Herd v. Herd, 71 Iowa, 497;
Applegate v. Applegate, 107 Iowa, 312.

We are of the opinion that such an action is clearly recognized by our courts and although we have no authorities in support of the case where the property tax has erroneously been omitted from assessment, we are of the opinion that such an action will lie against the administrator personally.

WORKMEN'S COMPENSATION: Volunteer firemen do not come within the Workmen's Compensation Act.

January 19, 1926. *Auditor of State:* You have requested the opinion of this department as to whether a volunteer fireman comes within the provisions of the Workmen's Compensation Act.

Paragraph 2 of Section 1361 provides as follows:

"This chapter (Workmen's Compensation) shall not apply to:
1. * * * * * * * *
2. Persons whose employment is of a casual nature.
3. * * * * * * * *
4. * * * * * * * *

You will note that under this section, the act is intended to embrace persons who are in the constant employ of the person whom they seek to hold liable, and whose employment is of a continuous nature.

In case of a volunteer fire department, the employment is indeed uncertain, depending entirely upon the contingency of a fire. It might well be that in some cases the volunteer firemen would not be called upon for a period of over one year. The only instance in which the members of the volunteer department are called upon to serve the city is in case of a fire. Clearly, therefore, such employment is casual in the sense that it is irregular and depends entirely upon a contingency.

There is a further reason for holding that the members of a volunteer department do not come within the provisions of the Workmen's Compensation Act. Section 1390 provides as follows:

"In all cases where an employee receives a personal injury for which compensation other than for medical, surgical, and hospital services and burial expenses, is payable, such compensation shall be upon the basis of sixty per cent per week of the average weekly earnings but not to exceed fifteen dollars nor less than six dollars per week, except if at the time of his injury his earnings are less than six dollars per week, then he shall receive in weekly payments a sum equal to the full amount of his weekly earnings."

You will note that the very basis of compensation paid under the act is derived from an estimate of the weekly earnings of the injured prior to the disability. In the case of volunteer firemen, no such weekly earnings exist. In many instances these firemen are volunteers in a strict sense of the word and receive no compensation. In some cities they receive a small compensation for each fire, but in practically no instances are the members of a volunteer fire department paid a weekly or annual wage. Therefore, the compensation to be paid could not be determined or computed under Section 1390, as above set forth. We are clearly of the opinion that the Workmen's Compensation Act was not intended to include persons within the type of employment of volunteer firemen. The act is so worded as to make their inclusion therein a practical impossibility, as you will see from the discussion of this section, just referred to, and we are, therefore, of the opinion that they do not come within the provisions of the Act, and therefore, would not be entitled to compensation thereunder.

BOARD OF SUPERVISORS may grant county aid to a farm organization which has obtained bona fide legal subscriptions. It is not necessary that the amount of the subscription be actually paid in cash.

January 19, 1926. *County Attorney, Fairfield, Iowa:* We wish to acknowledge receipt of your favor of the 5th requesting the opinion of this department in substance as to whether or not the Board of Supervisors have authority to deduct from the appropriation of the Farm Bureau for the year 1925 an amount paid to it for the year 1924 which they deemed to be in excess of that to which the Farm Bureau was entitled; the supervisors being of the opinion that it was necessary for the Farm Bureau in your county to actually raise a subscription in money, and that the appropriation was to be double the amount thus raised. They did not believe that bona fide subscriptions for an amount equal to one half of the amount appropriated by the Board of Supervisors was sufficient.

On December 28, 1925, this department wrote you an opinion in which we held it was not necessary that the subscription raised by the Farm Bureau be actually paid in cash before the Board of Supervisors were authorized to appropriate double the amount subscribed for their use. We held that the term "subscribe," as used in the statute, meant a bona fide contract or agreement to pay and did not mean the actual payment in cash.

You refer to an opinion of this department dated December 16, 1924. In reading the opinion referred to, a part of it would seem to be in conflict with the last opinion of this department, and insofar as it is in conflict with the last opinion of this department it is hereby recalled.

In view of the opinion given by this department December 28, 1925, we are of the opinion that the Board of Supervisors do not have authority to deduct from the appropriation made to the Farm Bureau for the year 1925 an amount which they claim was in excess of fifty per cent of the amount paid in cash by the Farm Bureau for the year 1924, but which was in fact not more than double the amount actually and in good faith subscribed for that year.

MUNICIPALITIES: City officers may receive (1) salary, (2) fees, but not both.

January 21, 1926. *Auditor of State:* We have received a letter from Mr. F. J. Kennedy, City Attorney of Estherville, Iowa, in which he submits to this department an inquiry with reference to municipal laws of the state. We have concluded to prepare an opinion for your department and send a copy thereof to the city attorney. The city atorney's letter is as follows:

"I am enclosing herewith a copy of Ordinance No. 204 of the City of Estherville, which fixes the compensation of the Mayor.

This Ordinance fixes his salary at $900 a year payable in equal monthly installments but does not say that it shall be 'in lieu of all other compensation.' The State Checkers have just completed checking the cities' finances and they find that the Mayor has collected fees in criminal cases in prosecution for violation of city ordinances. They contend that the Mayor is not entitled to these fees because he receives a salary under the enclosed ordinance.

At the time this ordinance was passed it was passed to give the Mayor a salary in addition to the fees that he would get from criminal cases. The city owns its own gas, electric light and water plants and it takes a lot of the Mayor's time to look after these plants and the fees he would get from the violation of city ordinances would not compensate him for the time spent in looking after the city affairs, so the Chamber of Commerce and the City Council got together and it was decided to pass an ordinance giving the Mayor a salary of $900, and still permit him to retain the fees from the criminal cases. It being the idea that any fees received from costs in the criminal cases would be earned in addition to the time spent in performing other duties for the city, hence, the ordinance did not provide that the compensation was 'in lieu of all other compensation' as provided in Section 5670 of the 1924 Code.

It was the thought of the council in passing this ordinance that it would be additional compensation. The former ordinance paid the Mayor a salary of only $50.00 per year and he retained all of the fees in the criminal cases and no question was ever raised as to his right to collect the salary and also retain the fees, but the Council felt that this was not enough to compensate him.

These fees have been retained in good faith and the Mayor is ready to pay them over if he is not entitled to them, but if he is required to pay them over it will be contrary to the thought that was had when the ordinance was passed. It seems to me that as long as the ordinance does not provide that the salary is not in lieu of the fees, that under Sections 5665 and 5670, the salary under the ordinance is in addition to fees authorized by law.

I understand from the checkers that your office rendered an opinion to them on this matter just recently but they said they did not forward a copy of the ordinance and I believe did not call to your attention that the ordinance did not provide that the salary was 'in lieu of all other compensation'."

Section 5670 reads as follows:

"It may be provided by ordinance that any city or town officer elected or appointed shall receive a salary in lieu of all other compensation; and in such case such officer shall not receive for his own use any fees or other compensation for his services as such officer, but shall collect the fees authorized by law or ordinance, and pay the same as collected, or as prescribed by ordinance, into the city or county treasury, as the case may be."

The statute, and particularly the above section, contemplates that city officers may be compensated in one of two ways: (1) The fees of the office and (2) A stated, specified salary. (Sections 5665, 5666 and the above section 5670). Either plan, but not both, may be adopted. The following authorities, in principle, support this construction of the statute.

State v. Peter Olinger, 109 Iowa 669;
City of Des Moines v. Polk County, 107 Iowa 525.

A consideration of the language of Section 5671 will throw light upon and assist us in construing Section 5670. It undoubtedly fortifies our conclusion as to the proper construction thereof. The latter section (5671) provides "All officers elected or appointed in any city or town, whose compensation is not fixed by law, *shall receive such salary, compensation or fees* for their services as the council may by ordinance from time to time prescribe." It will be noted that the statute is framed in the disjunctive. In other words, that a city or town council has the option or choice of prescribing either a salary or fees, or other compensation, and it is equally manifest that the city or town council may not provide that an officer may receive not only the salary but fees, as well.

ELECTIONS—MUNICIPALITIES: 1. Circles should be printed at the head of different tickets for town elections. 2. Stickers may be used, although the better practice is to write in the name.

January 21, 1926. *Auditor of State:* We have received a letter from Frank G. Pierce, Secretary and Treasurer of the League of Iowa Municipalities, in which he submits to this department an inquiry with reference to the election laws of the state applicable to towns and cities. On account of the importance of the questions submitted, we have concluded to prepare an opinion for your department and forward a copy to Mr. Pierce. The letter of Mr. Pierce is as follows:

"At this time of the year I receive a great many questions in regard to town elections, and there are two questions that came up a number of times last year about which I am not sure, and if it is not asking too much would be glad to have your opinion.

The first question is, should there be a circle printed on the ballots at the head of the different tickets at town elections. Should a circle be placed at the head of the ticket where the ticket is nominated by petition or where they are only nominated as democrats or republicans or some other party poll the necessary votes.

Second, would it be legal to use stickers at municipal elections instead of writing in the names? Quite often only one name is nominated but when it is too late to file other tickets the people want to put up their vote for some others, and the question has been asked whether these people could have stickers printed for such purposes instead of writing in the names."

Chapter 40 of the Code contains the provisions of the statute relating to the method of conducting election. Section 719 provides that the provisions of this chapter shall apply to all elections known to the laws of the state, except school elections. Therefore, this chapter governs the method of conducting town and city elections. Section 760 contains the form of the official ballots and provides for a circle opposite the name of the party or group of petitioners. Section 811 provides how a voter may mark the ballot if he desires to vote a straight ticket. In each of the subdivisions thereof prescribing the different methods of voting a straight ticket, the phrase "circle at the top of the ticket" appears. There are other statutes which have a bearing upon the first question submitted by Mr. Pierce, but we have referred to enough sections to show that the circle has, by comparatively recent enactments, been restored to the ballots.

We, therefore, answer the first inquiry in the affirmative. As this chapter applies to town and city elections a circle must be placed at the top of the ballot opposite the name of the party, or designation adopted by a group of petitioners.

Section 816 reads as follows:

"The voter may also *insert in writing* in the proper place the name of any person for whom he desires to vote and place a cross in the square opposite thereto. The writing of such name without making a cross opposite thereto, or the making of a cross in a square opposite a blank without writing a name therein, shall not affect the validity of the remainder of the ballot."

It will be observed that the voter may insert in writing in the proper place on the ballot the name of any person for whom he desires to vote and place a cross in the square opposite thereto. The word "writing" is susceptible of more than one meaning. It is not limited in its meaning to that which is ordinarily within the meaning of the term, but may also include many other methods of placing a name on paper.

Section 63 provides the following rule of construction, among several others:

"The words 'written' and 'In writing' may include any mode of representing words and letters in general use, except that signatures, when required by law, must be made by the writing or mark of the person."

It has been held in the case of *Barr v. Cardell,* 173 Iowa 18, that the voter has a right to write or paste upon his ballot the name of any person for whom he desires to vote. We are, therefore, of the opinion that your second question must be answered in the affirmative. We base this opinion upon the statutory provisions hereinbefore referred to, and also upon the case just cited. However, we desire to call your attention to the fact that the name must be written, or the name pasted upon the ballot, in the proper place and that a cross must be placed in the square opposite the name of the person written or pasted thereon. If this is not done then the elector has not voted for such party.

We also desire to state in conclusion that we believe the better practice is for the voter to write rather than paste on the ballot the name of the party for whom he desires to vote.

TUITION—BOARD OF EDUCATION: Iowa State College should not refund tuition to the Government for certain veterans of the World War.

January 21, 1926. *Business Manager, Iowa State College:* For some time we have been giving consideration to the matters involved in your request for an opinion as to the duty of the State Board of Education to rebate or refund to the United States Government the tuition paid for certain veterans of the World War in attendance at the Iowa State College. The request to which we refer in substance is,—should the Iowa State College, under the contract in question, refund to the United States Government moneys paid for such tuition because of the enactment of Chapter 218, Laws of the 41st General Assembly. Chapter 218, to which we have referred, provides as follows:

"Of the appropriation for soldiers' tuition the Iowa State College is to receive for each honorably discharged soldier or sailor of the United States who enrolls in any division of the institution, $20.00 for each semester, and $20.00 for each summer school."

You are advised that the appropriation for soldiers' tuition for the Iowa State College so referred to is in effect a provision whereby the State pays to the College for each honorably discharged soldier or sailor as tuition, $20.00 for each semester and $20.00 for each summer school. The law does not provide for a refund to the soldier who has paid this tuition.

Referring directly to the question as to whether the Government of the United States is entitled to a refund for money paid for soldiers' tuition, you are advised that the State will not pay a refund for the following reasons: First, that this is not a refund statute, and second, because after the law was enacted and with full knowledge of its contents, the United States Government contracted to pay the tuition which might otherwise have been paid from the appropriation referred to.

SCHOOLS—ANNEXATION OF TERRITORY: The fact that certain adjacent territory is consolidated with a city does not in itself result in the annexation of this territory to the city for school purposes.

January 22, 1926. *Superintendent of Public Instruction:* We wish to acknowledge receipt of your favor of the 21st requesting our opinion in substance as to whether or not the annexation to the city of Davenport of the town of Rockingham, which is adjacent thereto and which contains an independent school district, will consolidate the Independent School District of Rockingham with the Independent School District of Davenport. We assume that there is to be an election under the provisions of the statute, to determine whether or not the town of Rockingham shall be taken into the city of Davenport. Under the provisions of the statute, the question to be submitted after the preliminaries, is

"Shall the proposition for the annexation of.....to..... be adopted? (Section 5606, Code, 1924).

The statute in reference to the annexation of towns or cities does not contain any reference to the annexation of school districts. It must be kept in mind that although an independent school district may be included wholly within the limits of a city or town, that it is a separate and distinct legal entity. Whenever it is proposed to extend the limits of or add to the territory of existing independent city, town or consolidated districts, Chapter 210, Code, 1924, provides the procedure which must be followed. The question as to whether or not the territory is to be

consolidated or added to an independent district must be voted upon as a separate and distinct proposition by the voters of the two school corporations and before the territory can be included, the proposition must be approved by a majority of the voters voting thereon in each of such territories.

We are, therefore, of the opinion that the consolidation of the town of Rockingham with the city of Davenport will not in itself change the status of the two independent school districts.

CITIES AND TOWNS. Under the budget law and the facts submitted, the town may use the general fund to purchase a fire truck.

January 22, 1926. *Director of the Budget:* We wish to acknowledge receipt of your favor of the 19th requesting our opinion in substance as to whether or not a town may purchase a fire truck with money from the general fund, it appearing that the town does not make a levy under the provisions of paragraph 8, Section 6211, Code, 1924, but does levy under the provisions of paragraph 9 thereof.

The paragraph last referred to gives the town power to levy annually a tax for what is known as "the fire department maintenance fund," and reads as follows:

"Any city with a population of more than nine thousand, not exceeding seven mills, any city with a population of less than nine thousand and any city under commission form of government with a population of more than ninety thousand, not exceeding three mills, and any town, not exceeding two mills, which levies shall be used only to maintain a fire department; except that cities with a population under three thousand and towns may also use the fund to purchase fire equipment."

Under the provisions of the section quoted, it is apparent that the town may use the fund referred to for the purchase of fire equipment. However, we are advised that the amount which can be raised from this fund by the town in question is insufficient to pay for the fire truck which they desire to purchase.

Section 6207, Code, 1924, authorizing the levy for a general fund, reads as follows:

"The council of each city or town shall levy a tax for the year then ensuing for the purpose of defraying its general and incidental expenses, which shall not exceed ten mills on the dollar."

Paragraph 8 of Section 6211, authorizing a levy for what is known as a "fire fund," reads as follows:

"Not exceeding one and one half mills, which shall be used only to acquire property for the use of the fire department and to equip the same. No part of the general fund shall be used for equipping the fire department."

The limitation placed upon the general fund by the paragraph last quoted only applies in the event the town levies the "fire fund" therein authorized, and if this fund is not levied by the town there is nothing in the law prohibiting the use of the general fund in the purchase of fire equipment, providing the levy authorized under the provisions of paragraph 9, above quoted, is insufficient.

We are, therefore, of the opinion that under the facts submitted the town may properly use the general fund to purchase a fire truck.

TUBERCULOSIS: An applicant for admission to the Sanitorium at Oakdale must secure an examination by a physician licensed to practice medicine, and a certificate by an osteopath or chiropractor is not sufficient.

January 20, 1926. *Board of Control of State Institutions:* We have received your letter of January 18, 1926, enclosing a letter which the Board of Control received from H. B. Scarborough, the Superintendent of the State Sanitorium for the treatment of tuberculosis at Oakdale, Iowa, in which the said Superintendent requests an opinion of this department. The letter of the Superintendent is as follows:

"I have difficulty occasionally, as just at present, for example, with the question of whether or not an osteopath may properly, under the law, sign an application blank for admission to this institution.

I will be very pleased if we could have promptly, so as not to delay this applicant, a ruling from the attorney general's office as to whether or not Section 3390, Chapter 169 and Section 2181, No. 5, of Chapter 105, makes it legal and proper for an osteopath or chiropractor to sign an application blank for the admission of a patient to this institution. I think this should take a very short time, and since there is a dispute I would like to be right so I may not get into difficulty with either side of the question."

Chapter 169, of which Section 3390 is a part, relates to the State Sanitorium for the treatment of tuberculosis.

Section 3390 reads as follows:

"An applicant for admission to the sanitorium shall first secure a thorough examination of his condition *by a physician licensed to practice medicine* in this state, for the purpose of determining whether said applicant is afflicted with pulmonary tuberculosis. Said examining physician, shall, as accurately as possible, fill out the blanks furnished for that purpose, and at once mail the same to the superintendent."

The requirement, therefore, is that the applicant shall be examined by "a physician licensed to practice medicine." A reference to certain other sections of the statute will show that this phrase has a well defined meaning and that it does not include osteopaths, chiropractors or any other schools of practice, other than a doctor of medicine.

Section 2181, which is a part of Title VII dealing with the public health, contain the definitions of certain terms used in such statutes. Subdivision 5 of this section reads as follows:

"5. 'Physician' shall mean a person licensed to practice medicine and surgery, osteopathy and surgery, osteopathy, or chiropractic under the laws of this state; but a person licensed as a physician and surgeon shall be designated as a 'physician' or 'surgeon,' a person licensed as an osteopath and surgeon shall be designated as an 'osteopathic physician' or 'osteopathic surgeon,' a person licensed as an osteopath shall be designated as an 'osteopathic physician,' and a person licensed as a chiropractor shall be designated as a 'chiropractor.'"

This portion of the statute, therefore, defines the following terms: physician, physician or surgeon, osteopathic physician, osteopathic surgeon, and chiropractor. "Physician" or "surgeon," therefore, under the provisions of this section, has a meaning separate and distinct from "osteopathic physician," "osteopathic surgeon" or "chiropractor."

Section 2439 reads as follows:

"No person shall engage in the practice of medicine and surgery, podiatry, osteopathy,' 'osteopathy and surgery,' chiropractic, nursing, dentistry, dental hygiene, optometry, pharmacy, or embalming as defined in the following chapters of this title, unless he shall have obtained from the state department of health a license for that purpose."

The above section, therefore, classifies the professions as follows: (1) Practice of medicine and surgery, (2) Podiatry, (3) Osteopathy, (4) Osteopathy and surgery, (5) Chiropractic, and other professions not material in the solution of the question under consideration. It is, therefore, apparent that osteopathy, osteopathy and surgery and chiropractic are not included within the phrase "practice of medicine."

We are, therefore, of the opinion that Section 3390 relates alone to physicians practicing medicine and that an applicant who desires treatment at the sanitorium must be examined by a physician licensed to practice medicine.

BANKS AND BANKING: Both the estate and the heirs of a deceased stockholder of an insolvent bank are liable for assessment. The question is as to the ownership of the stock.

January 22, 1926. *Superintendent of Banking:* This department is in receipt of your letter dated January 15, 1926, enclosing a copy of a letter from Mr. C. H. Dwelle, Cashier of the Worth County State Bank, Northwood, Iowa. For convenience we quote Mr. Dwelle's letter at length. It is in words as follows:

"This assessment matter is of course new to us so we feel it necessary to ask certain questions concerning matters of procedure.

"It happens there are eight estates affected in this assessment.

"Should the estate as such pay the assessment or the heirs as individuals?

"Where distribution has been made and an heir unable to pay the assessment how can the matter be referred back to the estate? We understand that the liability carries back six months before any transfers, or even if it can be proven that the losses occurred while the former owner held the stock the former owner can be held even beyond the six months period. If this is true, it would seem the estate if solvent should pay if the heirs as individuals are unable to pay.

"What is the situation when a stockholder assigns shares as collateral to a loan? Can any liability attach to the one who is holding the stock as collateral? We would of course presume not, and the stock if sold by the failure of the one who assigned it to protect it, would be forfeited by the person holding it as collateral.

"Your information on these points would be received with appreciation.

You are advised that both the estate and the heirs may be liable for the assessment. The question is always as to the ownership of the stock. The fact that it is sold or transferred makes no difference if the stock was owned by a particular individual or estate at the time the indebtedness was incurred.

SCHOOLS AND SCHOOL DISTRICTS: 1. Where ten or more persons petition for a night school it is the duty of the Board to establish the same. 2. The Superintendent receives no additional salary if a night school is established.

January 23, 1926. *Superintendent of Public Instruction:* You have requested the opinion of this department upon the following proposition:

When the petition for a night school is filled out by 12 signers, has the local board of directors jurisdiction to disregard such a petition and delegate authority to conduct said school to a community organization, such as a community club.

In case the school must be established by the school board, what extra salary does the superintendent of schools receive for his service in connection with such school.

For your convenience we quote Section 4288 and 4289 of the Code, 1924, which provide as follows:

"The board of any school corporation may establish and maintain public evening schools as a branch of the public schools when deemed advisable for the public convenience and welfare." Sec. 4288.

"When ten or more persons over sixteen years of age residing in any school corporation shall, in writing, express a desire for instruction in the common branches at an evening school, the school board shall establish and maintain an evening school for such instruction for not less than two hours each evening for at least two evenings each week during the period of not less than three months of each school year." Sec. 4289.

You will note that under the provisions of Section 4289 it is mandatory upon the board of directors of the school corporation to establish and maintain a night school where ten or more persons over sixteen years of age sign the petition for such a school.

Therefore, on the facts you have submitted we believe the board of directors must establish and maintain a school of this character, and we are further of the opinion that the establishment of such a school could not be delegated to a community organization such as a community club. However, the community club could help support the school and share expenses.

The statute provides that the board of directors *shall* establish such a school and clearly no provision is made for its establishment by any other organization than the school board.

As to your inquiry relative to the salary to be received by the superintendent of schools in case such a school is established. We quote Section 4290 of the Code which reads as follows:

"If such evening school is a branch of a city or town school, the same shall be under the supervision of the superintendent of such city or town school; if not, the same shall be under the supervision of the county superintendent. Such evening school shall be available to all persons over sixteen years of age who for any cause are unable to attend the public day schools of such school corporation."

You will note that in case the night school is established within a city or town that it is to be under the supervision of the superintendent of the public school of such city or town. No provision is made in this section for the payment to the superintendent of any funds for such work of supervision in the night school, and we are of the opinion that he could not be paid for such services. The fact that a night school might be established requiring the services of the superintendent is a matter to be taken into consideration in the determination of the salary to be paid the superintendent of schools at the time of his hiring. If such a night school is in existence or subsequently comes into existence, it is part of the duties of the superintendent of schools to take charge of such a school and we believe that this duty is included within the duties of the superintendent and that he would not be entitled to receive any additional salary therefor.

TAXATION: General discussion of the taxation of corporations in Iowa.

January 23, 1926. *Honorable George W. Patterson, Burt, Ia.:* We have received your letter of January 11, 1926, in which you submit to this department a question relating to the taxation of stock in certain corporations. Your letter reads as follows:

"I seek a little information. Are the stocks of all domestic corporations exempt from taxation in Iowa? See Section 6944-20 and Section 6971. Supposing I owned stock in the cement company of Mason City, the Maytag Motor Company of Newton or the Bettendorf Company of Bettendorf, would I have to pay any tax on it? The way I read it, all such stock is exempt from taxation."

It is well known that so far as corporations are concerned, there are two species of property either one or both of which may be subjected to taxation. They are as follows: (1) The property owned by the corporation, both real and personal; (2) The interest of the stockholders in such corporation as evidenced by their stock.

The theory is that shares in corporations are property, separate, distinct and independent from the property of the corporation. The tax on an individual, in respect to his shares in a corporation, is not regarded as a tax upon the corporation itself.

Head v. Board of Review, 170 Iowa 300 (306);
Home Savings Bank v. Des Moines, 205 U. S. 503 (516);
Bradley v. People, 4 Wall. 459 (462) (18 L. E. 433-435);
Hepburn v. School Directors, 23 Wall. 480.

Now turning to the statutes, we will say that the property of manufacturing corporations or companies is assessed under the provisions of Sections 6975, 6976, 6977 and 6978. Section 6978 reads as follows:

"Corporations organized under the laws of this state for pecuniary profit and engaged in manufacturing as defined in the third preceding section shall list their

real estate, personal property not hereinbefore mentioned, and moneys and credits in the same manner as is required of individuals."

It will, therefore, be observed that (1) real estate (2) personal property not assessed under the povisions of Section 6976 and (3) moneys and credits of such corporations, shall be assessed in the same manner as is required of individuals. The property of such corporations in the process of manufacturing, refining, purifying, the combining of different materials, or by the packing of meats, with a view to selling the same for gain or profit, shall be assessed at its average value estimated upon those materials only which enter into a combination, manufacture or pack, to be ascertained in the manner therein provided. Sections 6975 and 6976.

It is, therefore, manifest that the statute provides a method for the assessment of the property of such corporations and not the stock in such corporations. Section 6944 exempts from taxation the shares of stock of domestic manufacturing corporations engaged in manufacturing, as defined in Section 6975. It is not the policy of this state to tax both the property of the corporation and the interests of the stockholders therein, as evidenced by their stock, although there is no constitutional objection or limitation to doing so. Some corporations are assessed on their property and some on the stock as a reading of the taxation statutes will disclose. In the case of manufacturing corporations, it is the property of such corporations and not the stock therein that is taxed. We believe that we have sufficiently answered your inquiry.

APPROPRIATIONS: The language "the same to be paid out of the general funds of the state" as used in section 1422 construed as an appropriation.

January 25, 1926. *Auditor of State:* We wish to acknowledge receipt of your favor of the 5th requesting our opinion on the following proposition:

Section 1422 of the Code, 1924, reads as follows:

"'Any policeman (except those pensioned under the policemen's pension fund created by law), any sheriff, marshal, constable, and any and all of their deputies, and any and all other such legally appointed or elected law-enforcing officers, who shall, while in line of duty or from causes arising out of or sustained while in the course of their official employment, meaning while in the act of making or attempting to make an arrest or giving pursuit, or while performing such official duties where there is peril or hazard peculiar to the work of their office, be killed outright, or become temporarily or permanently physically disabled, or if said disability result in death, shall be entitled to compensation, *the same to be paid out of the general funds of the state* for all such injuries, or disability. * * *"

"It is desired that you give us a ruling as to whether the language of the section quoted is sufficient to constitute an appropriation. If not, can the policemen, sheriffs, marshals, etc. be construed legally as employees of the state, thus permitting the appropriation contained in section 1418 to apply in such cases prior to July 1, 1925, and the appropriation made by the budget law, after that date?"

The determination of the question submitted involves simply the construction to be placed on the words "the same to be paid out of the general funds of the state." The question is, do these words, coupled with the other provision of the section, constitute an appropriation?

We have already held that these words or similar words do not constitute an appropriation where the matter referred to was considered by the General Assembly in connection with the adoption of the appropriation act in conformity to the provisions of the Iowa Budget Law.

Chap. 218, Acts of 41st G. A.
Chap. 20, Code of 1924.

It appears, however, that this section was not referred to either directly or indirectly by the legislature, and therefore the opinion to which we have referred and the statutes to which we have referred are not controlling.

From the very beginning of the state government, words such as are used in this section have been uniformly construed, adopted and applied as an appropriation. Hundreds of statutes of like character have been so construed. Great weight must be given to such construction, especially considering repeated re-enactments by the legislature without reference to the construction or change in it. The language used is not clear, and we therefore do not hesitate to say that the words must be construed as an appropriation. It necessarily follows that claims arising under the provisions of Section 1422 of the code, 1924, are to be paid out of the general funds of the state.

CLAIMS: The amount due upon contracts may be paid from the funds appropriated at the time the contract was entered into, even though the claim accrues subsequent to six months from July 1, 1925. If these funds have been transferred, they may be replaced on the books of the Auditor of State in the amount sufficient to pay the claim legally chargeable against them.

January 26, 1926. *Auditor of State:* We wish to acknowledge receipt of your favor of the 22d requesting our opinion on the following proposition:

"Your attention is respectfully directed to Section 2, Chapter 205, Laws of the Forty-first General Assembly, which reads as follows:

"'Except when otherwise provided by law, the auditor of state shall transfer to the general fund of the state any unexpended balance of any annual or biennial appropriation remaining at the expiration of six months after the close of the fiscal period for which the appropriation was made. At the time the transfer is made on the books of his office he shall certify such fact to the treasurer of state, who shall make corresponding entries on the books of the treasurer's office.'

"In complying with the above provision of law this office on January 1, 1926, transferred to the general fund of the state the sum of $1,288.92, then remaining unexpended in the account known as 'State Library—historical, memorial and art department,' the appropriation reference for which is H. F. 114, 23, 40th extra.

"On January 18, 1926, there were filed by the curator of the historical department, for payment from the above mentioned account, bills totalling $518.00. That you may be in possession of the facts in the case, we are attaching herewith copies of these claims. Will you kindly return these duplicate bills to this office with your opinion on the following points:

"(1) Are these claims payable or are they outlawed under the provisions of section 393, of the code as amended?

"(2) If they are payable from the above mentioned appropriation, would we be authorized to replace on our books the figure which we have charged off, or should only sufficient to pay these two claims be replaced?"

The claims referred to in your request show that the work was done under contract entered into in June, 1925. Apparently the work done by the Plumb Jewelry Company was not completed until December 24, 1925, and on January 18, 1926, the claim for the work done was filed in your office. The claim of the Hertzberg Bindery is dated June 30, 1925, and is for certain binding and labeling. This claim is sworn to and acknowledged by the claimant on June 30, 1925. There is nothing in this claim to show that the work was carried over into the period beginning July 1, 1925. However, if this is not the case we should be advised.

Chapter 205, Laws of the 41st General Assembly, amends Section 393, Code, 1924, so that this section insofar as applicable to the facts at hand reads as follows:

"No claim shall be audited by the board when such claim is presented after the lapse of six months from its accrual * * *."

It is apparent, therefore, from a reading of this section that after six months from the accrual of a claim, it is barred by the statute and cannot be allowed by

the Board of Audit. A claim may be said to accrue at the time the claimant would have a cause of action or a right enforcible against the state board or department for the work done or materials furnished.

This department has held in prior opinions that a contract made by a state board or department for work or material should be paid from the appropriation in existence at the time the contract was entered into.

It will be seen that there is no inconsistency between the statute limiting the time for the auditing of claims and the opinion of this department holding that the amount due upon contracts for labor or material is to be paid from the appropriation in existence at the time the contract is entered into, the statute limiting the time being separate and distinct in every respect and not affected by the result of our opinion.

We are of the opinion that the amount due upon contracts for labor or material should be paid from the funds appropriated at the time the contract was entered into, even though the debt due upon the contract does not accrue until after six months from July 1, 1925. The contractor has a right in the funds appropriated at the time the contract is entered into and funds sufficient to pay the amount due upon the contract should be retained in your hands and not transferred under the provisions of Section 2, Chapter 205, Laws of the Forty-first General Assembly, until the debt is paid. If these funds have been transferred, however, you would be authorized to replace on your books an amount sufficient to pay claims which are legally chargeable to the funds thus transferred. Apparently the claim of the Plumb Jewelry Store did not accrue until December 24, 1925. If this is true, they would be entitled to payment. The claim of the Hertzberg Bindery apparently accrued sometime on or prior to June 30, 1925, and is therefore barred.

TAXATION: Merchandise should be listed and assessed under the provision of Section 6963 in the county where it is kept and retained a greater part of the year preceding the first of January.

January 26, 1926. *Auditor of State:* We wish to acknowledge receipt of your favor of the 21st requesting our opinion on the following proposition:

"A question in regard to taxation has arisen that we feel is of sufficient general interest and importance in the listing of property to justify a consideration and ruling from your office. We have a good many lines of transient business that maintain a base of operations in the city of Des Moines, where they carry a general stock of merchandise for distribution throughout the larger portion of the state. In some instances they find it advisable to maintain what might be termed a resident agency, this being a place where no attempt is made to keep a stock of merchandise or to maintain a regularly established office more than to have a desk in some other place of business and telephone connections so that an agent working out of this center can keep in touch with the trade in his field of operations, the goods he handles and disposes of being shipped from the central or base office in the city of Des Moines. However, in operating this resident agency, the concern in question might have an ownership in several machines that were on trial in the county of this resident agency, the machines in question, of course, being considered in connection with the base agency in Des Moines, are taxed as stock of merchandise in Polk County.

"Now the question arises: Could there be any assessment made on this merchandise in the county where the resident agency was maintained? In one instance called to our particular attention, the assessor insists that property such as we have mentioned should be assessed in his county where this resident agency is maintained on the basis of the value of the property belonging to the Des Moines base agency on January 1st. The particular valuation in question being the value of machines that have been placed on trial."

In answering your inquiry we wish to call your attention to the provisions of Section 6963, Code, 1924, which reads as follows:

"Place of listing. Moneys and credits, notes, bills, bonds, and corporate shares or stocks not otherwise assessed, shall be listed and assessed where the owner lives, except as otherwise provided, and except that, if personal property not consisting of moneys, credits, corporation or other shares of stock, or bonds, has been kept in another assessment district during the greater part of the year preceding the first of January, or of the portion of that period during which it was owned by the person subject to taxation therefor, it shall be taxed where it has been so kept."

We believe this section fully answers your inquiry and that the merchandise in question should be taxed in Polk County unless it has been kept in another assessment district during the greater part of the year preceding the first of January, and in that event it should be taxed in the district where kept.

FISH AND GAME: A discussion of section 1766 relative to the filing of affidavits by persons possessing furs out of season.

January 27, 1926. *State Fish & Game Warden:* You have requested the opinion of this department upon the following statement of facts:

"Will you please advise if, in your opinion, section 1766, 1766a, and 1766a1, would require a fur buyer to file an affidavit with the county auditor within ten days following the close of the season on any protected game animals?

"We also wish to inquire if an affidavit should be filed for muskrats purchased lawfully in another state by a fur buyer although there is a three year closed season on muskrats in this state."

For your convenience we quote Section 1766 of the Code of Iowa, 1924, and also Section 1 of Chapter 37, Acts of the 41st General Assembly, which amended the section. This reads as follows:

"It shall be unlawful for any person to kill, trap, or ensnare any beaver, mink, otter, or muskrat, from March sixteenth to November fourteenth, both dates inclusive, or any raccoon or skunk from February first to October thirty-first, both dates inclusive, except where such killing, trapping, or ensnaring may be for the protection of public or private property; or to injure any muskrat house or destroy any skunk den, except for the protection of public or private property; or to have in possession during the closed season provided for in this section, except during the first ten days thereof, any of the animals or carcasses or parts thereof described in this section, whether lawfully or unlawfully taken within or without this state; but nothing herein contained shall be deemed to apply to green hides in process of manufacture."

"Notwithstanding the foregoing provisions no person shall be convicted of having in his possession during the closed season any fur-bearing animal or carcass or skin thereof if he shall upon the trial of the action prove the following things:

1. That the animals, carcasses, skins or parts thereof, for the possession of which he is charged, were received into his possession lawfully.

2. That during the first ten days next following the commencement of the closed season or the receipt by him of said articles he filed an affidavit in the office of the county auditor of the county wherein he keeps such articles, giving a list or inventory of them, stating when and from whom he acquired them or when he himself trapped or took them and giving a description of the premises where he keeps them."

You will note from these sections that it is provided that any person who has in his possession during the closed season any of the animals or carcasses or parts of such animals shall be deemed guilty of violating the law unless he files an affidavit with the county auditor as provided by subsection 2 of section 1766-a1.

Therefore, we believe that a fur buyer residing in this state and having in his possession skins of these animals enumerated in this section should file with the

county auditor within ten days an affidavit following the closing of the season.

We also believe that an affidavit should be filed for muskrats purchased lawfully in another state since there is a closed season on these animals within this state. We believe the intent of the legislature contemplated just such situations and that it was their purpose to require affidavits in these cases, both for the information of the state and for the protection of the fur buyer.

CENSUS: The population of a county insofar as salaries of county officers are concerned, is to be determined by the census which becomes effective only after the abstract of the census has been compiled and recorded by the secretary of state and any additions made thereto by the Executive Council and the certificate of the Secretary of State attached to the compilation thus made.

January 28, 1926. *Auditor of State:* We wish to acknowledge receipt of your favor of the 19th requesting our opinion upon the following proposition, to-wit:

"Recently we have had numerous requests for information as to when the population as determined by the 1925 census would be in force and effect for the regulation of salaries for county officials. I understand that the Director of the Census has been furnished certificates by the Secretary of State and that these certificates have been filled out and sent to the counties by the Director of the Census when the work of the compilation of the census for the counties is completed in each county. Code Section 421 indicates that abstracts of the census are to be recorded by the Secretary of State and that the Executive Council is to arrange for publication and that the Secretary of State shall attach his certificate to this census prepared for publication.

"The question now arises, shall the census as certified to the counties by the Director of the Census at the conclusion of his enumeration, be the determining factor in deciding when a change in salary occasioned by change in population takes effect, or shall the final certificate of the Secretary of State made in connection with the complete compilation of the census for the state govern and control in these matters?"

In answering your inquiry it is necessary to consider and understand the provisions of the statute in reference to the state and federal census. Section 421, Code, 1924, reads as follows:

"The Executive Council shall cause abstracts or compilations of said census to be prepared and recorded by the secretary of state, and said council may add thereto such other statistics in reference to the banking, railroads, insurance, manufactures, education, and other matters of public interest as it may deem advisable. Said secretary shall attach to said record a certificate, dated and signed by him, to the effect that said record constitutes a true compilation of said census."

Section 426 of the Code, 1924, requires in substance that the secretary of state publish the returns of the federal census. This section thereafter provides:

"* * *, and from and after the date of said publication said census shall be in full force and effect throughout the state * * *."

The only publication of the state census provided for is under the provisions of Section 423, Code, 1924, which requires the Executive Council to cause the state census to be published in a book known as the "Census of Iowa."

Section 429, Code, 1924, provides:

"Whenever the population of any county, city, or town is referred to in any law of this state, it shall be determined by the last certified, or certified and published, official census, whether the same be a state or national census, unless otherwise provided. If there be a difference between the original certified record in the office of the secretary of state and the published census the former shall prevail."

The section last quoted thus contemplates that the state census is to be effective when certified and the federal census only after it is certified and published.

There is no provision in Chapter 26, Code, 1924, dealing with the census, which requires the secretary of state to certify to the return of the census from any one county, or county by county as completed by the director of the census. The only certificate contemplated in this statute is that under the provisions of Section 421, which we have quoted.

We are, therefore, of the opinion that the census insofar as the salaries of county officials is concerned, becomes effective only after the abstract of the census has been compiled and recorded by the secretary of state, and any additions made thereto by the Executive Council which they deem advisable and the certificate of the secretary of state attached to the compilation thus made.

PRIMARY ROADS: The Highway Commission may reimburse the County for gravel taken from the county gravel pit where such gravel is used for the construction and maintenance of primary roads.

January 29, 1926. *Iowa State Highway Commission:* This department is in receipt of your letter dated January 28, 1926. For convenience I quote your letter at length. It is in words as follows:

"First: Assuming that a county purchased a 3.7 acre gravel pit during the year 1922 taking warranty deed thereto, paying the full purchase price from the county road fund, and assuming further that the gravel taken from said pit has been used wholly in construction and maintenance of primary roads, may the Primary Road fund legally reimburse the county for the first cost of the pit?

"Second: Assuming that the facts are as stated in the first assumption above, except that the pit purchased is located within the corporate limits of a town, may the Primary Road fund legally reimburse the county for the first cost of the pit, the county conveying the acreage to the state."

You are advised that the county, acting with the approval of the Highway Commission, may purchase gravel or a gravel pit provided the main value is in the gravel and not in the land purchased, whether within the corporate limits or without the corporate limits. Of course there is no power to condemn within the corporate limits. You are further advised that if in your judgment as a Commission, the gravel is worth the price to be paid for the benefit of the primary road system, then you may legally reimburse or pay the county.

PRIMARY ROADS—BRIDGES: The duty to construct bridges in towns and in cities not owning their own bridge funds falls upon the county.

January 29, 1926. *Iowa State Highway Commission:* On the 27th day of January, this department rendered you an opinion in reply to your request, holding that under the provisions of Chapter 114, Acts of the 41st General Assembly the Highway Commission was not obligated and should not assume the duty of maintaining bridges and culverts on extensions of the primary road system within towns and within cities which do not control their own bridge funds.

You have now requested our opinion that if the Highway Commission is not vested with the authority to maintain the said culverts and bridges in towns and cities not owning their own bridge fund, in whom is the duty to maintain said culverts and bridges vested.

Sections 4664 and 4665 read as follows:

"The county bridge and culvert system shall embrace all highways throughout the county, except highways entirely within cities which control their own bridge funds."

"The county bridge culvert system shall be constructed and maintained as follows:

1. Culverts which are thirty-six inches, or less, in diameter, and located within a city or town, by the council thereof.

2. Temporary culverts thirty-six inches, or less, in diameter, located on the township road system, by the township, except that the county shall furnish the material therefor, and deliver the same at a railroad station to be designated by the supervisors.

3. All bridges and all other culverts within said system, by the county."

By section 4664 the county bridge and culvert system is to include highways throughout the county except those within cities which control their own bridge fund. Section 4665 provides that culverts of thirty-six inches in diameter, or less, shall be constructed by the city or town council. It further provides that temporary culverts on the township road system shall be constructed by the township, and that all bridges and all other culverts within the said system are to be constructed and maintained by the county.

We are, therefore, of the opinion that it would be the duty of the county to construct all bridges in cities not owning their own bridge funds if such cities are included in the county bridge and culvert system. This would apply also to the construction and maintenance of bridges in towns.

Section 5874 has some bearing upon this question. This section reads as follows:

"Cities shall have the care, supervision, and control of all public bridges and culverts within their corporate limits; shall cause the same to be kept open and free from nuisance, and shall construct and keep in repair all public culverts within the limits of said corporation.

"They may aid in the construction of county bridges within the limits of the city, or of any bridge contiguous thereto on a highway leading to the city, or of any bridge across any unnavigable river which divides the county in which the city is located from another state by appropriating a sum not exceeding ten dollars per linear foot therefor."

Although the language used in Section 5874 is perhaps ill fitting, we do not believe that the same conflicts with the provisions of Sections 4664 and 4665. You will note that Section 5874 provides that cities shall have the care, supervision and control of bridges and culverts, but no provision is made for the construction of such bridges by the cities. Section 5874 contemplates the construction and maintenance of culverts by cities, and this is recognized by Section 4665. However, Section 5874 does not contemplate nor recognize the construction and maintenance of bridges by the city, and Section 4665 has delegated the duty of constructing and maintaining bridges in towns and within cities not controlling their own bridge fund to the county. Section 5874 has merely delegated to the city the supervision and control of public bridges after they have been constructed by the county.

We believe that these two cases can be read together and that they are not in conflict. Therefore, we are of the opinion that the construction and maintenance of culverts is to be undertaken by the city as provided by subsection 1 of section 4665, but that the construction and maintenance of bridges in towns and within cities not controlling their own bridge funds is to be undertaken by the county.

CENSUS: 1. The date of the abstract and compilation of census by Executive Council and recording by Secretary of State constitutes a publication of the census as contemplated by Section 5624. 2. The change in classification of a city takes place at the date of the recording of the certificates with the Secretary of State.

January 29, 1926. *Director of the Census:* You have requested the opinion of this department upon the following statement of facts:

"The following city and three towns have advanced in classification as a result of the taking of the 1925 census:
To a First Class City—

Iowa City in Johnson County;
To Second Class Cities—
DeWitt in Clinton County,
Dyersville in Delaware and Dubuque Counties,
Madrid in Boone County.

"The fact that this city and these three towns have advanced in classification means an increase in the number of councilmen and school directors, and they are anxious to have their new status legalized at the earliest possible date provided by law. See Section 421, Chapter 26, 1924 Code of Iowa. My question is, does the procedure of the Secretary of State as provided in this section constitute the publication of the census?

"Section 5624, Chapter 287, Code of 1924, is applicable to and affects the three towns and city advancing in classification. If, in the opinion of the Attorney General, the certification of the census records by the Secretary of State constitutes the legalizing and publication of the census, then when does the change in classification, as outlined in Section 5624, actually take place?"

For your convenience we quote Section 5624 of the Code, 1924, which reads as follows:

"Within six months after the publication of any state or federal census, the executive council shall cause a statement and list of each city or town affected thereby in its class as a corporation to be published in some newspaper at the seat of government and in each city or town, the class of which is changed. No city shall be affected in its classification by a subsequent loss of population, unless, in a city of the second class, it shall have dropped below fifteen hundred, or in a city of the first class, below ten thousand."

The first question for determination is what constitutes publication of the State census as contemplated by Section 5624.

Section 421, Code of Iowa, 1924, reads as follows:

"The Executive Council shall cause abstracts or compilations of said census to be prepared and recorded by the secretary of state, and said council may add thereto such other statistics in reference to the banking, railroads, insurance, manufactures, education, and other matters of public interest as it may deem advisable. Said secretary shall attach to said record a certificate, dated and signed by him, to the effect that said record constitutes a true compilation of said census."

We are of the opinion that at the time that the executive council causes the abstracts and compilations of the census which have been prepared and certified to be recorded with the secretary of state, that such recording constitutes a publication of said census as contemplated by Section 5624. It is as of this date that the said census becomes an official document and part of the official records of the State, and we believe that this act constitutes a publication thereof.

Your next question is when does the change in classification as outlined in Section 5624, actually take place. We are of the opinion that such change in classification takes place at the date the said certificates are recorded and filed with the Secretary of State. Although the Executive Council is required to publish a statement of the list of the cities and towns affected by the change in census within a period of six months after the filing of the certificate to the Secretary of State, we are of the opinion that the publication of such change in census by the Executive Council is a mere ministerial act and that the said change shall be considered to be in full force and effect from and after the date of its certification by the Executive Council to the Secretary of State and the filing and recording of the same in his office.

OSTEOPATHS: An osteopath may practice obstetrics providing he does not engage in major operative surgery.

January 29, 1926. *Senator A. H. Bergman, Newton, Iowa:* You have requested the opinion of this department upon the proposition which may be stated as follows:

"Our local board of trustees of our city hospital have made a ruling that all osteopaths who bring obstetric cases to this hospital must have in attendance at the time of birth a regular licensed physician, it being our understanding that an osteopath could not undertake the delivery of a child without the presence of such a physician.

"Some question has been raised as to the propriety of this rule and it is our desire to know whether or not we are correct in this matter. The hospital is a city owned hospital and is maintained by a regular tax levy for such purpose."

Chapter 118 undertakes to define and license the practice of osteopathy in this State. The chapter defines persons engaged in the practice of osteopathy and sets out the requirements for obtaining a license to practice this profession. Section 2554, however, restricts the power of an osteopath. Said section reads as follows:

"A license to practice 'osteopathy' or 'osteopathy and surgery' shall not authorize the licensee to prescribe or give internal curative medicines and a license to practice 'osteopathy' shall not authorize the licensee to engage in major operative surgery."

Under this section it would be illegal for an osteopath to administer internal curative medicines, and such has been the holding of the Supreme Court of Iowa in the case of *State of Iowa vs. C. C. Gibson*, 201 NW Re. 590. You will note also that the section forbids the practice of major operative surgery. We believe this part of the section deals with the question you have submitted. In other words, is the delivery of a child at the time of birth an act of major operative surgery.

In cases of child birth, which are in all respects normal, there is no need for any assistance to permit nature to complete her function. In other words, child birth is natural in all respects and is not an unnatural condition such as disease or infection. Therefore, if an osteopath is present at the birth of a child and undertakes through the manipulations of his science and art to assist and better the function of nature, we do not believe that he is performing any act of major operative surgery within the provisions of this statute.

Just where the line is to be drawn between minor operative surgery and major operative surgery is a question upon which we are unable to pass. The facts of the particular case coupled with the definitions and understandings of the medical profession would necessarily have to resolve such a question and we cannot pass upon it. There is, however, certain acts about which there can be no question, and of course, in such instances, if the acts are such that they constitute major operative surgery, then an osteopath performing such acts would be violating the statutes.

We are of the opinion that your Board of Trustees could not require the attendance of a physician or surgeon at the birth of a child where an osteopath is in attendance upon the patient in the case. We are of the opinion that the osteopath has a right to undertake to aid a mother in the birth of her child and that so long as the osteopath undertakes to perform no act of major operative surgery that he is coming within the terms of the statutes and that he would not be violating the law.

INTOXICATING LIQUOR: A county attorney is entitled to receive 10% of the fine actually paid under the provisions of Section 2429. Citing *Story County vs. Hansen*, 178 Iowa, 452.

January 30, 1926. *County Attorney, Algona, Iowa:* This will acknowledge receipt of your letter of the 6th instant acknowledging receipt of our ruling of the 5th.

It appears that there has been some misunderstanding as to the exact question submitted by you, and therefore, I quote again your original request for an opinion, which is as follows:

"What is the present holding of your department in regard to percentage on fines in liquor cases due to the county attorney who prosecutes the case and collects the fine? The case of *Story County vs. Hansen*, 178 Iowa, p. 452, seems to indicate that in nuisance cases at least a full 10% should be allowed. This is under former statute, however."

In your letter of the 6th instant you have supplemented your original request as follows:

"The only question that I had to offer, and that perhaps is answered in your letter in the last paragraph, is this: under the citation which I gave in my former letter it had been held that in liquor nuisance cases, that is criminal prosecutions for nuisance, that the county attorney was entitled to 10% of the fine actually paid. My question was whether or not the change in the statute had abrogated the holding in this case."

For your convenience we quote Section 2429 of the Code of 1897, which reads as follows:

"In all actions in equity against persons charged with keeping a nuisance, and to abate the same, and all proceedings for a contempt for violating any injunction, temporary or permanent, issued or decreed therein, the court or judge before whom the same shall be heard and determined shall allow the attorney prosecuting such cause a reasonable sum for his services, and in case a fine shall be assessed, he shall be allowed ten per cent of the fine collected."

This section appears as Section 2023 in the Code of 1924, and reads as follows:

"In all actions in equity against persons charged with keeping a nuisance, and to abate the same, and all proceedings for a contempt for violating any injunction, temporary or permanent, issued or decreed therein, the court or judge before whom the same shall be heard and determined shall, *if the plaintiff be successful*, allow the attorney prosecuting such cause *an attorney's fee of twenty-five dollars, such fee to be assessed against the defendant, together with the costs in such cause*, and in case a fine be assessed he shall be allowed ten per cent of the fine collected."

Section 2023, above quoted, is exactly the same as Section 2429 of the Code, 1897, with the exception that that part of Section 2023 as underlined has been added and written into the provisions of Section 2429. The case cited by you that of *Story County vs. Hansen*, 178 Iowa, 452, was decided under Section 2429, Code of 1897. The syllabus in that case reads as follows:

"The language of Section 2429, Code, 1897, that an attorney shall receive ten per centum of all fines collected 'in all actions in equity against persons charged with keeping a nuisance, *and to abate the same*' entitles such attorney to ten per centum of the fine imposed and collected as the result of a conviction *or a strictly criminal prosecution*."

Your question is whether or not the changes in Section 2429 as they appear in Section 2023 abrogates the holding of the decision of the Supreme Court. The first change in Section 2429 is the addition of the phrase "if the plaintiff be successful." We believe that this phrase would have no effect upon the decision of the Supreme Court for the reason that a fine could not be assessed unless the plaintiff was successful, and since your question relates only to the 10% allowed county attorneys in case a fine is assessed, the additional phrase "if the plaintiff be successful" would be immaterial as affecting this question.

The next phrase added to Section 2429 is as follows: "allow the attorney prosecuting such cause an attorney's fee of $25.00, such fee to be assessed against the defendant together with costs in such cause."

Section 2429 provided simply that the court shall allow the attorney prosecuting such cause a reasonable sum for his services. The legislature evidently undertook to define what the term "a reasonable sum for his services" should mean by providing in Section 2023 that the attorney should receive $25.00, such fee to be assessed against the defendant.

We do not believe that this change in the statute would be material as effecting your inquiry as to the 10% allowed in case of a fine. Therefore, we reach the conclusion that the changes in Section 2429 of the Code, 1897, that appear in Section 2023 of the Code of 1924 do not affect the holding in the case of *Story County v. Hansen* and that these changes in the statute do not abrogate the decision in this case.

COUNTIES: The Board of Supervisors has discretionary power to employ counsel to defend the sheriff, who has been charged with a criminal offense committed while discharging the duties of his office.

February 1, 1926. *County Attorney, Davenport, Iowa:* We have your letter of December 3, 1925, asking this department to prepare an opinion as to whether the Board of Supervisors of Scott County has a right to employ, at the expense of the county, counsel to defend the sheriff in a criminal action in which the sheriff is charged with oppression in an official capacity under Section 13305 of the Code. The letter from the sheriff to the Board of Supervisors is as follows:

"I would like to make application to your Board to employ legal counsel for me in the case of *Klinck v. Martin, Scharfenberg and Korn.* We were acting in our official capacity as officers at time of search of his car.

I trust that your Board will see fit to employ counsel for me in this case as I do not feel that we should be called upon to pay our own counsel in view of the fact that we were acting in our official capacity."

It is a well known rule of statutory construction that municipal corporations, which include counties, may exercise the following powers only:

(1) those granted in express words; (2) those necessarily implied or necessarily incident to the powers expressly granted; (3) those absolutely essential to the declared objects and purposes of the corporation. Also, any authority conferred upon municipal corporations is to be strictly construed and must be closely pursued, and any doubt or ambiguity arising from the terms used by the legislature in a grant of power to such a corporation must be resolved against the existence of the power. These propositions of law are amply supported by repeated decisions of the supreme court.

We have examined the statutes with care and we have been unable to find any provisions which specifically grant to, or authorize the board of supervisors to employ counsel to defend a sheriff in the criminal action pending against him. However, while there is no such express power granted, we are of the opinion that such power must necessarily be implied from the powers expressly granted and we shall briefly state our reasons therefor. In the 28th Volume of Cyc., on page 454, we find the following statement of the rule:

"It is within the discretionary power of a municipality to indemnify one of its officers against liability incurred by reason of any act done by him while in the bona fide discharge of his official duties, and the municipality has the right to employ counsel to defend the officer, or to appropriate funds for the necessary expenses incurred by him in such defense, or to pay a judgment rendered against him. But while there exists a discretionary power to thus favor an officer, there is no fixed obligation on the part of the municipality which may be enforced by such officer in an action at law."

A number of authorities are cited in the footnotes in the volume just cited in support of this rule, among which are the following:

Moorhead v. Murphy, 94 Minn. 123;
Gormly v. Town of Mt. Vernon, 134 Iowa 394.

In the case of *Peet v. Leinbaugh,* 180 Iowa at page 940, the Supreme Court discusses the effect of the opinion in the case of *Gormly vs. Town of Mt. Vernon,* supra, in the following language:

"Authorities are cited by appellees to sustain their contention that the officers of a municipal corporation may, in the exercise of their discretion, appropriate money from the funds of such corporations to employ an attorney for, and even to pay a judgment against, an officer of such corporation, where the same was incurred in good faith and for the benefit of the corporation. Among the cases cited are *Gormly v. Town of Mt. Vernon,* 134 Iowa 394; *State ex rel Crow v. City of St. Louis,* (Mo.) 73 S. W. 623. The cases cited and the doctrine established thereby are not applicable to a case where the officer knowingly and willfully makes himself liable to a municipal corporation, in violation of the prohibitions of the statute."

The court inferentially, at least, in the Gormly case adopts the rule quoted from 28th Cyc.

We are, therefore, of the opinion that the Board of Supervisors has a discretion in the matter and may pay the costs and attorney's fees incurred by the sheriff of Scott County in making a defense in the criminal case in which he was charged with oppression in an official capacity. The Board of Supervisors, however, may not be required to do so.

BOVINE TUBERCULOSIS ERADICATION: Where cattle are kept a part of the year in two counties, one of which requires the testing of cattle, such cattle must be tested.

February 2, 1926. *Secretary of Agriculture:* We have received your letter of January 28, 1926, asking this department to prepare an opinion upon the question which you have stated as follows:

"I am submitting to you a question that is confronting us in the eradication of bovine tuberculosis, which is as follows:

'All cattle in Pottawattamie County have to be and have been tested for T. B. free test. Now I live in Harrison county which joins Pottawattamie on the north. I have land in both counties. The cattle run in Pottawattamie County about half the time and by this I thought that I could perhaps have the free test given my cattle. The County Agent, Mr. Wilbur Oxley, of Council Bluffs, did not know, so I am writing you for information. We do not like to have to use milk from the cows if we can get them tested. Would like to know at once.'

This question was submitted to me by Mr. David Roberts of Loveland, Iowa, through the Wallaces' Farmer."

Section 2699 of the Code provides as follows:

"When the county is so enrolled the board of supervisors shall cause a notice of such enrollment to be published once in two official newspapers of the county and thereafter every owner of breeding cattle within the county shall cause his cattle to be tested for tuberculosis as provided in this chapter and shall comply with all the requirements for the establishment and maintenance of the tuberculosis-free accredited herd."

It will be observed that the statute contains the phrase "every owner of breeding cattle within the county." It is the opinion of this department that, under the facts stated in your letter, the property owner whose cattle for a part of the year are located in Pottawattamie County must comply with the law and have his cattle tested for tuberculosis, as therein provided. The fact that the cattle for a part of the year are in Harrison County will make no difference in the application of the statute.

BUILDING AND LOAN ASSOCIATIONS: The contingent fund of a Building and Loan Association is to be assessed according to the classification in which the property of which it is made up falls under the statute. This fund would not necessarily be taxed as personal property generally, but might be assessed as moneys and credits, depending upon the make-up of the fund.

February 2, 1926. *Auditor of State:* We wish to acknowledge receipt of your favor of the 19th requesting our opinion upon the following proposition:

"Our association is being taxed by the county on its contingent fund as personal property and we feel that there must be some mistake as this is a fund which we set aside a small amount to take care of a possible loss. Should this not be taxed as moneys and credits? Other institutions that carry a surplus are only charged at the rate of 5 mills and our tax amounts to about 40 mills.

Some time ago this matter was taken up with the assessor in this city by one of our directors and he would not change the tax.

This matter was taken up at one of our meetings and we thought probably you could take it up with the attorney general and advise us if anything could be done to help us to cut this tax. As it is now the taxes use up one-half of the earnings of this contingent fund."

Section 7016, Code, 1924, referring to building and loan associations, says:

"When such association owns real estate, or maintains a reserve, expense or other fund, or its equivalent, the real estate and the total amount of such fund or funds shall be subject to taxation at the principal place of business of the association, and shall be assessed against the association as real estate or other personal property, the tax of same to be paid by the association."

Section 7020, Code, 1924, provides in substance that the stock of building and loan associations shall be classed and assessed as moneys and credits.

Section 6985, Code, 1924, defines moneys and credits and as defined therein cash and money are included within the term. It is also therein provided that moneys and credits shall be taxed upon the uniform basis of five mills on the dollar of actual valuation.

Money and cash or credits are, of course, personal property. However, Section 6985, Code, 1924, classifies cash and money or credits differently from other personal property and provides for a different rate of levy thereon.

The question to be determined is one of fact and whether or not the contingent fund of this association is composed of moneys and credits, as defined by the statutes, or of other personal property. Under the statutes of this state all personal property is to be assessed and taxed. The legislature thereafter provided various classifications of personal property to be taxed at different rates. The classification of "moneys and credits" is such an exception and a different provision is made for the taxation of this class of personal property than that of other classes of personal property. After the fact question has been determined as to what class of personal property the contingent fund is actually composed of it is an easy matter to determine the rate of assessment. If it is determined that the contingent fund is made up of moneys and credits, we are then of the opinion that it should be assessed as such, and that the provisions of Section 1706, supra, do not take the moneys and credits out of the classification in which they would naturally fall.

BANKS: Discussion of the right of a savings bank to have its stock held in trust and the shares evidenced by an endorsement of the trust upon the stock of a national bank.

February 2, 1926. *Superintendent of Banking:* We wish to acknowledge receipt of your favor of the 4th requesting our opinion as to the legality of the method used by the Muscatine Savings Bank of Muscatine, Iowa, in handling its capital stock.

It appears that on June 15, 1906, an agreement was entered into between the stockholders of the First National Bank of Muscatine, Iowa, and the stockholders of the Muscatine Savings Bank, wherein it appears that the stockholders of both banks desired that the stock in the Muscatine Savings Bank should be continuously owned by the stockholders of the First National Bank. The stockholders in the First National Bank and in the Muscatine Savings Bank appointed certain named persons trustees, and surrendered their stock in both of said banks to the trustees named. They thereafter provided for a readjustment of the stock in the two banks, and it was provided that the First National Bank would issue its stock carrying an endorsement of a beneficial interest in a pro rata amount of the capital stock of the Muscatine Savings Bank; being further provided that after the reissue of the stock, that the capital stock of the Muscatine Savings Bank should be held by the named trustees or their successors, who were empowered with the right to exercise all the rights and powers of absolute owners of such stock except as limited in the trust agreement. It being therein provided:

"All dividends received by said trustees on the said shares of stock in the said savings bank shall, on the days of their receipt by said trustees, be paid over by said trustees to said national bank, or its successors as aforesaid, for the time being, for immediate distribution by the latter among the persons beneficially interested as aforesaid in the capital stock of said savings bank, pro rata, according to their ownership of record of shares of stock in said national bank, or its successors, for the time being: that is to say, each shareholder of said national bank, or its successors, shall participate in any dividend so distributed in the proportion of his or her holdings of record of the stock of said national bank, or its successors, on the day of the payment of the dividend of the savings bank so to be distributed."

The ownership of stock in the Muscatine Savings Bank being based on the pro rata value of the stock of both banks, fixed and determined at the time it was turned in to the trustees; the First National Bank acting as agent in the distribution of the dividend among the stockholders of record of the savings bank. The trust agreement provides that it shall continue so long as the national bank or its successors shall continue in the banking business, unless sooner terminated by a written request of two-thirds in interest of the owners of record of the capital stock of the national bank, and that upon the termination of the trust the stock of the savings bank be distributed among the shareholders of record of the national bank. It must be kept in mind that the shareholders in the national bank are the shareholders of the savings bank. The agreement further provides:

"The persons beneficially interested in the stock of said savings bank under the said trust shall be subject to the same liability upon the stock of said savings bank as they would have been subject to in case they had been owners of record of shares of stock of said stock corresponding in amount to their beneficial interest in said stock, and to that extent they shall indemnify and save harmless the trustees in whose names said stock shall stand of record from any loss or liability on account of said stock as the holders of record thereof; the obligation hereunder to be several and not joint on the part of the persons beneficially interested as aforesaid.

"While the stock of said savings bank shall be held by trustees, as hereinbefore provided, no person beneficially interested therein shall have the right to transfer his interest therein, or any part thereof, otherwise than by the transfer of the ownership of the stock in said national bank, or its successors, for the time being, upon the books of the latter, and no beneficial interest in said stock of said savings bank shall be capable of being severed from the ownership of said stock in said national bank, or its successors, and the only evidence of the beneficial interest of any person in the stock of said savings bank shall be that given if any by the following endorsement, which shall on the reissue of said national bank stock, be placed by the trustees hereinbefore provided for upon the back of all reissued cer-

tificates of stock of said national bank, and shall thereafter until the termination of the trust, always be placed as aforesaid on the back of all certificates of stock of said national bank, or its successors, as aforesaid, viz:

The owner of the shares of stock represented by this certificate is beneficially interested in common with all the other stockholders of the First National Bank of Muscatine in a pro rata amount of the capital stock of the Muscatine Savings Bank by and under a certain written agreement, dated June 15th, A. D. 1906, between S. G. Stein, J. Carskadden and others, trustees, parties of the first part, and S. M. Hughes and others, shareholders of the First National Bank of Muscatine, and R. K. Smith and others, shareholders of the Muscatine Savings Bank of Muscatine, parties of the second part, which beneficial interest is subject to all the terms, conditions and limitations of said agreement, including the condition that said beneficial interest cannot be sold or transferred otherwise than by the transfer of the shares of stock represented by the within certificate upon the books of said national bank. The beneficial interest in the stock of said savings bank now held by the owner of the within certificate shall pass with the transfer of the shares of the said national bank represented by the within certificate upon the transfer of the said shares upon the books of said national bank and shall be otherwise inalienable."

It further provides that no person shall be an officer or director of the savings bank who is not a director of the national bank.

It is further provided in the trust agreement:

"It is understood and agreed by all the parties hereto that the separate and distinct organization and business of the said First National Bank of Muscatine and the said Muscatine Savings Bank shall be kept up, conducted and maintained—and earnings distributed, dividends declared, and taxes paid upon the capital stock of each of said banks, without reference to or connection with the business of the other, during the life of this agreement; and neither of said banks shall be in any manner responsible for the obligations or liabilities of the other:—and neither of said banks shall have any right, title or interest, in the assets, earnings or business of the other, save and except as specifically set forth in this agreement."

The stock was surrendered and re-issued according to the terms of the trust agreement; the stock being issued in the First National Bank of Muscatine, Iowa, and bearing the endorsement of the trust agreement that we have hereinbefore set out. No certificates of stock or evidence of the ownership of stock in the Muscatine Savings Bank were issued after the agreement hereinbefore referred to was entered into, except the endorsement of the beneficial interest shown on the certificates of the First National Bank stock. You state that the savings bank makes reports and has filed a list of stockholders, as required under the provisions of Sections 9255 and 9257, Code, 1924, and that this report and list shows the owners of the stock in this bank the same as though certificates of stock had been issued to them in the ordinary form. We are not informed as to whether or not the Muscatine Savings Bank keeps a stock book showing the owners of the shares in that bank, but assume that this is done.

The obvious reason and purpose for the trust agreement is to so affiliate the two banks that their interests will be mutual and common, and in order that the national bank will control the savings bank. It should be noted that each bank is to retain its entity, its own records, capital stock, the same as though the trust agreement did not exist.

We assume that the savings bank has complied with the provisions of Chapter 413, Code, 1924, and has filed articles of incorporation, complying with the requirements of this chapter, and that a certificate has been issued authorizing the bank to do business.

The basis of the question raised by you is the right of the Muscatine Savings Bank to do business without having issued certificates of stock, and also whether or not a stock assessment, as provided by the laws of this State, might be levied upon the stock in this bank when certificates have not been issued.

Section 9192, Code, 1924, provides in part as follows:

"Capital of savings banks shall be divided into shares of One Hundred Dollars each, issued or acquired only upon full payment of the sums represented by them, transferable on the books of the corporation in such order as shall be prescribed by law and in its by-laws * * *."

In order to answer your inquiry it is necessary to understand the meaning of the terms "capital stock," "stock certificate," and "stock." The "capital stock" signifies the amount fixed by the corporate charter to be subscribed and paid in by the shareholders of the corporation and upon which it is to conduct its business. The term "capital" and "capital stock" are generally used synonymously. The "stock" of a corporation is the interest in the property of the corporation; it belongs to the individual stockholders and not to the corporation, and a "share of stock" is the interest or right of the owner, who is called the "shareholder" or "stockholder" in the management of the corporation and its business. Thus the equitable interest of the shareholder in the property of the corporation is represented by the term "stock," and the extent of his interest is described by the term "shares." The expression "shares of stock," when qualified by words indicating number and ownership, express the extent of the owner's interest in the corporation property. Thus our statutes have provided that the articles of incorporation of a savings bank shall state the amount of the "capital" invested. This is the property of the corporation. It further provides that the "capital" shall be divided into "shares" of One Hundred Dollars each. The statute states that the "shares" shall be "issued or acquired" only upon the full payment of the sum represented by them. It is to be noted that the statute does not require that the "stock" be represented by certificates, or that upon the payment for "shares" in the bank that certificates of stock shall be issued; but upon the payment of the full amount represented by the number of shares purchased, the person making the payment then acquires the ownership of shares equalling the amount paid by him into the capital of the corporation. The books of the bank must show the amount paid and the number of shares to which the purchaser is entitled.

A certificate of stock is not the stock itself, but merely evidence of the stockholder's rights or interest, and it has been uniformly held that in the absence of provisions to the contrary, the issuance of certificates of stock is not necessary, either to the existence of a joint stock corporation or to make one a stockholder in such a corporation, for one may be a stockholder without the formal written evidence of his rights. (7 C. J., 495).

The sale or transfer of stock in a bank is governed by the same rules that apply to other incorporated companies. (*Stephens v. Follett*, 43 Fed., 842). It is said in Fletcher on Corporations, Volume 5, at page 5610:

"In the absence of provisions or agreement to the contrary, a subscriber for stock in a corporation, or, except, as hereafter stated, a purchaser of stock, becomes a stockholder as soon as his subscription is accepted by the corporation and statutory or charter conditions are performed or fulfilled, or as soon as the purchase is completed, as the case may be, whether any certificate of stock is issued to him or not; and as soon as he thus becomes a stockholder, although he may have no certificate he is entitled to all the rights of a stockholder, including the right to dividends and the right to vote, etc., and is subject to all the liabilities of a stockholder, including liability to an action on his subscription and liability to creditors in case of the corporation's insolvency."

There are a large number of cases in almost every jurisdiction of the United States cited under this statement of authority.

The Supreme Court of this State in *Waukon & Mississippi R. Company v. Dwyer*, 49 Iowa, 121, at 125 says:

"A subscriber to stock becomes a stockholder by virtue of the subscription, in the absence of a provision requiring a payment as a condition of membership; and that, too, without the issuance of any certificate of stock. *Chester Glass Company v. Dewey*, 16 Mass. 94; *Spear v. Crawford*, 14 Wend., 20; *Vawter v. Ohio & Mississippi R. Co.*, 14 Ind. 174."

It has been held that the appearance of the name of a person on the books of a corporation as a stockholder is prima facie evidence that he was the owner of the stock, and that the issuance of the certificate was not necessary.

Sherwood v. Illinois Trust & Savings Bank, 62 NE., 835, 837;
Thompson v. Bank, 7 Pac., 68;
Nevada & Flower City Bank v. Shire, 84 N. Y. Sup., 810; 72 NE., 1141.

It has also been held by numerous authorities that a stockholder is estopped to deny his liability as a stockholder because of the fact that a certificate was not issued. (7 C. J., 516).

The facts submitted by you disclose that the names of the stockholders appear upon the books of the bank and also upon the list of stockholders submitted to you as required by the statutes of this state. Under these circumstances, we are clearly of the opinion that the stockholder could not escape liability for a stock assessment because of the fact that a certificate of stock had not been issued to him; and we are also of the opinion that the Muscatine Trust & Savings Bank may lawfully continue to do business and operate as a bank in this State without issuing certificates of stock as evidence of the holder's share of interest in the bank corporation.

We are returning herewith the stock certificate in the First National Bank of Muscatine, No. 373, to George W. Fisher; also the copy of the trust agreement herein referred to, and the list of stockholders in the First Trust & Savings Bank of Muscatine; also the list of stockholders in the First Trust & Savings Bank of Fort Dodge, and the two agreements concerning the First Trust & Savings Bank of Fort Dodge. What has been said herein with reference to the Muscatine Savings Bank is equally applicable to the First Trust & Savings Bank of Fort Dodge.

TOWNSHIPS: Township trustees may not incur indebtedness unless funds have been provided therefor by an authorized levy.

February 2, 1926. *Auditor of State:* We have received a request for an opinion from A. M. Helme of Sidney, Iowa. Mr. Helme is one of the trustees of a township in said county and desires an opinion as to whether there is a limit on the expenditures that may be made by such trustees. His letter reads as follows:

"If the trustees of a township have had more work done than they have money to pay for in 1925, and have allowed the bills, and the township clerk has written the warrants, can they be paid from the 1926 funds?"

The statutes provide that the township trustees may make three levies: (1) Township road levy of not to exceed six mills, (2) Road drag levy of not less than one nor more than two mills, and (3) A road drainage levy, if necessary, of not to exceed five mills. The township trustees may also, under certain conditions, levy a cemetery tax and a township hall tax. Section 4781 reads as follows:

"The township trustees are charged with the duty to repair and improve the roads of said system in their township, and to equitably and judiciously expend the

funds of the township, including road poll taxes, for the specific purposes for which authorized.

They shall not incur debts for said purposes unless funds have been provided for the payment thereof by an authorized levy.

They may let by contract, to the lowest responsible bidder, any part of the township work for the current year."

It will be noted that the township trustees may not incur debts unless funds have been provided for the payment thereof by an authorized levy. We are, therefore, of the opinion that no contracts may be entered into, bills incurred or warrants written, for a sum in excess of the authorized levy of the township. This does not mean, however, that the township trustees may not incur debts in excess of the amount that is actually collected. They may do so provided the expenditures are not in excess of the authorized revenues.

COUNTIES: Unless the statutes so authorize, an examiner in charge of a bank may not release chattel mortgages. This must be done by the receiver.

February 2, 1926. *Auditor of State:* We have received a letter from Jeanette H. Tesslink, County Recorder of Sioux County, Iowa, in which she requests some information with reference to the releases of chattel mortgages. Her letter is as follows:

"I have received several releases of chattel mortgages, which mortgages were made to the Hudson State Bank of Hudson, South Dakota. These releases being signed by the Examiner in charge. Am I placing myself in jeopardy to release and return the original instruments on a release executed in that way. Is the Notary acknowledgment that this man is the Examiner in Charge, sufficient to protect me, and can an Examiner in Charge release these instruments?"

We have concluded to prepare an opinion for your department and to forward a copy to the county recorder. It is our opinion that under ordinary circumstances the only official of the failed bank who has any authority to satisfy or release chattel mortgages is the receiver. The receiver is the official who is appointed by the court to act for the bank and he alone is authorized to sign contracts of any character. However, although this is the general rule, the statutes of South Dakota may provide that an examiner in charge of a bank may release chattel mortgages. If this be true, then the release of such a mortgage by him is legal. There should be some evidence, however, that the statute permits such releases by the examiner. The releases signed by either the receiver or the examiner, if the law permits the examiner to do so, must also be authorized or approved by the court appointing the receiver. We believe these rules are fundamental and do not require a citation of authorities in support thereof. However, the following authorities in a general way support the rules herein announced:

Saunders v. Stultz, 189 Iowa 1090;
First National Bank v. White Ash Coal Co., 188 Iowa 1227.

Therefore, we are of the opinion that the county recorder should not return the chattel mortgages to the mortgagor until the receiver has released the mortgages in the proper manner, or until some satisfactory evidence is presented to the recorder that the examiner in charge of the bank has, under the laws of South Dakota, the right to release such mortgages. We suggest that when such evidence is submitted, the county attorney should be consulted before the chattel mortgages are returned.

CRIMINAL LAW: Sentences under the Volstead Act and the state statute prohibiting the sale of intoxicating liquors, do not necessarily operate concurrently.

February 2, 1926. *County Attorney, Orange City, Iowa:* We have received your letter of January 29, 1926, submitting to this department the following inquiry:

"We have two prisoners in our county jail who were sentenced to serve three months and pay $300.00 fine on liquor charges. Just previous to being sentenced in District Court, they served 30 days in our jail on a federal charge involving violation of the liquor law.

Is there any way whereby the time they served on the federal charge can be credited on the time they are serving under the state charge? In case where a federal sentence was imposed after a state sentence, the federal court has often directed that such sentence be served concurrently with the sentence in state court."

The first two sections of the 18th Amendment to the Constitution of the United States provide as follows:

"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited."

"Section 2. The Congress and the several states shall have *concurrent power* to enforce this article by appropriate legislation."

Pursuant to the adoption of this amendment Congress enacted what is popularly known as the Volstead Act. The Legislature of Iowa has also amended and strengthened its statutes prohibiting the manufacture and sale of intoxicating liquors. These statutes are separate and distinct, even though they operate upon the same state of facts. It has been held by the Supreme Court of the United States that the same act may be made a crime by either sovereignty, and that a punishment for one is no defense in a criminal action in the other.

United States v. Vito Lanza, 67 L. Ed. 314.

Although both sovereigns act concurrently, each must nevertheless act separately and serving a sentence under a judgment in the courts of one sovereignty cannot be credited on the judgment of the courts in the other sovereignty. However, if a mittimus is issued by the courts in each sovereignty and delivered to the sheriff the sentences must, of necessity, operate concurrently. The sentence would begin to operate from the date the prisoner was delivered to the sheriff under a mittimus.

We, therefore, answer your question in this way—that unless the prisoner is serving time under a mittimus issued by each court, then the sentences would not operate concurrently and an imprisonment under one judgment would not operate under the other judgment.

HIGHWAYS: Assessments against primary roads may be paid out of the primary road fund only after the Code of 1924 became effective.

February 3, 1926. *Auditor, Iowa State Highway Commission:* We have received your letter of January 29, 1926, requesting this department to prepare an opinion upon the question which you have stated as follows:

"In 1918 within a drainage district in one of our counties, assessments were levied against certain miles of road within the district. A lump sum was spread against each mile benefitted. The assessment was not spread as against 'county roads' or 'township roads.' The county elected to take advantage of the 10 year payment plan.

At the time this assessment was levied, the primary road system had not been created. In 1919, certain miles of the roads in this drainage district became a part of the primary road system. The county has continued to pay the annual installments of this special assessment from year to year up to the present time.

The county now files with the Highway Commission a claim for reimbursement of county funds in the amount of assessments paid by the county on account of the certain miles that are now a part of the primary system and asks that the primary road funds assume the remaining deferred installments.

Would it be proper for the primary road fund to assume this drainage assessment obligation? If it be held that this drainage assessment becomes an obligation of the primary road fund, then it follows that any other improvement made on any road which in April 1919 became part of the primary system, would have to be paid for from primary funds, that is, the county reimbursed."

A comparison of the old statute with the corresponding section in the Code of 1924 will answer your inquiry. Section 4859 of the Compiled Code (Section 1989-a19, Code Supplement 1913, as amended by Section 4, Chapter 344, Acts of the 37th General Assembly) is as follows:

"Whenever such levee, ditch, drain or change of any natural watercourse crosses a public highway, necessitating the removal or the building or rebuilding of any bridge or bridges, the board of supervisors shall remove, build or rebuild such bridge or bridges, paying the costs and expenses thereof from the county bridge fund. Whenever any county or township highway within the levee or drainage district will be beneficially affected by the construction of any improvement or improvements in such district, it shall be the duty of the commissioners appointed to classify and assess benefits to determine and return in their report the amount of benefit to such highway, and notice thereof shall be served upon the clerk of the township in which said highway is located, as provided in the case of an individual property owner. The township trustees or clerk of such township may file objections to such assessment in the time and manner provided in case of landowners, and the trustees shall have the same right of appeal from the finding of the board with reference to the assessment on account of the benefits to such highway. *One-fourth of such assessment shall be paid by the county from the county road fund, or from the county drainage fund, and three-fourths by the township.* Such assessment may be paid by the township from its road fund, or out of a fund created for said purpose as provided in section twenty-nine hundred seventy. The amount finally assessed for benefits to highways shall draw interest at the same rate and from the same time as the assessment against lands."

Section 7470 of the Code reads as follows:

"When any public highway extends into or through a levee or drainage district, the commissioners to assess benefits shall ascertain and return in their report the amount of benefits and the apportionment of costs and expenses to such highway, and the board of supervisors shall assess the same against such highway. *Such assessments against primary highways shall be paid out of the county's allotment of the primary road fund* and against all other highways, one-fourth out of the county road fund or county drainage fund, and three-fourths out of the township road fund or township drainage fund. Such assessments shall draw interest at the same rate and from the same time as assessments against lands."

A comparison of the two sections just quoted will show that the phrase "Such assessments against primary highways shall be paid out of the county's allotment of the primary road fund" first appeared in the Code. Therefore, this portion of the statute became effective on the 28th day of October, 1924, when the Revised Code became effective. There is nothing in the statute indicating that the legislature intended that this portion of the statute should have a retroactive construction.

We are, therefore, of the opinion that the assessments against the primary roads should be paid out of the primary road fund only after the date herein specified, the 28th day of October, 1924. If there are any unpaid installments of benefits to primary roads which become due after that date they should be paid out of the county's allotment of the primary road fund. Also, all assessments made after said date should be paid from said fund.

PRIMARY ELECTIONS—CITIES AND TOWNS: In cities of the first class nomination for places on party ticket can be made first in primary only and a party caucus cannot thereafter make the nomination.

February 5, 1926. *Governor:* You have requested an opinion from this department upon the question of whether or not a caucus of the members of a political party may, after the primary election in a city of the first class, make nominations to fill certain places on the party ticket when there have been no candidates for those places in the primary election.

Your attention is first directed to the provisions of Section 639 of the Code, 1924, wherein it is stated that the chapter of the Code relating to nominations by primary election shall govern, insofar as applicable, to nominations of candidates by political parties for all offices to be filled by a direct vote of the people in cities of the first class. Section 529 is contained in the chapter of the Code relating to primary elections, and provides that the candidates of political parties for all offices which are filled at a regular biennial election by direct vote of the people, *shall* be nominated at a primary election. This language is mandatory, and the method of nomination provided in the primary election statutes is therefore exclusive. *Pratt v. Secretary of State*, 141 Iowa 196. It then follows that the other provisions of the law, insofar as they provide methods of nomination inconsistent with the provisions of the primary law, are not applicable or have in effect been repealed by implication, in political subdivisions where the primary law is applicable. This being true, the provisions of Chapter 37 of the Code, relating to nominations by convention, caucus or other meeting of qualified electors representing a political party, are not applicable and nominations cannot be made in the first instance by the method there provided.

It is the theory of the law that the only time a nomination for an office in a city of the first class on the ticket of a political party can be made under the provisions of chapter 37 of the Code, is when there is a vacancy. There can be no vacancy unless there has been a nomination previously made at the primary. The power to nominate in such cases by method other than the primary exists only when the nominee of the primary is no longer a candidate, and because of such fact a vacancy occurs. See the opinion of the Supreme Court of Iowa in *Pratt v. Secretary of State*, 141 Iowa, particularly at pages 199 and 200.

It therefore necessarily results that in a city of the first class, nominations for places on a party ticket for city offices can be made in the first instance in the primary election only, and a failure of a party to have a candidate for the nomination to any city office in the primary, precludes any party caucus after the primary from nominating candidates on the party ticket.

CONSTITUTION—JUDGES—COURT: The addition of an additional Judge in any district does not create a new office within the meaning of Sec. 21, Article III of the Constitution of Iowa.

February 6, 1926. *Governor:* You have requested the opinion of this department upon a question involving the construction of the provisions of Section 21 of Article III of the Constitution of Iowa insofar as said provisions affect the eligibility of a state senator to appointment to fill a vacancy in a district judgeship, the particular judgeship having been added by the legislature during the present term of the senator.

Section 21 of Article III of the Constitution of Iowa reads as follows:

"No senator or representative shall, during the time for which he shall have been elected, be appointed to any civil office of profit under this State, which shall

have been created, or the emoluments of which shall have been increased during such term, except such offices as may be filled by elections by the people."

You state that a senator who was elected in 1922 and whose term of office commenced in January, 1923 and continues until the first of January, 1927, is an applicant for appointment to a vacancy in a judgeship, the incumbent thereof having resigned, said judgeship having been added to the 13th Judicial District of Iowa by the 40th General Assembly, the session of which was during the present term of the senator.

The question, therefore, is as to whether the 40th General Assembly "created a civil office of profit" during the time for which the senator was elected within the meaning of the language as used in the foregoing provisions of the Constitution when it created this additional judgeship. There is a dearth of authority on this question and but one decided case in this state. Mr. Justice Ladd in his opinion in the case of *Schaffner v. Shaw*, reported in 191 Iowa 1047, in holding that a legislative act which provides for an additional district judge does not *create an office*, said:

"The court existed from its creation by the Constitution. Its functions are exercised through a single judge, and the addition of a judge in a district does not change the court, but amounts to no more than adding another to the numerous offices of district judge. The acts, then, did not create a distinctively new office, but added to the number of offices previously existing."

It might be further observed that the reasons for excluding persons from office who have been concerned in creating them or increasing their emoluments are to take away, as far as possible, any improper bias in the vote of the legislative member and to secure to the constituents some solemn pledge of his disinterestedness. Even though it be thought by some that the language of the constitutional provisions in question might apply, although we do not deem it necessary to pass upon that question herein, we might call attention to the fact that the exception at the close of the section might be construed as exempting elective offices from the prohibitions therein contained. Unless this construction be given, what is the effect of the exception? Otherwise, it would have been better and would have answered the purpose to have omitted it entirely. Also, if it had not been the intent to exempt elective offices from the purview of this prohibition, would not the framers of the Constitution have said that, "no senator or representative shall, during the time for which he shall have been elected, be appointed to any elective or appointive civil office of profit," etc.

We are clearly of the opinion under the facts as above stated that no question can be raised as to the eligibility of the senator to qualify as a judge of the 13th Judicial District of Iowa because of the fact, as stated by the Supreme Court, the addition of a judge to those already authorized in the district does not create a new office within the meaning of the constitutional provisions referred to and said provisions therefore are not applicable.

WATERWORKS TRUSTEES: The bond required of waterworks trustees cannot be paid for from waterworks' funds.

Febraury 10, 1926. *Auditor of State:* We wish to acknowledge receipt of your favor of the 3d requesting our opinion on the following proposition:

"The following question is submitted for ruling: Section 6175, Code 1924 relative to the bonds of Water Works Trustees provides as follows:

"'A bond in the sum of five thousand dollars shall be required of each member of the board before entering upon the duties of his office, conditioned as provided by law, with sureties to be approved by the council. When so approved, said bond shall be filed in the office of the city clerk.'

"Has the Board of Water Works Trustees the authority to pay the premiums on bonds of its members from the funds of the water company?"

The statutes in regard to the management of municipal water plants by a board of water works trustees require that a bond be given by the trustees, but nowhere in the statute is there any provision by which the premium for this bond may be paid from public funds coming into the hands of the trustees by virtue of their office. In the absence of a provision in the statute authorizing the payment of this premium from the water works fund, we are of the opinion that the premium cannot be paid therefrom, but must be paid by the members of the board personally.

FRUIT TREE RESERVATION: A shack may be erected on land set aside as a fruit tree reservation and the property is entitled to the exemption authorized by statute.

February 10, 1926. *Secretary of Agriculture:* We wish to acknowledge receipt of your favor of the 7th requesting our opinion upon the following proposition:

"The question has been submitted to the department on whether a house or shack may be erected on land designated as a fruit tree reservation, provided the building does not interfere with the minimum number of trees to the acre?

"If such shack is occupied, is it exempt from taxation under the fruit tree reservation statute?"

The laws of this state provide for two sorts of reservation. They are forest reservations and fruit tree reservations. The statute in reference to forest reservations contains this provision:

"No ground upon which any farm building stands shall be recognized as part of any such reservation."

Section 2611, Code, 1924, defines a fruit tree reservation and reads as follows:

"A fruit tree reservation shall contain on each acre at least forty apple trees or seventy other fruit trees, growing under proper care and annually pruned and sprayed. Such reservation may be claimed as such under this chapter for a period of eight years after planting."

Nowhere in the statute is there any provision prohibiting the erection of a building or "shack" upon a fruit tree reservation.

In view of the fact that the legislature has included a provision prohibiting the occupancy of forest reservations by farm buildings and failed to make any such prohibition as to fruit tree reservation, we are of the opinion that the fruit tree reservation is entitled to the tax exemption authorized by statute, even though a "shack" is erected thereon and may be occupied.

SCHOOLS: Territory may be removed from one school district and attached to another, even though bonds have been issued in the school district.

February 11, 1926. *Superintendent of Public Instruction:* We have received your letter of May 9, 1925, asking this department to prepare an opinion upon the following question:

"On the following question an opinion is respectfully requested:

"'Under what circumstances, if any, can territory be removed from a consolidated district, upon which a bond issue has been levied, provided it can be shown that on the remaining part of the consolidated district, the levy necessary to pay the total bond issue would not exceed the five per cent maximum permitted by law?'

"A case has arisen in Kossuth County, where in the formation of a new consolidated district, it is proposed to remove four sections of the Ledyard Consolidated District upon which a bond issue of ninety thousand dollars has been levied.

"A prompt reply is requested as the County Superintendent of Kossuth County awaits your opinion before taking action in the case."

For the purpose of getting a correct understanding of the facts relating to your request, we will copy into this opinion a letter written by Mr. William Shirley, County Superintendent of Schools of Kossuth County. It is as follows:

"We have rather a peculiar situation here in regard to the organization of a prospective school district and I would like if you could give me a little light on the subject.

"The Lakota District is trying to consolidate and in order to make a good district and divide the distance between them and Ledyard they want to take over four sections of the Ledyard District. This would make the Lakota District 31, I believe. As the sections in question are generally closer to Lakota it seems no more than fair to have them go to the closest town.

"However, in 1923 the Ledyard District voted $90,000 bonds on their district. Some of the folks there are of the opinion that the four sections could not be released from the Ledyard district because of this bond issue. Their claim is that it would raise the bonded amount over the remaining portion of the district over the 5% maximum allowed by law.

"I have gone over the finances of the district for the year 1923, when the bonds were voted, and I am enclosing a statement of same as I find it on the Auditor's books.

"According to the best calculation that I can make the figures show that the District of Ledyard could issue bonds to the extent of $98,000 and a trifle over and still keep within the maximum limit.

"If that is the case, then the four sections could be released and the bond issue on the remaining part of the district would still be less than the 5% maximum.

"If you can let me have the information on this within a week or so I would like it very much as many of the people involved in this are quite anxious to know how the matter stands.

"I am sending you a copy of the valuations taken from the Auditor's books and a map of the districts. The territory that Lakota wants to take is as follows: All of Sections 12 and 22 and the east half of Sections 1, 11, 15 and 19 of Ledyard Township."

The sole question submitted is as to whether or not territory may be removed from a consolidated district in which bonds have been issued.

Section 4403 of the Code, 1924, provides for the levying in each school district of a tax sufficient in amount to pay the interest due, or that may become due, for the year, upon lawful bonded indebtedness, and in addition thereto such amount as the board may deem necessary to apply on the principal.

Sections 4132 and 4133 of the Code, 1924, relate to the restoration of territory to an independent school district and the change of boundary lines of contiguous school corporations by the concurrent action of the respective boards of directors at their regular meetings in July, or at special meetings thereafter, called for that purpose. These sections read as follows:

"Where territory has been or may hereafter be set off to an adjoining school township in the same or another county, or attached for school purposes to an independent district so situated, it may be restored to the territory to which it geographically belongs upon the concurrence of the respective boards of directors, and shall be so restored by said boards upon the written application of two-thirds of the electors residing upon the territory so set off or attached, together with a concurrence of the county superintendent and the board of the school corporation which is to receive back the territory." Sec. 4132 of the Code, 1924.

"The boundary lines of contiguous school districts may be changed by the concurrent action of the respective boards of directors at their regular meetings in July, or at special meetings thereafter, called for that purpose. The corporation from which territory is detached shall, after the change, contain not less than four government sections of land and its boundary lines must conform to the lines of congressional divisions of land. In the same manner, the boundary lines of contiguous school corporations may be so changed that one corporation shall be included in and consolidated with the other as a single corporation." Sec. 4133 of the Code, 1924.

Section 4134 of the Code, 1924, reads as follows:

"When boundary lines are changed by concurrent action, school districts affected thereby shall not be required to elect new boards of directors, and the boards then in office may make final settlement of all assets and liabilities as provided in Sections 4137 and 4138 and in case of a consolidation of districts under this section the officers and members of the board of directors of the independent district having the larger number of inhabitants, shall continue to be the officers and directors of the independent district as consolidated for the period for which such officers and directors were elected."

It will be observed that the last section provides that when boundary lines are changed by concurrent action of boards the boards then in office shall make final settlement of assets and liabilities as provided in Sections 4137 and 4138. These two sections contain the provisions of the statute relating to the division of the assets of school corporations and an equitable distribution of the liabilities of such corporations when the corporate limits of school corporations are changed.

We find nothing in the statute that prohibits the removal of territory from a consolidated district in which a bond issue has been voted.

We are, therefore, of the opinion that, under the facts stated in your letter, and the letter of Mr. Shirley, the territory referred to therein may be removed from the Ledyard District.

It appears from the letter of the County Superintendent that the total indebtedness of the Ledyard District, after the removal of the territory therefrom, will not exceed the five per cent limit prescribed by the Constitution and the statute.

EXTRADITION: One who has given a bond conditioned upon the support of his wife or children in Iowa, under the desertion statute may be extradited to another state for a crime committed there.

February 12, 1926. *Governor:* We wish to acknowledge receipt of your favor of the 9th enclosing a copy of a letter from the sheriff of Box Butte County, Nebraska. The facts presented to you are apparently that one Ben S. Wright, now a resident of this state, is under bond in Greene County, Iowa, conditioned to support his wife, as provided by Chapter 598, Code, 1924. The authorities of Alliance, Nebraska, contemplate extradition of Wright to the State of Nebraska, where he is wanted on two charges—one for forgery and the other for disposing of mortgaged property. The question presented is whether or not the fact that Wright is under bond conditioned on the support of his wife would prevent his extradition to Nebraska.

Section 13502, Code, 1924, in part provides:

"Whenever a demand is made upon the governor by the executive of another state or territory, in any case authorized by the constitution and laws of the United States, for the delivery of a person charged in such state or territory with a crime, if such person is not held in custody under bail to answer for an offense against the laws of the United States or of this state, he shall issue his warrant, * * *"

Chapter 598, Code, 1924, previously referred to, provides that in the case of desertion by a husband of his wife, that he may be released on a bond conditioned on her support. This provision is found in Section 13232 of said chapter, which reads as follows:

"If after arrest and before trial or after conviction and before sentence the party so arrested or convicted shall appear before the court in which the case is pending or the conviction had, and enter into a bond to the state in a sum to be fixed by the court, which in no event shall exceed the sum of one thousand dollars, with or without sureties as may be determined by the court, conditioned that such husband will furnish said wife with a necessary and proper home, food, care, and clothing, * * *, then said court may release the defendant."

It is thereafter provided in this chapter that the bond is to remain in force so long as the court deems it necessary and may be annulled whenever the court believes the husband is in good faith properly caring for his wife. Should the husband fail to comply with the undertaking he may be arrested and the bond forfeited and the defendant tried or committed unless a new undertaking is given.

It will appear, therefore, that the bond given by a husband, under the provisions of the statute referred to, is not a bail bond or a bond requiring him to appear at a time certain to answer for an offense either against the laws of this state or of the United States. (6 Corpus Juris, 891). Neither does the giving of such a bond hold the husband in custody.

We are, therefore, of the opinion that when he has given a bond conditioned upon the support of his wife, under the provisions of Chapter 598, supra, he is "not held in custody or under bail to answer for an offense against the laws of the United States or of this state," and may therefore in a proper proceeding be extradited to another state.

EXTRADITION: The governor of Iowa may make such rules and regulations in reference to application made to him for requisition as he may believe necessary and may refuse to grant a request for requisition if the rules are not complied with. However, the application may be made by other than the county attorney and may issue whenever the governor, in the exercise of his judgment, deems the same right and proper.

Feb. 12, 1926. *Governor:* We wish to acknowledge receipt of your favor of the 10th requesting our opinion upon the following proposition:

"I am just in receipt of the enclosed letter and application for requisition in the case of Leland Mackey. The application is made by the surety on the bond of Leland Mackey and not by the County Attorney. Are these papers sufficient, the application being made by the surety on the bond and not by the County Attorney? May I hear from you as promptly as possible in order that I may rule upon the case immediately?"

The law in reference to requisition and fugitives from justice is found in Chapter 624, Code of Iowa, 1924. A reading of these statutes will disclose that it is optional with the governor whether or not he will grant an application for requisition. He is vested with the discretion after having fully investigated the application for requisition, to grant the application or refuse it.

The governor has heretofore issued a rule and regulation relating to the granting of extraditions. It is therein provided, among other things, as follows:

"All applications for requisition must be made by the county attorney and addressed to the governor of Iowa. * * *"

This regulation is a proper one and one within the discretion vested in the chief executive by the constitution and laws of this state. The governor may, therefore, very properly stand upon such rule and regulation and refuse to grant extraditions unless there is compliance therewith. There is nothing, however, in the constitution or statutes which require the governor to refuse an extradition unless it is made by the county attorney. Section 13497 of the Code provides as follows:

"The governor, in any case authorized by the constitution and laws of the United States, may appoint agents to demand of the executive authority of another state or territory, or from the executive authority of a foreign government, any fugitive from justice charged with treason or felony."

This section vests in the governor the absolute power to issue a requisition when-

ever in his judgment it is right and proper that one should be issued, and this without any application being made to him at all, either by an individual or an officer. The mere fact that the governor has issued a rule and regulation requiring application to be made by the county attorney in no wise deprives the governor of the power vested in him. The question as to whether or not a requisition should issue or not issue is one to be determined by the chief executive. It may issue either upon an application made under the rules and regulations of the executive office or whenever, in the exercise of his judgment, the governor may deem the same right and proper.

WORKMEN'S COMPENSATION—TOWNSHIP: A township is not a municipal corporation and need not comply with the provisions of the workmen's compensation act.

Feb. 12, 1926. *County Attorney, Williamsburg, Iowa:* We wish to acknowledge receipt of your favor of the 8th requesting our opinion upon the following proposition:

"Certain Township Trustees are hiring men to do work for the township not as individual contractors, and contemplated taking out Workmen's Compensation Insurance. After examination of Section 1362 of the Code of 1924, and other Sections of Chapter 70, of said Code, and in view of the decision of the Supreme Court laid down in 52 Iowa, at page 132, holds that a Township is not a Corporation, and I advised the Township Trustees that they did not come under Workmen's Compensation Act, and felt that the County would not need to carry such Insurance of Township Employees."

The Supreme Court of Iowa in the case of *Hanson v. City of Cresco*, 132 Iowa, 533, at 540 said:

"A township is clearly therefore to be classed with quasi corporations, and not with municipal corporations." (Citing cases).

Section 1362, Code, 1924, in the chapter on Workmen's Compensation, provides as follows:

"Where the state, county, municipal corporation, school district, or city under any form of government is the employer, the provisions of this chapter for the payment of compensation and amount thereof for an injury sustained by an employe of such employer shall be exclusive, compulsory, and obligatory upon both employer and employe, except as otherwise provided in the preceding section."

Unless it can be said, therefore, that a township is a "municipal corporation," it need not comply with the provisions of the Workmen's Compensation Act. As we have pointed out, the Supreme Court of this state has held that a township is not a municipal corporation.

We are, therefore, of the opinion that a township need not comply with the provisions of the Workmen's Compensation Act.

ADOPTION: The consent of minor unmarried female to the adoption of her child is sufficient without the appointment of a guardian or court procedure.

February 13, 1926. *Board of Control of State Institutions:* We wish to acknowledge receipt of your favor of the 10th requesting our opinion as follows:

"Where a girl is a minor (less than 21 years of age) and unmarried and the mother of a child and wishes to have her child legally adopted by another:

"1. Is adoption legal where the girl only has signed the papers?

"2. Would a release to a Licensed Child Placing Agency, as provided in Sec. 8, Chapter 80, Acts of the 41st G. A., be legal and make a succeeding Adoption by the Agency legal, if the release were signed by the Minor girl without having the signature of her guardian also?

"3. Would the parents of said minor girl be legally considered her guardian and qualified to sign release or adoption papers for the child of their minor daughter?

"4. If No. 3 is held in the affirmative, would the guardians action in authorizing and completing the adoption be legal without the authority and approval of the Court?"

Section 10497, Code, 1924, relating to the adoption of children, reads as follows:

"Consent of parents or judge. If living and not divorced or separated, the consent of both parents; if divorced, separated, or unmarried, the consent of the parent lawfully having the care and providing for the wants of the child; or if either parent be dead, then the consent of the survivor; * * *"

The following section 10498, provides that an adoption when not consummated by a court action shall be by written instrument, and this instrument shall contain the following things:

"The consent required by the preceding section shall be given by an instrument in writing signed by the party or parties consenting, which shall give the name of the parents, if known, the name of the child, if known, the name of the person adopting it, place of residence of all such persons, if known, the name by which such child is thereafter to be called, and shall also state that it is given to the person adopting for the purpose of adoption as his own."

This instrument is required to be acknowledged and filed for record and thereafter the relations between the parent and child by adoption are to be the same as those between a natural parent and child, including the right of inheritance.

As it will be noted by a reading of the sections above quoted, it is only necessary that the "parent" of the child having its custody consent to the adoption. There is no provision requiring a court action, appointment of a guardian or other legal proceeding in order to make legal the consent to the adoption of her child by an unmarried minor woman.

The statutes limiting the right of minors to contract, and guardianship proceedings for minors all have to do with property rights. It is further to be observed that the adoption statutes of this state are in the nature of special statutes. Proceedings of this nature were unknown at common law, and must be authorized by statutory enactment in states which have adopted the common law.

Section 8 of Chapter 80, Laws of the Forty-first General Assembly, in reference to child placing agencies, designates who may place children and the manner in which it may be done. In this section we find the following provision:

"If the parents are not married to each other the parent having the care and providing for the wants of the child may sign the release. Children so surrendered may not be recovered by the parents except through decree of court, based upon proof that the child is neglected by its foster parent, guardian or custodian, as neglect is defined by the statute relating to neglected children."

It will be noted that there is no provision in the statute requiring that a guardian be appointed, or intimating that the consent of a minor parent to the placing of her child is not sufficient.

We have searched the reports carefully and have found but one case bearing upon this question. The facts in the reported case were similar to those suggested in your request. In that a minor unmarried female gave birth to a child and consented to its adoption by a man and his wife. After the lapse of about five years the natural mother of the child became of age and sought in a court proceeding to annul the adoption and recover possession of her child. This proceeding was before the probate court and that court held that where the mother was a minor at the time of the adoption proceedings, her consent was sufficient to render the adoption valid. (*In re Bush*, 47 Kansas, 264; 27 Pacific, 1003).

The state is parens patriae to a child and may by legislation control the child's rights to inherit from its parents and to give it into the custody of others. (*Ex*

parte Wallace, 190 Pacific, 1022; *Purinton v. Janrock*, 80 Northeastern (Mass.) 802). Parents have no property right in their children, although they ordinarily have the right to the minor's wages and time. This, however, is not a property right.

In view of the fact that the adoption proceedings authorized by the statutes of this state are a special proceeding and therefore take the subject matter thereof out of the general statute, and the fact that parents have no property right in their children, and the decision of the Supreme Court of Kansas in the cited case, we are of the opinion that an unmarried female who is a minor and the mother of a child may legally consent to its adoption and may consent to the placing of a child in a child placing agency, under the provisions of Chapter 80, Laws of the Forty-first General Assembly, and that it is not necessary to have a guardian appointed or that the parents of the mother consent to the adoption as her natural guardian. This, of course, applies only to the adoption proceeding authorized under the provisions of the statutes referred to. Any contract between the parent and the adopting parents affecting property rights or that extend beyond the scope of the statutory adoption proceedings might be subject to the limitation imposed on the rights of a minor to contract.

APPROPRIATIONS: The appropriation made by the budget law for normal institutes is restricted to $50.00 for each fiscal year.

Feb. 13, 1926. *Auditor of State:* We wish to acknowledge receipt of your favor of the 8th requesting our opinion upon the following proposition:

"It is found necessary to ask your opinion on a question which has arisen with regard to the payment of state aid for teachers' institutes as contemplated by sections 4112 and 4113, Code, 1924.

"Section 4113, reads in part as follows:

"'The institute fund of each county shall consist of: 1. Fifty dollars *annually*, which is hereby appropriated.'

"The budget bill, at section 40, makes a biennial appropriation of $9,900 for the purpose of paying state aid to normal institutes.

"Does the occurrence of the word 'annually' in section 4113 of the Code limit each county to fifty dollars a year for each year covered by the biennial appropriation made by the budget bill? Does the word 'annually' here appearing refer to the fiscal year or the calendar year?"

We wish to call your attention to Section 58, Code of Iowa, 1924, which reads as follows:

"All annual appropriations shall be for the fiscal year beginning with July 1st and ending with June 30th of the succeeding year, and when such appropriations are made payable quarterly, the quarter shall end with September 30th, December 31st, March 31st and June 30th; but nothing in this section shall be construed as increasing the amount of any annual appropriation."

Chapter 218, Laws of the 41st General Assembly is known as the Budget Law. Section 40 thereof reads as follows:

"For the Superintendent of Public Instruction for state aid to public schools there is hereby appropriated for the biennium beginning July 1, 1925, and ending June 30, 1927, the sum of nine hundred nine thousand nine hundred dollars ($909,900.00), or so much thereof as may be necessary, to be available as required during the biennium, for the following purposes:

"For State aid to public schools:

* * * * * * * * *

* * * * * * * * *

* * * * * * * * *

Normal institutes, $9,900.00."

The budget law became effective July 1, 1925, and the appropriation therein made for normal institutes is in lieu of the appropriation contained in Section 4113, Code, 1924. The two statutes, however, must be read and construed together. In doing away with the appropriation clause of Section 4113, the statute provides that the county institute fund of each county shall consist of $50.00 annually, which sum is to be paid from the $9,900.00 appropriated for the biennium in Section 40, supra.

Construing these sections together we are of the opinion that the appropriation made by the 41st General Assembly is to provide an institute fund for each county of $50.00 for the fiscal year beginning July 1st and ending June 30th of each year in the biennium covered by the appropriation.

CITIES: Cities do not have the right to invest surplus earnings of the municipal light and power company in municipal bonds of the city.

February 13, 1926. *Director of the Budget:* We have received your letter of February 9, 1926, asking this department to prepare an opinion upon the question which you have stated as follows:

"This department is in receipt of an inquiry from the city of Pella, as to the legality of investing surplus earnings of the municipal light and power plant in Municipal bonds of the city.

Their statement is as follows:

'The city of Pella has a municipal electric light and power plant, which is entirely paid for and has no debt. From the income of said plant we have at this time a surplus of money on hand, which we have no use for at this time; however electric plant renewal and extensions are necessary from time to time and unexpected emergencies arise, for which we want to be prepared.

For that reason our council have in mind creating a reserve fund which will remain intact until needed for some special purpose and to invest said money in municipal bonds which can be readily converted into cash if necessary.

Would state further that the surplus money referred to is altogether from the income of said electric light and power plant and not from a tax levy.'

Kindly furnish this department with a written opinion on this question at your earliest convenience."

Chapter 312, Sections 6127 to 6151, both inclusive, contains the provisions of the statute relating to heating plants, waterworks, gasworks and electric plants. Chapter 313 relates to the purchase and construction of waterworks in certain cities of the state. The latter statute does not apply to the city of Pella for the reason that it is not one of the class of municipalities therein designated. A careful search of the statute fails to show any authority in the city of Pella, or any other municipality of the same class, to invest the income of the electric light and power plant in the purchase of municipal bonds. The income from said plant is a trust fund for the use and benefit of the electric light plant and may not be used for any other purpose. We have no doubt about the right of the city to deposit the income from its electric light plant in a savings account which may be converted into cash whenever it is necessary. We are, however, clearly of the opinion that its funds may not be invested in municipal bonds.

CORPORATIONS: Corporations may not furnish money with which stock in the corporation is bought and a mortgage taken by the corporation for the money loaned.

February 13, 1926. *Secretary—Executive Council:* We have received your letter of February 10, 1926, in which you request this department to prepare an opinion upon the question which you have stated as follows:

"The following letter has been received from Louis Murphy Co. of Dubuque, Iowa.

'If this question is fairly within the province of your office, will you kindly advise in reply?

'An Iowa corporation, organized in 1920, charged each subscriber with an amount equal to the face value of the stock subscribed by him; then entered as a notes receivable item of each subscriber an amount equal to the amount of stock he purchased. In other words, it appears from the books that the corporation advanced the money to the stockholders to buy the stock and then took notes for the money advanced—not, apparently, for the stock.

'I desire to be advised if this was a compliance with the Iowa Law?

'The occasion of the question is an additional excess profits tax assessment against this corporation, the basis of additional tax claimed being that notes were issued for the stock in violation of the laws of Iowa.

'Thanking you for such notice as you shall give this inquiry, I am

Respectfully,

(Signed) Louis Murphy'

"Will you kindly advise me what your opinion would be regarding a transaction of this kind?"

Sections 8412 and 8413 of the Code read as follows:

"No corporation organized under the laws of this state, except building and loan associations, shall issue any certificate of a share of capital stock, or any substitute therefor, until the corporation has received the par value thereof."

"If it is proposed to pay for said capital stock in property or in any other thing than money, the corporation proposing the same must, before issuing capital stock in any form, apply to the executive council of the state for leave so to do. Such application shall state the amount of capital stock proposed to be issued for a consideration other than money, and set forth specifically the property or other thing to be received in payment for such stock."

It will thus be observed that under these two sections, no corporation organized under the laws of this state, with the exception of building and loan associations, shall issue any certificate of a share of capital stock, or any substitute therefor, until the corporation has received the par value thereof in one of two ways: (1) In money, and (2) In property. No stock may be issued covering the value of property other than money until the Executive Council shall approve of and fix the value on such property.

It was held in the following cases that a promissory note may be executed and delivered to a corporation for a stock subscription, provided the stock is not issued until after the note has been paid:

First National Bank v. Fulton, 156 Iowa 734;
Lone Tree Bank v. Timmerman, 193 Iowa 1320.

These authorities, however, do not cover or authorize the plan stated in the letter of Louis Murphy. We are clearly of the opinion that the plan therein described is a plain and obvious violation of the statutes. It is a mere subterfuge to evade the statutes and to accomplish in an indirect way that which the statute itself condemns. In effect, the corporation pays for its own stock. No money or property of any kind passes to the corporation in return for the stock issued. However, if the notes were given as a subscription to stock and the certificates were not issued until after the notes were paid, we believe there can be no objection to such plan. We, therefore, hold that the plan described in the Murphy letter is absolutely void and in contravention of the statutes hereinbefore referred to.

HIGHWAYS: Under the provisions of Sections 4694 and 4720, a county cannot submit the question of improving the county roads to the exclusion of the primary roads. Under the provisions of these sections, the primary roads are to be first improved.

Feb. 15, 1926. *County Attorney, Tama, Iowa:* We wish to acknowledge receipt

of your favors of the 11th. In these letters you request our opinion upon certain provisions of the statute in reference to the improvement of the highways in your county. These propositions may be answered together. As stated by you they are as follows:

"A question came up today before the Board of Supervisors concerning the submission of the question to the people of Tama County for the improvement by draining, grading and graveling the county road system without an assessment and the issuance of bonds of the approximate of $900,000 for the improvement of the county road system to be submitted to the people for a vote without voting on the improvement of the primary road system.

"Under the law as I view it secondary roads are not to be improved before the primary roads are improved, and that a joint proposition of the improvement of the primary road system with the secondary road or county road system could be submitted to the people, and that if one or the other of the propositions failed, then both would fail.

"I do not believe that it was the intention of the Legislature to improve the secondary roads before the primary roads are improved.

'In other words the secondary road system leads to the primary road system and it is the object to get into the main business centers under the primary road system and then connect up with the system with the secondary roads. However, in order to satisfy the Board in this matter I have submitted the question to you for your opinion."

You do not state under what provisions of the statute it is contemplated that the improvements referred to above are to be made. Chapter 242, Code, 1924, contains the only statutes authorizing the improvement of the county road system separate and distinct from the primary system. It will be noticed, however, that the provisions of this chapter only apply to counties having a population of more than seventy thousand. As Tama County does not have a population of seventy thousand, the provisions of this chapter cannot apply to your situation. We, therefore, turn to the provisions of Chapter 241 referring to the improvement of the primary and secondary road system. Section 4694 of the chapter last referred to authorizes three options in the expenditure of primary road funds. A third option therein provided is for hard surfacing in a more rapid manner than otherwise provided by the issuance of bonds. Before bonds may be issued, however, the question must be submitted to a vote of the people in the county. Section 4737 of this chapter after providing for the maintenance of the primary road system refers to the secondary system. It is therein provided:

"After the primary road system, as now constituted, or as it may hereafter be constituted in any county, by authorized modification, is fully improved by grading, draining, and graveling or other surfacing approved by the highway commission, the state highway commission shall each year appropriate from said county's allotment of the primary road fund a sufficient amount:"

The statute thereafter provides that this money shall be used first to pay the cost of maintaining the primary road; next, to pay the interest and principal of surfacing, if any; and third, to pay the interest and maturing principal of primary road bonds, if issued. After this is done, this section further provides:

"All funds remaining in said county's allotment of the primary road fund after the above amounts have been set aside are hereby made available for the grading, draining or graveling of secondary roads in said county which connect with or form laterals or feeders to the primary roads of said county."

The section continues as to the procedure which the board is to follow in the initiation of secondary road projects, and in reference to a bond issue it is said:

"In the resolution providing for the submission to the voters of the question of a bond issue for development of the primary system as provided in Section 4720,

the board may also outline or indicate any lateral roads, part of the secondary system, which it ultimately contemplates improving after the primary system has been finished, but such action shall not be deemed a material matter in any way affecting the validity of such bond issue for such primary roads, nor shall such action interfere in any way with the earlier improvement of such lateral roads under statutes relating to the improvement of roads in the secondary system."

County roads are a part of the secondary road system (Section 4745, Code, 1924), and the statutes provide for the improvement of the county road system through draining, grading and graveling, by assessment of the benefited district when sufficient funds are not otherwise available. There is no provision, however, for the issuance of bonds, the proceeds from the sale thereof to be used for the "draining, grading and graveling of the county road system without an assessment."

Under the provisions of the statute we are, therefore, of the opinion that in counties having a population of less than seventy thousand the board cannot submit and the voters cannot authorize the issuance of bonds by the county, the proceeds from the sale thereof to be used, as stated by you, for the "improvement by draining, grading and graveling the county road system without an assessment."

The board may properly submit to the voters, under the provisions of the statutes we have herein referred to, the question of issuing bonds for the improvement of the primary road system, and in a resolution providing for the submission they may indicate any lateral roads, part of the secondary system, which they ultimately contemplate improving "after the primary system has been finished." The statutes, however, provide that this action shall not be material insofar as the primary road bonds are concerned. It was the intention of the legislature, as shown by the statutes we have herein set out, to require that the primary road system be first improved, and after this is done any surplus remaining in the primary road fund may be expended under the provisions of Section 4737, supra.

BANKS: Banks may deduct the value of capital actually invested in real estate located outside of the State of Iowa.

February 16, 1926. *County Attorney, Waukon, Iowa:* We wish to acknowledge receipt of your favor of the 7th requesting our opinion on the interpretation of Section 7002, Code, 1924. You particularly inquire whether or not the provisions of this section authorizing the deduction of the capital actually invested in real estate owned by the bank, apply to capital invested in real estate located outside the state of Iowa.

You will note that the section does not restrict the deduction to the capital invested in real estate located in the state of Iowa, and real estate located in another state is subject only to the jurisdiction of that state for the purpose of taxation and is assessed and taxed where located. To refuse the deduction of capital invested in real estate located outside of the state of Iowa would be, in effect to subject this real estate to taxation in Iowa as well as to taxation in the state where located. We do not believe that this was the intention of the legislature. We are of the opinion, therefore, that the deduction authorized may be of capital actually invested in real estate owned by the bank and located outside of the state of Iowa.

HIGHWAYS: The question of hard surfacing, submitted under the provisions of Section 4694, Code, 1924, or Section 4720, Code, 1924, need not be carried, except by a majority of the county voting on the proposition. Under the provisions of Chapter 242, however, the proposition must be carried by a majority of those voting both in rural and urban precincts.

February 18, 1926. *Hon. Z. S. Ratliff, Mount Pleasant, Iowa:* We wish to acknowledge receipt of your favor of the 15th requesting the opinion of this department in substance as to whether or not a proposition to hard surface the primary roads of your county must be carried by a majority of the voters residing in both rural and urban precincts. You do not state under what provisions of the statute the proposed election is to be held. One method provided for the hard surfacing of primary roads is that under the provisions of Section 4694, Code, 1924. If the proposition is submitted under the provisions of this section a majority of the votes cast in the whole county is all that is necessary.

Another method provided for hard surfacing is that under the provisions of Section 4720, Code, 1924, and it is only necessary that the proposition submitted under the provisions of this statute be carried by a majority of the voters voting upon such proposition in the whole county.

In addition to these methods there is the method provided under the provisions of Chapter 242, Code, 1924. Section 4773 thereof reads as follows:

"Any county having a population of seventy thousand or less may adopt the additional method herein provided for the improvement of the roads of such county, but in any such county separate ballot boxes must be provided for the voters residing in cities and towns and for the voters residing outside of cities and towns. The proposition submitted shall not be deemed to be carried in any such county unless a majority vote cast is in favor thereof both in the incorporated and unincorporated territory."

Therefore, if the question is submitted under the provisions of this chapter it is necessary that the proposition be carried by a majority vote cast in favor thereof both in the incorporated and unincorporated territory.

HIGHWAYS: A county may improve its secondary or county roads independent of the primary roads of the county, under the provisions of Chapter 242, Code, 1924.

February 18, 1926. *County Attorney, Tama, Iowa:* Referring to our opinion of February 15th regarding the hard surfacing and improvement of the highways in your county,—in the opinion referred to we assume that the board did not contemplate proceeding under the provisions of Chapter 242 of the 1924 Code.

You did not state in your request what provision of the code the board contemplated following. In the event, however, that the board were contemplating the adoption of the additional method provided in Chapter 242, we have deemed it advisable to extend our opinion to include this method.

Section 4773 of the chapter referred to, provides as follows:

"Optional procedure. Any county having a population of seventy thousand or less may adopt the additional method herein provided for the improvement of the roads of such county, but in any such county separate ballot boxes must be provided for the voters residing in cities and towns and for the voters residing outside of cities and towns. The proposition submitted shall not be deemed to be carried in any such county unless a majority vote cast is in favor thereof both in the incorporated and unincorporated territory."

The additional method referred to in this section is the method provided for under the provision of Chapter 242. Section 4756 of this chapter provides as follows:

"In addition to the other methods provided by law for the improvement of roads, any county having a population of more than seventy thousand may issue bonds for the purpose of raising funds to pay the cost of draining, grading, bridging, paving and/or graveling, and completing the construction of the primary and county roads and may levy taxes for the payment of such portions of said bonds and the interest thereon as are not paid by the primary road fund or the county

road, drainage, and bridge and culvert funds, when authorized by a vote of the people, by proceeding as hereinafter provided."

Under the provisions of this chapter the proposition of improving the county roads by draining, grading, bridging and completing the surfacing thereof may be submitted as a separate proposition, or the proposition for improving the county roads as aforesaid may be submitted together with the proposition for improving the primary roads. This manner of submission is authorized by the provisions of Section 4762 of the chapter referred to.

In counties having a population of seventy thousand or less this proposition must be carried by a majority of the voters voting thereon in both the incorporated and unincorporated territory. The provisions contained in the chapter we have herein discussed are the only ones authorizing the improvement of the county road system separate and distinct from the primary system. In the opinion directed to you of February 15th we have discussed the other provisions of the statute in reference to the improvement of the roads. We believe, with these two opinions before you, that any question in reference to the procedure for hard surfacing or improving the roads in your county has been answered.

ELECTIONS—SCHOOL: The registry books used at the general city elections are to be used at the school elections, and is the duty of the registrars appointed by the school board to perform the duties in respect thereto, the same as registrars appointed under the general election laws.

February 19, 1926. *County Attorney, Dubuque, Iowa:* We wish to acknowledge receipt of your favor of the 18th requesting our opinion on the following proposition:

"Are registry books that are used for State and City elections also used for school elections, and if so, whose duty is it to copy the names into the registry book."

Section 4207 provides in part:

"The Board of Directors of school corporations, where registration is required at general elections, shall, not less than ten days prior to the school election, appoint two registrars in each of the registration districts of such school corporation for the registration of voters therein, who shall have the same qualifications as registrars appointed for general elections and shall qualify in the same manner and receive the same compensation to be paid by the school corporation. The person in custody of the registration books and records and poll books for the general election shall furnish the same to the board of directors which shall distribute them to the proper registrars and judges and they shall be used for registration at school elections the same as at general elections and shall within ten days after the school election be returned to the proper custodian. The registrars shall meet and remain in session on election day during the time the polls are open.

"In all respects except as in this chapter provided the general registration laws shall apply to registration for school elections in cities and towns wherein registration is required for general elections, except that administrative and clerical duties imposed thereby on the mayor and city clerk shall be performed by the president and the secretary of the board respectively * * *."

A reading of this section clearly answers the first of your inquiry in that it is provided that the registration and poll books used for the general election shall be furnished to the board of directors of the school district for use at the school election. We are of the opinion that it is the duty of the registrars appointed by the school board to perform the duties in respect to registration the same as the registrars appointed under the general election laws, and thus to copy the names in the registry book.

MUNICIPALITIES—CITIES: Discussion of the law relating to the date when the second installment of a special assessment becomes due.

February 19, 1926. *Auditor of State:* We have received your letter of February 15, 1926, asking this department to prepare an opinion upon the question which you have stated as follows:

"I have received a letter from a city clerk, which reads as follows:

'I would like your opinion as to maturity of payments of installments in connection with special assessments for paving, etc. as governed by Sections 6032 and 6033 of the new Code of Iowa.

'The city council of the city of Eldon made a levy of assessment for paving on October 27, 1925. It was my understanding, as governed by these sections, that the first payment was due and payable on or before thirty days, or November 26, 1925, that the second payment was due March 31, 1926, the third March 31, 1927, etc. This is the way the certificates were issued and this is the way I certified the unpaid assessments to the county auditor for collection. The county treasurer now holds that the first payment is due on or before March 31, 1926, the second on March 31, 1927, the third on March 31, 1928, etc. He did not follow my certification and has made up his books according to his interpretation of the law.

'The county treasurer evidently bases his claim on the words "annually thereafter" which appear in Section 6033, and claims that if the payments are made as I suggest it would make two of them come due at the same time and not give a year's spread between them. Section 6032 states that such payments "may be made in ten equal annual payments" and Section 6033 states very clearly that the first payment "shall" become due and payable thirty days from the date of the levy, which in our case would be November 25, 1925. In order to conform with Section 6032, which reads "ten equal annual payments," and also to conform with Section 6033 which reads "annually thereafter at the same time and in the same manner as the March semi-annual payment of ordinary taxes," it is necessary, in my mind, to have one payment come due some time in the year 1926. This would become due January 1, 1926 and payable without penalty up to April 1, 1926. If they claim the first payment is due March 31, 1926, they are contrary to Section 6033, and if they claim the first payment is due November 25, 1925 and the second on March 31, 1927 they are, I believe, contrary to both sections, as this would leave no payment at all to be made in the year 1926 except as to those who are delinquent in their first payment. I also believe that the county treasurer should either have returned my certification to me for correction, or else have made up his books accordingly.

'I have submitted this question to the attorney general who informs me that it must be submitted through you in order to obtain an opinion from him.'

"Will you kindly give this department an opinion covering the questions asked by the city clerk at your earliest convenience."

Section 6033 of the Code reads as follows:

"The first installment, with interest on the whole assessment from date of levy by the council, shall mature and be payable thirty days from the date of such levy, *and the others, with interest on the whole amount unpaid, annually thereafter at the same time and in the same manner as the March semiannual payment of ordinary taxes.*

Any or all installments not yet paid together with accrued interest thereon may be paid on the due date of any installment.

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.

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 April following."

We are of the opinion that the city clerk's construction of the statute is correct. The statute is not ambiguous. The first installment of the special assessment becomes due thirty days from the date of the levy—that is, the date the assessments are finally confirmed by the city council. The next installment becomes due on the

first day of January of the year following and, if not paid before the first day of March, becomes delinquent on that day. Thereafter, each annual installment thereof becomes due on the first day of January. Applying the rule herein adopted, it is apparent that if the thirty day period within which the property owner may make the first payment expires after the first day of January of the next year after the levy is made, the second installment will not become due until the first day of January of the following year. To state it differently, if the first installment becomes due at any time during the year, even on the thirty-first day of December, the second installment becomes due on the first day of the next year. If, however, the first installment becomes due on or after the first of the year, the second installment will not become due during that year. We believe that there is no escape from this conclusion.

MOTOR VEHICLES: The statute authorizing the revocation of the license for a motor vehicle would prevent such vehicle from being licensed in the hands of an innocent purchaser subsequent to the revocation of the license, providing the statutory requirements are complied with.

February 19, 1926. *County Attorney, Burlington, Iowa:* We wish to acknowledge receipt of your telegram requesting our opinion as follows:

"Construe Section 5076, Iowa code. The accused sold his car to an innocent party who has applied for a transfer of registration but was refused him. Does this section tie up the car for the period of revocation or can this innocent buyer obtain a license."

The section referred to by you is as follows:

"A judgment of conviction for operating a motor vehicle while intoxicated, or for failure, in case of accident, to furnish the required aid or information or to properly report an accident, shall state whether, in the opinion of the court, the certification of registration for the vehicle should be suspended for a named time or revoked."

Section 5078, Code, 1924, is as follows:

"When said conviction becomes final the department shall, by proper orders, enforce the recommendations of the court, and in case of a revocation of the certificate may, for such time as it may deem proper, refuse to issue a certification to said accused."

It is to be noted in the section first quoted that the statute provides: 'certification of registration *for the vehicle* should be suspended." The statutes do not require that the operator of the vehicle that is not engaged in transportation of persons or property for hire shall obtain a certificate or license. The reference in the statute, therefore, must be to the registration certificate issued for the vehicle. If the provisions of the statute are complied with and the cancellation of the registration made of record with the county treasurer, so that a purchaser, subsequent to the cancellation, will have knowledge of this fact, then the transfer cannot be made.

We are of the opinion that the statute refers to the license or certificate of registration issued for the vehicle, and that a compliance with the provisions of the statute may tie up the car in question for the period of revocation provided for, so that a purchaser from the one convicted could not have the car transferred and obtain a certificate of registration.

HIGHWAYS: Primary road funds may be used to purchase right-of-way for the secondary road system after all the primary roads of the county have been fully improved and completed and after the allotments have been made by the Highway Commission therefrom.

February 22, 1926. *Hon. G. L. Venard, Hawarden, Iowa:* We wish to acknowledge receipt of your favor of the 17th requesting our opinion as to whether or not

primary road funds may be used by the Board of Supervisors to purchase right-of-way in the improvement of the secondary or county road system. You state that the primary road system of your county has been fully improved and that the primary road fund allotted to your county is now available for use on the secondary or county roads.

Section 4690, Code, 1924, creating the primary road fund, provides that it may be used for the purchase of additional right-of-way for the primary road system. Section 4737, Code, 1924, provides in substance that after the primary road system in any county is fully improved by grading, draining and graveling or other surfacing, approved by the Highway Commission that the commission shall apportion the county's allotment of the primary road fund, first, to the payment of the cost of maintenance for the primary road system; second, to pay interest and principal and maturing certificates issued by the county anticipating its allotment to the primary road fund; and third, to pay interest and principal of primary road bonds if issued. This statute thereafter provides:

"All funds remaining in said county's allotment of primary road fund after the above amounts have been set aside, are hereby made available for the grading, draining, or graveling of secondary roads in said county which connect with or form laterals or feeders to the primary roads of said county."

You state that the secondary road which it is contemplated shall be improved connects with the primary road system of your county and forms feeders to it.

The statute last referred to then provides:

"The procedure by the county board in the initiation of secondary road projects as herein specified, the approval of said projects by the State Highway Commission, the letting and approval of contracts for the construction work, and the payment of claims therefor, shall be the same as provided in this chapter for projects on the primary road system."

It will be noted that there is nothing contained in this section or other provisions of the code expressly authorizing the use of the primary road funds for the purpose of purchasing right-of-way as part of the secondary road system.

However, we believe that it was the intention of the legislature to make the primary road fund available for the improvement of the secondary road system after the primary road system has been completed, in the same manner and for the same purpose that the fund may be used for the improvement of the primary system. We are, therefore, of the opinion that the primary road fund, after it becomes available for use on the secondary system may be used for the purchase of right-of-way for that system, the same as it may be used for the purchase of right-of-way in the primary system.

SCHOOLS AND SCHOOL DISTRICTS: In a school election if notice is not posted as required, the County Superintendent can post the same.

February 23, 1926. *Superintendent of Public Instruction:* This department is in receipt of a request for an opinion, dated February 23, 1925. Your request is in words as follows:

"Complaint has come to this department that in a certain subdistrict for the past several years the election has been illegally held, thereby giving the old director another term, and making it impossible to elect a new director.

Kindly advise if there is any procedure whereby the secretary and board in this district may be compelled to post the proper notices, to hold the polls open the required length of time, and in other ways comply with the law. If something is not done before the election the same thing will happen and because the election is illegal, the old director will hold over for another year."

You are advised that in the event of the failure to post the proper notices, by the proper parties, the county superintendent of schools should post the notices, signing the names of the secretary and the board, by herself, as county superintendent of schools.

TUBERCULOSIS: It is the duty of the board of supervisors to see that the eradication statute is carried out under the accredited area system and to require the retesting of herds.

February 23, 1926. *Chief of Division of Animal Industry, Department of Agriculture:* We have received your letter of February 18, 1926, in which you submit to this department the following inquiries:

"Mr. C. A. Norman, Chairman of the Board of Supervisors of Hardin County asks the following questions:

When a county is declared a modified accredited area by the federal and state authorities what further duties under the county area law are required by the Board of Supervisors in requiring the re-testing of infected herds?

As to compelling the owners of such herds to have them tested?

The paying of expenses of such test and indemnity for re-acting cattle?"

Section 6 of Chapter 54, Laws of the 41st General Assembly repeals Section 2695 of the Code, which relates to the notice of and the effect of the enrollment of a county under the accredited area plan. The new statute reads as follows:

"If objections are filed with the secretary of agriculture on or before the date fixed in the notice, the secretary shall hear the objectors and petitioners and determine whether or not the county shall become an accredited area. In passing upon the sufficiency of the petition for establishing the county as an accredited area the secretary of agriculture shall count all agreements which have been filed in his office within a period of two years preceding the date of final determination. If the petition is found sufficient, the secretary of agriculture shall make an entry of record establishing the county as an accredited area and shall notify the board of supervisors of such county accordingly. Thereafter every owner of breeding cattle within the county shall cause his cattle to be tested for tuberculosis as provided in this chapter *and shall comply with all the requirements for the establishment and maintenance of a tuberculosis-free accredited herd.*"

It will be observed that the statute contains the phrase "and shall comply with all the requirements for the establishment and maintenance of a tuberculosis-free accredited herd." To what does this phrase refer? Manifestly, to the rules, regulations and requirements for the establishment and maintenance of tuberculosis-free accredited herds of cattle approved by the United States Bureau of Animal Industry from time to time. This is made certain, we think, by the provisions of Section 2665, which reads as follows:

"The state department of agriculture is hereby authorized to co-operate with the federal department of agriculture for the purpose of eradicating tuberculosis from the dairy and beef breeds of cattle in the state."

It is obvious that this phrase does not relate to any rules, regulations or requirements embodied in the statute. The regulations adopted and approved by the United States Bureau of Animal Industry, December 11, 1925, contains certain provisions for the retesting of accredited herds. We do not deem it necessary to refer to, or copy in this opinion, any considerable portion of these regulations. A copy thereof will be attached to and made a part of this opinion. The nineteenth paragraph, which is a portion of Part II entitled the "Modified Accredited Area Plan," is as follows:

"The provisions of the Individual Accredited Herd Plan that relates to testing, removal of reactors, cleaning, disinfecting, and sanitation, shall apply to the Modified Accredited Area Plan."

Section 2694 of the Code, as amended by Section 5, Chapter 54, Laws of the 41st General Assembly, makes it the duty of the Department of Agriculture to enroll a county under the accredited area plan, but the statute requires said Department to notify the Board of Supervisors of such county of such enrollment. Section 6, Chapter 54 of the Laws of the 41st General Assembly, hereinbefore referred to, also makes it the duty of the Department of Agriculture to notify the Board of Supervisors of any county of the enrollment of such county under such plan.

Section 2702 provides as follows:

"Before any action is commenced under the second preceding section, (Section 2700 providing a penalty for the failure of any owner of breeding cattle in any county which has been enrolled under the accredited area plan to have his cattle tested) the board of supervisors of the county shall cause such owner to be served with a written notice of the provisions of the eight preceding sections, at least fifteen days before the commencement of the action."

It is, therefore, obvious that the final execution of the law rests with the board of supervisors. The members thereof are unquestionably vested with the duty of seeing that the law, in all its particulars, is fully carried out after the enrollment of the county under such plan.

We, therefore, answer your questions in the following way: It is the duty of the board of supervisors to require the retesting of infected herds as provided in the rules and regulations hereinbefore referred to, and the expenses of such test and indemnity for reacting cattle must be paid for as provided in the act itself.

HIGHWAYS: The county cannot vote upon paving the primary roads of the county oftener than once in twenty-four months, either under the provisions of Chapter 241 or Chapter 242, Code, 1924.

February 24, 1926. *County Attorney, Muscatine, Iowa:* We wish to acknowledge receipt of your favor of the 23d requesting our opinion on the following question:

"Muscatine County under the provisions of what is now Chapter 241, Code of 1924, on June 2, 1924, submitted to the electors of the county the proposition of hard surfacing the primary roads and issuing bonds therefor. I attach herewith a copy of ballot. At this election the propositions were both defeated.

"Section 4693 of Chapter 421 provides as follows: 'The question of hard surfacing shall not be submitted to a vote in any county oftener than once in twenty-four months.'

"A petition (sample attached) has been filed with the Board of Supervisors, signed by more than ten per cent of the total number of votes cast for governor, asking to submit under the provisions of Chapter 242, Sections 4756 to 4773, inclusive, Code of 1924, a program of highway improvement, providing for paving and graveling of all primary and county roads. Section 4771, Chapter 241, provides 'All the provisions of law with reference to voting primary road bonds and the issuance and sale thereof shall apply to bonds issued hereunder.'

"The question is: Can Muscatine County legally submit to the electors such a proposition within 24 months of the last election or before June 2, 1926? I am requested by the Board of Supervisors and by a representative of the Highway Commission to ask your office for an immediate opinion on this question."

An examination of the ballott submitted with your request, that was used at the election June 2, 1924, discloses that the question submitted was under the provisions of Section 4720. The section referred to only provides for the hard surfacing of the primary roads in the county.

Chapter 242, Code, 1924, to which you refer, was enacted as part of Chapter 25, Laws of the 40th Extra General Assembly. The title to this chapter, referring

to the body of the act, after enumerating the other provisions thereof, reads as follows:

"* * *, relating to the improvement of primary and county road systems and issuance of bonds therefor, and anticipating primary road funds for primary road bonds and county road funds for county road bonds, and relating to taxation for the payment of both kind of said bonds and the interest thereon, and providing a method additional to that now provided by law for improvement and maintenance of primary and county roads; * * *."

The law is contained in Chapter 242 provides for the surfacing of the primary roads and also for the surfacing of the county roads. Either proposition may be submitted to the voters or under the provisions of this chapter both propositions may be combined and submitted. It is the improvement of the county roads by surfacing and combining of the two projects that is additional to the other methods provided in the statute and which are contained in Chapter 241, Code, 1924.

Section 4771, contained in Chapter 242, reads as follows:

"Statutes applicable. All the provisions of law with reference to voting primary road bonds and the issuance and sale thereof shall apply to bonds issued hereunder, and all provisions of the primary and county road laws, respectively, shall apply to highway improvements made hereunder, all except as herein otherwise provided."

As stated in your request, in the provisions of Section 4693 of Chapter 241, there is a provision by which the submission of a proposition to hard surface shall not be submitted oftener than once in twenty-four months. Theer is no provision in Chapter 242, excepting the provisions of that chapter from the limitation imposed on hard surfacing by the section referred to. It was therefore the intention of the legislature to make the limitation imposed upon submitting questions of hard surfacing applicable to the provisions of Chapter 242 insofar as hard surfacing was concerned.

We are, therefore, of the opinion that the question of hard surfacing, whether it be under the provisions of Chapter 241 or Chapter 242, Code, 1924, cannot be submitted to a vote in any county oftener than once in twenty-four months. However, the additional method of improving the county road system under the provisions of Chapter 242 may be submitted within twenty-four months from the date that a question of hard surfacing the primary roads of the county was submitted.

SHERIFFS—DEPUTY: In counties where the county seat is in two places the chief deputy and the deputy in charge of the office and such other place as the court may be held is entitled to 65% of the sheriff's salary. A third deputy assisting the deputy in charge of the office is entitled to not to exceed $1,500.00 per year.

Feb. 25, 1926. *Auditor of State:* We wish to acknowledge receipt of your favor of the 23d requesting our opinion on the following proposition:

"On December 28, 1925, we wrote you a request for an opinion in regard to the legal salary of Deputy Sheriffs in Lee County and on January 25th we received a reply signed by Maxwell O'Brien in which he informed us that he did not gather fully all the facts concerning our request. We have since talked with him in regard to the matter and thought instructions had been given our examiner which would enable him to properly handle the matter. Just recently we have received a request from the examiner for a clear statement of our understanding as to the amount, if any, that should be charged back to the Deputy Sheriff at Keokuk who was really the third deputy and who has been drawing $1,755 per annum. Code section 5227 governs the salary of deputy sheriffs. Par. 3 of this section applies in Lee County and, we understand, makes it possible to pay the chief deputy at Fort Madison and the deputy in charge of the office at Keokuk, 65% of the sheriff's salary which under the opinion of the Attorney General's office given October 25, 1919, would be $2,100 plus $300 for sheriff's residence. This would make the maximum allowance for these deputies in question $1,560.

"Now the question arises, what is the limit of the allowance that can be made for the second deputy at Keokuk?"

Section 5227, Code, 1924, concerning the salaries of deputy sheriffs, reads as follows:

"Each deputy sheriff shall receive his annual salary in counties having a population of:

"1. Less than fifty thousand, and in any county where district court is held in but one place, not to exceed fifteen hundred dollars, fixed by the board of supervisors.

"2. Fifty thousand or over, sixty-five per cent of the amount of salary of the sheriff to be paid to the one designated by the sheriff as chief deputy, but in the event such amount exceeds eighteen hundred dollars, then to be reduced to said sum.

"3. In any county where district court is held in two places, for the chief deputy and for any deputy other than the chief deputy in charge of the office where such court is held outside the county seat, sixty-five per cent of the amount of the salary of the sheriff."

Lee county has a population of less than 50,000 and the sheriff has his residence in Fort Madison, and has to assist him the chief deputy at that place. There is also a deputy in charge of the office at Keokuk. The deputy in charge of the Keokuk office has a deputy to assist him. A reading of paragraph 3 of the section just quoted will readily disclose that the chief deputy and the deputy having charge of the office in Keokuk are limited to sixty-five per cent of the sheriff's salary, which would be in the case presented $1,560. There is no provision made in this paragraph of the statute for the deputy assisting the deputy in charge of the Keokuk office.

It is to be noted that the section quoted herein is the only statutory provision concerning the salary of deputy sheriffs. Paragraph 1, of this section fixes the compensation of deputy sheriffs in counties having a population of less than fifty thousand at not to exceed $1,500.00 per year. We are of the opinion that this paragraph determines the amount of the salary that may be paid to the third deputy sheriff in Lee county, or to any deputy other than the chief deputy and the deputy in charge of the office where court is held outside the county seat. The deputy in Lee County whose salary is questioned is, therefore, limited to a sum not exceeding $1,500.00 per annum.

CIGARETTES: A portion of the Cigarette License Fee may not be refunded even though the business of the permit holder is destroyed by fire.

February 26, 1926. *County Attorney, Council Bluffs, Iowa:* We have received your letter of February 24, 1926, in which you submit to this department a question submitted to you by the city attorney of Council Bluffs, Iowa. The letter of the city attorney is as follows:

"Under the statutes relating to the issuance of a Cigarette License, the city clerk of Council Bluffs, under direction and approval of the city council issued to Paul Mahler, license for the purpose of selling cigarettes in the lobby of the Grand Hotel. This permit was issued to him on *September* 23, 1925, and would have expired on July 1st, 1926. The Grand Hotel was consumed by fire. Mr. Mahler's business was likewise consumed in that conflagration which occurred on or about *December* 10, 1925. He had been operating under his permit about six weeks.

He has now made application to the City Council for a rebate or refund, of the unused portion of his license fee. The council is disposed to allow the refund if it can legally do so, figured on a pro-rata basis, repaying to Mr. Mahler the unused portion of the license fee. They are prompted to do this by reason of the fact that the fire destroyed his business and property without his own fault and he cannot now re-enter business at a desirable location.

Will you kindly supply us with your opinion as to the legality of the action of the Council in refunding to Mr. Mahler the unused portion of his license fee under these circumstances."

Section 1563 reads as follows:

"No permit shall be granted or issued until the applicant shall have paid to the treasurer of the city or town or county granting such permit, a mulct tax as follows:

1. In towns and other places outside any city or town, fifty dollars.
2. In cities of the second class, seventy-five dollars.
3. In cities of the first class, one hundred dollars.

Such mulct tax shall be paid for the period ending the first of July next following such permit and said permit shall become null and void if the holder thereof shall fail to pay a similar mulct tax on or before the first day of July each year thereafter, for the year then beginning."

There is no provision in this section or any other section of the statute permitting or requiring the refunding of any part of the tax therein provided for to the licensee, either when he abandons his business or it is destroyed by fire or other casualty.

Therefore, we are clearly of the opinion that the law does not permit the refunding of any part of the license paid under the facts stated in the letter of the city attorney. We believe this is made certain by the provisions of Section 1575 of the Code and Section 2, Chapter 146, Laws of the 41st General Assembly, which amended, revised and codified the said section 1575. The latter statute reads as follows:

"Upon the written request of the original purchaser thereof and the return of any unused stamps, *the treasurer of state shall redeem such stamps and cause a refund to be made therefor.* The treasurer shall prepare a voucher showing the amount of such refund due and the auditor shall draw his warrant on the treasurer for such amount. There is hereby appropriated out of any unappropriated funds in the state treasury a sum sufficient to carry out the provisions of this act. It shall be unlawful for any dealer to sell such unused stamps to any person whomsoever."

The provisions of this section, and the provisions of the original section, 1575, evidence an intention on the part of the legislature to provide for the redemption of unused stamps and a refund of the amount paid therefor. If it had been the intention of the legislature to grant to a permit holder the right to have a portion of the license fee or tax refunded under certain conditions it would have specifically so provided as it did for the redemption of unused stamps.

It is, therefore, our conclusion that no portion of said license fee may be refunded.

SCHOOLS: A school district cannot issue warrants for more than the amount estimated and appropriated in the fund upon which the warrants are issued for any one year.

February 27, 1926. *Director of the Budget:* We wish to acknowledge receipt of your favor of the 24th requesting our opinion upon the following proposition:

"The Director of the Budget requests your opinion with reference to the Independent School District of Creston issuing warrants to complete and equip a new school building, after the money voted by the people has been exhausted.

"Their statement is as follows:

"'First: In December, 1924, a bond issue was authorized at a special election in the amount of $275,000.00.

"'Second: When the bonds were offered for sale, it was found that this amount, together with prior bonded indebtedness, exceeded the statutory limit of $5,000.00. Therefore, bonds were issued amounting to $270,000.00, for the purpose of erecting and equipping a new school building.

"'Third: On January 28, 1924, a hearing was held under the budget law on the proposition of erecting a high school building, the estimated cost of which was $250,000.00, plus architects fees and cost of supervision.

"'Fourth: Contracts were let and later it was decided to revise the specifications to include certain changes, which increased the contract price somewhat.

"'Fifth: The school board has contracted for necessary equipment for the new building, amounting to $24,000.00 and find that this amount exceeds the balance left from the sale of bonds in the amount of $16,000.00. The Architects estimate on equipment was $27,000.00, but the board, by securing the lowest possible price, agreed to pay cash, thereby effecting a saving of $3,000.00.

"'Sixth: Having reached the limit of their bonded debt, the school board desires to know if they can legally issue warrants in the amount of approximately $16,000.00 in anticipation of the collection of taxes in the school house fund, covering a period of about three years.

"'The District now levies a school house tax sufficient to pay bonds and interest coming due and create a surplus of $6,000.00 each year. It is with this surplus that they propose to redeem the warrants if they are permitted to issue them.'"

This department has repeatedly held, under the statutes of this state that a municipal corporation cannot expend or anticipate from any fund more than the amount estimated and appropriated therefor for the year.

We are of the opinion that the statutes so interpreted are applicable to the statement of facts submitted by you, and that the school district cannot issue warrants for $16,000.00 or any other amount which is greater than the amount estimated and appropriated for that particular fund upon which the warrants are issued for the year.

SCHOOLS: The last day of filing nomination papers for school election is seven days prior to the date of election, excluding the day of election.

March 2, 1926. *Superintendent of Public Instruction:* You have orally requested this department to prepare an opinion construing Section 4201 of the Code, relating to the filing of nomination papers for candidates for office in certain school districts. The statute reads as follows:

"The names of all persons nominated as candidates for office in each independent city or town and consolidated district shall be filed with the secretary of the school board not later than noon of the seventh day previous to the day on which the annual school election is held. Each candidate shall be nominated by a petition signed by not less than ten qualified electors of the district."

The answer to your inquiry depends upon the construction or meaning of the phrase "noon of the seventh day previous to the day on which the annual school election is held." Under the provisions of Section 4194 of the Code a meeting of the voters of each school corporation shall be held annually on the second Monday in March for the transaction of the business thereof.

The word "previous" has been defined to mean "before and up to." *State v. Gunagy*, 84 Iowa 177. The word "previous," as defined in the opinion of the court in the above authority, was used in a criminal statute, but we believe the meaning therein given to it is also applicable to the word as found in the statutes under consideration.

We are, therefore, of the opinion that in determining the last day of filing nomination papers, we must determine the seventh day prior to the date of the election, excluding the day of election—namely, March 8, 1926. The seventh day, therefore, previous to the day of election is Monday, March 1, 1926.

ELECTIONS—CITIES—MUNICIPALITIES: Sisters in Catholic Institutions must vote under their baptismal names instead of their assumed names.

March 3, 1926. *Auditor of State:* We have received a letter from F. A. Garnsey, the city clerk of Sioux City, Iowa, in which he submits to this department a question relating to the election laws of the state. The question submitted has refer-

ence to municipal elections and may again be submitted to this department. Because of this fact we have concluded to prepare an opinion for your department and mail a copy thereof to the city clerk. The letter of Mr. Garnsey reads as follows:

"The question has arisen in this city regarding the Sisters in the various Catholic Institutions voting under the names they assumed when they joined the Catholic Institutions. For illustration, their maiden name was Mary Jane Fitzgibbons, and after taking the veil she gives up her maiden name and is known as Sister Mary Josephine. In the past there has never been any question regarding the sisters voting under the name of Sister Mary Josephine.

The opinion of our City Attorney is, they have the right to vote under the name of Sister Mary Josephine, but in the absence of a Supreme Court Ruling, I would consider it a great favor if you would give me an opinion at your earliest convenience that I may advise the voters of Sioux City before the election, which is March 16, 1926."

We have been unable to find any opinions of the Supreme Court directly bearing upon or definitely settling the question you have submitted. However, we believe that a reference to some of the statutes of the state will solve this question. Section 800 of the Code of 1924, which is a part of Chapter 40, entitled the "method of conducting elections," provides as follows:

"*The name of each person,* when a ballot is delivered to him, shall be entered by each of the clerks of election in the poll book kept by him, in the place provided therefor."

Under the common law a person may assume a name other than his own, and transact business, execute contracts, issue negotiable paper and sue or be sued, in his assumed name. The rule is stated in Cyc. as follows:

"Without abandoning his real name, a person may adopt any name, style, or signature, wholly different from his own name, by which he may transact business, execute contracts, issue negotiable paper, and sue or be sued. Such assumed or fictitious name may be either a purely artificial name or a name that is or that may be applied to natural persons.

It is a custom for persons to bear the surnames of their parents, but it is not obligatory. A man may lawfully change his name without resort to legal proceedings, and for all purposes the name thus assumed will constitute his legal name just as much as if he had borne it from birth." 29 Cyc. p. 270, 271.

While the rules just stated prevail under the common law, we believe that these rules have no application in this state for the reason that we have a statute which provides in what manner a person may change his name. We refer to Chapter 543 embracing Sections 12645 to 12657, both inclusive. We are of the opinion that this statute is exclusive of any other method and excludes the common law rules hereinbefore stated. For some purposes a person may be precluded from disputing that a name assumed by him is his true name. This rule, however, in our opinion, was adopted for the purpose of protecting the rights of those who deal with a person under the assumed name.

McDonnell v. Winthrop State Bank, 179 Iowa 551.

We are, therefore, constrained to hold that under the facts stated in your letter the Sisters in the various Catholic Institutions must vote under their original or baptismal names and may not vote under the name which they assumed at the time they entered such institutions. To use the illustration in your letter—Mary Jane Fitzgibbons must vote under that name and cannot vote under the name of Sister Mary Josephine, unless the right to use the assumed or new name has been obtained by a compliance with the statutory provisions hereinbefore referred to. We assume that a sister in one of the Catholic Institutions assumes the new name for purely religious purposes and not with the intention of making it her legal name, and if she did intend to change her legal name, as distinguished from the one assumed for religious purposes, she would have complied with the provisions of the statute. We see no escape from the conclusion that she should vote under her baptismal or original name.

BOVINE TUBERCULOSIS: (1) The Secretary of Agriculture may not count any agreements that were filed before the beginning of the two year period prescribed in the statute. (2) Where an election is held the defeat of the proposition for the establishment of an accredited area plan does not affect the enrollment of a county under the county area plan.

March 3, 1926. *Secretary of Agriculture:* We have received your letter of February 20, 1926, in which you request this department to prepare an opinion upon the question which you have stated as follows:

"We have a peculiar situation, which has developed in Delaware County, one of the counties first enrolled under the county area plan, in the fall of 1923.

Owing to heavy infection and consequent lack of funds, the testing has not progressed as fast as in other counties. Therefore, seventy-five per cent of the owners of breeding cattle in the county had not signed the agreements or petition at the end of two years.

According to Section 2695, Chapter 129, Code of 1924, as amended by the 41st General Assembly, the Secretary of Agriculture in passing upon the sufficiency of the petition for establishing a county as an accredited area shall count all agreements which have been filed in his office within a period of two years preceding the date of final determination.

Is it, therefore, to be assumed that the original petition, after a lapse of two years, cannot be considered in determining the sufficiency of signatures for declaring the county an accredited area or does this only mean that any objectors may have the right to remove their names from the petition at the hearing, if they so desire.

In view of some such difficulties, it has been suggested that the question of whether the county be enrolled on the area basis be put to vote in the county, this coming November. Can this be done and if so and the measure defeated, would it annul the 51% basis, under which we are now working?"

Section 6 of Chapter 54, Laws of the 41st General Assembly, which repeals Section 2695 of the Code and enacts a substitute therefor, contains the following statements:

"In passing upon the sufficiency of the petition for establishing the county as an accredited area the secretary of agriculture shall count all agreements *which have been filed in his office within a period of two years preceding the date of final determination.*"

This particular part of the statute is unambiguous. Under its provisions, the Secretary of Agriculture may not count any agreements that were filed before the beginning of the two year period therein prescribed. If those who sign prior to that time desire to have their names counted in determining the enrollment or establishing of the county as an accredited area, they should sign new petitions within the two year period.

Section 2697 provides for the establishment of a county under the accredited area plan by a vote of the people. Section 2698 reads as follows:

"If the proposition received 65% of the votes cast at such election the board shall notify the department, which shall enroll the county under the accredited area plan."

The proposition submitted at an election has no reference whatever to the county area plan, but only the proposition of enrolling the county under the accredited area plan. Therefore, the result of the election can have no possible effect upon the enrollment under the county area plan. The enrollment of the county under

such plan is final and the defeat of the proposition to establish the accredited area plan will not have the effect to nullify or set aside such enrollment.

Your second question must, therefore, be answered in the negative.

WAREHOUSE CERTIFICATES: Operation of the warehouse certificate act discussed.

March 3, 1926. *Secretary of Agriculture:* We have received your letter of February 20, 1926, requesting this department to prepare an opinion upon the questions which you have stated as follows:

"In consideration of the large number of warehouse certificates outstanding in the state, the Department of Agriculture should adopt or formulate uniform rules for method of their cancellation and release.

"The following parties are to be considered in the original transaction of issuing warehouse certificates:

Department of Agriculture
Sealer of Warehouse Board
Owner of Grain or Borrower
County Recorder
Mortgagor;

and it is their part in the release of the certificates that we wish to ascertain.

"The sealer of the warehouse board may be considered the department's agent. His job is that of sealing the grain, issuing the certificate and making monthly inspection trips.

"The time arrives when the owner wants to sell his grain to take up his loan.

"Arrangements are made between mortgagee and the mortgagor for the sale of the grain to an elevator at a point designated on the certificate.

"Should the mortgagor notify the sealer to remove the seal or may the owner break the seal by notification to the sealer that the bank will have their loan satisfied by the sale of the grain at a certain elevator?

"May the mortgagor make out a reassignment of the certificate on the back of the certificate in place marked 'Endorsement' to the original owner, sending to the elevator to be turned over to the owner when the elevator has collected the amount of the loan due the mortgagor?

"Would it then be in order for the owner to turn this 'proof or satisfaction' over to the county recorder, in this manner releasing the certificate in the county recorder's file?

"Is it in order for the county recorder to charge a fee for making record of the re-assignment?

"If in your opinion the above procedure would be the simplest method of taking up the certificates, how would you recommend that the Department of Agriculture should receive notice as to the cancellation of the various certificates?

"The Department of Agriculture, as you know, holds insurance policies on each certificate, which should be returned to the owner.

"Would you recommend that the banks notify the department of the satisfaction of their loans or if the sealer should do this—what method would you recommend, so that the banks will be sure to notify the sealer that the grain is released?"

Chapter 427 of the Code to which you refer, relates to unbonded agricultural warehouses. Under the provisions of this chapter, the owner of the grain may cause the same to be sealed in an unbonded warehouse by a sealer, duly appointed and qualified as in the chapter provided. Once the grain is sealed, the local board issues warehouse certificates in duplicate. The original warehouse certificate is a negotiable instrument. The duplicate certificates are for convenience only. One of the duplicate certificates is filed with the recorder, and properly indexed, thus making a record, which, under the law, constitutes constructive notice of the existence and negotiation of the original warehouse certificate.

The law provides for the unsealing of the warehouse in cases of emergency, such as fire, etc., but contains no other specific provision whereby the grain, once sealed, can be unsealed.

The question before us for determination is, therefore, just how can the grain be unsealed upon the redemption of the warehouse certificate, or for the purpose of providing funds with which to redeem such warehouse certificate.

You are advised that the grain can be unsealed whenever the holder of the warehouse certificate of record consents thereto. Such consent should be in writing, and a copy of such consent delivered to the original owner of the grain and a copy to the purchaser with such instructions to such purchaser as the holder of the warehouse certificate may deem advisable to give.

Once the warehouse certificate has been redeemed, the then holder of record of the warehouse certificate should reassign the same to the original owner and in such assignment specifically release the same. The county recorder, upon receiving the original warehouse certificate with such reassignment and release should enter such reassignment and release upon the duplicate of record in the office of such recorder and the duplicate and the orginal should then be delivered to the original owner of the grain.

The only other question submitted by you has relation to the release of the insurance policy in your office. You are not authorized to release the insurance policy in your office until there is produced either a certificate from the county recorder to the effect that the warehouse certificate has been released in the manner provided in Section 9777 of the Code or upon the delivery to you of the original warehouse certificates showing the same so released. Upon receipt of evidence of this kind you would be authorized to return the insurance policy, entering upon the duplicate receipt filed in your office the facts and returning the original warehouse receipt after released, to the owner.

As I understand, your department already has adopted a custom of releasing the insurance policy or policies upon notification by the official sealer of the release of the original warehouse certificate. There is nothing wrong with a continuance of this policy, and the other suggestion is solely to meet contingencies which may arise and to also present another method of releasing the insurance policy.

BANKS—INTEREST: A note payable on the amortization plan, wherein the maximum legal rate of interest is charged and collected in advance, is usurious.

March 5, 1926. *Superintendent of Banking:* Referring again to your favor of the 22d ult. in which you requested our opinion upon the question submitted to you by the Toy National Bank and associated banks of Sioux City, we wish to state that we have heard directly from the Toy National Bank and they have furnished us with the information desired.

It appears that the Farmers Loan & Trust Company or the Toy National Bank, with which it is associated desires to make certain loans not to exceed $300.00 upon personal security, the bank to handle the loan in the following manner: As an example, we assume a person borrows $100.00, payable in one year. This would be discounted at six per cent, the bank paying out in advance the six per cent interest and charging an investigation fee of $2.00 making a total charge of $8.00. The borrower would then receive $92.00 in cash and the $100.00 note would be payable in twelve equal monthly installments of $8.33 per month, with no additional interest charges. Should any of the installments become past due, the whole amount of the note is to be deemed due and payable at once; and if any installment remains unpaid for thirty days or more, the bank to charge additional interest upon past due installments, or the total amount of the note declared due. However, if the note is paid as stipulated, no other additional interest or other charges will be made.

We are of the opinion that the provision in this form of note whereby the principal is retired on installments would make the transaction usurious. It will be readily apparent that by decreasing the amount of the principal due, even to a small extent, that the interest charged will immediately become illegal and usurous. The Supreme Court of Arkansas in the recent case of *Castleberry et al. v. Weill*, 219 SW, 739, passed upon a transaction in many respects identical with the one presented by the Toy banks. The note in the cited case was payable ten months after due, providing, however, for payments at $50.00 per month until paid. The maximum rate of legal interest was charged upon the principal sum due and deducted in advance. The decision of the court is aptly put in the syllabus which reads as follows:

"Where note calling for ten per cent interest was payable ten months from date, but providing for payment of note in installments during such ten months' period, the withdrawing or deducting from face of note of ten per cent interest for the full ten months constitutes usury; more than the legal rate of interest being charged thereby, in view of payment of note in installments."

We are of the opinion that the Supreme Court of this State would follow the reasoning in the cited case.

OSTEOPATH: An Osteopath is not entitled to engage in the business of fitting eye glasses under the present statutes.

March 8, 1926. *County Attorney, Centerville, Iowa:* This department is in receipt of your letter dated March 3, 1926. In this letter you request an official opinion. Your letter is in words as follows:

"I would like the opinion of your department on the following matter:
"An osteopath of this city has for many years past been engaged in the fitting of eye-glasses. A local optometrist, relying on Section 2574, desires to prosecute the osteopath should he in the future resume the fitting of glasses. However, the osteopath takes the position that under the old law he had a legal right to fit glasses and that once having had the right that Section 2574 would not deprive him of it. I might say that the osteopath has discontinued the practice pending a ruling from your department, as to whether he would be liable to criminal prosecution should he resume the practice of fitting glasses."

You are advised that under the statute an osteopath cannot engage in the business of fitting glasses. The state has a perfect right at any time to change any statute relating to any of the professions. This is an inherent right of the state in the exercise of its police power.

SCHOOLS: The Board of Directors of a school corporation may indemnify for school books and supplies destroyed through the concurrent action of the Board of Directors and Board of Health in suppressing an epidemic.

March 10, 1926. *County Attorney, Humboldt, Iowa:* We wish to acknowledge receipt of your favor of the 27th requesting our opinion as follows:

"We have been having a siege of Scarlet Fever in Humboldt County this winter, and in Corinth Township it was deemed necessary by the school board and the local Board of Health that all books, tablets, etc. used in the school during the time that a number of the children were taken sick with the Scarlet Fever should be burned, and the health physician of the township recommended to the local Board of Health that said property be disposed of by burning. The local Board of Health took appropriate action, ordering said property destroyed by burning and the subdirector of the school district did burn the books, tablets, etc. The question now arises as to who should stand the expense of procuring the new books and supplies."

The action taken by the Board of Health is authorized by the statutes of this State. The school board acted properly in co-operating with the Board of Health in the action taken. We are of the opinion that the school board may pay from the general fund the cost of replacing the books, tablets and other school supplies that were destroyed by the concurrent action taken.

TAXATION: Board of Supervisors has no authority to remit taxes because it is their opinion that the property has been over-assessed. Any mistakes of a clerical or ministerial nature may be corrected by the county auditor.

March 12, 1926. *County Attorney, Algona, Iowa:* We wish to acknowledge receipt of your favor of the 8th in which you request our opinion upon the following proposition:

"It has long been customary for the Board of Supervisors in this County by resolution to direct a rebate where an erroneous assessment was made and where a recommendation was first had by the local board of review. The State checkers have made some objection to this, claiming that where an erroneous assessment as to value was made—as for instance, where one foot of ground was taxed $500, as occurred in a matter at Lakota in this county—that the party should have appealed to the board of review and then to the Court, and that the Board of Supervisors should not grant these rebates even though it appear that a serious mistake has been made. The law, of course, is clear as to the matter of valuations but these are places where no assessment roll was signed and the assessor merely made a serious blunder as in the case of assessing the one foot of ground for $500 where it should have been $5.00."

Any clerical errors such as the one referred to in your request wherein the assessor erroneously fixed the value of a small piece of ground at $500.00 when it should have been $5.00 may be corrected by the county auditor. If there is a dispute as to the value and not merely a clerical error in entering the amount, then the taxpayer must pursue the remedy provided by statute by appeal from the board, etc. The Board of Supervisors have no statutory authority to make rebates in cases where they believe property is assessed at a higher rate than it should be.

SCHOOL ELECTIONS: Where there are three directors to be elected, one to fill a vacancy, and there are three candidates but no candidate is designated or nominated for the vacancy, no one may be considered elected to fill the vacancy.

March 13, 1926. *Superintendent of Public Instruction:* We have received your letter of March 11, 1926, in which you submit to this department a certain inquiry with reference to the school laws of the state. As we understand the facts they are as follows:

Sometime prior to the annual meeting in March one member of the Board of Directors of an independent school district resigned. At the annual meeting there were three candidates for the office of Director. Two directors for full terms were to be elected. No one of the three candidates was nominated for the unexpired term.

You want to know whether the one receiving the lowest number of votes was elected to fill the vacancy caused by the resignation of one of the members. We have grave doubts about whether the member was elected to fill the vacancy. In fact, as no candidate was designated or nominated to fill the vacancy, we believe that the three candidates were nominated for the full terms. We suggest, however, that the members of the school board should elect the third candidate as a Director to fill the vacancy caused by the resignation of the member. This course will, therefore, settle any controversy as to his right to become a member of the board.

HIGHWAYS: Bridge funds after the portion thereof necessary for bridge purposes is set aside may be used in the payment of bonds issued under the provisions of Chapter 242.

March 13, 1926. *Chief Engineer, Iowa State Highway Com.:* We have received

your letter of March 9, 1926, in which you submit to this department the following inquiry:

"Chapter 242, Code of 1924, provides a means by which a county can vote bonds for improving county and (or) primary roads.

"In connection with the proposed bond issue in one of the counties under this chapter, the question has been raised as to whether any part of the county bridge funds may be used to defray the cost of maintaining county roads in case such bond issue carries. Section 4767 and Paragraph 4 of Section 4761 appear to bear on this subject. These sections are not clear to us. Accordingly we are writing to ask your opinion on the following question:

"In case a county votes bonds under the provisions of Chapter 242, Code of 1924, for improving county roads, is any portion of the county bridge fund thereby made available for use in the maintenance of county roads, exclusive of bridge and culvert work on said roads?"

Subdivision 4 of Section 4761, which contains the form of the ballot, reads as follows:

"* * 4. And shall all the county road, drainage, and bridge funds coming into the county treasury from taxes and all other sources, except such as are required for the maintenance of such roads, the construction of bridges and miscellaneous expenditures, be appropriated and used for the payment of said county road bonds and interest thereon."

Under the provisions of the above portion of the statute all bridge funds, together with county road and drainage funds, except such bridge funds as are required for the construction of bridges, shall be appropriated and used for the payment of said county road bonds and the interest thereon. Therefore, the bridge funds, except such as may be needed or required for the construction of bridges, may be set aside for the payment of the bonds that were issued pursuant to the vote of the electors and the interest thereon.

Section 4767 reads as follows:

"If at said election the said proposition as to county roads or as to both county and primary roads, carries, the board of supervisors shall make a budget of the county road, the county road drainage and the county bridge and culvert funds separately and shall set aside funds for each of said purposes sufficient for the maintenance and drainage of the county roads and the building of necessary county bridges and culverts."

It will, therefore, be noted that if the propositions submitted to the voters carry, the board of supervisors shall make a separate budget of the following funds: (1) the county road, (2) the county road drainage and (3) the county bridge and culvert funds. It is also their duty to set aside for each of said purposes sufficient for (1) the maintenance and drainage of the county roads and (2) the building of necessary county bridges and culverts. It is, therefore, apparent that it is the duty of the board of supervisors if the plan provided for in Chapter 242 is adopted by the voters to set aside each year the amount necessary to carry on the building of necessary county bridges and culverts and the balance of said bridge fund may be appropriated for the purpose of paying the bonds therein provided for and the interest thereon. We find no provision in this statute authorizing the use of any part of the bridge funds for the maintenance of the highways as distinguished from the improvement or construction of bridges.

We are, therefore, of the opinion that your inquiry must be stated in the negative.

TAXATION: Compensation money not exempt from taxation or collateral inheritance tax.

March 15, 1926. *County Attorney, Decorah, Iowa:* We wish to acknowledge receipt of your favor of the 11th requesting our opinion on several questions, which

we will answer in the order presented. You first inquire whether or not pension money received by a veteran of the civil war is subject to assessment and taxation. We are of the opinion that this question should be answered in the affirmative. You next inquire whether or not the proceeds from a war risk insurance policy being paid to the brother of the insured, is subject to assessment and taxation. This must also be answered in the affirmative.

You next inquire whether the proceeds of such policy is subject to the collateral inheritance tax, and we are of the opinion that this should also be answered in the affirmative.

Section 6946, Code, 1924, provides certain exemptions for soldiers, sailors and marines engaged in the various wars and it is because of the exemptions provided in the section referred to that pension money and the funds from insurance policies upon the lives of soldiers, sailors and marines are not exempt from taxation; the section referred to granting exemption to this class in various amounts, whether these amounts are made up from pension money or other sources.

HIGHWAYS: Plans, specifications, surveys and reports made in connection with the plan for improvement of county roads adopted under the provisions of Chapter 242, Code, 1924, must be submitted to the Highway Commission for their approval. The plans for highway improvements, under the provisions of this chapter, however, need not be submitted for approval. Plans and specifications for county bridges and culverts are not to be confused, and are under the supervision of the highway commission.

March 15, 1926. *County Attorney, Washington, Iowa:* Last week by telephone you requested the opinion of this department as to whether or not the State Highway Commission was required to approve plans and specifications for the improvement of county roads when such improvement is authorized by the voters under the provisions of Chapter 242, Code, 1924.

Section 4771 of Chapter 242, reads as follows:

"All the provisions of law with reference to voting primary road bonds, and the issuance and sale thereof, shall apply to bonds issued thereunder, and all provisions of the primary and county road laws, respectively, shall apply to highway improvements made hereunder, all except as herein otherwise provided."

There is no provision in the chapter referred to limiting or restricting the functions of the State Highway Commission in respect to the improvement of county roads as authorized therein, from the general supervision and control that the commission has over county roads generally. Turning then to the provisions of Chapter 240, Code, 1924, it will appear that surveys and plans for improvement of the county roads are to be submitted to the State Highway Commission. Concerning the surveys and reports, Section 4645 provides:

"The survey and report of each section, as soon as completed and approved by the Board of Supervisors, shall be submitted to the State Highway Commission, and the Board of Supervisors may designate to the said commission what sections in their estimation, should be first passed upon by said State Highway Commission. The said commission shall pass on such reports and plans and in so doing, shall take into consideration the thoroughness, feasibility, and practicability of such plans, and may approve and modify the same."

Section 4646 provides:

"After such survey and plan for each section is passed upon by the State Highway Commission, they shall be returned to the county auditor with full and explicit directions as to modifications if any. The auditor shall record the same at length in a county road book, and the work shall be done in accordance therewith."

Applying the provisions of the statute hereinbefore referred to, it is plain that the plans and specifications, surveys and reports made in connection with the

plan for the improvement of the county roads, adopted under the provisions of Chapter 242, must be submitted to the Highway Commission for their approval or modification, as the case may be. There is nothing in the statute, however, which requires that the plan for county highway improvements, under the provisions of Chapter 242, be submitted to the Highway Commission for approval or modification.

The plans and specifications for county bridges and culverts must not be confused with the plan for county road improvement under the provisions of Chapter 242. Sections 4671 and 4672, Code, 1924, give the State Highway Commission supervision over the plan for county bridges and culverts.

JUSTICES OF THE PEACE: Two justices of the peace are to be elected in each civil township. If an incorporated town is within a civil township and it has not been set off as a separate civil township, justices are to be elected from all the territory.

March 16, 1926. *County Attorney, Monona County:* We wish to acknowledge receipt of your favor of the 15th requesting our opinion in substance as to whether or not justices of the peace should be elected in an incorporated town which comprises a part of a township, and also be elected in the territory of the township outside of the incorporated town.

Section 523, Code, 1924, provides as follows:

"In all townships, except such as are included in the territorial limits of municipal courts, there shall be elected, biennially, two justices of the peace and two constables, who shall hold office two years and be county officers."

Chapter 283, Code, 1924, providing for the boundaries of townships, authorizes the Board of Supervisors to divide a township having a city or town with the population exceeding fifteen hundred within its limits, into two townships, one to embrace the territory without, and the other the territory within the incorporated limits. If this has been done, then there are in fact two townships, and under the provisions of the section first quoted, two justices of the peace are to be elected in both townships. If, however, the territory has not been divided and comprises but one township, then but two justices of the peace are to be elected within the territory.

ELECTIONS: Voters residing in a township in which an incorporated city or town is located, when the incorporated city or town is not set off as a separate civil township, shall vote for all township officers except assessor.

March 16, 1926. *Auditor of State:* I wish to acknowledge receipt of your favor of the 15th in which you request our opinion on the following proposition:

"Is a resident of an incorporated town that is included within the same voting precinct with the township in which the incorporated town is situated, entitled to vote for any township officer?

Is a resident of an incorporated town that is included within the same voting precinct with the township in which the incorporated town is situated, qualified to hold any township office?"

The statutes provide the Board of Supervisors may divide a township in which a city or town of fifteen hundred or more inhabitants are located, into two civil townships,—one township comprising the city or town, and the other the territory of the township outside of the city or town; thus making two distinct townships.

A voter residing in one township cannot vote for township officers in another township. If the city or town, however, is not set off as a separate civil township, but is included within the territorial limits of a civil township, the residents of the city or town would be eligible to vote for any township officers to be elected in the township of which the city or town is a part, with the exception of the office

of township assessor. Section 525, Code, 1924, relating to election of a township assessor provides in part as follows:

"In townships embracing no city or town, the election shall be by the voters of the entire township. In townships embracing a city or town the election shall be by the voters of the township residing outside of the corporate limits of such city or town. Such assessor shall be a resident of the territory of the township outside such city or town."

In order to be eligible to hold office, the person must be a resident of the township in which he seeks to be elected. In other words, a resident of one township would not be eligible to be elected to a township office in any other township than that of his residence.

BOARD OF SUPERVISORS: The Board of Supervisors who were in office at the time an action was taken and made of record, may subsequently and within a reasonable time correct the record to show the true facts. Under particular facts it is deemed advisable to have a new hearing so that the question of intervening rights may not be involved.

March 17, 1926. *County Attorney, Fairfield, Iowa:* We wish to acknowledge receipt of your favor of the 8th requesting our opinion upon the following proposition:

"Can a Board of Supervisors upon discovery of an error in its records, modify and correct the record so as to express the intent of the board even though this will result in a complete change of its former action."

An examination of the statutes of this state will disclose that there is no statutory provision providing any means or procedure for an action of this kind. It is elementary, however, that courts and boards or bodies required to keep official and public records, in the absence of a statute prohibiting such action, may amend or correct their records so that the record will correctly show the true facts. It seems to be the general rule that such an amendment or correction must be made by the officer charged with the duty of making the record at the time the error was made. In other words, an error made in an official record could not be corrected by an officer after he leaves the office. (34 Cyc. 591).

It is also the general rule that where a record is corrected or amended to conform to the true facts, the correction takes effect only from the date of the correction, and that such amendment is without prejudice to the rights of third parties acquired during the existence of the defect. It is said in 34 Cyc., 592, that the amendment or correction "cannot deprive an innocent party of the benefit of the record as originally made." This also seems to have been the opinion of the Supreme Court of Iowa as expressed in *Ridley v. Doughty*, 85 Iowa, 418, 421, where it is said:

"The remaining question to be determined is, did the resolution of the board of supervisors, made after this suit was commenced, affect the rights of the plaintiffs to have the correction made? It appears that the order made in June, 1887, reducing the assessment, was properly entered upon the record. At the next meeting the proceedings of the June meeting were read, and, on motion, approved. The resolution of the board made in August, 1888, was made by a body not composed of the same members. There was a change in one of their number, and one of the original members voted against the amendatory resolution. It is doubtless true that errors in the proceedings of a board of trustees or board of supervisors may be corrected. But resolutions of the board, once adopted, and afterwards read and approved, and after the lapse of a year, and after the board has been partially changed by the retiring of one member and the election of another, ought not to be repealed on the ground that it was erroneously entered, upon the mere memory of the members of the board, and without notice to the parties affected thereby. Such a proceeding would render public records of but little force as against the memory of

a part of the officers under whose direction the records are made. In our opinion, the evidence of the proceedings by which the record was changed was properly rejected by the court. It is to be remembered that what the board attempted to do was not a correction of the record by adding thereto, but it expunged a resolution from the records on the ground that it was not passed by the board, and the act, if sustained, would increase the taxation of real estate in the incorporated town in a large amount. We find no authority in any adjudged case for such an exercise of power."

The Supreme Court of this state has upon two other occasions passed upon the right of the Board of Supervisors to amend a record. In *Beatle v.* Roberts, 156 Iowa, 575, at 580 the court said:

"That such a body may so amend its record as that it shall speak the truth cannot well be questioned. *Tod v. Crisman*, 123 Iowa, 693. See *Mann v. City of Le Mars*, 109 Iowa, 251."

This question was passed upon in the case of *Tod v. Crisman*, cited in the quotation above, the court saying:

"In a proper case no good reason is perceived for denying an officer the right to so correct his record as that it shall speak the truth."

We are therefore of the opinion that the Board of Supervisors who were in office at the time the original action was taken or record made, may subsequently and within a reasonable time correct the record so as to show the true facts.

In your letter it appears that this question arose because of the fact that the Board of Supervisors of your county is of record as having refused to establish a certain drainage district, while as a matter of fact the board did establish the district. It is a correction of this record that is sought to be made. We would advise that the safe and best procedure would be to have the hearing anew, with notice to all parties as required by statute, so that there can be no question as to intervening rights involved.

MOTOR CARRIER: There are two classes of motor carriers, freight and passenger. A certificate of convenience issued to a carrier for the purpose of transporting passengers does not authorize the transportation of freight under the statutes.

March 18, 1926. *Board of Railroad Commissioners:* We wish to acknowledge receipt of your favor of the 15th requesting our opinion upon the following questions:

"1. In the case of a motor carrier who holds a Certificate to transport passengers only, and who desires to also transport newspapers for compensation in his passenger carrying vehicles, can this Board grant such additional authority without first holding a hearing and making the finding required by Chapter 5, Laws of the Forty-first General Assembly?

"2. In the case of a motor carrier who holds a Certificate to transport passengers only, and who desires to also transport a limited amount of freight, usually termed express, for compensation in his passenger carrying vehicles, can this Board grant such authority without first holding a hearing and making the finding required by said Chapter 5?"

The Motor Carrier Law is contained in Chapters 4 and 5, Laws of the Forty-first General Assembly. A reading of the statutes as contained therein will show that the legislature clearly contemplated two classes of carriers,—freight and passenger. A certificate of convenience, under the statutes, may be issued by the Board of Railroad Commissioners for either or both classes. A certificate authorizing the carrier to engage in the transportation of passengers would, under the statute, not authorize the carrier to engage in the transportation of freight, and the converse would be equally true.

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. So. Pac. Co., 132 Federal, 829, 838;
The Nassau, 188 Federal, 46, 48;
Noyes v. Canfield, 27 Vt., 79, 85.

We are, therefore, of the opinion that the motor carrier cannot engage in the transportation of freight without procuring a certificate authorizing it to engage in this line of business; this certificate to be obtained in the manner provided by the statutes. Neither can there be any distinction drawn between the various articles of freight which may be transported.

BOVINE TUBERCULOSIS: Board of Supervisors has no right to reduce the amount of the indemnity for slaughtered cattle.

March 20, 1926. *Division of Animal Industry, Department of Agriculture:* We have received your letter of March 15, 1926, enclosing a letter from J. A. Swan, Auditor of Appanoose County, Iowa, in which the auditor asks for an opinion upon the question therein stated. The letter of the county auditor is as follows:

"We have your statement of claim for V. D. Hall of Centerville, Iowa, for two reactors, amount $200.00. The Board of Supervisors have reduced it to $100.00 and he does not think it right. Should he be allowed the full amount, $200.00, or does the board have the right to reduce same as they see fit? And is the county to pay the full amount you certify to on the abstract of voucher?"

Section 2671 of the Code, as amended by Chapter 55, Laws of the 41st General Assembly, is as follows:

"When breeding animals are slaughtered following any test there shall be deducted from their appraised value the proceeds from the sale of salvage. When breeding animals are slaughtered following a first test under this chapter, there shall also be deducted five per cent of the appraised value of the breeding animals tested.

"The owner shall be paid by the state one-third of the sum remaining after the above deductions are made.

"The state shall in no case pay to such owner a sum in excess of fifty dollars for any registered pure bred animal or twenty-five dollars for any grade animal."

The above statute provides a method of determining the exact amount that must be paid to the owner of cattle slaughtered under the provisions of the statute. This method may not be varied, changed or abandoned. The provisions of the statute are plain and mandatory.

Therefore, we are clearly of the opinion that the board of supervisors has no right to change or reduce the amount of compensation therein provided for.

NOTES—BANKS AND BANKING: A provision in a note waiving the exemption of the homestead is not void and does not render the note non-negotiable.

March 22, 1926. *Supt. of Banking:* You have requested the opinion of this department upon the following statement of facts:

"Enclosed you will find sample of note sent in from Independence. You will notice the one statement in the note in brackets. We will appreciate an opinion from you as to the value of that clause.

Would also ask whether or not, in your opinion, the insertion of that clause affects the negotiability of the note.

In case of bankruptcy of the maker of such a note, and in case he claims exemption, would the holder of a note of this kind have any advantage?

We would appreciate an opinion, when the note is signed by the husband only, and also by husband and wife."

That part of the note which you have enclosed, so far as pertinent to this opinion, reads as follows:

"We expressly waive the exemption of our homestead from judicial sale on this contract and expressly stipulate and agree that our homestead may be sold on execution, the same as other property, to satisfy this contract or any judgment rendered thereon. If suit is commenced, a reasonable amount for attorney fee to be paid or taxed with the costs."

We will first consider the value to be given to this provision of the note. In the case of *Curtis v. O'Brien*, 20 Iowa 376, the note in question provided as follows:

"without the benefit of exemption laws or stay of execution."

This provision in the note was held to be void as against public policy in that the statutes of this State provided for the various exemptions, and that it was the duty of the Court to enforce the said exemptions and to allow the same to debtors. That a contract waiving the said exemptions would be undertaking to agree upon a form of writ to be entered by the Court or upon a judgment or decree to be entered by the Court, the provisions of said decree would be of such a character that they could not in fact have been entered by the Court itself. In other words, the parties undertook to do by contract and agreement what the Court could not itself do by its own order, and therefore, such an agreement was held to be void as against public policy. This decision has been reaffirmed in numerous cases in this State and is undoubtedly the present law.

It has also been held that a confession of judgment containing a stipulation consenting to execution issuing against any of the property of the defendants was invalid and void.

Rutt v. Howell, 50 Iowa 535.

And so, in the case of *Maguire v. Kennedy*, 90 Lowa 272, where the note provided as follows:

"all homestead and exemptions are expressly waived"

that such a provision was void.

It has been held in numerous cases in this State that where in a mortgage the mortgagor expressly consented to execution issuing against his homestead that such execution might so issue and that such provision was not void.

Nycum v. McAllister, 33 Iowa 374;
Fejavary v. Broesch, 52 Iowa 88;
Sioux Valley State Bank v. Honnall, 85 Iowa 352;
Grover v. Younie, 110 Iowa 446.

In other words, there is this distinction, namely, that a contract which provides for the waiving of all of the exemption laws is void, whereas, a contract or mortgage waiving only an express exemption such as a homestead exemption is not void and is recognized as enforcible. The reason for this is obvious in that in the first case the creditor has the right to proceed against all the property of the debtor both real and personal, as the said debtor has waived the right to hold any of his property exempt, whereas, in the second case, the debtor has given the creditor the right to proceed against one specific kind of exempt property by waiving that specific exemption as for instance, he gives the creditor a right to proceed against his homestead which would otherwise be exempt. This, of course, does not give the creditor the additional right to proceed against the exempt personal property and other property of like character, and therefore the distinction in the decisions as set forth.

The statute also recognizes the right of the debtor to waive the exemption of his homestead by a contract. Section 10155 provides as follows:

"The homestead may be sold to satisfy debts of each of the following classes:
1. * * * * * * * *
2. Those created by written contract by persons having the power to convey, expressly stipulating that it shall be liable, but then only for a deficiency remaining after exhausting all other property pledged by the same contract for the payment of the debt.
3. * * * * * * * * *
4. * * * * * * * * *"

With this review of the decisions, we shall proceed to discuss the classification of the particular clause in question. It is to be noted that the said clause does not waive all of the exemptions, but provides merely for the waiver of the exemption of the homestead. Therefore, the rule laid down in the case of *Curtis v. O'Brien*, 20 Iowa 376 would not apply to this clause. Therefore, our question is whether or not a contract agreeing to the waiver of the exemption of the homestead is a valid contract and enforcible, or whether or not such a clause is void.

As already pointed out, a clause in a mortgage waiving the exemption of the homestead is enforcible. The instant clause appears in the note instead of the mortgage, but we believe that the same rule would apply as in the case of mortgages. The signer of the note has not undertaken to waive all exemptions, but rather has expressly undertaken to waive only the right of his homestead to be exempt. We believe that such a provision in a note is contemplated by the provisions of section 10155 above set forth. In view of this section, and in view of the decisions of the Supreme Court holding similar provisions in mortgages to be enforcible we reach the conclusion that the clause in the note in question is not void and that the same could be enforced.

You have further requested our opinion as to whether or not this clause affects the negotiability of the note. The Supreme Court has recently passed upon a question very similar to the one which you have submitted in the case of *Perry National Bank v. Engnell*, 198 Iowa 26. The note in question provided as follows:

"waiving our rights to all exemptions allowed us by law."

The court held that this provision was void, but that the same did not affect the negotiability of the note, and that the same was negotiable. Speaking of this, the court says as follows:

"In this connection, appellee relies upon the case of *Curtis v. O'Brien*, 20 Iowa 376, holding that a person contracting a debt cannot, by a simple contemporaneous waiver of exemption laws, entitle the creditor to levy on exempt property. The fact that the provision may be invalid and of no effect does not give it any force to destroy the negotiable character of the note in which it is found. In *Tolman v. Janson*, 106 Iowa 455, it was held, before the enactment of the Negotiable Instruments Law, that a provision in a note authorizing an attorney to appear and confess judgment, being void in this state, did not render the note nonnegotiable. *Newhall Sav. Bank v. Buck*, 197 Iowa 732. See, also, *Chandler v. Kennedy*, 8 S. D. 56, (65 N. W. 439), and *Daniel on Negotiable Instruments*, Section 62-a."

In the above case the court held that even though the clause in question was void the note was nevertheless negotiable, and we are of the opinion that in the instant case where the clause is not void that clearly the note would be negotiable.

As to the provision in the clause for the payment of attorney fees and costs in case it is necessary to sue the said note, we are of the opinion that such a provision is valid and enforcible and that the same does not affect the negotiability of the said note. In the case of *Sperry v. Horr*, 32 Iowa 184, the note provided as follows:

"If not paid when due and suit is brought thereon I hereby agree to pay collection and attorney fees therefor."

The question was raised as to whether or not this clause affected the negotiability of the note. Speaking of this, the court said:

"The agreement for the payment of attorney fees in no sense increased the amount of money which was payable when the notes fell due, and we are unable to see that it rendered that amount uncertain in the least degree. It simply imposed an additional liability in case suit should be brought, and such liability did not become absolute until an action was instituted. This agreement relates rather to the remedy upon the note, if a legal remedy be pursued, to enforce its collection than to the sum which the maker is bound to pay. * * * * In our opinion, therefore, the court was correct in holding that the instruments sued on are negotiable, * * *."

To the same effect see *Shenandoah National Bank v. Marsh*, 89 Iowa 273.

HIGHWAYS: The appropriation of $20,000.00 for "maintenance" of state roads cannot be used to pay a special assessment for drainage.

March 24, 1926. *Auditor, Iowa State Highway Commission:* I wish to acknowledge receipt of your favor of the 19th requesting our opinion on the following proposition:

"The City of Ames recently established College Park Storm Sewer District which includes a portion of the Iowa State College property fronting on Riverside Drive. The storm sewer which has been constructed is a lateral extending along Riverside Drive and along the front of this College property. A special assessment of $500 has been levied against the state owned land within the storm sewer district.

"Acting President Herman Knapp asks Mr. F. R. White, Supervisor of State Roads, as to whether or not payment of this assessment can be made from state road funds under the provisions of Section 4634, Code, 1924. We have an appropriation of $20,000 for a two year period for maintenance of state roads at *all* educational institutions (Section 14-b, Chapter 218, 41st General Assembly) and this amount is, as you can readily understand, needed for ordinary maintenance.

"I presume that the question is as to whether or not by the construction of a storm sewer the City of Ames has constructed *drainage* for a state road under Section 4634."

Section 4634, Code, 1924, to which you refer, is contained in the chapter concerning "State Roads" and reads as follows:

"When a city, town, special charter city, or county shall drain, oil, pave, or hard surface a road which extends through or abuts upon lands owned by the state, the state, through the executive council, shall pay such portion of the cost of making said improvement through or along such lands as would be legally assessable against said lands were said lands privately owned, which amount shall be determined by said council or board."

It is a question of fact and one which your department can readily determine whether or not the improvement to which you refer does in fact "drain" the road abutting upon the land owned by the state. If this be a fact, then the provisions of the section above quoted would be clearly applicable.

The appropriation of $20,000.00 to which you refer, is contained in what is known as the "Budget Law" of this state and under the appropriations made for the Board of Education. The purpose of the appropriation is stated as follows:

"For maintenance of state roads at any or all of the state institutions under the Board of Education ..... $20,000.00."

The improvement to which you refer we do not believe can be classed as "maintenance" of a state road, and we are, therefore, of the opinion that the appropriation in question cannot be used to pay the amount levied as a special assessment for this purpose.

MULCT TAX: Mulct tax collected under the provisions of Section 5052 should, in the absence of legislative direction, be paid into the county general fund.

March 24, 1926. *Auditor of State:* We wish to acknowledge receipt of your favor of the 22d requesting our opinion upon the following proposition:

"Under the provisions of Code Section 2052 we have a case where a mulct tax of $600 has been collected and after the deductions provided by law, we are at a loss to determine whether the proceeds shall be placed in the general county fund or in the temporary school fund. Kindly inform us at your earliest convenience which would be the proper fund to receive the proceeds of this mulct tax."

An examination of the statute involved will disclose an unusual situation. Section 2051, Code, 1924, provides for the imposition of a "mulct tax" upon any building or place kept or maintained in violation of the intoxicating liquor laws. Section 2052 to which you refer, reads as follows:

"Said tax shall be in the sum of $600.00 and shall be imposed in the same manner and with the same consequences as governs the imposition of a tax in injunction proceedings against places used for the purpose of lewdness, assignation, or prostitution."

The provisions of the statutes we have just referred to, as formerly contained in the code and supplements thereto, provided for a distribution of the tax equally between the municipality and county, and that the county's share thereof went to the general fund.

Chapter 79, Code, 1924, concerning houses of prostitution, provides for the imposition of a mulct tax thereon, and in providing for the application of the tax. Section 1616 of the chapter referred to, contains the following provisions:

"The said tax collected shall be applied in payment of any deficiency in the costs of the action and abatement on behalf of the state to the extent of such deficiency after the application thereto of the proceeds of the sale of personal property as hereinbefore provided, and the remainder of said tax together with the unxpended portion of the proceeds of the sale of personal property shall be distributed in the same manner as fines collected for the keeping of houses of ill fame, except that twenty per cent of the amount of the whole tax collected and of the whole proceeds of the sale of said personal property, as provided in this chapter, shall be paid by the treasurer to the attorney representing the state in the injunction action, at the time of final judgment."

Following the direction of the legislature, we next turn to the provisions of the statute providing the penalty for keeping houses of ill fame. This is contained in Section 13175, Code, 1924, which reads as follows:

"If any person keeps a house of ill fame resorted to for the purpose of prostitution or lewdness, such person shall be imprisoned in the penitentiary not more than five years."

It is readily apparent that the statute just quoted does not provide for the assessment of a fine or its distribution.

We are, therefore, confronted with the proposition of having a statutory authorization for the imposition of a mulct tax upon certain property and no provision made for the distribution of such tax. The prior statutes that provided the manner of distribution have been supplanted by the provisions referred to in the code of 1924. From the history of the tax in question we believe it was the intention of the legislature to provide for a tax and not a fine. All taxes collected by the county for which provision has not been made are to be paid into the general county fund.

We are of the opinion, therefore, that the proceeds of the tax imposed under the provisions of Section 2052, Code, 1924, is in the nature of a tax and not a

fine and should therefore, in the absence of legislative direction, be paid into the county general fund.

TAXES: The unpaid license fee on dogs is a lien on the owner's real estate.

March 24, 1926. *Auditor of State:* We have received your letter of March 13, 1926, in which you submit to this department the following inquiry:

"We have been questioned about delinquent dog license tax becoming a lien and being collectible as other taxes. In answer to an inquiry in regard to this matter we wrote to a county auditor that in our judgment this tax became a lien against real estate under the provisions of Section 5441. He now comes back at us with the statement that he is of the impression that they have a letter from the Attorney General or that an opinion was rendered by your office in which there was a holding that delinquent dog license tax would not become a lien and was not collectible as other taxes. Kindly inform me in regard to this matter, at your earliest convenience."

Chapter 276 of the Code, 1924, Sections 5420 to 5457, both inclusive, is the statute providing for the licensing of dogs. Under the provisions of this statute the county auditor must, after the publication of the notice therein provided for, certify to the county treasurer the list of unlicensed dogs.

Section 5440 provides as follows:

"Immediately following said May thirty-first, the auditor shall, except as to persons to whom he has granted exemption, certify to the county treasurer:

1. The name of the owner of each unlicensed dog.
2. The number of dogs so owned by said person and the sex thereof.
3. The amount of the unpaid license fee, plus a penalty of one dollar for each dog, and a pro rata part of the cost of publication."

Section 5441 reads as follows:

"On receipt of said certificate, the treasurer shall at once enter, as a tax, against each person the amount therein indicated as owing by him, and said tax shall be attended with the same consequences, and be collected in the same manner, as ordinary taxes."

It will be observed that the said license fee or tax shall be collected by the county treasurer in the same manner as ordinary taxes and shall be attended with the same consequences. We believe this section makes all of the statutes relating to the collection of taxes on personal property applicable to the license fee or tax on dogs.

Section 7203 provides for the lien of personal property taxes on real property. It is as follows:

"Taxes due from any person *upon personal property* shall be a lien upon any and all real estate owned by such person or to which he may acquire title."

The phrase "personal property", as found in the above statute, is comprehensive in its nature and obviously covers all personal property that is subject to taxation. We can see no escape from the conclusion that such license or tax is a lien on real property.

SCHOOLS—TEACHERS: A resolution passed by a school board providing that married women cannot teach in the schools of their district is contrary to public policy and void.

March 27, 1926. *Superintendent of Public Instruction:* This department is in receipt of your letter dated March 25, 1926. Your letter is in words as follows:

"Kindly advise if a school board has authority to pass a resolution providing that married women cannot teach in the schools of their district."

You are advised that it is my opinion that a resolution providing that married women cannot teach in schools is contrary to public policy and is void.

TAXATION: (1) Taxes are never barred by the statute of limitations. (2) Taxes on the stock in a bank are not claims against the bank.

March 29, 1926. *County Attorney, Davenport, Iowa:* We have received a letter from Mr. H. O. Hansen, Delinquent Tax Collector, requesting this department to prepare an opinion upon several questions relating to the collection of taxes upon bank stock. On account of the importance of the questions submitted, we have concluded to prepare an opinion for your office instead of for the collector who requested the opinion. We do this so that it may operate as an official opinion. In order to get a correct understanding of the questions submitted we shall quote the letter of Mr. Hansen in its entirety:

"We desire an opinion from your office on the following:

The second installment of taxes of the Citizens Trust & Savings Bank of Davenport, Iowa, remain unpaid for the year 1914, in amount of $1,339.90 including penalty. When the delinquent tax collector called upon Mr. Dougherty, President of the above named institution to collect said taxes, Mr. Dougherty stated 'that these taxes were outlawed' for the reason that the present corporation had purchased the assets of the above named bank and incorporated under the same name with a new set of officers.

The Collector intimated it was his contention that taxes were never outlawed and if the corporation would not pay these taxes he would enforce collection upon the individual stockholder. (Sec. 1322 S. 1913 as amended Ch. 257 38th G. A. and Ch. 15, 39th G. A.) (Sec. 1323 Code 1897) (C. C. 1924 Sec. 6998) Mr. Dougherty then asked the delinquent tax collector to hold up mailing these statements to the individual stockholders for the second installment of taxes of the year 1914 and he would send their attorney Mr. Chamberlain to take up this matter.

Prior to the meeting with Mr. Chamberlain the delinquent tax collector interviewed County Attorney Weir with reference to these taxes and Mr. Weir stated he knew of no statute whereby such taxes were outlawed or should be cancelled and sustained the collector in his procedure for the collection of same. In the conference between Mr. Chamberlain and the Delinquent Tax Collector they agreed to submit the matter to your office for an opinion.

Here is the situation—Articles of Incorporation were filed by Citizens Trust & Savings Bank, place of business Davenport, Iowa, and recorded in Book 'H' page 138 October 30th, 1906 at 12:05 o'clock P. M. showing authorized capital stock $100,000.00. (in shares of $100.00 each to be paid in full) surplus $100,000.00 (to be paid in full) showing E. C. Walsh, President; A. E. Walsh, Vice President and H. R. Krohn, Cashier (shall continue in business 50 years).

The assets of the above corporation including furniture, fixtures and safe were sold to the present occupants there being no bank failure it did not pass through court for dissolution and distribution. (No dissolution of old corporation found recorded).

The present corporation filed Articles August 1, 1914, recorded in Book 'J' page 312 under same name Citizens Trust & Savings Bank, place of business Davenport, Iowa, showing authorized Capital Stock $50,000.00 (shall continue in business for 50 years).

The assessment of the above taxes was made in accordance with statute and no question has ever been raised in that respect by anyone. The first installment of the taxes for the said year being paid without protest. The assessor's office has filed agreements signed by the officers of the various banks of Scott County including above institution stipulating that bank stock taxes would be paid by the institution instead of individual stockholders, however a list of the stockholders are given with statement for taxation and the assessor copies list of same of each bank on back pages of the assessor's book for each year's assessment.

The question: Would the above tax in question outlaw, if not what would be the proper procedure to enforce collection for such taxes? Would such tax be lien on the real estate of the new institution? (C. C. 1924 Sec. 7203) Could the safe, furniture and fixtures, which were purchased in the transaction from the old institution be sold at Distress Sale under Sec. 7189 C. C. 1924 for these taxes?

It is a well settled principle of law that the statute of limitations does not run

against the right of a state to collect the taxes unless the statute is expressly made applicable thereto. 37 Cyc. 1247.

The Supreme Court, however, at one time held that so far as municipalities are concerned, the ordinary period of limitations applicable to liabilities founded on statute may be pleaded as a defense to a suit for the recovery of taxes.

37th Cyc. 1247;
Brown v. Painter, 44 Iowa 368;
State v. Henderson, 40 Iowa 242.

It was expressly held in the case of *Brown v. Painter*, supra, that the statute of limitations will operate to bar the county's action for the recovery of delinquent taxes. The same rule was made applicable to cities in the case of *Burlington v. B. & N. Rd. Co.*, 41 Iowa 134.

However, we believe that statutes enacted subsequent to the handing down of the opinions herein referred to change the rule therein announced. We base this statement upon the following sections of the statute:

"No penalty or interest, except for the first four years, shall be collected upon taxes remaining unpaid four years or more from the thirty-first day of December of the year in which the tax books containing the same were first placed in the hands of the county treasurer, and the board of supervisors at the January meeting may declare such tax unavailable, and when so declared by the board, the amount shall be credited to the treasurer by the auditor as unavailable and he shall apportion such tax among the funds to which it belongs." Section 7194.

"Any portion of such tax belonging to the state shall be reported by him in his semi-annual settlement sheets to the auditor of state as unavailable, whereupon the auditor of state shall credit the county with the amount so reported, *but nothing in this or the preceding section shall be construed to in any way release the county treasurer from any duty required of him in the collection of delinquent taxes, nor to release the taxpayer from his liability for the same.* Sec. 7195.

"Should any of such tax afterward be collected, the county treasurer shall distribute the net amount collected among the several funds the same as though it had never been declared unavailable, and the portion belonging to the state shall be credited back to the state and included in the treasurer's remittance of other state taxes to the treasurer of state and shall be reported by the county auditor in his semiannual settlement sheets to the auditor of state, who shall recharge the same to the county." Sec. 7196.

It will be observed that the board of supervisors may declare unavailable taxes remaining unpaid for a period of four years. After said date no penalty or interest may be collected thereon. Section 7195 provides that the making of certain taxes unavailable does not release the county treasurer from any duty required of him in the collection of delinquent taxes, *nor to release the taxpayer from his liability for the same.* It will be noted that there is no provision in any of these three sections, that fixes or attempts to fix a limit upon the time within which taxes may be recovered and we have been unable to find such a provision in any other statute. Therefore, we think it is manifest that it was not the intention of the legislature that delinquent taxes should become barred, or the taxpayer released from his liability therefor.

It is, however, our opinion that such taxes may not be recovered, either of the old or the new bank corporation, although the statute in effect at the time the taxes referred to in your letter became due made the bank liable for the payment of the taxes levied against the individual stockholders thereof. The bank, in paying such taxes, was merely acting as the agent of the stockholders. The tax is not upon the property of the bank, but upon the stock owned by the individual stockholders therein. The statute recognizes two separate and distinct species of property as

follows: first, the property of the corporation, and second, the property of the individual stockholders. Indeed, it is clearly within the constitutional right of the legislature to provide for the taxation of both of these species of property.

Des Moines National Bank v. Fairweather, 191 Iowa 1240.

We, therefore, believe that the only remedy available to your county in the collection of such taxes would be to resort to the proper remedy against the stockholders who owned the stock on the first day of January of the year in which the assessment was made.

However, the bank itself is not liable for such taxes and the property of the bank could not be resorted to in the collection thereof.

CITIES AND TOWNS: In arriving at the value of property for the purpose of special assessment, the council may take into consideration its value at the time the improvement is completed. The last assessment really is prima facie evidence of value. Other matters may be considered by the council.

March 29, 1926. *Director of the Budget:* This department is in receipt of your letter of March 27, 1926. In this letter you request an official opinion. Your letter reads as follows:

"This department has been asked for a ruling on the following questions:
"Is it allowable for the council to fix the actual value of the property subject to assessment because of public improvement, or must the value fixed in the last assessment roll be taken as the actual value of such property?
"Is it allowable to include the cost of the special improvement as a part of the value of the property, in determining whether there will be a deficiency under Section 6021?"

You are advised that it is the actual value of the property subject to assessment at the very time of the making of the assessment that determines the matter. The last assessment roll is taken as prima facie evidence, but the council may take into consideration the other matters.

You are further advised that while it is not allowable to include the cost of the special improvement it is allowable to take into consideration the value of the property at the time the improvement is completed because it is then that the assessment is made.

Belknap v. City of Onawa, 192 Iowa, 1383.

BANKS: Funds received in payment of stock assessment ordered by the Superintendent of Banking go into the general assets of the bank and not as a trust fund. Losses should be charged out upon the receipt of assessments. A stockholder is also liable for the statutory assessment after the bank is closed.

April 2, 1926. *Deputy Superintendent of Banking:* This department is in receipt of your letter dated March 31, 1926, in which you submit a number of questions for answer. These questions deal with assessments in banks. For convenience we are quoting that portion of your letter setting forth the questions and the information desired:

"*Hypothetical Situation:*
1. Bank is operating and open for business.
2. Superintendent orders an assessment as of April 1, 1926, for 100% or any other '%' not exceeding 100%.
3. Bank proceeds according to requirements to collect assessment. (Are allowed 120 days by law before forcing collection).
"*Desired Information:*
1. Are funds received in payment of assessment to be carried in a trust account or special account by the bank, pending receipt of all amounts due?

(a) If so, is the account to be carried in general ledger as a deposit, or in statement of assets and liabilities as trust liability?
(b) How long shall this account be carried before charging out losses therefrom?
(c) How long does this account remain a trust account if it is a trust account?
(d) If not carried in special or trust account pending full collection, what are book entries on amounts paid in?
2. If bank closes before all of assessment is collected and before 120 days from date assessment was ordered by Superintendent of Banking, is any stockholder, who has paid his assessment, liable for another assessment which can be levied by the Superintendent after such closing of the bank?
3. If bank closes before all of assessment is collected and after 120 days from date ordered by Superintendent and while bank is in process of forcing payment of assessment by law, is any stockholder who has paid his portion of the assessment liable for another assessment which can be levied by the Superintendent of Banking?"

You are advised that funds received in payment of an assessment should be at once carried into the general assets of the bank and should not be carried as a trust account. The difficulties which we have encountered in closed banks with reference to assessments paid prior to closing have all arisen in cases where banks have failed to carry into the general assets of the banks the proceeds of assessments. Such assessments paid in should be melted into the general assets as a part of the undivided profits. Of course with the assent of the Superintendent of Banking a different item might be opened up, but in no event should assessments be carried as trust funds.

Losses should be charged out at once upon the receipt of the assessment or any portion thereof.

Having already determined that no stock assessment paid in should be carried as a trust account, it is unnecessary to elaborate thereon. If there are losses in a bank it is elementary that such losses should be taken care of from the assessments paid in, for the very purpose of the assessment is to do this. If the bank waits until it collects all of the assessment it may wait forever. In my opinion, as stated, it is the duty of the bank officers to at once take out losses and charge to the amount of the assessment paid in.

Answering your second question, you are advised that in my judgment a stockholder is liable not only for an assessment which he may have paid in prior to the time a bank closed, but he is also liable under the statute relating to stockholders' liabilities in closed banks. Therefore, if a stockholder has paid in an assessment prior to the date of closing, he is liable and can be compelled to pay in a suit brought by the Receiver for the benefit of all creditors under the stockholders' liability statute.

It is unnecessary to answer your third question, because we have already done so. The point to keep in mind is that the two assessments are distinct and separate and that nothing done by the bank as a live and going bank can affect the rights of creditors to the 100% collection from stockholders under the stockholders' liability statute.

HIGHWAYS: The State Highway Commission under the provisions of the statutes and with the consent of the federal authorities may eliminate the particular road from the primary road system.

April 3, 1926. *Chief Engineer, Highway Commission:* We wish to acknowledge receipt of your favor of the 2d requesting our opinion as follows:

"A situation has arisen in one of the counties where it appears necessary and advisable to remove a certain road (about 21 miles in length) from the primary road system. There would be no other road added to the primary road system in lieu of the one which was removed. In other words, this removal would constitute a reduction of about 21 miles in the mileage of the primary road system of the said county. About half the length of this road has heretofore been built to finished grade and permanent bridges and culverts have been constructed. The remaining one-half has not been graded and would be a very expensive road to grade. There has been no gravel or other surfacing constructed on any portion of the road.

"Before taking final action on this matter, the Commission would like to have your opinion on the following matter:

"'Has the State Highway Commission authority under the provision of Chapter 4689 of the Code, to remove a road from the primary road system?'

"It should be noted in connection with this matter that the removal of this road from the primary road system will very materially reduce the cost of constructing the primary road system of that county and will very materially decrease the cost of maintaining the primary road system of that county. There is no town located on the road which it is proposed to remove. In other words, no towns would be left off the primary road system by virtue of the removal of this road.

"We will be glad to have your opinion on this matter at your earliest convenience."

Section 4689, referered to by you, reads in part as follows:

"* * * * * * * * * * * * *

"The primary road system shall embrace those main market roads (not including roads within cities), which connect all county seat towns and cities and main market centers, and which have already been designated under Section 2 of Chapter 249 of the laws of the Thirty-seventh General Assembly, accepting the provisions of the Act of Congress approved July 11, 1916, known as the federal aid road act; provided that the said designation of the roads shall, for more efficient service or more economical construction of the system, and with the consent of the federal authorities, be subject to revision by the State Highway Commission. Any portion of said primary system so eliminated by any change shall revert to and become a part of the system from which originally taken. * * * * * *."

We are of the opinion, under the facts stated by you and the provisions of the section above quoted, with the consent of the federal authorities, the State Highway Commission may eliminate from the primary road system the particular road in question.

BANKS: A concern cannot engage in the banking business in Iowa without first obtaining a charter and certificate. When the charter expires the certificate becomes of no effect. If the corporate existence is not renewed by the stockholders or voluntary liquidation attempted the Superintendent of Banking has authority to take charge of the assets of the institution and proceed to liquidate.

April 5, 1926. *Superintendent of Banking:* We wish to acknowledge receipt of your favor of the 29th ult. requesting our opinion upon the following proposition:

"A meeting of the stockholders of one of the banks under the supervision of this Department has been called to vote on the question of renewing the corporate existence of such bank. Our law requires a two-thirds vote of all shares in the affirmative to effect a renewal. The cashier of the bank has written to know what steps shall be taken in case two-thirds of the shares of stock do not vote in favor of renewal."

Section 8371, Code, 1924, provides for the renewal of the corporate existence of any state or savings bank by an affirmative vote of two-thirds of the shareholders at a stockholders' meeting held for that purpose within a certain time prescribed by the statute. The statutes do not provide for the procedure in the event such corporate existence is not renewed.

It has been held in numerous decisions by the supreme courts of other states that upon the expiration of the corporate existence of a bank or other corporation,

it is thereby ipso facto dissolved and does not even become a de facto corporation. (14 Corpus Juris, 226). It has also been held that when debts are incurred after the expiration of the corporate existence, the members are liable as in a partnership.

Under the banking laws of this state, the Superintendent of Banking is given the general supervisory control of banks, except national, in this State. Section 9238, Code, 1924, provides as follows:

"If any such bank shall fail or refuse to comply with the demands made by the said superintendent, or if the said superintendent shall become satisfied that any such bank is in an insolvent or unsafe condition, or that the interests of creditors require the closing of any such bank, he may appoint an additional bank examiner to assist him in the duty of liquidation and distribution, whereupon the right of levy or execution or attachment against said bank or its assets shall be suspended."

The section following the one quoted provides in substance that the Superintendent may apply to the District Court for his appointment as Receiver for such bank, and its affairs are thereafter under the direction of the court. Section 9242, Code, 1924, provides in substance that the Superintendent of Banking shall be the only liquidating officer or receiver for said banks.

Under the statutes of this State a concern cannot engage in the banking business without obtaining a charter and certificate authorizing it to engage in such business, from the Superintendent of Banking. When its charter expires, the certificate issued to engage in such business under the Superintendent of Banking becomes of no effect, for the reason that the corporation to whom the certificate was issued no longer exists.

We would suggest in such cases that the Superintendent of Banking notify the officers of the bank that unless the affairs of the corporation are voluntarily wound up or the corporate existence renewed, that the Superintendent, under the authority vested in him by the statutes, would take charge of the assets of the institution and liquidate the same.

We are of the opinion that the Superintendent of Banking may, under the facts stated by you, take possession of the assets of the concern in question and proceed to liquidate under the provisions of the statute.

COUNTIES: Discussion of the right of a sheriff to receive rewards for the arrest and apprehension of persons charged with a crime.

April 7, 1926. *Auditor of State:* We have received your letter of April 4, 1926, in which you submit to this department questions which you have stated as follows:

"I am in receipt of a communication from one of our examiners concerning a question as to whether or not a sheriff is entitled to money that may be received as a reward for the apprehension of a criminal. I talked to Mr. O'Brien and Mr. Huff in regard to this matter and they seemed to have a different idea that a sheriff was not entitled to a reward. At first thought I was rather inclined to think he would be entitled to it but since I have given it a little more thought I came to the conclusion that it might depend upon who offered the reward and further, it might depend upon whether the reward was offered in the sheriff's own county or some other county of the state or some other state. The questions that occur to me in regard to this matter are as follows:

1. Is a sheriff entitled to a reward offered for the apprehension of a criminal?
2. Will it make any difference if the reward is offered in the sheriff's own county or in some other county of the state, or from some other state?
3. Will it make any difference if the reward is offered by a private individual or by some municipality?
4. Should the sheriff demand and accept the reward in cases where same is offered and then turn the same into the county fund of his county if he is not entitled to receive and appropriate it to himself? In other words, can he receive it in his official capacity and account for it to the county?
5. If a sheriff has received such reward and appropriated it to his own use, should the examiner charge him with the amount and expect him to remit to the county or if the reward was offered by a private individual would he have to return it to the party who paid the reward."

The supreme court of the state has recently been called upon to pass upon the question of the right of certain public officials to receive rewards offered for the apprehension and conviction of persons committing crimes in their counties. In the case of *Maggi v. Cassiday*, 190 Iowa 933, the court determined the right of sheriffs, town marshals, policemen and officials of a foreign state to receive such rewards. It was held in this case that a reward for the arrest, or arrest and conviction, of an alleged criminal may be earned and properly received by an official who is under no official duty to apprehend and arrest the one, who committed the crime. It was also held that the sheriff of the county in which the murder was committed was not entitled to the reward but that the sheriff in another county, who assisted in apprehending the one charged with the crime, was entitled to the same. It is the warrant or process issued to the officer that in a large measure determines the right to participate in the distribution of the reward. This case was based to a certain extent, although not entirely, upon the provisions of the code section 4885 of the Code of 1897 (Sec. 13301 Code of 1924) which made it unlawful for any officer to accept or receive any gratuity or thing of value for the performance of any official duty.

We will, therefore, answer your questions in the following way:

1. A sheriff may or may not be entitled to a reward offered for the apprehension of a criminal depending entirely upon the facts with relation to his official duties in connection therewith.
2. If a reward is offered in the county where the crime was committed and the sheriff of which has a warrant for his arrest, he will not be entitled to the reward, but if he resides in another county and is not armed with a warrant for the arrest of the criminal he may receive said reward.
3. In the case cited in this opinion the reward offered was raised by popular subscription. Therefore, it is our opinion that it makes no difference in the application of the above rules whether the reward is offered by a public official or a private individual or individuals.
4. If the sheriff is not entitled to receive the said reward then it may not be paid into the public treasury. If the only officer who may have earned the reward is one who may not under the law receive the same, such reward must be returned to the ones who offered it.
5. If a sheriff who is not under the law permitted to receive such reward, has received the same and appropriated it to his own use the examiner should recommend that said amount be returned to the private individuals who offered the same, or be paid to any other person or persons who may be entitled to it under the law.

BOVINE TUBERCULOSIS: Where owners of cattle, slaughtered under the provisions of the statute, fail to avail themselves of the federal indemnity they may not secure the amount to which they were entitled under the federal indemnity out of the county funds after the federal and state funds are exhausted.

April 8, 1926. *Secretary of Agriculture:* We have received your letter of March 31, 1926, requesting this department to prepare an opinion upon the question which you have stated as follows:

"I herewith submit to you a request for an opinion regarding the paying of indemnity on animals that react to the tuberculin test when claims are being presented to the county board of supervisors as set forth in Chapter 129, Sections 2670 and 2690 of the Code of Iowa 1924, as amended by the Forty-first General Assembly.

As you are aware, the work of tuberculosis eradication under the county area plan, the county accredited plan and the accredited herd plan is being done in co-operation with the United States Department of Agriculture.

One of the rulings of the United States Department of Agriculture is that tuberculous animals shall be slaughtered within thirty days of date of appraisal, except that in extraordinary and meritorious cases, and at the discretion of the Chief of the Bureau said time limit of thirty days may be waived. It is also a ruling of the United States Department of Agriculture that no compensation will be paid for tuberculous unregistered bulls. The state of Iowa does pay indemnity on unregistered bulls.

The question I wish to have your opinion on is:

"When claims for indemnity are being paid from the county tuberculosis eradication fund, will an owner who has failed to comply with the federal regulation above stated receive only the portion of indemnity that would be paid by the state if the county was not yet using its own funds, or would he receive from the county both the state and federal amounts if he had complied with the state law as set forth in Chapter 129, Section 2670?

I would also like to have your opinion as to whether or not the county should pay double indemnity on unregistered bulls."

Section 2671, as amended by Chapter 55 of the Laws of the 41st General Assembly, reads as follows:

"When breeding animals are slaughtered following any test there shall be deducted from their appraised value the proceeds from the sale of salvage. When breeding animals are slaughtered following a first test under this chapter, there shall also be deducted five per cent of the appraised value of the breeding animals tested.

The owner shall be paid by the state one-third of the sum remaining after the above deductions are made.

The state shall in no case pay to such owner a sum in excess of fifty dollars for any registered pure bred animal or twenty-five dollars for any grade animal."

It will be observed that this statute definitely fixes the compensation or amount of indemnity that shall be paid out of state funds as damages for animals slaughtered under the tuberculosis statute. This, however, must be read in connection with Section 2690, which reads as follows:

"After the amount allotted in any year by the department to any county enrolled under the county area plan has been expended in said county, or at any time that there ceases to be available for such county any federal funds for the eradication of bovine tuberculosis, the county eradication fund provided in this chapter shall become available as a substitute for either or both such funds for the payment of materials, indemnities, inspectors, and assistants as herein provided."

It is obvious that after the state and federal funds have become exhausted the amount raised by taxation in any county shall become available as a substitute for either or both of such funds for the payment of materials, indemnities, inspectors, and assistants as herein provided. A condition precedent to the right to use such county fund is the exhaustion of the state and federal funds. Therefore, the failure of any owner, whose cattle has been slaughtered as provided in the statute, to comply with the federal regulations to entitle such owner to the portion of the indemnity payable out of federal funds may not secure the payment thereof out of the state or county funds. If he fails to comply with the federal regulation, his failure to receive indemnity is not due to the fault of anyone but himself. It would be manifestly unjust to permit him to fail to comply with the federal regulation and then to secure the same indemnity from the state or county funds. We are clearly of the opinion that this may not be done.

As we understand the matter, under the federal law and regulations no indemnity is paid where unregistered bulls are slaughtered. Such indemnity is, however, paid under the Iowa statute. Where the state and federal funds are exhausted, as provided in Section 2960, the amount of indemnity that is paid for the loss of an unregistered bull is the amount to which the owner is entitled under the state statute. Manifestly, if the owner is not entitled to indemnity under the federal law, he is not entitled to such indemnity where the funds have been exhausted. Therefore, so far as unregistered bulls are concerned, the owner thereof is entitled to only the indemnity provided under the Iowa law.

SCHOOLS—TEACHERS: The board of educational examiners cannot accept anything less than two years of college training as a basis for a five year state certificate.

April 12, 1926. *Superintendent of Public Instruction:* We wish to acknowledge receipt of your favor of the 9th requesting our opinion upon the following proposition:

"Would the Board of Educational Examiners have a legal right to accept anything less than two years of college training above high school graduation as the basis for issuing a five year state certificate?"

Section 3868, Code, 1924, in reference to state certificates reads as follows:

"In all cases where graduation shows compliance with the requirements of Section 3863 and 3864 hereof, and the board is satisfied that the applicant possesses good moral character and is professionally qualified, the board shall issue a state certificate to the applicant, valid for five years, to teach in any public school in the state."

Section 3863 referred to is as follows:

"The board may issue state certificates and state diplomas to such teachers as are found upon examination to possess a good moral character, thorough scholarship, and knowledge of didactics, with successful experience in teaching."

Section 3864 enumerates the various subjects on which an examination is required for a state certificate.

Section 3866 reads as follows:

"The state board of educational examiners may accept graduates from the regular and collegiate courses in the state university, state teachers college, state normal schools and the state college of agriculture and mechanic arts, and from other institutions of higher learning in the state having regular and collegiate courses of equal rank, as evidence that a teacher possesses the scholarship and professional fitness requisite for a state certificate."

Were it not for the section last quoted it would be necessary that applicants for five years certificates take the examination over the subjects prescribed in Section 3864. The section last quoted, however, makes an exception, and in order to secure the certificate referred to in Section 3868 it is necessary that the applicant either qualify after having passed the examination or possess the qualifications enumerated in Section 3866, supra.

We are, therefore, of the opinion that the board of educational examiners cannot issue a certificate under the provisions of Section 3868 unless the applicant has first qualified by passing an examination over the subjects enumerated in Section 3864, or possess the qualifications enumerated in Section 3866, which the board is authorized to accept as a substitute for the examination.

In view of the language used in the provisions of Section 3866 that the educational examiners may accept graduates from the "regular or collegiate courses," etc., it is advisable to define what is meant by the use of these terms. Section 4341, Code, 1924, concerning the teachers minimum wage, provides in paragraphs one and two thereof, for the wage of teachers who have received a state certificate or

diploma. There is no other provision elsewhere referring to the wages paid teachers holding a state certificate or diploma. Paragraph one, just referred to, in part reads as follows:

"A teacher who has completed a four year college course and received a degree from an approved college," etc.

Paragraph two in part reads:

"A teacher who has completed a two year course in education in a state normal school, or other school whose diploma is recognized as an equivalent by the state board of educational examiners, and who shall be the holder of a state certificate, or who shall be the holder of a state certificate issued upon examination, * * *."

It is thus apparent that the legislature, in fixing the teachers' minimum wage, had in mind courses of four years and two years in an approved college. We are of the opinion, therefore, that the "regular and collegiate courses," referred to in Section 3866, are the four year or two year courses recognized in Section 4341, referring to the minimum wage.

BOVINE TUBERCULOSIS: Even though claims for indemnity are payable out of the county funds, the claims must be filed with the Department of Agriculture within six months.

April 13, 1926. *Secretary of Agriculture:* We have received your letter of April 5, 1926, in which you request this department to prepare an opinion upon the question which you have stated as follows:

"Claims for reactor cattle are disallowed by the State Auditor, if presented more than six months after date of slaughter.

Is there a limit on time of payment for claims going to county auditors for reactor cattle found in the county area test? In other words how much time is allowed, before the duplicate claims may be filed in a dead file?"

Section 393 of the Code of 1924, as amended by Section 1, Chapter 205, Laws of the 41st General Assembly, is as follows:

"All claims for money due from the state, to be paid from the state treasury, except the monthly or annual salaries of the various officers and employees whose salaries are fixed by law, shall be approved and certified by the state board of audit before warrants in payment of the same are drawn.

No claim shall be allowed when the same will exceed the amount appropriated for any department, office, bureau, commission, or institution under the state government.

No claim shall be audited by the board when such claim is presented after the lapse of six months from its accrual. Said board shall have no authority to authorize the creation of a claim against the state."

It will be observed that the above section relates entirely, to use the language of the statute, to all claims for money due from the state and to be paid from the state treasury. Section 2690, as amended, and Section 2693 of the Code read as follows:

"After the amount allotted in any year by the department to any county enrolled under the county area plan has been expended or contracted in said county, or at any time that there ceases to be available for such county any federal funds for the eradication of bovine tuberculosis, the county eradication fund provided in this chapter shall become available as a substitute for either or both such funds for the payment of materials, indemnities, inspectors, and assistants as herein provided." Sec. 2690.

"All claims presented under the third preceding section shall be certified by the department and filed with the county auditor who shall present them to the board of supervisors and such board shall allow and pay the same as other claims against the county." Sec. 2693.

A reading of these sections will disclose the fact that there is no time limit therein for the filing of any claims to be paid out of the county fund after the exhaustion of the state and federal funds.

However, the county fund for the eradication of bovine tuberculosis is, under the statute, a mere substitute for the state and federal funds and in no event is it available for the payment of such claims until after the primary funds liable for the payment thereof are exhausted. The work under the eradication statute is conducted under the direction of, and is authorized only by the State Department of Agriculture. For all practical purposes the liability therefor is a state and not a county liability. We do not believe that it was the intention of the legislature that anyone who had a claim payable out of such fund should have one period for presenting the same if payable out of the primary fund and another and longer period if made payable out of the county or the secondary fund. Under the statute, Section 2693, all claims presented shall be certified by the department and filed with the county auditor. All such claims must, therefore, in our opinion, be filed with the Department of Agriculture for certification within the period prescribed in the statute for the filing of claims that must be audited by the Board of Audit.

We are, therefore, of the opinion that such claims must be filed with the Department of Agriculture within six months after the date of slaughter.

MUNICIPALITIES—CITIES: The special assessments in a road district may not be reduced by the establishment of another road improvement district taking in more territory.

April 13, 1926. *Auditor of State:* We have received your letter of March 23, 1926, in which you submit to this department a question referred to your department by E. B. McGlothlen, the county auditor of Greene County. The letter of the county auditor is as follows:

"I would like to be advised in regard to the following matter which was brought before the Board of Supervisors at their last meeting.

The City Council of the City of Jefferson, Iowa, passed a resolution of necessity, ordering gravel on certain streets in the City of Jefferson, Iowa. Proper notices were published and hearings, etc., had in accordance with law. Contracts were let and the improvement completed according to specifications. The assessments were then levied complying with Resolution of Necessity which called for assessing all costs to adjoining and abutting property. This all being done during the year 1924.

Part of said improvement being adjacent to agricultural lands over ten acres, but all lying inside of the incorporation of Jefferson. One party being aggrieved with his assessment but who failed to file objections thereto in the time specified by law has interviewed the City Council with reference to getting relief. This party, his attorney, and the City Attorney appeared before the Board of Supervisors with the proposition that the property owners outside the city limits adjacent to and forming a continuation of this special assessment district, in conjunction with the property owners already assessed for benefits in the district already completed, petition the Board of Supervisors under the provisions of Chapter 241 of the 1924 Code of Iowa, for the establishment of a secondary road district to include city property already assessed for the completed improvement, which if done, would place both the City and agricultural lands outside the city limits under the supervision of the Board of Supervisors subject to re-classification of benefits and would naturally mean that property owners within the city limits who have paid or are to pay the entire cost of the first named special assessment district, would be entitled to and receive refund for over assessment as computed under the city special assessment plan and the benefits which would be assessed under a secondary road district plan.

I might add further, that part of the property owners within the city limits who were assessed for the entire cost of the first named project have paid their assessment in full, part have signed waivers and are taking advantage of the seven year installment plan. Said waivers or special assessment certificates being held by the City of Jefferson and all of the non-waivers being certified to the county treasurer for collection and are partially paid.

In view of the fact that the first named improvement district was established by the City Council of the City of Jefferson, Iowa, in 1924, and all assessments levied by said City Council and most of them paid, either in cash or settlement being made on the seven year installment plan and all others being certified to the County Treasurer for collection, the Board of Supervisors did not believe that the request of the parties hereinbefore mentioned could be legally granted and have requested me to submit the matter to you for the opinion of the Attorney General."

We are of the opinion that the assessments made in the old or original road assessment district and the assessments made in the enlarged or new district must be considered as separate and distinct. A portion of the assessments in the original district may not be shifted to those embraced within the new or enlarged district. Therefore, the assessments in the old or first district must be paid by those property owners embraced within such district and in the proportions and amounts assessed therein. New assessments must be made in the enlarged district and all property owners therein must pay their just portion thereof. Any other rule would bring about manifest confusion and might work a hardship upon those embraced within the new district.

CORPORATIONS—EXECUTIVE COUNCIL: The Executive Council has no power to revoke a permit to issue stock after it has once been issued because of the failure to pay the costs and expenses of the appraisal.

April 13, 1926. *Secretary, Executive Council:* We have received your letter of March 23, 1926, in which you ask this department to prepare an opinion upon the question which you have stated as follows:

"On March 23, 1926, we submitted to you, a letter regarding the certified check of $100.00 sent by the West Bend Telephone Company of West Bend, Iowa, to the Executive Council, to pay for the appraisal of their property.

On March 16, 1926, the Council instructed the Secretary to certify to the West Bend Telephone Company, granting them authority to issue stock in the amount of $23,000.00, for certain property as listed in an application which is on file in this office.

Our letter of March 23rd, advises you of the difficulty which we are having in trying to clarify the account of $100.00 for which the West Bend Telephone Company, refuses to send a new check to take the place of the one drawn on a bank now defunct.

The question which the Council desires to have you answer is—can they revoke this permit after it has been once issued, to the above firm, upon the ground that they have not paid the investigator for the appraisement of this property?"

Section 8414 reads as follows:

"The Executive Council shall make investigation, *under such rules as it may prescribe*, and ascertain the real value of the property or other thing which the corporation is to receive for the stock. It shall enter its finding, fixing the value at which the corporation may receive the same in payment for capital stock; and no corporation shall issue capital stock for the said property or thing in a greater amount than the value so fixed."

The manner of paying the costs of making an appraisal of property owned or purchased by a corporation, when it is the intention of the corporation to issue stock covering the value of such property, should be governed by a rule of some kind. The claim for such costs should be presented to the corporation on behalf of those who make the appraisal and incur the expenses thereof. There is nothing in the statute giving the Executive Council authority to revoke a permit to issue stock after it has once been issued because of the failure to pay such costs and expenses. We suggest, therefore, that in all cases the permit should be withheld until after the appraisal is made and the costs of making the same paid by the corporation. The details of such a rule must be worked out by the council itself.

MUNICIPALITIES—TOWNSHIPS: Where a town is incorporated after the township taxes are levied but not paid, the town may not require a division of the township funds.

April 13, 1926. *Director of the Budget:* We have received your letter of April 6, 1926, in which you submit to this department the following inquiry:

"We are submitting herewith a question in connection with the incorporation of a town in Warren County.

During the latter part of the year 1924 the town of Cumming was incorporated, but this action was too late to allow the town to levy a tax for the year 1925. The tax for that year apparently was levied by the township, as in former years, and included all property within the town. The tax collected in 1925 was paid into the township funds, although the town was incorporated before January, 1925.

The new council, when taking office, caused the streets to be graded and repaired and issued warrants, which are being held pending receipt of funds.

In view of the above should the town of Cumming be reimbursed by the township for the tax collected by the township during the year 1925, on property located within the town?"

Your letter submits but one question—that is, do the statutes provide for a division of the taxes levied for the township between the said township and a portion thereof which was incorporated as a town after the taxes were levied, but before they were paid? We have examined the statutes with care and also made a search to determine whether there are any opinions of the supreme court upon this question. We have found none and we are, therefore, of the opinion that the town is not entitled to any of the funds raised by taxation in the township.

COUNTIES—TAXATION: (1) After county warrants have been paid, a county is under no further obligation to the warrant holder. (2) Counties may not be required to pay a fee for protesting drainage warrants which are not paid because of the failure of a bank. (3) A taxpayer is entitled to no rebate of taxes or moneys and credits because a bank fails after the assessment is made.

April 13, 1926. *Auditor of State:* We have received your letter of March 27, 1926, enclosing a letter from the County Auditor of Pocahontas County, in which he submits to your office certain questions. The letter of the County Auditor is as follows:

"There are several questions that have arisen in this and other county offices here upon which we desire your opinion:

1. The First National Bank in Pocahontas, of Pocahontas, Iowa, and the First National Bank of Fonda, Iowa, were, on January 12, 1926, duly designated of county funds and funds of the county were on deposit in both banks. Various warrants were issued by this office in the regular manner in payment of claims against the county duly allowed. Four, at least, of these warrants were deposited by the drawees thereof in the First National Bank, Fonda, Iowa. The stamps on the reverse of the warrants indicate that they were then sent through the regular clearing-house channels by the Fonda bank to the First National Bank in Pocahontas, by whom they were presented for payment to the County Treasurer. The latest date of payment by the treasurer of any of them is January 15, 1926. It appears that the Pocahontas bank then sent a draft or other evidence of credit of their own issuance to the Fonda Banks. On January 18, 1926, the First National Bank in Pocahontas was closed. The Fonda bank then charged the amounts of the warrants back to the drawees who deposited them on the grounds that the draft received in payment of them was dishonored by the closing of the Pocahontas bank. The drawees of the warrants are now seeking reimbursement of the county.

Question (a) Is Pocahontas County in any manner liable for the amounts of the warrants so paid, and (b) if not, where should the liability rest?

2. Prior to January 18, 1926, the County Treasurer issued two treasurer's checks on the First National Bank in Pocahontas in payment of drainage warrants that

had been presented, registered and later called for payment. These checks were protested at the closing of the bank.

Question: (a) Are protest fees collectible in this case, and (b) if so, who is liable therefor and how shall the payment of them be effected?

3. Several taxpayers in this vicinity listed with the assessor in good faith, moneys that they had on deposit with the First National Bank in Pocahontas, which, in effect, have ceased to exist as moneys or credits since the closing of the bank.

Question: Is there any way in which the taxes on such moneys and credits can legally be abated after they are once assessed as such?"

We shall answer your questions in the order in which they appear in the letter of the County Auditor. As we understand the facts upon which the first question is based, the warrants therein referred to were paid by the County Treasurer of Pocahontas County. The question, therefore, seems to be—which bank shall sustain the loss? We are clearly of the opinion that if the warrants were paid by the County Treasurer, the county is under no further duty or liability thereon. The county is under no duty to safeguard or protect the interests of the owner of the warrants after they are paid. This is a matter for him alone to look after. We do not deem it necessary or proper to determine where the liability rests as between the two banks, or which bank must sustain the loss.

In answer to the second inquiry, we will say that the liability of the county cannot be increased in any way beyond the amount due from the county. Under the statute we do not believe that it was necessary to have the checks or warrants protested. The protest fees should, in our opinion, be paid by the one having the same protested and that he may not recover this amount from the county. It is not our duty to determine where the ultimate liability therefor rests.

Section 7237 reads as follows:

"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."

We are of the opinion that this section is not applicable to and does not cover the facts stated in your third question. It evidently relates to property of the same character as the items of property specifically mentioned therein, such as buildings, crops and stock. Under the rule of ejusden generis, where particular words in a statute are followed by general ones, the general ones are restricted in meaning to the objects of a like kind with those specified.

Rolf v. Kasemeier, 140 Iowa 182;
State v. Wignall, 150 Iowa 650;
McCarney v. Bettendorf Axle Co., 156 Iowa 418;
Lames v. Armstrong, 162 Iowa 327.

Applying this rule to the state of facts contained in your letter, we must give a construction to Section 7237 that is consistent with the meaning and purpose thereof and the language used therein. It will be observed that the statute contains the phrase "has been destroyed." Therefore, property covered by the statute must be of such a character that it may be physically destroyed in some manner and a mere loss resulting from a failure of a bank, in our opinion, cannot be covered by this section. When money is deposited in a bank the bank secures the title thereto and the bank becomes the debtor to the amount of the deposit and is not a bailee therefor. This rule is sustained by the almost universal weight of authority.

Mereness v. First National Bank, 112 Iowa 13;
Lowry v. Polk County, 51 Iowa 50;

Long v. Emsley, 57 Iowa 11;
Marine Bank v. Fulton Bank, 2nd Wall. 252;
School District v. First National Bank, 102 Mass. 104;
Independent District v. King, 80 Iowa 497;
Cadwell v. King, 84 Iowa 228;
Officer v. Officer, 120 Iowa 389;
Hunt v. Hopley, 120 Iowa 695;
Chaffin v. Johnson (Ia.) 204 N. W. 4 24.

If the bank fails to pay the deposit, or any part thereof, when demanded, the depositor cannot lay claim to, or recover the specific money deposited. He cannot bring an action in replevin or trover therefor. His sole remedy is to bring an action against the bank to recover on the obligation arising therefrom.

We are, therefore, of the opinion that there is no way that the tax on moneys and credits may legally be rebated after it has once been assessed.

HIGHWAYS—Width of road. The presumption is that a road established is 66 feet wide. This presumption may be rebutted by proof that the road was established as a 60 foot road.

April 14, 1926. *County Attorney, Bedford, Iowa:* I wish to acknowledge receipt of your favor of the 12th with further information concerning the establishment of Primary Road No. 16 in your county. As we understand the facts, this road was established by order of court in 1857. A commissioner was appointed, survey made and properly filed with the auditor. You state that the court's order does not show the width of the road thus established. It is now sought to open this road to a width of sixty-six feet. Upon these facts you ask the following question:

"Would the road legally be a sixty-six foot road, or would it be a sixty foot road? And if a sixty foot road, would the county be required to pay for the six feet of dirt taken for primary road purposes?"

Section 4561, Code, 1924, provides in substance that roads established thereafter shall be sixty-six feet in width unless otherwise fixed by order of the board. This section has been reenacted and appears in the Code of 1851 as Section 515, which reads as follows:

"County and state roads hereafter established must be sixty-six feet in width unless otherwise specially directed, but the court may for good reason fix a different width not less than thirty-three feet."

The section just quoted is found in Chapter 38 of the Code referred to, which also deals with the manner of establishing county roads. It is provided that a commissioner shall be appointed who may cause the road to be surveyed and the surveyor's plat and field notes are required to be filed. The time is thereafter set for a hearing, and in Section 546 of the chapter referred to, the court is given the following authority:

"It may establish or reject the road absolutely or it may make such establishment conditional upon the payment in whole or in part of the damages awarded * * *."

Section 550 of the same chapter requires that the plat and field notes of the road established be filed and recorded with the clerk, so that they are a part of the record. If the court order does not specify the width of the road and the plat and field notes show the width at which it was established, the road would legally be the width shown in the plat and field notes.

If the plat and field notes and the court order do not show the width of the road as laid out and established, the presumption would be that the road was established sixty-six feet in width. (*Bigelow v. Ritter*, 131 Iowa, 213). The presumption, however, is not conclusive, but may be rebutted and it is purely a question of fact

which must be determined in each case. If the facts cannot be agreed upon, then of course the courts may be resorted to.

If the road is found to have been established as a sixty foot road and six feet has been taken therefrom, the damage to the abutting property owners is payable from the primary road funds. The Board of Supervisors and Highway Commission must agree on the amount of damage that shall be paid.

The letter to the Highway Commission from General Gibson, dated April 24, 1925, concerning this matter, and to which you have referred, merely states that in his opinion in order to avoid litigation because of the dispute concerning the facts the commission would be justified in reaching a settlement with the property owners. Adjustments of matters of this kind are generally advisable.

DEPENDENT AND DELINQUENT CHILDREN: A child may not be transferred from one private institution to another without an order of court.

April 14, 1926. *Board of Control of State Institutions:* We have received your letter of April 10, 1926, in which you submit to this department a question which you have stated as follows:

"A Reverend Zook, who had charge of a childrens' home at Tabor called. Their home went out of business and turned some children over to the home at Boone. The children were committed to the Tabor home by the court.

The question Mr. Zook wanted to know about is probably a legal one—the children having been committed to their home, which was conducted by a sectarian organization by the court, could they transfer the children to another home by their own act or should they have a court order to make the transfer. If it requires a court order then the Tabor people will have legal custody of the children. If it does not require a court order to transfer them the Tabor people are out of it and they, of course, want to be out of it, having disbanded the home."

We believe the question submitted is not difficult of solution. Under the provisions of Section 3637 of the Code a neglected, dependent or delinquent child may be committed to any institution in the state, incorporated and maintained for the purpose of caring for such children.

Section 3638 makes the institution, when a child is committed to it under the provisions of Section 3637, the legal guardian of the person of such child and such institution may be made a party to any proceeding for the legal adoption of such child, *but any such adoption shall be approved by the court.*

Section 3639 reads as follows:

"In any case contemplated by the second preceding section, the court may, from time to time, incorporate in its order such conditions and restrictions as it may deem advisable for the welfare of the child, *and the jurisdiction of the court over said proceedings and said child shall continue until the child is legally adopted, or until the child is committed to a state institution.*"

So, it is apparent that until the child is legally adopted, or committed to a state institution, the jurisdiction of the court over such child continues.

We, therefore, believe that the matter of transferring the children from the home at Tabor to the home at Boone should be submitted to and approved by the court and that any order made with reference to such transfer will not be legal or valid until approved by the district court.

It may be that the question submitted must be determined under the provisions of the new statute. Chapter 80, Laws of the 41st General Assembly, relates to child placing agencies. Even though the question may be determined by the new statute, we think the child could not be transferred without an order of the district court. See said chapter, and especially Sections 8 and 10 thereof.

SMALL LOANS: Persons engaged in the small loan business must comply with the provisions of the small loan law and secure a permit.

April 16, 1926. *Superintendent of Banking:* I wish to acknowledge receipt of your favor of the 5th in which you enclose a letter from F. W. Van Druff, manager of the Industrial Finance Company of Council Bluffs. Mr. Van Druff in his letter presents the following proposition:

"We are handling a loan for a young man by the name of Marvin Siders. He first made a loan with us for $250.00, payable in ten installments of $25.00 and interest at the rate of two per cent. He has paid the first three payments promptly, and called today wanting to make another loan to take up a loan he has now with another loan man by the name of M. S. Welker, located in the Merriam Block in Council Bluffs.

"Mr. Siders advises me that he loaned him $30.00 for one month and took a note for $36.00.

"I just called Mr. Welker and advises me that he is not operating under the banking department and that he took (Mr. Welker says) a bill of sale or bought Mr. Siders' wages.

"Please advise me if a loan man has a right to charge $6.00 for the use of $30.00 for one month under a bill of sale or an assignment of wages."

Your questions based upon this statement are as follows:

"1. Is the practice set out a violation of Section 9427 or 9429 of the Chattel Loan Law?

"2. Does the fact that a Bill of Sale is given by the borrower to the lender for his salary remove such transactions from the operation of the Chattel Loan Law?"

In this connection Section 9410 in the chapter relating to chattel loans must be considered. This section is as follows:

"No person, copartnership, or corporation shall engage in the business of making loans of money, credit, goods or things in action in the amount or to the value of three hundred dollars or less, and charge, contract for, or receive a greater rate of interest than eight per cent per annum therefor, except as authorized by this chapter, and without first obtaining a license from the superintendent of banking hereinafter called the licensing official."

From the facts stated by you we are of the opinion that Mr. Welker is engaged in the chattel loan business and should be required to comply with the provisions of Chapter 419, Code, 1924, and that his failure to procure a license under the provisions of this chapter and loaning money in the manner stated by Mr. Van Druff is a violation of the provisions of Section 9429, supra. The fact that a bill of sale is given by the borrower for his salary does not, in our opinion, remove the transaction from the provisions of the chattel loan statutes.

We will refer this matter to the county attorney of Pottawattamie county and request him to make a careful investigation of the business conducted by Mr. Welker; and if after the investigation is made the facts warrant, to start prosecution under the provisions of Section 9435, Code, 1924.

WAREHOUSE CERTIFICATES: An assignment of a warehouse certificate and the release of the certificate are handled the same as chattel mortgage instruments. When the certificate is returned the assignment and release should also be returned at the owner's request.

April 21, 1926. *County Attorney, Humboldt, Iowa:* We wish to acknowledge receipt of your favor of the 20th requesting our opinion as follows:

"In complying with Section 9777 of the Code, should the County Recorder retain the assignment in the office after copying it on the duplicate warehouse certificate on file, or should the assignment be attached to the certificate and all papers returned to the owner of the grain? If the County Recorder wanted to release the

Farm Warehouse certificate by the filing of a properly executed release from the corporation holding said certificate, should the release be retained on file in the County Recorder's office or returned to the owner of the grain, together with the Farm Warehouse certificate on file, in the same manner as chattel mortgage instruments?"

Section 9777, Code, 1924, reads as follows:

"When the owner or holder of a certificate makes written assignment thereof, the recorder shall on request of the assignee enter a copy of such assignment upon the duplicate in his office, and enter upon his index book the date of the assignment, the names of the assignor and the assignee. In case of reassignment of the certificate to the person to whom issued, the recorder shall copy such assignment on the duplicate and deliver the same to the original owner and enter upon the index book 'Reassigned to the original owner'."

The statute just quoted does not answer the question submitted by you, and only provides the method of recording an assignment. There is no provision in the statutes in regard to warehouse certificates that provide what shall be done with the assignment after it is entered of record. The statutes are also silent as to what shall be done with the properly executed release. We are of the opinion, however, that both instruments should be handled the same as chattel mortgage instruments, and that the assignment should be retained by the recorder until the certificate is returned to the owner of the grain. When the certificate is thus returned, the assignment and release should also be returned with the certificate at the owner's request. The provisions of the chattel mortgage statute covering this matter are Sections 1024 to 1029, Code of Iowa, 1924.

TAXATION: Ex-service men may claim exemption any time prior to September 1st. If the tax is paid and no exemption claimed, person paying is not entitled to a refund.

April 21, 1926. *County Attorney, Jefferson, Iowa:* I wish to acknowledge receipt of your favor of the 19th requesting our opinion as follows:

"Section 6949 of the 1924 Code, provides that an ex-service person may file claim for exemption from taxation with the Board of Supervisors on or before September 1st, of the year following the year for which the exemption is claimed. Thus, it would seem that such a claim for exemption for 1925 taxes can be made any time prior to September 1, 1926. Is this your interpretation of this section?

"In case such exemption can be claimed prior to September 1, 1926, what method should be employed in correcting the tax list in case the tax has not been paid? In case the tax has been paid, can the Board of Supervisors refund such tax?"

We agree with you in your first conclusion that claim for exemption may be filed with the Board of Supervisors any time before September 1st the year following the year for which the exemption is claimed. If the exemption was not claimed, however, and the taxes were paid, no refund could be made, the exemption being the privilege which the person entitled to may claim or waive; and if he waives the exemption and pays the tax, there is no provision authorizing a refund.

STATE BOARD OF EDUCATION: Where an estimate on public construction is assigned to a bank, voucher for the estimate less the 15% to be retained should be made payable to the contractor and bank jointly.

April 22, 1926. *Secretary, State Board of Education:* We have received your letter of April 17, 1926, in which you submit to this department an inquiry which you have stated as follows:

"On March 22, 1926, the Iowa State Board of Education made and signed an agreement with A. A. Alexander, Des Moines, Iowa, Contractor for the construction

of the new Heating Plant located on the campus of the State University at Iowa City, Iowa, the amount of the so-called general contract being $238,702.00.

"Mr. Alexander enjoys a good reputation as a contractor. Because the cost of the building is a large amount, he does not have money enough to finance it. He, therefore, made arrangements for money with the Iowa National Bank of Des Moines, Iowa. On April 10, 1926, he made an assignment, as follows, to the said Iowa National Bank:

"'Know all men by these presents that A. A. Alexander, Des Moines, Iowa, in consideration of one dollar and other good and valuable consideration in hand paid the receipt hereby is acknowledged, do hereby sell, assign, transfer and set over to the Iowa National Bank of Des Moines, Iowa, all moneys due to which we may be now or hereafter entitled on account of work on the New Heating Plant, located on the campus of the State University of Iowa, Iowa City, Iowa under and by virtue of a certain contract entered into by and between the said A. A. Alexander and the Iowa State Board of Education under date of March 22, 1926, also hereby assigning and transferring all estimates now on file or hereafter allowed on account of work done under said contract and authorize and direct all payment of moneys due or hereafter become due on account of said work to be paid to said Iowa National Bank of Des Moines, Iowa.

"'Dated on this 10th day of April, 1926.

(Signed) A. A. Alexander.'

"According to the terms of the agreement, payments will be made to the said contractor 'upon written certificates issued by the Architects from time to time as the work proceeds, but the total sum of such payments on account shall at no time exceed eighty-five (85%) per cent of the value of the materials in place and labor performed, as estimated by or for the Architects, less the total amount of accrued liens as disclosed by the affidavit of the said party of the first part, or other notice of a lien under the laws of the State of Iowa.'

"The party of the first part is the contractor, A. A. Alexander. In other words, payments are to be made in accordance with Section 10310 of the Code, 1924, with the exception that we pay only eighty-five (85) per cent instead of ninety (90) per cent.

"A year ago, when the J. A. McDonald Construction Company of Minneapolis, Minnesota, Contractor for the construction of the Elementary and High School Building located on the campus of the State University of Iowa, Iowa City, Iowa, was having more or less trouble with sub-contractors, you directed us to make all of the institutional warrants based on monthly estimates of the said contractor payable jointly to the order of the said J. A. McDonald Construction Company and the Independence Indemnity Company of Philadelphia, Pennsylvania. The latter firm was surety on the Contractor's bond.

"Very likely, within a few days, Mr. A. A. Alexander will present a monthly estimate for material furnished and labor performed on the New Heating Plant. To whom shall the secretary of the State University issue an institutional warrant —*to A. A. Alexander* or to the *Iowa National Bank*, Des Moines, Iowa, or to the *Contractor and the Bank jointly?*"

There is nothing in the statute that prohibits an assignment such as is described in the above communication provided, of course, it does not cover the amount that must be retained under the contract and the statute for the benefit of subcontractors. We are of the opinion that the estimate, less the 15% to be retained, should be made payable to A. A. Alexander and to the Iowa National Bank, Des Moines, Iowa, jointly. The conjunctive "and" instead of the disjunctive "or" should be used therein.

MUNICIPALITIES: Lands of ten acres or more used in good faith for agricultural purposes are not subject to tax to pay the cost of constructing sewers, light and water plants.

April 30, 1926. *Auditor of State:* We have received your letter asking this department to prepare an opinion upon the question which you have stated as follows:

"A case has been submitted to us where in the instance of a town when the matter

of valuation was under consideration for the purposes of bonding the town for special improvements such as sewer, light and water the valuation considered was that including the land within the corporate boundaries of a town. These incorporation boundaries include several tracts of ten acres and more in extent, that are exempt from the city levies.

"Now the question arises, is land in tracts of ten acres or more, subject to the bond levy for improvements such as sewer, light and water?"

We assume that your letter refers to the type of bonds which have been issued in payment for the cost of constructing sewer, light and water plants by the city, which bonds are to be paid out of general taxes on property within the city limits, and not to what are known as special assessment bonds which are payable entirely out of special assessments against the benefited property. This opinion is limited to the exact question just stated.

Section 6211 of the Code of 1924 contains several subdivisions providing for the levy of taxes by cities and towns for the purpose of paying the cost of constructing, reconstructing or repairing sewers, light and water plants. It will not be necessary to quote any of these subdivisions in this opinion.

Section 6210 reads as follows:

"*No land* included within the limits of any city or town which shall not have been laid off into lots of ten acres or less, or which shall not subsequently be divided into parcels of ten acres or less by the extension of streets and alleys, and which shall also in good faith be occupied and used for agricultural or horticultural purposes, *shall be taxable for any city or town purpose*, except that said lands and all personal property necessary to the use and cultivation of said agricultural or horticultural lands shall be liable to taxation for city and town road purposes, at not exceeding five mills, and for library purposes."

It will be observed that the statute provides that the tracts of land specified in the statute shall not be taxable for any city or town purpose, with the exception of city and town road and library purposes. The solution of your question depends entirely upon the question as to whether the taxation for the purposes specified in your letter amounts to taxation for any city or town purpose. A careful search of the authorities has failed to disclose any opinion of the supreme court passing upon this exact question. It has been held, however, that this statute does not apply to and exempt such agricultural land from liability for special assessments.

Farwell v. Des Moines Brick Mfg. Co., 97 Iowa, 286;
Allan v. City of Davenport, 107 Iowa, 91 (103).

It will be observed that the statute contains the phrase "which shall also in good faith be occupied and used for agricultural or horticultural purposes." It has also been held that, under some conditions, where the land which it is claimed is being used and occupied for agricultural or horticultural purposes receives some benefits from city improvements, such land is not used in good faith for such purposes and the same is subject to taxation because it receives such benefits.

Farwell v. Mfg. Co., 97 Iowa, 286;
Allan v. City of Davenport, 107 Iowa, 91 (102);
LaGrange v. Skiff, 171 Iowa, 143.

We are clearly of the opinion that lands which are used and occupied in good faith for agricultural or horticultural purposes and which do not receive some direct benefit from city improvements, are exempt from taxation for the purposes specified in your letter. The comparatively recent case of *Huddlestun v. Webster City*, 185 Iowa, 706, in our opinion, bears out this construction of the statute.

Therefore, it is the holding of this department that such lands are not subject to taxation for the purpose of providing a fund for paying the bonds issued by the town for special improvements such as sewer, light and water. Such lands, however, are not exempt from special assessment for any purpose authorized by the statute.

INTOXICATING LIQUOR: Discussion of right of vendor of automobiles sold under unrecorded conditional sales contract to claim a prior lien upon the vehicle when seized by sheriff for illegal transportation of liquor.

April 30, 1926. *County Attorney, Waterloo, Iowa:* You have requested the opinion of this department upon the following statement of facts:

"Will you kindly inform me as to the rights of a lien holder upon an automobile taken under the forfeiture clause for transporting intoxicating liquor?

"The question is this, if the Conditional Sales Contract is not filed for record prior to the seizure of the motor vehicle, is it a proper lien in condemnation proceedings or would it be controlled by the same rule which applies to the filing of record as against innocent purchasers and attachment creditors."

I call your attention to Sections 2013 and 2014, Code of Iowa, 1924, which reads as follows:

"Priority of liens. The judgment shall establish the amount and priority of all allowable claims. (Section 2013).

"Distribution of proceeds. The sheriff shall apply the proceeds of a sale, or of the forfeited bond, in the following order:

1. Expense of keeping the conveyance.
2. Court costs.
3. Liens in the order established by the court. (Section 2014)

The court in entering the judgment of forfeiture of the vehicle and directing its sale shall find, as a part of the judgment and shall establish the claims against the said vehicle. It is the duty of the court to establish the order in which such claims shall be allowed, and upon sale of the vehicle the sheriff is to pay, first, the expense of keeping the vehicle; second, the court costs; and third, the liens in the order established by the court. Your particular question is whether or not, where the car is sold under a conditional sales contract, and such contract is not recorded prior to the seizure of the vehicle, the conditional sales contract is a lien to be recognized by the court and to be established as a claim against the vehicle to be paid by the sheriff.

Section 10016, Code of Iowa, 1924, relates to conditional sales and to the requirements for their validity. Said section reads as follows:

"Conditional sales. No sale, contract, or lease, wherein the transfer of title or ownership of personal property is made to depend upon any condition, shall be valid against any creditor or purchaser of the vendee or lessee in actual possession obtained in pursuance thereof, without notice, unless the same be in writing, executed by the vendor and vendee, or by the lessor and lessee, acknowledged by the vendor or vendee, or by the lessor or lessee, and recorded or filed and deposited the same as chattel mortgages."

It has been held under this section that execution or attaching creditors may avail themselves of the provisions of this statute in their favor.

Myer v. Car Co., 102 U. S. 1;
Vorse v. Loomis, 86 Iowa 522;
National Cash Register Co. v. Brocksmit, 103 Iowa 271.

Section 2010 sets forth the procedure for the forfeiture of the vehicle seized for the illegal transportation of liquor. Subsection 6 of Section 2010 reads as follows:

"6. Judgment. A judgment of forfeiture shall direct that said conveyance be sold by the sheriff as chattels under execution, and a certified copy of such order shall constitute the execution."

It is, therefore, our opinion, in view of this sub-section that the seizure of the conveyance and its sale by the sheriff is equivalent to its seizure by an execution creditor, and that under the rule of the cases above cited, the sheriff would be entitled to avail himself of the provisions of Section 10016 as to the recording of the conditional sales contract, and that since the same has not been recorded that it could not and should not be recognized as a lien entitled to priority by the court in establishing the payments to be made from the sale of the said vehicle, as provided by Section 2014 above quoted.

INSANE: One committed to the state penitentiary for the criminal insane wherein his time of confinement is not fixed is to be confined until he becomes mentally restored, and if a warrant is outstanding for his arrest at that time, the warden should notify the office holding the warrant and delivering the person over to him.

April 30, 1926. *Warden, Men's Reformatory:* We wish to acknowledge receipt of your favor of the 13th requesting our opinion on the following proposition:

"I am enclosing herewith copy of mittimus in the Geo. Zoller case wherein he was sentenced to the Criminal Insane Department of this institution by the Commissioner of Insanity.

"We would like your opinion as to the length of sentence this man is to serve in the Criminal Insane Department."

We wish to call your attention to the provisions of Section 13909, Code of 1924, which reads as follows:

"If, after conviction for a misdemeanor and judgment of imprisonment in jail, the defendant is suspected of being insane, the same proceedings shall be taken as is provided in Chapters 176 to 178, inclusive, and if found insane, he shall be committed to the department for the criminal insane at Anamosa, and all subsequent proceedings shall be as provided in the preceding section."

The preceding section, that is Section 13908, is in part as follows:

"If the accused is committed to the department for the criminal insane, as soon as he becomes mentally restored, the person in charge shall at once give notice to the sheriff and county attorney of the proper county of such fact, and the sheriff, without delay, must receive and hold him in custody until he is brought to trial or judgment, as the case may be, or is legally discharged, * * * * *."

You have attached to your letter a copy of the warrant of admission which shows that George Zoller was adjudged insane by the Insanity Commission of Clayton County, Iowa, and that prior to such adjudication the said George Zoller was convicted on the charge of illegal transportation of intoxicating liquor and sentenced to serve three months in the Clayton County jail, and to pay a fine of $1,000.00. He was serving this sentence at the time he was adjudged to be insane, and therefore his case is clearly covered by the provisions of the sections we have hereinbefore quoted.

We are of the opinion, therefore, that George Zoller and others committed in the same manner are to be confined in the department for the criminal insane at Anamosa until he becomes mentally restored, at which time you will notify the sheriff and county attorney of such fact and deliver the person confined over to the proper county authority.

TAXES: Penalty on delinquent personal taxes. A taxpayer must pay interest and penalty on delinquent personal taxes within the current four year period.

April 30, 1926. *Auditor of State:* We wish to acknowledge receipt of your favor of the 24th requesting our opinion on the interpretation of Section 7194, Code of 1924. The proposition, as we understand it, is as follows: It appears that a taxpayer has failed to pay his taxes each year beginning with the year 1915 to and including 1922. The county treasurer has figured the penalty upon each of these years and the taxpayer, through his attorney, now contends that the penalty should only be computed upon each of the years to and including the year 1918. In other words, that there is no penalty which may be assessed within four years and that the penalty is to be assessed upon the years prior to those within the four year period.

Section 7194 referred to, reads in part as follows:

"No penalty or interest, except for the first four years, shall be collected upon taxes remaining unpaid four years or more from the 31st day of December of the year in which the tax books containing the same were first placed in the hands of the county treasurer, * * *."

The clause contained in this section "except for the first four years," was inserted as an emendment by the Thirty-sixth General Assembly. Prior to such amendment the Supreme Court of this State in *Collins Oil Company v. Perrine,* 188 Iowa, 295, construed the statute and held that after four years the penalties and interest were ipso facto cancelled.

We are of the opinion that the construction placed upon this statute by the taxpayer in question is untenable. The statute is plain and unambiguous and easily understood. It can have no other meaning than that placed upon it by your department and the county treasurer. In other words, the statute does not relieve the taxpayer from the payment of interest and penalties on delinquent taxes within the current four year period, but does provide that only four years" interest and penalties shall be collected. Interest and penalties could thus not be assessed from year to year subsequent to the expiration of the four year period upon taxes remaining unpaid and delinquent in that period.

COUNTIES: Board of Supervisors may not offer bounties for killing animals provided for in Sections 5413 and 5414 in addition to the amounts therein specified.

May 5, 1926. *Auditor of State:* We have received your letter of April 29, 1926, in which you submit to this department the following inquiry:

"I am in receipt of a letter from one of our examiners working in Sac County in which he informs me that the board of supervisors in that county on the advice of an attorney passed a resolution increasing the bounty on pocket gophers from 10c to 15c for each gopher taken and destroyed. They did this, I understand, under the assumption that Section 5415, providing for additional bounties, was applicable and could be interpreted to give authority to increase bounties definitely provided for by Section 5413.

Kindly inform me as to your opinion concerning the matter in question as soon as possible so I can inform the examiner before he completes the examination which is nearing a close."

In the determination of the question you have submitted we must consider three sections of the Code which form a part of Chapter 275 entitled "Bounties on Wild Animals." These sections are 5413, 5414 and 5415, and read as follows:

"The board of supervisors of each county shall allow and pay from the county treasury bounties for wild animals caught and killed within the county as follows:
For each adult wolf, ten dollars.
For each cub wolf, four dollars.
For each lynx, one dollar.
For each wildcat, one dollar.
For each pocket gopher, ten cents."
Section 5413.

"The board may by resolution adopted and entered of record authorize the payment of bounties as follows:

For each crow, ten cents.
For each groundhog, twenty-five cents.
For each rattlesnake, fifty cents."

Section 5414.

"The board may determine what bounties, in addition to those named in the two preceding sections, if any, shall be offered and paid by the county on the scalps of such wild animals taken and killed within the county as it may deem it expedient to exterminate, but no such bounty shall exceed five dollars."

Section 5415.

It will be observed that the first of the above sections makes it mandatory for the board of supervisors to allow and pay bounties for certain wild animals caught and killed within the county. The second section grants to the board certain options with reference to the animals therein described. The final solution of your question depends upon the meaning of Section 5415,—in other words, whether it permits the payment of additional bounties on the animals described in Sections 5413 and 5414, or whether it grants authority to pay bounties on wild animals taken and killed within the county other than those described in the first two sections.

We are clearly of the opinion that it was the purpose and intention of the legislature to permit the board of supervisors, under the provisions of Section 5415, to pay bounties upon wild animals that are not described in the first two sections. This is made manifest, we think, by the use of the phrase "scalps of such wild animals taken and killed within the county as it may deem it expedient to exterminate." This phrase certainly grants to the board a discretion as to the determination of the animals that it may be expedient to exterminate.

We are clearly of the opinion that Section 5415 does not permit the board to grant an additional bounty for the killing of the animals described in Sections 5413 and 5414, but provides for a bounty upon other animals that the board of supervisors may deem it expedient to exterminate. The bounties prescribed in Section 5413 and 5414 may not be increased by the board.

STATE PARK: The Board of Supervisors of a county are authorized to pay the state board of conservation a sum agreed upon for care and maintenance of a state park.

May 5, 1926. *Secretary, Board of Conservation:* You have orally requested us today as to the right of Polk County, through its Board of Supervisors to pay the Board of Conservation certain stipulated amounts for the care and maintenance of a state park located in said county.

It appears that by agreement made between the Board of Conservation and Polk County, through its Board of Supervisors, that in consideration of the purchase of certain land for use as a state park by the Board of Conservation, Polk County agreed to pay the Board of Conservation for the care and maintenance of said park the sum of $5,000.00 April 15, 1926, and $5,000.00 April 15, 1927. Section 14, Chapter 33, Laws of the 40th General Assembly, in reference to the State Board of Conservation, reads as follows:

"The board may, subject to the approval of the Executive Council, enter into an agreement or arrangement with the Board of Supervisors of any county or the council of any city or town whereby such county, city or town shall undertake the care and maintenance of any state park. Counties, cities and towns are authorized to maintain such parks and to pay the expense thereof from the general fund of such county, city or town as the case may be."

The meaning of the section just quoted is clear and under the authority therein

granted, we are of the opinion that the Board of Supervisors of Polk County are authorized to pay the Iowa State Board of Conservation the sums agreed upon between them for the care and maintenance of the state park in question.

ASSESSORS: Compensation once fixed by the Board of Supervisors and the assessors having completed their work, cannot thereafter increase the allowance made.

May 5, 1926. *County Attorney, Tama, Iowa:* I wish to acknowledge receipt of your favor of the 29th in which you inquire in substance whether or not the Board of Supervisors of your county have authority to increase the allowance or compensation already fixed by them for the assessors in your county, it appearing that the Board of Supervisors at their January session fixed the amount of compensation and the assessors thereafter proceeded with their work, and upon the completion of the same found that they had been required to put in more time than authorized by the Board of Supervisors. It is for the additional time which the assessors have thus been required to put in at their work for which the board wishes to compensate them by increasing the allowance made at the January session.

The compensation of assessor is fixed by the Board of Supervisors under the provisions of Section 5573, Code, 1924, which reads as follows:

"Each township assessor shall receive in full for all services required of him by law a sum to be paid out of the county treasury, and fixed only by the Board of Supervisors at its January session for the current year, on a basis of three and one-half dollars ($3.50) for each day of eight (8) hours, which said board determines may necessarily be required in the discharge of all official duties of such assessor."

"* * *"

Your board followed the provisions of the section above quoted and at the January session fixed the assessors' compensation, and we are of the opinion that the board, after the completion of the assessor's work under the allowance previously fixed, could not increase the amount of compensation which the board has already fixed for the assessors.

TAXATION—BANK STOCK: A refund cannot be made after the assessment of bank stock has been paid without protest.

May 8, 1926. *County Attorney, Bedford, Iowa:* We wish to acknowledge receipt of your favor of the 5th requesting the opinion of this department concerning the taxation of bank stock. You submit three questions which are stated as follows:

"(1) Should banks be assessed for 1926 on 25% of the net remaining after the deduction of the amount of capital stock invested in real estate from the capital, surplus and undivided profits without taking into account the custom of deducting 40% from the actual net?—as other property is assessed in this district?

"(2) If the banks which have heretofore strictly complied with the law and paid taxes on the basis of an assessment without the benefit of the 60% basis file petitions for refund should they be allowed and if so for how many years back?

"(3) If it is determined that banks which have had the benefit of taxation based on 60% of the net value and have heretofore paid taxes on that basis are liable to taxation based on the other 40% of the net actual value, can recovery be had against them and if so what is the proper procedure necessary to so recover?"

This department has already given an opinion answering your first question. This opinion was given to the Honorable J. C. McClune, Auditor of State, dated January 12, 1925. We are enclosing a copy of the opinion herewith.

Referring to your second question, you are advised that if the banks paid their assessment without protest or filing objections and availing themselves of the remedy afforded by the statutes of this state, a refund cannot be made. Taxes

voluntarily paid upon property subject to taxation, even though the assessment is erroneously computed, cannot be refunded to the taxpayer.

ELECTIONS: After the time for filing nomination papers under the primary election law has expired candidate may not withdraw his name.

May 10, 1926. *County Attorney, Spencer, Iowa:* We have received your letter of May 5, 1926, in which you submit to this department an inquiry which you have stated as follows:

"I would like to have an opinion upon the following question just as soon as you are able to have the same prepared. It involves a question concerning the primary election laws and the County Auditor is desirous of knowing the answer before primary election ballots are prepared. The question is this: Can a candidate for a county office, such as for supervisor, withdraw his name and his candidacy at any time before the primary election and his name be left off the ballots?

In considering this question Code section 542 provides that nomination papers when filed shall not be withdrawn or added to nor any signatures thereon revoked. There is no provision in the chapter or nomination by primary election specifically providing in one way or another for withdrawal of candidates.

Chapter 37 of the Code provides for the nominations by convention and by petition and provides in Section 652 for withdrawals of candidates by filing a sworn-to or acknowledged written request for such withdrawal by the candidate.

In Section 649 of this chapter the words 'any primary' are mentioned along with the words 'convention of delegates, caucus or meeting of qualified electors representing a political party' etc. As long as Section 652 in providing for withdrawals refers to all methods used in Chapter 37, I am wondering whether such section or withdrawal would apply to the question of a nomination by primary election, the above words being used in Section 649. There is also a question in my mind as to whether or not the section on withdrawals does not apply to all methods of nomination.

Of course Chapter 37 of the Code has been amended by the 41st General Assembly, Chapter 27 which in reality codifies Chapter 37 of the Code. Sections 9 and 10 of Chapter 27 of the 41st G. A. apply to withdrawals and provide that in case of a county office the same might be done twenty days before the day of election. However, this particular provision has been amended again in the same session of the general assembly in Chapter 23, making it twenty-five days instead of twenty days.

The County Auditor is wondering whether in view of the fact that there is no specific section under the primary election laws relative to withdrawals, this section on withdrawals as amended is not a general provision applicable to all manner of nominations and is a general provision thereto, the primary election method equally as well as the petition or convention method."

We have examined the primary election statute with care and we have been unable to find any provision therein permitting a candidate to withdraw his candidacy after he has been nominated in accordance with the provisions of the statute. However, Section 544 provides for the execution and filing of an affidavit by a candidate at the primary election. In this affidavit the form of which is prescribed by the statute, we find these statements:

"That I am eligible to the office for which I am a candidate, and that the political party with which I affiliate is the ..... party; that I am a candidate for nomination to the office of ..... to be made at the primary election to be held in June, 19..., *and hereby request that my name be printed upon the official primary ballot* as provided by law, as a candidate of the..... party. *I furthermore declare that if I am nominated and elected I will qualify as such officer.*"

The execution and filing of this affidavit is a condition precedent to the right of a candidate to have his name placed on the primary election ballot. If he does not do so, then notwithstanding the fact that petitions have been filed containing a sufficient number of names to nominate him, his name may not legally be placed on the ballot. Therefore, it is apparent that it is necessary for the candidate to take some affirmative action to entitle him to the right to have his name placed upon the ballot. Apparently this will take the place of the right to withdraw.

Section 542 referred to in your letter reads as follows:

"A nomination paper, when filed, shall not be withdrawn nor added to, nor any signature thereon revoked."

It is quite apparent that this section does not apply to withdrawals of candidates' names, but merely relates to the nomination papers themselves.

Section 652, as amended by the 41st General Assembly in no way relates to the question you have submitted to us. By the specific language of Section 652, the right to withdraw under the provisions of this section is limited to a candidate named by either of the methods authorized in the chapter. A reference to the heading will show that the nominations therein referred to are those made by convention or petition. The chapter also relates to the withdrawal of the name of a candidate after he has been formally nominated and not to the withdrawal of the name of a candidate who has complied with the primary election law. However, in the foregoing discussion of the question you have submitted we have only considered the right of a candidate to withdraw after the expiration of the time for filing nomination papers. We believe that up to and including the last day of filing the candidate may withdraw his affidavit and thereby forfeit the right to have his name placed on the primary election ballot. After the expiration of the period for filing petitions, however, a candidate may not withdraw his name from the list of candidates.

TAXES: Penalty and interest on delinquent property tax are not ipso facto cancelled after they have remained delinquent for four years. Each year is to be figured separate and distinct from the other, and each year interest and penalty for four years may be added during the current four year period. No more than four years' interest and penalty may be added however.

May 11, 1926. *County Attorney, Centerville, Iowa:* We wish to acknowledge receipt of your favor of the 7th concerning the interpretation of Section 7194, Code, 1924. We have given an opinion on the interpretation of this section to the Auditor of State, and this department, on November 15, 1921, gave an opinion upon the same section to J. A. Nelson, County Attorney, of Decorah, Iowa. The latter opinion is found on page 150, Report of the Attorney General for 1922. To make the matter clear, however, we will again recite the propositions involved.

Section 7194, Code, 1924, reads as follows:

"No penalty or interest, except for the first four years, shall be collected upon taxes remaining unpaid four years or more from the thirty-first day of December of the year in which the tax books containing the same were first placed in the hands of the county treasurer, and the Board of Supervisors at the January meeting may declare such tax unavailable, and when so declared by the board, the amount shall be credited to the treasurer by the auditor as unavailable and he shall apportion such tax among the funds to which it belongs."

This section formerly appeared as Section 13917 of the Code of 1897, and was amended by the Thirty-sixth General Assembly, by inserting the clause "except for the first four years" after the comma following the word "interest" in the first line of this section. Prior to the amendment, the Supreme Court of Iowa in the case of *Collins Oil Company v. Perrine*, 188 Iowa, 295, construed the statute to mean that after personal property taxes had remained delinquent a period of four years, in that event the penalties and interest were ipso facto cancelled.

The question now arises concerning the interpretation of this section as amended. From your letter we understand a taxpayer contends that in the event there is a series of delinquent personal taxes extending back for more than four years, he is to pay the tax upon all of the years due and only the penalty and interest for the first four years of the period that these taxes become delinquent. This interpretation would permit a taxpayer to allow his taxes to become delinquent for, we will say, as an example, sixteen years, and he would only be required to pay interest and penalties upon the first four years that these taxes become delinquent, and no interest or penalty upon each of the years following the first four year period, to the date of the payment. We cannot agree with this interpretation.

We are of the opinion that each of the years a taxpayer's personal taxes become delinquent and are unpaid is to be figured separatedy and apart from any other years in which his taxes are delinquent. The statute limits the amount of penalties and interest which may be collected upon each of these years to a four year penalty and interest. After four years have expired no additional interest or penalty may be charged and collected upon that item of delinquent personal tax. Interest and penalty may be collected for four years, however, upon each item consisting of a year's delinquent personal tax which remains delinquent and unpaid. Thus each year or item of delinquent personal tax might bear interest and penalties for four years if it remained unpaid for that length of time. Within four years from the date the taxes are paid, penalties and interest would be charged against each item for three years, two years, and one year, respectively.

MOTOR VEHICLES: Discussion of what constitutes a reconstructed motor vehicle under the provisions of Section 4863.

May 12, 1926. *Secretary of State:* We have received a letter from Mr. F. J. McGreevy, an attorney of Ackley, Iowa, submitting to this department the question of whether certain trucks owned by the Snater Construction Company of Hardin County, Iowa, were repaired or reconstructed automobiles within the meaning of subdivisions 19 and 20 of Section 4863. For the purpose of giving a correct understanding of the question submitted we will copy herein a portion of the affidavit required of the owners of reconstructed motor vehicles, which was executed by Rieko Snater, the Manager of the Snater Construction Company. The following statements appear in the affidavit:

"What did you do to rebuild it? (State in full) New motor assembly with fan and carburetor. Motor No. 13234862. New gas tank, radiator, rear and front springs, 2 radius rods, 2 wheels and rims (rear), hood, transmission, and body. Rear and front ends rebuilt."

The question for us to determine is whether a truck, changed in the manner stated in the affidavit, was repaired or reconstructed.

Subdivisions 19 and 20 of Section 4863 read as follows:

"19. 'Reconstructed motor vehicle' shall mean a *motor vehicle which shall have been assembled or constructed largely by means of essential parts, new or used,* derived from other motor vehicles or makes of motor vehicles of various names, models or types, or *which, if originally otherwise constructed, shall have been materially altered by the removal of essential parts, or by addition or substitution of essential parts, new or used,* derived from motor vehicles or makes of motor vehicles."

"20. 'Essential parts' shall include, not only *integral parts but also body parts* such as fenders, hood, cowl, and other parts, *the removal, alteration, or substitution of which will tend to conceal the identity or substantially alter the appearance of the motor vehicle;* but in case of dispute the determination of the department as to the character of such assembly, reconstruction, or alteration shall be conclusive."

We have underlined the first portion of the statute marked 19 to show that the meaning of the phrase "Reconstructed motor vehicle" means a vehicle which has been assembled or constructed from the ground up and does not consist of the reconstruction of such a vehicle already in existence. It will be observed that the second portion thereof contains the description of essential parts which consists of integral parts and also body parts, the removal, alteration, or substitution of which will tend to conceal the identity or substantially alter the appearance of the motor vehicle. As we understand the repairs made on the truck in question, while the number of the engine is different from the original engine number, the new parts added thereto are such as not to materially alter the identity or appearance of the motor truck. If this statement is true, then it cannot be said that the motor truck, after the repairs or additions thereto were made, is a reconstructed truck. If the additions thereto were not in the nature of repairs, then it will be almost impossible to conceive of a distinction between a repaired truck and a reconstructed truck. The word "reconstructed" when given its ordinary meaning means something more extensive than the mere addition of new parts thereto, and we believe it was the intention of the legislature to give to this phrase the ordinary and accepted meaning and that the definition of this term in the statute was framed for that purpose.

We are, therefore, clearly of the opinion that the motor vehicle described in the affidavit of the owner thereof is a repaired and not a reconstructed automobile. The owner of the auto truck in claiming that it is reconstructed rather than repaired places chief reliance upon the fact that a new engine was placed in the truck, which bears a new engine number. If this would make the car a reconstructed vehicle, then almost any repair made thereon would do so. We, therefore, hold that the motor truck was repaired and not reconstructed.

BUDGET LAW—STATE FAIR BOARD: The amount that may be expended in aid of fairs is limited by the appropriation in the Budget Law.

May 14, 1926. *Secretary, Iowa State Fair Board:* We have received your letter of April 24, 1926, in which you submit to this department a certain inquiry which was submitted to you by W. F. Weary, Secretary of the Sac County Fair. The letter of Mr. Weary reads as follows:

"The last assessor in Sac City assessed twenty-two acres of our fair ground although the entire fair ground tract consists of fifty-seven acres. The assessor maintains that this twenty-two acres which lies to the east of the track, was rented for pasture part of the year, which is true. However, that acreage is used for fair purposes during the four days of the fair and is a part of the fair grounds and kept up for fair purposes the same as any other part.

"Our supervisors are willing to remit this tax if we can convince them the law will permit it."

Section 6944 reads in part as follows:

"The following classes of property shall not be taxed:

* * * * * * * * * *

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

We are not advised as to whether the Sac County Fair Grounds are owned by the county, or some corporation or voluntary association. We are assuming that the grounds belong to the county. We are of the opinion that even though the fair grounds may be rented for a part of the year and rent collected therefor, it is nevertheless not taxable. Notwithstanding these facts, it is used for a public purpose and not for pecuniary profit within the meaning of the statute from which

the above quotation is taken. This conclusion is amply supported by the comparatively recent case of *City of Osceola v. Board*, 188 Iowa, 278. In the opinion in this case we find the following quotation:

"We see little, if any, room for argument to the contrary. Clearly, this land was acquired for public use, and not for pecuniary profit. It is just as clear that it is not now held for pecuniary profit, and that it is fully devoted to the public use for which it was acquired. We have not heretofore passed directly upon the question here presented but authority is abundant from other jurisdictions. (Citing many authorities).

"The fact that a charge is made for a use of the property which is consistent with and incidental to the public use does not change the exemption character of such property. The public use of municipal property frequently, if not usually, involves the collection of rents and rates; water rates from consumers; tuition from school children; reasonable value of support from inmates in poor farm and asylum. These things are all incident to the just and economic administration of a public institution. We think that the collection by the city of the rental in question was a mere incident of the public use and of the maintenance of the public property; that it was necessarily absorbed in the expense of maintenance, and in that sense reduced such expense.

"It was the clear duty of the officers of the municipality to avail itself of all reasonable methods to reduce such expense of maintenance. The collection of such rent, therefore, as an incident to the maintenance, did not imply a pecuniary profit, but only a just and economical way of meeting, to that extent, the current expense of operation and maintenance of the institution."

We are, therefore, clearly of the opinion that the Sac County Fair grounds are not subject to assessment for taxation.

BOVINE TUBERCULOSIS: Discussion of method of procedure in indicting a cattle owner for failing to observe quarantine.

May 14, 1926. *County Attorney, Alton, Iowa:* We have received your letter of May 11, 1926, in which you submit to this department the following inquiries:

"Our local State Veterinarian has asked me to prosecute a violation of quarantine of certain tubercular cattle in this county. Sometime ago reactors were found in a herd of cattle when tests were being made and notice of quarantine was served upon the owner on Form O-2, used by the Division of Animal Industry of the Department of Agriculture. The owner of the cattle has refused to abide by the rules of quarantine in every way. He refuses to keep the infected animals isolated; refuses to kill the infected animals and has been selling milk from the infected cattle to creameries.

"Kindly advise me what the proper procedure is in this case. Under what sections of the law should he be prosecuted? Is it my duty to prosecute this case without instructions from your office?"

Chapter 129 of the Code of 1924, as amended by the 41st General Assembly, contains the provisions of the Iowa Law relating to the eradication of Bovine Tuberculosis. Section 2669 thereof relates to the use or disposition of tubercular animals, and reads as follows:

"If, after such examination, tubercular animals are found, the department shall have authority to order such disposition of them as it considers most desirable and economical. If the department deems that a due regard for the public health warrants it, it may enter into a written agreement with the owner, subject to such conditions as it may prescribe, for the *separation and quarantine of such diseased animals*. Subject to such conditions the diseased animals may continue to be used for breeding purposes."

Sections 2700 and 2701, as amended by the 41st General Assembly, read as follows:

"Penalty. Any owner of breeding cattle in any county which has been enrolled under the accredited area plan, as provided in this chapter, who prevents, hinders, obstructs or refuses to allow a veterinarian authorized by the department of agriculture to conduct such test for tuberculosis on his cattle after a period of ninety days from the publication of the notice of enrollment, shall be guilty of a misdemeanor and shall be punished by a fine of not more than one hundred dollars." Sec. 2700.

"Quarantine. The cattle owned by violators of the above section shall be quarantined by the department until such test is made." Sec. 2701.

Chapter 128 relates to infectious and contagious diseases among animals. Section 2643, which is a part of said chapter, reads in part as follows:

"In the enforcement of this chapter the department of agriculture shall have power to:

1. Make all necessary rules for the suppression and prevention of infectious and contagious diseases among animals within the state.
2. Provide for quarantining animals affected with infectious or contagious diseases, or that have been exposed to such diseases, whether within or without the state.
3. Determine and employ the most efficient and practical means for the prevention, suppression, control, and eradication of contagious or infectious diseases among animals.
4. Establish, maintain, enforce, and regulate quarantine and other measures relating to the movements and care of diseased animals.
5. Provide for the disinfection of suspected yards, buildings, and articles, and the descruction of such animals as may be deemed necessary.
6. Enter any place where any animal is at the time located, or where it has been kept, or where the carcass of such animal may be, for the purpose of examining it in any way that may be necessary to determine whether it was or is infected with any contagious or infectious diseases. * *"

Manifestly, this section was designed to secure the suppression and prevention of diseases among animals. Pursuant to the authority granted by said section, the Department of Agriculture adopted regulations for the control of contagious and infectious diseases of live stock. Such regulations were prepared in 1925. We are enclosing a pamphlet containing such regulations. Regulations 10 and 11 read as follows:

"Regulation 10. Sec. 1. All cattle that react to the tuberculin test, as well as those which show physical evidence of tuberculosis shall be marked for identification by branding with the letter 'T' not less than two or more than three inches high on the left jaw, and attached to the left ear, a metal tag bearing serial number, and in the inscription 'REACTOR' (Penalties—Sec. 2663 Code of Iowa 1924)"

"Regulation 11. Sec. 1. The term 'Quarantine' shall be construed to mean the perfect isolation of all diseased or suspected animals from contact with healthy animals as well as the exclusion of healthy animals from yards, stables, enclosures or grounds where suspected or diseased animals are or have been kept."

The quarantining of animals under the tuberculosis law would, of course, come under the provisions of the above regulations. Section 2663 provides as follows:

"Any person who shall violate any provision of this chapter or any rule adopted thereunder by the department shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail for not more than one year."

These regulations must be followed by any person, whose cattle may be afflicted with tuberculosis, and in preparing an indictment charging the property owner in Sioux County with a violation of the quarantine, each and all of the statutes and regulations herein referred to must be complied with.

We have in a general way indicated the procedure to be followed in preparing the indictment.

HIGHWAYS—TREES: Trees on the highway should not be destroyed unless it is necessary to do so to properly improve the highway, or unless they obstruct a highway.

May 14, 1926. *Auditor of State:* We have received a letter from J. W. Wiersma, County Engineer of Sioux County, Iowa, in which he submits to this department the following inquiry:

"Could you advise me how to proceed in having a property owner remove six apple trees from the highway.

This party has been notified some three months ago to cut the trees along his property. He has cut them all back to the line with the exception of these six apple trees. He claims that under Chapter 247 of the Code that he cannot be compelled to cut these apple trees unless he is allowed a damage for the loss of them.

He does not dispute the correctness of the line and his requested allowance for damages are reasonable.

The reason I am making this inquiry is that in case it is not necessary to allow him damages I may be sure that I am correct in requiring him to cut these trees. The amount of the damages are small, but I do not like to set a precedent by paying them."

We have concluded to prepare an opinion for your department so that it may operate as an official opinion.

Section 4791 of the Code is in the following language:

"The road superintendent shall not cut down or injure any tree growing by the wayside which does not obstruct the road, or tile drains, or which stands in front of any town lot, farmyard, orchard or feed lot, or any ground reserved for any public use, or destroy or injure the ingress or egress to any property, or turn the natural drainage of the surface water to the injury of adjoining owners; but it shall be his duty to use strict diligence in draining the surface water from the public road in its natural channel, and to this end he may enter upon the adjoining lands for the purpose of removing obstructions from such natural channel that impede the flow of such water."

The evident purpose or design of the above statute is to protect trees growing by the wayside which do not obstruct the road or tile drains. Similar protection is afforded by the statute to trees which stand in front of any town lot, farmyard, orchard or feed lot, or any ground reserved for any public use. It has been held by the supreme court that trees which do not obstruct the highway, and the removal of which is not necessary to properly improve it, are not to be removed in opposition to the wishes of an adjoining owner on whose portion of the highway the trees are growing.

Bills v. Belknap, 36 Iowa 483;
Everett v. Council Bluffs, 46 Iowa 66;
Quinton v. Burton, 61 Iowa 471;
Crismon v. Deck, 84 Iowa 344.

We believe that Chapter 247, relating to hedges along the highways, does not apply to the situation under consideration. This chapter must be read in connection with the section just quoted. This section relates to trees that do not constitute a part of what are known as hedges, as described in Chapter 247. Therefore, we believe that the trees referred to in the communication of the county engineer should not be destroyed unless they interfere with the proper improvement of the highway.

MUNICIPALITIES: (1) City has power to extend limits so as to include land owned by the Iowa State College at Ames; (2) City may not levy special assessment against state property.

May 19, 1926. *Secretary, Iowa State Board of Education:* We have received your letter of May 10, 1926, in which you submit to this department certain inquiries which you have stated as follows:

"On or about March 5, 1926, Mr. A. B. Maxwell, City Auditor and Clerk, Ames, Iowa, wrote to the Iowa State College of Agriculture and Mechanic Arts, as follows: 'An assessment for Storm Sewer on Riverside Drive Street has been made, and from Lincoln Way to 4th St. is charged with Five Hundred ($500.00) dollars. If you wish to pay your assessment you must call at this office before April 1, 1926.'

"I am calling your attention to an official opinion that Mr. Maxwell O'Brien Assistant Attorney General, wrote on March 24, 1926, to Mr. C. R. Jones, Auditor, Iowa State Highway Commission, Ames, Iowa.

"I am enclosing a blue print showing the location of the Storm Sewer on Lincoln Way and Riverside Drive. It also shows the abutting property and the boundaries of the assessed district. The College property along Riverside Drive and Lincoln Way is pasture land, being a part of the general farm of some six hundred acres.

"The Iowa State College did not receive a notice regarding the proposed construction of the Storm Sewer. The first notice was the bill for $500.00, a copy of which is given in the first part of this letter. I shall appreciate your giving me the following information:

1—Has a city the authority to extend its incorporate limits so as to include state property without permission from the General Assembly or a statute empowering the city to do so?

2—Has the city of Ames legal authority to levy an assessment for a storm sewer against the Iowa State College?"

The statute provides for the annexation of both platted and unplatted territory to cities and towns. The sections relating thereto are 5612 to 5618, both inclusive, which are a part of Chapter 286 entitled "Incorporation." It will not be necessary to copy any part of these sections in this opinion. It will suffice to say that there is no limit therein to the kind or character of territory that may be annexed thereto. We are, therefore, clearly of the opinion that the city has authority to extend its corporate limits so as to include state property without permission from the General Assembly, or the enactment of a statute empowering the city to do so. We deem it advisable to say, however, that even though such property may be embraced within the city limits, it is not subject to taxation for municipal or any other purpose.

Section 6944 provides in part as follows:

"The following classes of property shall not be taxed:

1—Federal and state property. The property of the United States and this state, including university, agricultural college, and school lands. * *"

Your second question must be answered in the negative. It has been held that the statutes of this state do not confer upon cities and towns the power to levy a special assessment upon property owned by the state and used for governmental purposes. It is quite apparent that in establishing and maintaining schools, the state acts in a governmental capacity. The following authorities so hold:

The Polk County Savings Bank, et al. v. State of Iowa, et al., 69 Iowa 24;
Edwards & Walsh Construction Co. v. Jasper Co. and City of Newton, 117 Iowa 365.

It was held in the latter case that property held by the state cannot be made liable for special assessments for two reasons: first, because it cannot be sold on execution, nor may any lien be created against it, and second, because the state may not be sued, nor may judgments be enforced against it.

These decisions are decisive of the questions you have submitted to us. We, therefore, hold that the city of Ames has no authority whatever to levy a special assessment against the property owned by the state and used for college purposes.

The method usually pursued in cases of this character is to ask the legislature to make an appropriation to pay the portion of the cost of such public improvements which should justly be paid by the state.

COURT EXPENSE FUND: Fees collected by the Clerk of the District Court should be credited to the county general fund and not the court expense fund.

May 19, 1926. *Auditor of State:* We wish to acknowledge receipt of your favor of the 12th requesting our opinion as follows:

"We are in receipt of a request from our examiner, Mr. L. I. Traux, who at the present time is engaged in an examination of Polk County, for an opinion in regard to turning clerk's fees to the court expense fund. It seems that in Polk County the fees turned over by the clerk of the court are placed in the court expense fund since the enactment of the 41st General Assembly set out in Chapter 125. Kindly inform us at your earliest convenience whether or not the turning of these fees collected by the clerk of the district court to the court expense fund, is legal."

In the absence of statutory provision all fees collected for a county are to be credited to the county general fund. Prior to the enactment of Chapter 125, Laws of the 41st General Assembly, to which you refer, the salary of the clerk of the district court was paid from the county general fund. The amendment now authorizes the payment of such salary from the court expense fund, but does not require the salary to be paid from such fund. The court expense fund is in fact but an addition to the county general fund, and a millage may be levied for this fund providing the general fund is not sufficient to pay the court expenses. Chapter 125, supra, does not provide that the fees collected by the clerk of the district court shall be paid into the court expense fund. Many counties do not have such a fund, but pay the expenses of the court from the county general fund. It was plainly the intention of the legislature to only provide an additional fund from which the clerk's salary might be paid providing such a fund was created. There was no intention of diverting the fees collected by the clerk from the general fund to this additional or court expense fund.

We are, therefore, of the opinion that the fees collected by the clerk of the district court should be credited to the county general fund and not the court expense fund.

ELECTIONS. In computing time a voter has lived in his voting precinct, the first day of a person's residence should be excluded and the last day included.

May 20, 1926. *County Attorney, Oskaloosa, Iowa:* We wish to acknowledge receipt of your favor of the 15th concerning the eligibility of a voter. The question presented by you is—

"Whether the first day of arrival in a new state, county or precinct shall be counted when the party in question seeking to vote leaves the old location and arrives in the new place of residence on the same day."

Paragraph 23 of Section 63, Code, 1924, reads as follows:

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

I believe this paragraph answers your inquiry, and in computing the time the first day of the person's residence at his new domicile should be excluded and the last day included.

CRIMINAL—SENTENCE: Indeterminate sentence law does not apply in the case of a sentence imposed prior to the taking effect of such law.

May 20, 1926. *Governer of Iowa:* We wish to acknowledge receipt of your favor of the 17th in which you enclose a request for an opinion from Hon. T. P. Hollowell, warden of the state penitentiary. You request our opinion upon the case submitted by Warden Hollowell.

The case referred to was one of rape committed by Frank Ralston on the 28th day of April 1907, in Monroe County, Iowa. The defendant was tried, found guilty, sentenced and committed to the state penitentiary at Fort Madison, Iowa, for a period of twenty years. He was received at the penitentiary October 17, 1907. The warden states that based on a twenty year sentence with allowances for good time, the convict is due to be released May 27, this year.

You inquire whether or not the indeterminate sentence law applies to the facts in this case, or whether the court properly fixed the term of confinement in the sentence.

If the indeterminate sentence law applies, the court exceeded his authority in fixing the time the defendant would serve. (*Adams v. Barr*, 154 Iowa, 83). Section 4756, Code, 1897, providing the punishment for the crime of rape fixed the maximum sentence at imprisonment in the penitentiary for life. Section 5718-a13, Supplement to the Code of 1913, being the indeterminate sentence law, provides in substance that the term of imprisonment shall be the maximum term provided by law for the crime. Thus if the indeterminate sentence law was applicable to the instant case, the court could not fix the term of imprisonment for any number of years less than life.

The indeterminate sentence law provides in part as follows:

"After July 4, 1907, whenever any person over sixteen years of age is convicted of a felony committed subsequent to July 4, 1907, except treason or murder, the court imposing a sentence of confinement in the penitentiary shall not fix the limit or duration of the same, but the term of such imprisonment shall not exceed the maximum term provided by law for the crime of which the prisoner was convicted; * * *."

The crime in the instant case was committed on April 28, 1907, and is therefore excepted by the express terms of the statute referred to. Section 4756, Code, 1897, fixing the punishment for the crime of rape provided that the convicted person "shall be imprisoned in the penitentiary for life or any term of years." Under the provisions of this statute the court had authority to fix in the sentence the term of years one convicted of rape should serve, and this the court did in fixing the sentence in the case under consideration.

We are of the opinion that the indeterminate sentence law did not apply to this case. The sentence of the court fixing the term of imprisonment at twenty years was within the court's authority, and therefore the convict may be released May 27th of this year.

COUNTY TREASURER: Discussion as to whether or not the county treasurer's bond has been released.

May 20, 1926. *County Attorney, Albia, Iowa:* We wish to acknowledge receipt of your favor of the 18th with the enclosed proceedings of your Board of Supervisors concerning the county treasurer's bond. From the proceedings it appears that the Board of Supervisors on December 7, 1925, by a resolution resolved to release the bond of the county treasurer which had been given for the period from January 1, 1925 to January 1, 1927, and upon which the premium had been fully

paid. This action was taken in view of the provisions of Chapter 95, Laws of the Forty-first General Assembly. A copy of this resolution was given to the local agent of the surety company and by him forwarded to the home office of the company December 9, 1925. Application was made at that time for a $10,000 bond and a request for the return premium upon the bond that the board attempted to release. On December 11th, the home office notified their agent that they could not become surety upon the $10,000 bond, and requested a certified copy of the proper resolution releasing their bond from liability, and stating that they would then return the unearned premium. December 17th the agent replied to the company stating that in his opinion the resolution of the Board of Supervisors was sufficient and requesting the return premium promptly. No answer was received to this letter, and on January 2, 1926, the Board of Supervisors by a resolution resolved to continue the bond of the county treasurer in force until the date of its expiration, being January 1, 1927, and nullifying the former resolution. A copy of this resolution was furnished to the local agent for the surety company upon the same date and sent by him to the company. On February 18, 1926, the surety company notified the local agent that they had decided that the Board of Supervisors were within their legal rights in cancelling and releasing the company as surety upon the bond in question, and that the company refused to concur in the subsequent action of the Board of Supervisors nullifying their former resolution and continuing the bond in effect. Again on February 24, 1926, the company wrote the local agent that they could not continue their liability under the bond and on the same date notified the Board of Supervisors that they would consider their liability on their bond terminated as of January 1, 1926, and would return the premium and would not concur in the second resolution of the board. On March 25, 1926 the company wrote to their local agent inquiring whether a new bond had been given by the treasurer. He replied that no bond had been given, and that the county still held them responsible. A bond for $10,000, signed by three personal sureties and dated April 8, 1926, appears to have been approved by the Board of Supervisors on April 8th and filed with the county auditor. Apparently no resolution or minute was made in the records of the Board of Supervisors concerning this bond.

We assume that it was an additional bond to that already given by the county treasurer. Not until April 15, 1926, did the surety company attempt to return the unearned premium upon their bond. This they did by mailing a check to their agent in Albia for $226.25, and requesting the agent to return his proportion of the commission amounting to $111.25, which would make a total unearned premium to be returned of $337.50. It does not appear that this check, the agent's check, or any other tender was ever made to the county auditor, county treasurer or Board of Supervisors. The check from the company was returned to them by their agent. On April 23d one of the personal sureties on the personal bond we have hereinbefore mentioned notified the supervisors that he would no longer continue liable on the bond, and by resolution dated April 23, 1926, the Board of Supervisors accepted an additional bond for the county treasurer signed by personal sureties, in the sum of $10,000. On May 12th the surety company mailed their check to the chairman of the Board of Supervisors for $226.25, which they claim was their share of the unearned premium on the treasurer's bond, and notified the chairman that they had asked their local agent to give the supervisors his check for $111.25. It does not appear that the agent ever tendered his check, and apparently the check of the company was not accepted.

Under the facts above related, you inquire whether or not the surety company was released from its obligation either by the action of the Board of Supervisors in passing the resolution on December 7, 1925, or by the taking effect of Chapter 95, Laws of the Forty-first General Assembly.

Chapter 95, Laws of the Forty-first General Assembly became effective January 1, 1926. At that date the bond in question was in full force and effect and the premium had been fully paid to January 1, 1927. A contract of suretyship had been entered into by the company and the county on January 1, 1925. The contract at that date was concededly legal. We believe it fundamental that subsequent statutory enactments cannot divest rights which have previously vested under a valid and legal contract.

Before the surety company had changed its position in any respect, and long before the unearned premium was tendered to the county, if it be claimed that it was tendered, the Supervisors rescinded their action relieving the surety company from liability on the bond, and expressly continued the bond in full force and effect. The statute provides a method by which the surety company might be relieved from liability upon their bond, however, they have not elected to pursue this method. We are of the opinion that the action of the Board of Supervisors in passing the resolutions dated December 7, 1925, and January 2, 1926, did not operate as a release of the surety bond,—particularly in view of the other facts that we have related.

Furthermore, there was no proper and legal tender by the surety company of the unearned premium, and the bond was never surrendered or returned. Before the company had changed its position the supervisors elected to withdraw their offer of cancellation and the bond was thus continued in effect.

We are of the opinion that the bond in question is still a valid binding obligation on the part of the surety company.

FAIRS: The appropriation in the Budget bill as aid for county fairs may not be exceeded and if not sufficient the aid must be prorated.

May 20, 1926. *State Fair Board*: We have received your letter of April 7, 1926 in which you submit to this department an inquiry which you have stated as follows:

"I am enclosing herewith a tabulation containing some information regarding the State Aid paid to County and District Fairs.

"I call your attention to the tabulation at the bottom of the page. You will note that during the biennial period of 1921-22, the County and District fairs were paid, $325,753; in 1923-24, $331,505. During the four year period under the State Law which provides for the State aid, there was an unlimited appropriation. As I understand it the law creating the office of Budget Director, specified that the Budget Director shall place before the Legislature an appropriation bill providing for appropriations for all money disbursed by the state.

"The appropriation bill passed by the 41st G. A. carried an item of $320,000 for state aid for County and District Fairs, for the biennial period 1925-26. During the year 1925, $170,965 was disbursed. Of this amount $1,853 was paid prior to July 1, 1925, and was charged to the 1924 account. The net amount charged to the appropriation made by the 41st G. A. was $169,111.24, leaving $150,888.66, available for fairs held in 1926.

"From the list of Fairs that have already claimed dates, it is evident that there will be practically as many fairs this year as last. Therefore, we have reason to believe that the State Aid claimed by these fairs will be about the same as last year or $171,000. This will leave a deficit of approximately $20,000 in this account.

"To my knowledge there is nothing in the law that gives the State Budget Director, the State Auditor or this department authority to pro rate the amount available among the fairs claiming State Aid. Neither is there anything in the law that would permit me to hold up the filing of these reports with the State Auditor, or the State Auditor refusing to issue these warrants when the reports are filed as the

law is very specific as to my duties and the duties of the State Auditor in these matters. Therefore, you will readily understand that if I certify the reports to the State Auditor as they are filed, and the State Auditor issued the warrants, the last ten or twelve fairs to file reports will not receive State Aid unless additional funds are provided for either by the Budget Director or the committee on Retrenchment and Reform.

"This is a matter that should be taken care of before the fair season opens and any reports are filed.

"I also call your attention to the tabulation at the top of the enclosed page. This tabulation shows the number of fairs commonly known as 'Street Fairs or Fall Festivals,' held during the past five years. It also sets out the total amount of premiums paid by each of these fairs and the amount of State Aid received. These fairs have all qualified with the law which is very simple. All they are obliged to do is to file articles of incorporation as provided by state law, have an exhibit of agriculture, dairy and kindred products, livestock and farm implements.

"In the report made to this department, the President, Secretary and Treasurer are obliged to make an affidavit to the effect that the fair had a bona fide exhibition of live stock and products enumerated in the law, also that their society is incorporated under the laws of Iowa. Personally I have no objection to the State paying State Aid to these street fairs, but I find it rather embarrassing and difficult to determine just what constitutes a bona fide county or district fair as defined by the present State law.

"From the information I have in this office at least four or five of these street fairs will be organized and incorporated this year, and they no doubt will make application for State Aid. I am inclined to feel that this law should be amended and a county and district fair more definitely defined. If it is the wish of the Legislature to pay these street fairs State Aid, a law should be passed providing for same. If the number, however, continues to increase under the present arrangement, I am inclined to feel that this will jeopardize the State Aid for our bona fide county and district fairs, very few of which could operate without it."

The provisions of the Budget Law seem to be determinative of the question you have submitted. Sections 1, 57 and 58 of Chapter 218, Acts of the 41st General Assembly, entitled State Budget, provide as follows:

"That the amount derived from direct taxation, other than from the bonus levy, during the fiscal years beginning July 1, 1925, and July 1, 1926, and ending June 30, 1926, and June 30, 1927, respectively, together with any unexpended appropriations at the close of the biennium ending June 30, 1925, and all revenue from sources other than direct taxation which is available for appropriation for state purposes, and all other money in the state treasury which is not by law segregated, shall be established as a general fund, and so much thereof as may be necessary, shall be, and the same is hereby appropriated for the biennium beginning July 1, 1925 and ending June 30, 1927, in the following manner and for the following uses, to-wit:

* * * * * * *

Sec. 57. No state department, institution or agency receiving appropriations under the provisions of this act shall expend funds or approve claims in excess of its appropriations, except as otherwise provided by this act. If the expenditures of any state department, institution or agency shall in any other manner exceed the amount of its appropriations, the members of the governing board of any such state department, institution or agency who shall have voted for such excessive expenditure, or, if there be no governing board, the head of any such state department, institution or agency, making such excessive expenditure, or approving such excessive claims shall be personally liable for the full amount of the unauthorized deficit thus created.

The executive council, with the approval of the budget director, is authorized where the appropriation for any department, institution, or agency is insufficient to properly meet the legitimate expense of such department, institution, or agency of the state, to transfer from any other department, institution, or agency of the state having an appropriation in excess of its necessity, sufficient funds to meet such deficiency.

Sec. 58. No obligation of any kind whatsoever shall be incurred or created subsequent to June 30, 1927, against any appropriation made by this act, unless otherwise specifically provided by law, and, on June 30, 1927, it shall be the duty of the head of each department, board or commission, receiving appropriations under the provisions of this act, to file with the auditor of state a list of all expenditures for which warrants have not been drawn."

These sections manifestly do away with what have previously been known as implied appropriations, or such as necessarily follow from the provisions relating to the payment of specific items out of public funds. It will be observed that Section 1 provides that the amount derived from direct taxation other than from the bonus levied within the period therein designated, together with any unexpended appropriations at the close of the biennium therein specified and all revenue from sources other than through taxation which is available for appropriation for state purposes and all other money in the state treasury which is not by law segregated, shall be established as a general fund and so much thereof as may be necessary is appropriated for the biennium therein designated in the manner therein provided. The other two sections place a limit upon the expenditure of funds by any state department, institution or agency receiving appropriations under the provisions of the act and prohibit the expenditure of funds or approval of claims in excess of the appropriations except as otherwise provided by this act. We believe these sections absolutely prohibit the expenditure of money by any state department, institution or agency in excess of the appropriation provided by the act, except in the manner designated in Section 57. Under the provisions of this section, the Executive Council, with the approval of the Budget Director, is authorized to transfer from any department, institution or agency of the state, having an appropriation in excess of its necessity, sufficient funds to properly meet the legitimate expenses of some other department, institution or agency of the state.

On the 9th day of November, 1925, this department prepared an opinion for Honorable J. C. McClune, Auditor of State, upon this question. A copy of the same is attached hereto and made a part of this opinion.

Therefore, it is our conclusion that the appropriation of $320,000 for state aid for county and district fairs for the biennium of 1925 and 1926 may not be exceeded by your department. If the amount, which it is provided in other sections shall be paid for such purpose, is in excess of this amount, then the amount actually appropriated must be pro-rated among the county and district fairs. The provisions of Section 2902, 2903 and 2904, relating to state aid for county and district fairs must be read in connection with the provisions of the Budget Law. Even though the statute provides that there shall be paid a specific amount for each county or district fair, nevertheless there is no fund out of which such aid may be paid except the appropriation made therefor.

We believe that street fairs or fall festivals, if they come within the provisions of the sections relating to state aid, are entitled to such aid. If it is deemed advisable to limit the aid to what are generally known as county or district fairs, the matter should be referred to the legislature for such action as it deems it advisable to take.

BOVINE TUBERCULOSIS: Prorating of indemnity paid on reactors discussed.

May 20, 1926. *Secretary of Agriculture:* This department is in receipt of your letter dated May 19, 1926, in which you request an official opinion. It is advisable to set your letter out at length. It is in words as follows:

"Under date of October 1, 1925, you prepared an opinion on the method of deduction of 5% of the total appraised value of a tuberculin tested herd in the prepa-

ration of indemnity claims, which was based on Section 2671 of the 1924 Code, as amended by Chapter 55 of the laws of the 41st General Assembly. The section reads as follows:

'When breeding animals are slaughtered following any test there shall be deducted from their appraised value the proceeds from the sale of salvage. When breeding animals are slaughtered following a first test under this chapter, there shall also be deducted five per cent of the appraised value of the breeding animals tested. The owner shall be paid by the state one third of the sum remaining after the above deductions are made.

The state shall in no case pay to such owner a sum in excess of fifty dollars for any registered pure-bred animal or twenty-five dollars for any grade animal.'

A summary of your opinion is quoted:

'The statute does not provide that the deduction shall be made from the appraised value of an *animal* or breeding *animal* but the plural thereof is used in both sections. We believe this manifests an intention on the part of the legislature that the deduction should be from the total appraised value of all the animals that are slaughtered and not from the appraised value of each animal slaughtered.'

Under date of March 20, 1926, an extract from an opinion on a different question but based on the same section states:

'The above statute provides a method of determining the exact amount that must be paid to the owner of cattle slaughtered under the provisions of the statute. This method may not be varied, changed or abandoned. The provisions of the statute are plain and mandatory. Therefore, we are clearly of the opinion that the board of supervisors has no right to change or reduce the amount of compensation therein provided for.'

These opinions do not conflict but the wording of the second opinion has again brought up the question as to whether the department is following the correct method of figuring claims.

Basing our method of calculation on the first opinion received, the reactors were figured on a collective basis—that is the amounts resulting from the deduction of salvage from the appraised value of the reactors were totaled—the five per cent deducted and the remaining difference divided three ways,—one third loss to be paid by the state—one third by the Federal government, and one third to be stood by the owner.

It is evident, however, that by this method, an owner may possibly receive more than the twenty-five dollars allowed by law for one of his grade animals, provided the difference between the salvage and appraised value of the other reactors in his herd is sufficiently low to reduce the average to twenty-five dollars for each animal. Payment on this same animal if it had been the only reactor in the herd would not have exceeded twenty-five dollars but when figured collectively, the difference is allowed to stand unchanged, which of course raises the amount to be paid on the rest.

As the law in stipulating the amount to be paid on reactors specifically states *any* registered pure-bred animal or *any* grade animal, it would seem as if the five per cent would have to be pro-rated individually among the reactors and each one figured separately.

Will you kindly give us your opinion?"

You are advised that the five per cent would be pro-rated individually among the reactors and each one figured separately, as it is set forth in your letter. This is rather a close question and no criticism can be lodged in the event there has been a different method of figuring, but we believe in the future that this should be the policy which your department should pursue.

INSANE: An adjudication of insanity raises a presumption that the person is incompetent to enter into contracts. (2) The superintendent of a hospital for the insane is vested with discretion in permitting or denying the right to talk business matters with patients.

May 21, 1926. *Board of Control:* You have requested us to prepare an opinion upon a question which was submitted to your department by H. A. Stewart, the

Superintendent of the Iowa State Hospital for the Insane at Independence, Iowa. The letter of the superintendent containing the question is as follows:

"Relative to the above named patient, will state that she was received in this institution on the 30th day of December, 1924, from Fayette County. At that time she was 44 years of, age, single and her correspondent was her father, Peter Jubb, Fayette, Iowa, but who has recently died.

"She suffers with Involutional Melancholia. She was paroled on November 3, 1925, and returned March 18, 1926. Last week Attorney O. W. Stevenson wrote me stating that he desired to bring the above named patient's mother down with him and have Ella Jubb sign some certificates of deposit, some deeds, and some mortgages. He requested me to phone him immediately if this would be satisfactory and I advised him that I could not permit her to sign such papers as I was in doubt as to the propriety of such being done but that I would be willing to take the matter up with the Board of Control and if they felt it was proper, I would then be glad to permit her to sign the papers. Today I received another letter from Attorney Stevenson with some facts in her case as stated by him. I am enclosing his letter and facts and would thank you to send me your recommendations as to how is best to proceed in such cases. In other words, please state if it is proper to permit an insane patient to sign such papers.

"The patient has been restless and very depressed but at the present shows some slight improvement. So far, she has not attempted suicide but when at home she hid knives and glass around her room, leading her relatives to believe that she might be making preparations to attempt it."

The authorities on the question of whether a person adjudged to be insane by the proper tribunal and committed to a hospital for the insane is incompetent to enter into a contract are in conflict. The question of the effect of inquisition of insanity and the appointment of a guardian on the right to enter into a contract is discussed in the 32nd Volume of Corpus Juris, page 731, Section 502. Many authorities are cited in the footnotes in support of the conflicting rules adopted by the various courts. Under the common law an adjudication of insanity is admissible as evidence of insanity at a later time, although not conclusive. Ordinarily such an adjudication substitutes for the general presumption of sanity a presumption of insanity, and accordingly the party's subsequent civil acts are prima facie invalid. 32 Corpus Juris, page 647, Section 228. It has been held by the supreme court that the appointment of a guardian of a person on the ground that it is alleged that the person is of unsound mind affords no more than a presumption that such person is incompetent.

Jones v. Schaffner, 193 Iowa, 1262, (1274);
Ockendon v. Barnes, 43 Iowa, 615;
Milehan v. Montagne, 148 Iowa, 476;
In re Estate of Hanhrahan, 182 Iowa, 1242;
Linkmeyer v. Brandt, 107 Iowa, 750;
In re Will of Fenton, 97 Iowa, 192.

It has also been held by the supreme court that the adjudication of insanity by the commissioners of insanity at least raises a presumption of the defendant's insanity.

Tiffany v. Tiffany, 84 Iowa, 122.

So far as we are able to discover the supreme court of this state has never had occasion to pass upon the exact question you have submitted to us, that is—whether a person who has been committed to a state hospital for the insane is conclusively presumed to be incompetent to enter into a contract. Such patients are, however, committed to the institution for treatment and care. The superintendent of the institution is vested with a wide discretion in determining just what is proper or

wise so far as the treatment of such patient is concerned. There is a presumption that such a patient is incompetent to enter into a contract and, ordinarily, the permitting of an inmate to discuss business matters or to discuss the propriety of entering into certain contracts may have a detrimental effect upon the patient. We, therefore, believe that the superintendent of the institution should, in the exercise of discretion, either permit or deny the right to any person to discuss business matters with the patient or to ask the patient to sign certain contracts or conveyances according to the facts in each case.

We, therefore, believe that under the law this matter should be vested in the superintendent, subject to the approval or disapproval of the Board of Control. However, as there is a presumption that the patient is incompetent to enter into contracts, the only safe course to pursue is to have a guardian appointed who will transact business for and handle the property of the patient. One who desires to enter into a contract with a patient cannot safely do so on account of the fact that there is not only a possibility, but a strong probability that such a contract will be nullified by the court. Therefore, the interests of those who desire to enter into contracts with a patient demand that a guardian be appointed and that contracts involving the patient's property should be made with the guardian, with the approval of the court.

STATE BOARD OF EDUCATION: (1) First National Bank of Iowa City has a right to put up U. S. bonds as collateral for the deposit of state university funds. (2) The title to said pledged bonds is in the First National Bank, subject to the specific lien in the State University to secure the payment of the deposits.

May 21, 1926. *Secretary, State Board of Education:* We desire to acknowledge receipt of your letter of May 17, 1926, in which you submit to this department two inquiries which you have stated as follows:

"Mr. W. J. McChesney, President of the First National Bank at Iowa City, Iowa, is the treasurer of the State University. He has filed a surety bond amounting to $150,000 with the Iowa State Board of Education. The funds are deposited in the First National Bank of Iowa City. That institution has pledged United States Treasury Bonds, amounting to $200,000 to the Treasurer of the State University as security for the deposit of institution funds while they are in the First National Bank of Iowa City. These bonds are filed in the Federal Reserve Bank of Chicago.

I am enclosing the following:

1. A statement that was made and signed on April 20, 1926, by Thomas Farrell, Secretary of the First National Bank, Iowa City, Iowa.
2. Photostatic copies of certain statements and receipts regarding the said United States Treasury Bonds.

I shall appreciate your giving me the following information:

1. Do these bonds protect the interests of the State University of Iowa in an amount not to exceed $200,000?
2. Do these bonds form a part of the assets of the First National Bank of Iowa City, Iowa?"

On April 22, 1926, the Board of Directors of the bank adopted the following resolution:

"Resolved that the officers of the First National Bank of Iowa City are hereby authorized to pledge $200,000 United States Treasury Bonds with the Treasurer of the State University of Iowa as security for the deposit of funds held by the Treasurer of the State University of Iowa with the First National Bank of Iowa City."

In a letter written by F. Bateman, Manager of the Securities Department of the Federal Reserve Bank of Chicago, we find the following statements:

"We will accept such a deposit of Liberty Bonds and issue our safe-keeping receipt in the name of the depositing bank and give permission for them to endorse it over to the depositing treasurer even though our safe-keeping receipt has printed on it that it is not transferable nor negotiable."

On the so-called safe-keeping receipt issued by the Federal Reserve Bank of Chicago, to the First National Bank of Iowa City, dated on February 16, 1924, there is the following language:

"We have received and are holding on special deposit for your account and at your risk securities as described below which will be delivered in accord with your instructions given below, or the proceeds thereof credited or remitted for, only upon the return of this receipt officially signed. We agree to give the property left in our custody the same care that we do our own, but assume no further responsibility."

Attached to said receipt is the following assignment:

"Iowa City, Iowa,
Dec. 17, 1924

We hereby assign the bonds described in the within receipt to W. J. McChesney, Treasurer of State University of Iowa, or his successor in office, *as security for the funds* of the State University of Iowa which he now has on deposit or may in future have on deposit with this bank."

As the bank, which is involved in your inquiry, is a national bank, the questions submitted are covered by the provisions of the National Bank Statute. U. S. Revised Statute 5153, as amended by the Act of March 3, 1901, C. 871, Sec. 1 and Act March 4, 1907, C. 2913, Sec. 3, Act Dec. 23, 1913, C. 6, Section 27, and Act of August 4, 1914, C. 225, provides as follows:

"All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositories of public money and financial agents of the Government, as may be required of them. *The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safe-keeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government:* Provided, That the Secretary shall, on or before the first of January of each year, make a public statement of the securities required during that year for such deposits. And every association so designated as receiver or depository of the public money shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid into the Government for internal revenue, or for loans or stocks: Provided, That the Secretary of the Treasury shall distribute the deposits herein provided for, as far as practicable, equitably between the different states and sections."

It is obvious, we think, that the above provisions of the statute have application only to the depositing of funds belonging to the federal government or some subdivision or agency thereof. However, it has been held that the power to make contracts and to exercise all incidental powers as shall be necessary to carry on the business of banking which is granted to national banks by the statute (Rev. Statutes—Sec. 5136) includes the power to become a depository of public moneys, to pay interest on such deposits and to give a bond for their security.

Nebraska v. Orleans First Natl. Bank, 88 Fed. 947;
National Bank v. Ferguson, 48 Iowa 732, 30 Pac. 237;
7th Corpus Juris, 817.

The rule is stated in 7th Corpus Juris, page 817, Section 753, as follows:

"The National Banking Act makes provision for national banks acting as depositories of public moneys; and it is also held that, under the power to 'make contracts' and to exercise 'all such incidental powers as shall be necessary to carry

on the business of banking,' a national bank may become a depository of the public moneys and may lawfully agree to pay interest on such deposits and to give a bond for their security.*"

This is also the rule as adopted in this state. State banks have the power to give security for public deposits either in the nature of a bond, or by giving collateral security therefor.

Richards v. The Osceola Bank, et al., 79 Iowa 707.

We are, therefore, of the opinion that the United States Treasury Bonds pledged by the First National Bank of Iowa City for the security of the deposit of funds belonging to the State University fully protect the interests of said institution.

II.

We are of the opinion that the bonds pledged as collateral belong to the First National Bank of Iowa City and that the title rests in said bank, subject to the specific lien in the state university to secure the payment of the amounts deposited in said bank. Of course, the State University has a limited title therein, or perhaps it would be more correct to say that said institution has certain rights in said bonds which it is necessary for the pledgee to have to secure its deposits. However, the title of the bank is not divested until notice and sale or action has been taken to secure the foreclosure of said pledge. The following authorities so hold:

Palmer v. Mutual Life Ins. Co. of New York, (Minn.) 30 N. W. 250;
State v. Gibson, (Ia.) 202 N. W. 109;
Grand Avenue Bank v. St. Louis Union Trust Co., (Mo.) 115 S. W. 1071;
Minge v. Clarke, (Ala.) 72 So. 167;
In re Cross, 244 Fed. 844;
Oden v. Vaughn, (Ala.) 84 So. 779;
J. H. & C. K. Eagle Inc. v. Kunkle, (Pa.) 122 Atl. 276.

MUNICIPALITIES: (1) A municipality may anticipate the collection of a fund for equipping the fire department and may issue certificates or bonds therefor. (2) The Fire Maintenance Fund may not be used to purchase fire equipment in cities and towns over 3,000 in population.

May 21, 1926. *Director of the Budget:* You have requested us to prepare an opinion upon the question which was stated by C. A. Currier, Mayor of Chariton, Iowa, as follows:

"The City of Chariton has $3,570.60 in the Fire Fund, and $2,563.72 in the Fire Apparatus Fund. We would like to have permission from you, if you can see it that way, to use $5,000.00 out of both funds, to apply on the purchase price of a fire engine. We are figuring on an election to vote bonds to pay the balance on the same."

Section 6211 of the Code, as amended by Chapter 139 of the Laws of the 41st General Assembly, reads in part as follows:

"Any city or town shall have power to levy annually the following special taxes:
* * * * * * * *

"8. Fire Fund. Not exceeding one and one-half mills, which shall be used *only* to acquire property for the use of the fire department and to equip the same. No part of the general fund shall be used for equipping the fire department.

"9. Fire department maintenance fund. Any city with a population of more than nine thousand, not exceeding seven mills, any city with a population of less than nine thousand and any city under the commission form of goverment with a population of more than ninety thousand, not exceeding three mills, and any town, not exceeding two mills, which levies shall be used *only* to maintain a fire department; except that cities with a population under three thousand and towns may also use the fund to purchase fire equipment."

It will be observed that the use of each of the above funds is limited to the purpose for which it is raised. However, the Fire Department Maintenance Fund may be used to purchase fire equipment in cities and towns under 3,000 in population. The population of the city of Chariton, as given in the Iowa Official Register for 1925-1926 is 5,175. It will, therefore, be seen that the city of Chariton is not a municipality that may, under the provisions of the statute, use the fire maintenance fund for the purchase of fire equipment. We are, therefore, of the opinion that this may not be done. However, under Section 6261 the city council may anticipate the collection of the fund for equipping the fire department and may issue certificates or bonds with interest certificates therefor. We believe this is the method that should be pursued by the city of Chariton.

The city should under no circumstances authorize the expenditure unless it is covered by a budget estimate of either a general or special nature as the statute provides.

MUNICIPALITIES: The tax for fire equipment may be anticipated and certificates or bonds issued therefor.

May 22, 1926. *Director of the Budget:* You have requested us to prepare an opinion upon a question submitted to your department by C. A. Easterly, Clerk of Manning, Iowa. The letter of the clerk is as follows:

"While in your office I took up the matter of the purchase of fire apparatus for the town of Manning, the payment to be anticipated for a period of about five years, the purchase really having been made under a lease or contract providing for the payment of approximately $1,000 and interest annually, a bill of sale to be given after the amount of the purchase price had been paid under this lease.

"At that time you quoted an opinion of the Attorney General in the matter of purchase of road equipment.

"Thinking that the purchase of fire fighting apparatus might be considered in the light of emergency equipment for the protection of property, we would like at this time to have an opinion on the purchase of fire apparatus under this plan.

"I enclose herewith blanks furnished by two manufacturers, which we wish you would submit to the Attorney General, with the request that he furnish us his opinion in the matter with the return of the enclosed blanks."

Section 6261 of the Code, as amended by Chapter 139, Laws of the 41st General Assembly, reads in part as follows:

"Any city or town may anticipate the collection of taxes authorized to be levied for * * *, the fund for equipping fire departments, * * * and for that purpose may issue certificates or bonds with interest coupons."

This section is determinative of the question you have submitted. It is, therefore, our opinion that the town of Manning may purchase equipment for the fire department and issue certificates or bonds in payment thereof.

We have carefully read the printed forms of contracts submitted by two corporations manufacturing and selling fire equipment. We do not approve of either of these contracts. The title to the property purchased should vest immediately in the city. The contracts should be simple in form and provide for the payment of a certain portion of the contract price each year. The payment of the same is certain and no provision should be inserted in the contract that will, in any way, hamper the town in the use of the fire apparatus purchased under the contract. We do not deem it advisable to prepare such a contract, but it should be an ordinary contract of sale, specifying the property purchased, the price therefor, when to be delivered and the terms of payment.

The city should under no circumstances authorize the expenditure unless it is

covered by a budget estimate of either a general or special nature as the statute provides.

MUNICIPALITIES: Where a city has an ordinance providing that deficiencies in special assessments shall be paid from the improvement fund, such deficiencies may not be paid from the general fund. (2) The general fund may not be used for the maintenance of a band. (3) Where an ordinance provides a fee of ten cents for each special assessment notice posted the clerk may not retain such fee.

May 22, 1926. *Auditor of State:* We have received your letter of May 18, 1926, in which you submit to this department the inquiries which you have stated as follows:

"One of our municipal examiners now engaged at Council Bluffs has asked the following questions concerning matters which have come to his attention there:

"First: 'In going through the accounts of this city we find that a great deal of money has been paid out for deficiencies in special assessments. This is due to a heavy grading program that must be carried out along with any sidewalk building, etc. But I find an ordinance providing that all deficiencies shall be paid from the improvement fund. Several thousands of dollars have been paid from the Emergency appropriation from the General Fund. Under the state law I believe these could be paid from the General Fund without question, but would their city ordinance be illegal?'

"Second: 'When the tax levies were made last year the council were under the impression that the city had more than 40,000 inhabitants, and so did not levy a band tax. They find now that they are under 40,000 and, desiring to maintain the band this season, they inquired if the maintenance of the band could be paid from the General Fund.'

"Third: 'The clerk has been drawing extra pay for the posting of special assessment notices. The council has passed a resolution allowing the price of ten cents for each notice posted, but does not make it one of the duties of the clerk. Would the clerk be allowed this extra compensation?'"

It is, of course, well known that the deficiencies in special assessments are ordinarily paid out of the Improvement Fund, but such deficiencies, or any other part of the cost of paving may be paid out of the general fund. If, of course, there is an Improvement Fund, then such deficiencies should be paid out of such fund. However, the city has an option in the matter and may provide for the payment of the same out of an Improvement Fund, or the General Fund. (Section 6017). In view of the fact that the city of Council Bluffs had an ordinance at the time the paving was ordered in and was constructed and the assessments made providing that all deficiencies should be paid from the Improvement Fund, we believe that the deficiencies may not be paid out of the General Fund. The enactment or adoption of such an ordinance was clearly the exercise of a proper municipal function. The authority to do so cannot be doubted. Therefore, we believe that the act of the city in paying the deficiencies in such assessments out of the general fund was absolutely unauthorized and illegal.

We believe that the cost of maintaining a band may not be paid out of the General Fund. The maintenance thereof is not strictly a municipal function and the cost of maintaining the same may not be paid out of the municipal funds unless authority to do so is granted by state. The authority to do so is embodied in Chapter 296 of the Code, Sections 5835 and 5840, both inclusive. The statute provides a fund designated for a particular purpose and all the cost of maintaining a band must be paid from such fund.

We are also of the opinion that if the City Clerk is authorized by the council to post the notices of special assessments, as required by statute, he is not entitled to the price of ten cents for each notice posted. If he performs such services the amount to which he is entitled must and should become a part of the city funds. The council is not permitted to increase his salary in such a manner.

MUNICIPALITIES: Discussion of what constitutes maintenance of a band.

May 22, 1926. *Auditor of State:* We have received a letter from Mr. A. B. Carter, President of the Band Association of Fayette, Iowa, in which he submitted to this department certain inquiries relating to the expenditure of the tax raised for the purpose of maintaining a band. On account of the possibility that this question may be again submitted to this department we have concluded to prepare an opinion for your department and mail a copy thereof to Mr. Carter. Mr. Carter's letter reads as follows:

"I would like to ask your opinion in regards to the band tax.

We have a band fund, raised by the 2 mill levy which fund amounts to $400.00. We have a director for the band whom we pay $600.00. The $200.00 difference is made by subscription or other means of making the money.

This director is employed by the Consolidated School and the majority of the town band is made up of the school band. He has been working with the band for a little over a year now and they gave a concert this week and will during the summer.

If we would have to hire a band to give the concerts it would cost about $50.00 to $60.00 per week. Our fund would not buy many concerts at that rate.

Is employing a director for the band maintaining a band?

Does this band fund have to be spent in employing a band to give concerts, that is, pay them each time they play?

The Mayor and council of the town say that it can not be spent in the way that we are doing it, that is, to a director but has to be paid to a band at the rate of so much per concert. Is this right?

Section 5835 provides as follows:

"Cities having a population of not over forty thousand and towns may, when authorized as hereinafter provided, levy each year a tax of not to exceed two mills for the purpose of providing a fund for the maintenance or employment of a band for musical purposes."

Section 5840 reads:

"All funds derived from said levy shall be expended as set out in section 5835 by the council or commission."

Section 5838 also has a bearing upon the question submitted. It is as follows:

"Said levy shall be deemed authorized if a majority of the votes cast at said election be in favor of said proposition, and the council or commission shall then levy a tax sufficient to support or employ such band, not to exceed two mills on the assessed valuation of such municipality."

It will be observed that in Section 5835 there is the phrase "maintenance or employment of a band" and in Section 5834 the phrase "to support or employ such band." It is manifest that the band fund may be used to employ a band to give concerts. The fund may also be used in any other way that will conserve and promote the interests of the band, and assist in preserving such institution. We, therefore, answer the questions submitted in the following way:

Employing a director for the band is certainly, in a sense, a part of the maintenance or support of the band. The funds may be used for other purposes such as the purchase of instruments and uniforms, the payment of the costs of securing music and the rent of a hall in which to practice. The fund may also be expended in paying the expenses of giving concerts, which of course, includes a certain sum to be paid to the band. We cannot lay down or specify any rule that would govern in all cases. Naturally the city council has a wide discretion in determining the method of expending this fund, being only limited by the necessity of expending the same in a way that will properly maintain or support the band.

MUNICIPALITIES: (1) Cities may not levy a bridge or sidewalk tax to pay for the construction of sidewalks on bridges. (2) The sidewalk on a bridge may be constructed and the cost thereof paid out of the improvement or general fund.

May 24, 1926. *Auditor of State:* We have received your letter of April 23, 1926, in which you submit the following inquiry:

"I have received today a letter from J. K. Medberry, City Clerk of the City of Rock Rapids, Iowa, in which he states:
'We also have to aid in the construction of the sidewalks on the bridge the county is building across the river here.'
"And then he asks:
'Can we levy a bridge or sidewalk tax for this purpose? It will cost approximately $2,000.00 not more, to make this.'"

You are advised that on October 26, 1925, this department prepared an opinion for Mr. B. H. Brauer, County Attorney, at Allison, Iowa, upon the question of whether it is the duty of the county to construct and maintain sidewalks on the bridges which the law requires the county to build and maintain within the incorporated limits of a city or town. It was held in this opinion that the county is under no duty to construct and maintain sidewalks on such bridges. It was also held that no duty rests upon cities or towns to construct or maintain sidewalks on said bridges but that such municipalities may do so, and if they do so, they must maintain and keep the same in repair. You will find a copy of said opinion attached hereto.

However, we are clearly of the opinion that the city may not levy a bridge or sidewalk tax for the purpose of paying for the construction of sidewalks on the bridge. There is no provision in the statute for a sidewalk tax. The said sidewalk may be constructed and the cost or part thereof may be paid out of the improvement fund, or the general fund.

MUNICIPALITIES: Cities may not rent an auditorium erected by the city to one person and permit him to lease the same for profit.

May 25, 1926. *Auditor of State:* We have received a letter from Mrs. G. C. Morgan, a resident of Sioux City, Iowa, in which she submitted to this department the following inquiry:

"A few years ago the town of Hawarden built an auditorium in order that the public might have a place to hold meetings without paying rent. The city council now rents the building to one man for $100.00 a month permitting him to make what profit he can off the building by charging the public for the use of the building. Legally, does the council have the right to rent the building? How can they be prevented from renting it?"

We have concluded to prepare an opinion upon the above question for your department. Section 5773 of the Code is as follows:

"Any city or town may, when authorized by the voters, erect a city or town hall to be used for general community and municipal purposes, including assembly hall, auditorium, public hall, armory, council chamber and offices, waterworks offices, fire or police station, or for any one or more of such purposes. The council may prescribe rules whereby such building may be used for other than municipal purposes and fix the compensation to be paid therefor."

It will be observed that the provisions of the above section authorize the erection of a city or town hall, which may include an assembly hall or auditorium, for general community and municipal purposes. It is obvious that the city council may not rent the auditorium to one person for a year to the exclusion of all others, and permit the lessee to rent the same to other persons for profit making purposes. To

permit the city council to do so would obviously violate the provisions of the statute and do away with the evident purpose of erecting such building. We are, therefore, of the opinion that the lease referred to in the above letter is absolutely null and void and beyond the power of the municipality to execute.

We do not mean to say, however, that the city may not rent the hall for a stated rental. The section hereinbefore quoted specifically authorizes the council to prescribe rules whereby such building may be used for other than municipal purposes and fix the compensation to be paid therefor. The compensation or rental for the use thereof, however, should not be fixed at such an amount as to permit the city to derive a profit therefrom. Such rentals should be used only for the purpose of paying the necessary and actual expenses of operating the same. The rules for the use of the auditorium prescribed by the city council should be reasonable and should apply alike to all who desire to use the hall for a proper purpose.

COUNTIES: Discussion of the construction of the Nepotism Statute.

May 27, 1926. *Auditor of State:* We have received a letter from Mr. B. G. Rees, Clerk of the District Court of Jones County, in which he submits the following inquiry to this office:

"I would like to have your opinion in regard to Section 1166 of the Code of 1924, relative to the appointment of persons related by consanguinity or affinity as clerks, deputies, or helpers, there has been quite a difference of opinion among the attorneys here, some contend that an officer can appoint a relative and the board can approve the appointment regardless of the salary and others contend that the board cannot approve the appointment providing the salary is in excess of $600.00 per year."

We have concluded to prepare an opinion upon the above question for your department. Section 1166, the Nepotism Statute, reads as follows:

"It shall hereafter be unlawful for any person elected or appointed to any public office or position under the laws of the state or by virtue of the ordinance of any city or town in the state, to appoint as deputy, clerk, or helper in said office or position to be paid from the public funds, any person related by consanguinity or affinity, within the third degree, to the person elected, appointed, or making said appointment, unless such appointment shall first be approved by the officer, board, council, or commission whose duty it is to approve the bond of the principal; provided this provision shall not apply in cases where such person appointed receives compensation at the rate of six hundred dollars per year or less, nor shall it apply to persons teaching in public schools."

By the plain provisions of the above statute a person related by consanguinity or affinity, within the third degree, to the clerk of the district court, may be appointed as deputy clerk provided the appointment is first approved by the board whose duty it is to approve the bond of the clerk. As it is the duty of the board of supervisors to approve the bond of the clerk of the district court, a relative within the prohibited degrees may be appointed, if the board of supervisors approves the appointment. It is specifically provided therein that the statute does not apply to cases where the person appointed receives compensation at the rate of $600.00 per year, or less. The clerk may appoint a relative within the prohibited degrees, deputy clerk, even though the salary is in excess of $600.00, provided the board approves the appointment.

HIGHWAYS: Discussion of the question as to whether the Board of Supervisors or the State Highway Commission should make application to the Railroad Commission where it is the intention of eliminating grade crossings.

June 1, 1926. *Bridge Engineer, Iowa State Highway Commission:* We desire to

acknowledge receipt of your letter of May 25, 1926, in which you submit to this department the following inquiry:

"In the expenditure of the primary development fund provided for by Chapter 114, Laws of the 41st General Assembly, we have included in plans for improvement, the grade separation projects on certain railroads. Whatever expenditure of public funds required in the elimination of the grade crossings in these instances will be paid from the primary road development fund.

We have taken up negotiations with the railroad companies involved and in certain instances are unable to agree with these companies. It, therefore, becomes necessary to appeal the matter to the Board of Railroad Commissioners, as provided for in Sections 8020 to 8022, inclusive, Code of 1924. Under the provisions of this statute, can this appeal be made by the State Highway Commission, or is it necessary in each instance that the appeal be made by the Board of Supervisors even though whatever expenditure of public funds is made in the crossing separation project will come from the primary road development fund?"

Sections 8020, 8021 and 8022 of the Code read as follows:

"Wherever a railway crosses or shall hereafter cross a highway at grade, the railway company and the board of supervisors of the county in which such crossing is located, if a primary or secondary highway, or such railway company and the trustees of the township in which such crossing is located, if a township highway, may agree upon any change, alteration, vacation, or relocation of such highway so as to carry such highway over or under such railway or eliminate such crossing entirely, and upon the expense each party shall pay for making such changes." Sec. 8020.

"If the railway company and said highway authorities can not agree upon the changes to be made, either party may make written application to the board of railroad commissioners, setting forth the changes and alterations desired, and said board shall fix a date for hearing and give the other party ten days' written notice by mail of such date." Sec. 8021.

"The board of railroad commissioners shall hear and determine such application, taking into consideration the necessity of such changes and the expense thereof, the location of any crossing and the manner in which it shall be constructed and maintained, or whether a crossing is to be eliminated and the provisions therefor, and may make such order in relation thereto as shall be equitable, including authority to condemn and take additional land for such purposes when necessary, and shall determine what portion of the expense shall be paid by any party to such controversy." Sec. 8022.

It will be noted that in each of these statutes, if a primary or secondary highway is involved in such a proceeding the board of supervisors is designated as the body representing the public and that if a township highway is involved therein, the township trustees represent the public. At no place in the statute is any power or authority vested in the State Highway Commission. Now, turning to Chapter 114, Acts of the 41st General Assembly, we find that the statute places the maintenance of all primary roads outside of cities and towns in the State Highway Commission and enjoins upon such Commission the duty of co-operating with the various county boards of supervisors. Section 3 of the statute creates the primary road development fund which is entirely under the control and direction of the State Highway Commission. This statute does not seek, in any way, to amend or change the sections of the Code hereinbefore copied in this opinion. We also believe there is nothing in the statute that repeals by implication any portion of such sections. It is, therefore, manifest that it was not the purpose of the legislature to either repeal or change the provisions of the above statute. It is a well known rule of construction that statutes on the same subject shall be read as though enacted at the same time and must be read together, and each and all of the parts thereof given force and effect if possible to do so without doing violence to the language used.

We believe that we should apply this rule of statutory construction to the two statutes we now have under consideration. We are, therefore, of the opinion that under the statutes hereinbefore referred to, it is the board of supervisors and not the State Highway Commission that should make application to the Board of Railroad Commissioners, as provided in Section 8021.

FISH & GAME—BOARD OF CONSERVATION: Establishment of state game refuges by state game wardens discussed.

June 5, 1926. *Dr. L. H. Pammel, Ames, Iowa:* This will acknowledge receipt of your letter of the 28th ultimo, requesting our opinion as the the proper method for the establishment of a Fish and Game refuge. I call your attention to the provisions of Chapter 32 of the Acts of the 41st G. A. which for your convenience I quote the pertinent provisions thereof, which read as follows:

"1709-a. Whenever any land, stream, or lake has been declared by the state board of conservation to be a public park and has been taken for public park purposes, or where any land is now owned and used by the state of Iowa, the state game warden shall have the right and power to establish state game refuges or sanctuaries on such land where the same is suitable for this purpose. It shall be unlawful to hunt, pursue, kill, trap or take any wild animal, bird, or game on any state game refuge so established at any time of the year, and no one shall carry firearms thereon, providing, however, that predatory birds and animals may be killed or trapped under the authority and direction of the state game warden."

We believe that under this section if the Board of Conservation has declared the particular lake or stream or tract of land to be a state park that then the State Game Warden has the right to establish a Fish and Game refuge upon the tract in question.

I note from Mr. Lampman's letter that it is his opinion that the Board of Conservation shall establish the refuge. It is our opinion that the Board of Conservation need only to establish the State Park and that the State Game Warden may establish the refuge if he sees fit.

FOREST TREE RESERVATIONS: Discussion of the right to claim a forest reservation within city or town limits.

June 8, 1926. *Secretary of Agriculture:* We desire to acknowledge receipt of your letter of May 25, 1926, in which you submit to this department the following inquiry:

"I have been asked the following question and would appreciate your opinion.

"My fruit farm is located on the outskirts of the city. It consists of five acres —four acres of which I have planted out in fruit trees.

The city assessor states that I am not entitled to a maximum tax or one dollar an acre because the law does not apply to acres within the city limits."

The portion of the statute relating to fruit trees and forest reservations is Chapter 126, embracing Sections 2604 to 2617, both inclusive. We do not deem it necessary to copy any portion of this statute in this opinion. It will suffice to say, however, that although the statute prescribes what shall constitute forest or fruit tree reservations, there is no provision therein limiting the land which may be designated as such reservations to land outside the limits of cities and towns.

However, so far as lands within city or town limits are concerned, we are of the opinion that only agricultural lands of ten acres or more, which are exempt from city or town taxation, as provided in the statute, may constitute forest or fruit tree reservations within the meaning of the provisions of Chapter 126 of the Code of 1924.

STATE EMPLOYES: Discussion of the necessity of securing the approval of the Executive Council before incurring the expense of business trips outside of the state.

June 10, 1926. *Auditor of State:* We have received your letter of June 8, 1926, in which you submit to this department the following inquiry:

"1. Is it necessary for the head of any department or any employee thereof to obtain the approval of the Executive Council before being authorized to incur expense for business trips outside of the state when these trips are purely on business in connection with the office?

2. Do you construe Section 398 of the Code of 1924 to include conventions, conferences and business trips or only conventions and conferences?

3. Do you construe this section to include an employee of the Governor, Attorney General, Railroad Commissioners or Commerce Counsel?

4. Before expense may be legally incurred in traveling outside of the state, what official must secure the approval of the Executive Council?"

Section 398 reads as follows:

"Claims for expenses in attending conventions, and conferences outside the state shall not be allowed unless the voucher is accompanied by so much of the minutes of the executive council, certified to by its secretary, as show that such expense was authorized by said council. This section shall not apply to such claims in favor of the governor, attorney general, railroad commissioners, or commerce counsel."

We are of the opinion that the phrase "attending conventions, and conferences outside the state" is sufficiently comprehensive to cover any and all purposes that may require an official or employee to travel outside of the limits of the state. The word "conferences" must be given a meaning that was evidently intended by the legislature. It should not be limited to what are ordinarily designated as conferences, but should be given such a wide meaning and scope as to include any interview or business transaction involving the state. We will, therefore, answer your inquiries in the following way:

1. With the exceptions noted in the section above quoted, and any other exceptions made by the statutes of this state, it is necessary for the head of any department or employe thereof, to obtain the approval of the Executive Council before incurring any expense for business trips outside of the state, when these trips are purely on business in connection with the office.

2. Section 398 in our opinion includes business trips as well as what are ordinarily denominated conventions or conferences.

3. By the specific provisions of Section 398 the Governor, Attorney General, Railroad Commissioners or Commerce Counsel are exempted from the provisions of the statute. Therefore, these officials are not required to obtain the approval of the Executive Council before incurring the expense of business trips outside of the state.

4. It is our opinion that the approval and consent of the Executive Council must be obtained by all officials and employes of the state before incurring the expense of trips outside of the state with the exception of the following: (a) the Governor; (b) the Attorney General; (c) Railroad Commissioners or Commerce Counsel; (d) the Commissioners on Uniform State Laws; (e) Board of Parole and its employes when operating under the provisions of Section 3785, Code, 1924; (f) the Finance Committee of the State Board of Education when operating under the provisions of Section 3933 and Section 3941, Code of 1924; (g) the Board of Control of State Institutions and its employes when operating under the specific exceptions to the statute; and (h) the Superintendent of Banking, when the expenses are incurred under the authority of Section 9144, Code, 1924.

CEMETERIES—SOLDIERS AND SAILORS: Rate of payment to be made by County for care of soldiers and sailors' lots in cemeteries discussed.

June 11, 1926. *Auditor of State:* You have requested the interpretation by this department of Chapter 94, Acts of the 41st G. A. Your request reads as follows:

"Some difference of opinion has arisen in this county concerning the interpretation of Chapter 94 Acts of the 41st General Assembly. I would like if you would get us the opinion of the attorney general on the matter. A number of cemetery associations have asked for aid under this chapter and most of them are very reasonable, only asking for $1.50 per lot per year, but one association has filed quite a lengthy list, figuring the care of the whole cemetery out in feet and asking for pay for the upkeep of considerable ground which is kept in reserve for the burial of soldiers, but upon which probably only one or two soldiers are buried. Our county attorney has held that the legislature intended for the payment on the basis of the ordinary burying lot and that an average payment per lot of cemeteries of like nature would fill the bill. Our board have fixed $1.50 per lot for graves not otherwise provided for, a lot meaning the ordinary lot which generally contains four graves. The stumbling block seems to be the clause which states, 'Such payment to be made at the rate charged for like care and maintenance of other lots of similar size in the same cemetery.' Does the law contemplate payment for ground containing several hundred square feet, which is set apart as a burying ground for soldiers and upon which probably only one or two are buried, or does it mean the ordinary burying lot."

For your convenience we set out Chapter 94 Acts of the 41st G. A., which reads as follows:

"Section 1. The board of supervisors of the several counties in this state shall each year, out of the general fund or soldiers' relief fund of their respective counties, appropriate and pay to the owners of, or to the public board or officers having control of cemeteries within the state in which any deceased soldier or sailor of the United States is buried, a sum sufficient to pay for the care and maintenance of the lots on which they are so buried, in any and all cases in which provision for such care is not otherwise made. Such payment shall be made at the rate charged for like care and maintenance of other lots of similar size in the same cemetery, upon the affidavit of the superintendent or other person in charge of such cemetery, that the same has not been otherwise paid or provided for."

The part pertinent to your inquiry is the last sentence of the section which proprovides that payment to be made by the Board of Supervisors shall be made at the rate charged for like care and maintenance for other lots of similar size in the same cemetery. It is our interpretation of this statute that the owner of said cemetery is entitled to receive a like rate for the care of the lots of deceased soldiers and sailors buried in the said cemetery as such owner charges for the care and maintenance of the other lots of the said cemetery.

In other words, the owner of the cemetery is entitled to be paid for the care of lots in which soldiers and sailors are actually buried. He cannot, however, in our opinion, set aside a tract of land, or a part of the cemetery, for the burial of soldiers and sailors and receive pay for the care of the entire tract. As we understand the statute, the owner of the cemetery can only be paid for the actual lots themselves which he maintains and which contain graves of soldier or sailor dead.

BRIDGES: Board of supervisors may sign contract for the expenditure from the bridge fund in one year the amount raised thereby.

June 12, 1926. *Auditor, Iowa State Highway Commission:* We have received your letter of April 13, 1926, in which you submit to this department the following inquiry:

"One of our counties submits this question:
"Suppose that the county on July 1, 1926, has a balance in the bridge fund, which,

together with receipts from tax levy during the balance of the year, will total approximately $10,000 none of which is obligated, the county desires to erect a bridge which will cost approximately $20,000.00. They hold a regular letting and award this contract, the completion date being May 1, 1927, it not being expected that the contractor will be able to complete the work during this calendar year, and the plan being that the contractor go ahead with the putting in of the abutments, going as far as he can this fall, and completing the super-structure next spring.

"Is such a contract illegal under the provisions of Section 5258, Code of 1924?

"It is possible that you have ruled upon a very similar question in an opinion rendered by your office under date of December 8, 1925, addressed to Honorable J. C. McClune and referring to a situation in Shelby County. I do not have a copy of this opinion at hand but I am told that a ruling along this line was handed down by you.

"In answering the above question, let it be assumed that the case does not come under any of the exceptions coming under Section 5259. Let it be assumed too, that the board entered into such a contract in good faith and in the belief that the carrying out of this contract will not result, *during the year*, in an expenditure from the bridge fund in excess of the collectible revenues of that fund for the year."

Section 5258 reads in part as follows:

"It shall be unlawful for any county, or for any officer thereof, to allow any claim, or to issue any warrant, or to enter into any contract, which will result, *during said year, in an expenditure from any county fund in excess of an amount equal to the collectible revenues in said fund for said year, plus any unexpended balance in said fund for any previous years.* * *"

Section 380, a part of the local budget law, provides as follows:

"No greater tax than that so entered upon the record shall be levied or collected for the municipality proposing such tax for the purpose or purposes indicated; *and thereafter no greater expenditure of public money shall be made for any specific purpose than the amount estimated and appropriated therefor, except as provided in Sections 373 and 381.*"

It will be observed that in both of the above sections the word "expenditure" appears therein so that the prohibitions of the statutes relate entirely to the expenditure of such funds during the year. We must, therefore, define the word "expenditure." Does it mean the actual disbursement or payment of funds during the year, or does it include the contracting of such indebtedness as will be a claim against the bridge fund?

We are clearly of the opinion that the word "expenditure" is not limited in its meaning to the actual disbursements but also includes the amounts contracted to be paid and also claims against the bridge fund incurred during the year. If the contracting of such indebtedness does not amount to an expenditure within the meaning of the term in the statute because it is not payable during the year, then the bridge fund for the next year must of necessity be pledged to the payment of such claims and as a result the board of supervisors might pledge the bridge fund for several years in the future for the payment of such claims or indebtedness. We believe that such a result was not contemplated by the legislature.

We are, therefore, of the opinion that under the two statutes quoted in this opinion, the board of supervisors may only contract for the expenditure from the bridge fund in one year the amount raised thereby or the amount appropriated therefor or the collectible revenues in such fund for the year. However, after the levy of the bridge tax has been made so that the amount to be raised thereby is reasonably certain, the board of supervisors may enter into contracts providing for the disbursements of said funds during the year in which the tax is paid, provided the limit of the collectible revenues is not exceeded by such contracts.

CO-OPERATIVE ASSOCIATIONS—STOCK DIVIDENDS: Corporations organized under Chapter 389, Code 1924, cannot pay stock dividends.

June 18, 1926. *Secretary, Executive Council:* You have requested an opinion on the question of whether or not a co-operative association organized under the provisions of Chapter 389 of the Code, 1924, may issue and pay to the stockholders a stock dividend, there being a surplus upon which such stock dividend may be based.

We have carefully considered the provisions of law pertaining to the organization of and operation of such associations. There can be no question but what it is the purpose of these provisions of law to provide machinery whereby those engaged in agriculture and the other pursuits mentioned in Section 8459 of the Code, may co-operate together for the purpose of marketing their products and deriving the benefits and profits incident to the particular business engaged in. Such a corporation is quite dissimilar to corporations organized under the general laws of this state pertaining to corporations and the special provisions contained in Chapter 389 of the Code must be given effect without regard to the other general provisions of the law pertaining to corporations. It will be readily observed that the accumulated surplus in a co-operative association organized under the provisions of this law belongs to the stockholders and that the same can be disposed of only in the manner provided and authorized by the statute.

Section 8475 of the Code provides that the board of directors shall each year set aside not less than 10% of the net profits for a reserve fund. It is provided that this practice shall be continued from year to year until an amount has accumulated in said reserve fund equal to 50% of the paid up capital stock. It will be observed further that up to 25% of this reserve fund may be invested in the capital stock of any other similar co-operative association.

In addition it is provided further in the Chapter in Sections 8476 and 8477 how the profits may be distributed. It is first provided that the board may each year, out of the net profits remaining after the reserve fund mentioned in the preceding paragraph has been provided for, and subject to the approval of the association at any general or special meeting, (1) provide an educational fund to be used in teaching co-operation, which shall not exceed 5% of the net profits; and (2) declare and pay a dividend on the stock not exceeding 10%. It is then provided that if there be any net profits remaining, such profits shall then be distributed by uniform dividends upon the amount of purchases of shareholders, and upon the wages and salaries of employes. There are no other provisions in the statute relative to the distribution of net profits nor the payment of dividends. These provisions are exclusive and must be construed to govern the distribution of the net profits of such an association.

In this connection it might be further observed that the use of the word "dividend" unqualifiedly has been construed as referring only to a money dividend. See *Sexton v. Percival Co.*, 189 Iowa 586. It is commonly understood that the Supreme Court of the United States and the Internal Revenue Department have defined the unqualified word "dividend" as used in the internal revenue laws as meaning only a money dividend. With these general propositions in mind, we cannot escape the conclusion that under the laws of this state such an association cannot declare and pay a stock dividend.

It is, therefore, the opinion of this department that a co-operative association organized under the provisions of Chapter 389 of the Code, 1924, may not declare and issue a stock dividend and such being the law the Executive Council has no authority to authorize the issuance of a stock dividend by such an association.

CRIMINAL PUNISHMENTS—SENTENCES FOR CRIMES—INDETERMINATE SENTENCE LAW: Court cannot nullify provisions of indeterminate sentence law in pronouncing sentence.

June 21, 1926. *Warden, State Penitentiary:* You have requested an opinion of this department upon the following proposition:

You state that one Ed Welch was convicted in Greene County of the crime of entering a bank with intent to rob in violation of the provisions of Section 13002 of the Code, 1924. You call attention to the fact that Section 13002 of the Code was first enacted by the Thirty-seventh General Assembly and provides that any person convicted of the crime therein defined shall "be imprisoned in the penitentiary at hard labor for life or for any term of years not less than ten years." Section 13960 of the Code provides the indeterminate sentence features of the law and was enacted long prior to the enactment of Section 13002 of the Code, the section under which the defendant in question was sentenced. You state there is some controversy as to whether or not the trial judge was authorized in sentencing the defendant to serve a term of twenty-five years or whether or not the indeterminate sentence provisions apply and that he should be committed for life.

The answer to your question will be found in the opinion of the Supreme Court of Iowa in *State v. Drayden*, 199 Iowa, 231, commencing at the bottom of page 236. The same question was raised there as is raised here in regard to another statute. The court there said in discussing the matter that the defendant should be committed to the penitentiary for an indeterminate period under the indeterminate sentence law even though the statute under which conviction was had was enacted subsequent to the enactment of the indeterminate sentence act. It will be observed that the language in the statute there under discussion contained a similar provision to the language in question in Section 13002.

It is, therefore, the opinion of this department that the defendant referred to herein should be committed for life under the provisions of Section 13002 and the indeterminate sentence law.

ELECTIONS: A candidate for Judge of the District Court may have his name printed upon the official ballot as a candidate of more than one political party.

June 22, 1926. *Secretary of State:* You have submitted to this department for an official opinion the following proposition:

Can a candidate for the office of Judge of the District Court have his name printed upon the official ballot as a candidate of more than one political party?

In this connection, your attention is invited to the following sections of the Code, 1924:

"The name of a candidate shall not appear upon the ballot in more than one place for the same office, whether nominated by convention, primary, caucus, or petition, except as hereinafter provided." Sec. 756.

"The name of a nominee for the office of judge of the district court shall be printed on said general official ballot as a candidate of each political party, political organization, or group of petitioners nominating such candidate. The bar association or convention of attorneys of any county or judicial district shall be deemed a political organization for the purpose of this section." Sec. 759.

These two sections speak for themselves. The office of judge of the district court seems to be the exception to the rule and a candidate for that office, if properly nominated by more than one political party, or political organization, or group of petitioners, can have his name printed upon the official ballot as a candidate of each of such parties, organizations or groups.

MOTOR VEHICLES: Discussion of the right to assess a penalty against automobile owner when the automobile is purchased on the last day of the month and not registered before the first day of the next month.

June 23, 1926. *County Attorney, Jefferson, Iowa:* We desire to acknowledge receipt of your letter of June 21, 1926, in which you ask this department to prepare an opinion upon the question which you have stated as follows:

"An automobile dealer of this County has asked me to secure an opinion from you relative to the following statement of facts.

"On May 31, 1926, at approximately 10 o'clock P. M., A, an automobile dealer, sold a new automobile to B. B. immediately signed an application for a motor vehicle license which was acknowledged before A, who was also a Notary Public, under date of May 31st. On the morning of June 1st, A acknowledged a certificate of sale, which certificate showed the sale as having been made under date of May 31st. Both the certificate and application for license were mailed on the morning of June 1st, but reached the office of our Treasurer on the same day.

"Our Treasurer has taken the position that he must collect a dollar penalty for the reason that this car was sold in the month of May but not registered until the month of June.

"I am advised that the State Motor Vehicle Department has taken the same position in this case as our County Treasurer."

The two pertinent sections of the statute are 4931 and 4932 of the Code of 1924, which reads as follows:

"On January first of each year, a penalty of one dollar shall be added to all fees not paid by that date, and one dollar shall be added to such fees on the first of each month thereafter that the same remains unpaid, until paid." Sec. 4931.

"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." Sec. 4932.

The construction of the Motor Vehicle Statute was involved in the case of *State v. Gish*, 168 Iowa 70. In this opinion it was held that all laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will always be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter. It is manifest that the law does not require impossibilities. The purchaser of an automobile should be granted a sufficient time within which to complete the sale thereof and make application for a license without being subjected to penalties for failure to do so. Under the facts stated in your letter we are clearly of the opinion that the transaction of sale was not completed until the delivery of the memorandum of sale and the possession of the automobile to the purchaser on the first day of June. The certificate and application for a license were mailed on the morning of June first and also reached the office of the county treasurer on the same day. We can conceive of no way that the purchaser could have been more diligent than he was in the case under consideration. We are, therefore, of the opinion that he should not be subjected to the penalty of $1.00 for failure to file the application for a license on May 31st. Any other result would be a hardship. This, the law does not require.

BUDGET LAW—FUNDS: Discussion of the provisions of the law relating to the transfer of funds.

June 23, 1926. *Director of the Budget:* We have received your letter of June 16, 1926, in which you submit to this department an inquiry which you have stated as follows:

"We are in receipt of the following letter from Mr. L. A. Ritter of Rock Rapids, Iowa, and request that you kindly furnish an opinion on the questions submitted:

"'As a member of the city council of Rock Rapids, Iowa, which is a city having a population of about 2500, or in any event being a city with a population of less than 8,800 as provided by Section 6215 of the 1924 code of Iowa, I would ask of you a legal opinion upon the following proposition:

"'May a city coming within the contemplation of Section 6215 make permanent transfers from one or more of the several funds enumerated in said Section 6215, to one or more of said several funds so enumerated in said Section 6215, upon a unanimous vote, and providing that such action is approved by a Judge of the District Court? I am assuming of course that Section 6215 and 6216 will be legally complied with.'

"'The question is whether or not Section 6230, referring to "Diversion of funds," remains applicable to the sections first above enumerated? As you will observe, if a permanent transfer is made from one of the several funds enumerated in Section 6215 to any of said funds, it would in legal effect amount to a diversion of a fund, or a portion thereof from the purpose of which it was levied and assessed. In other words, the money on hand in some of the several funds so enumerated under Section 6215 has been levied and assessed for these particular funds by statutory permission, and the real question is whether Section 6230 is in conflict with said Section 6215 or 6216 or whether said Sections 6215 and 6216 are a modification of 6230 as re-codified. If they amount to a modification thereof then the diversion statute 6230 would have no application and there would be no violation thereof if action were taken under 6215 and 6216.

"'It occurs to the writer that if Section 6230 is a limitation upon said Sections 6215 and 6216 then said Sections 6215 and 6216 may as well be stricken from the law as surplusage. This is a very important question to members of City Councils, and the personal safety in acting for municipalities requires, in the opinion of the writer, a definite legal opinion of your department, and from the office of the Attorney General.

"'We have no desire of passing the responsibility to anyone else, but personally and in behalf of others who are likewise interested as members of the city council, we ask for an opinion from your department, and which opinion we assume will be either originally given or sanctioned by the Attorney General's office.

"'Sections 387 and 388 provide for the transfer of funds when the necessity for maintaining such funds has ceased to exist, and also provides for the transfer from one fund to another for temporary purposes upon condition that it be transferred back as soon as possible.

"'We assume that these sections cannot be construed as limitations on the sections heretofore quoted, but simply provide for a means of transferring, first, in cases where the necessity for maintaining a fund has ceased to exist, and second, for the transfer for temporary purposes with an understanding and intention to return the money to the fund from which transfer has been made, as soon as may be, and that there is and can be no conflict in pursuing one of the two above methods.

"'In other words the above sections stand separate and simply provide for transfers under the conditions as outlined therein, and that other transfers coming within the purview of Section 6215 are separate and distinct, and that there are no limitations either from one or the other, as against each other.'"

Section 6215 provides as follows:

"Cities having a population of eight thousand eight hundred or less, and towns, may make either temporary or permanent transfers from the grading fund, improvement fund, sewer fund, and waterworks fund, gas or electric plant fund, water fund, gas or electric light or power fund, to any of said funds by resolution concurred in by a unanimous vote of the council, if approved by a judge of the district court in the county wherein such city or town is located at a hearing had on a day to be fixed by said judge."

It will be observed that the above section permits cities having a population of 8,800 or less, and towns, to make either temporary or permanent transfers of funds by complying with the procedure specified in said section and also Section 6216 of the Code of 1924, as amended by Chapter 140, Acts of the 41st General Assembly.

Sections 387 and 388 also permit the transfer of funds of municipalities. These sections are a part of the budget law and it will not be necessary to copy either of them in this opinion. It will suffice to say that both sections are made subject to the provisions of any law relating to municipalities meaning, of course, any law relating to the subject of the transfer of funds. We held in an opinion prepared for the Director of the Budget on August 18, 1924, (Report of the Attorney General 1923-24, page 81) that in the enactment of the two sections just cited it was not the intention of the legislature to repeal or modify any existing provisions of law relating to the temporary or permanent transfer of funds of cities but that the power granted therein must be exercised by the municipalities in connection therewith and such municipalities must comply with the provisions of the law relating thereto in force at the time the Budget Law was enacted. It will, therefore, be seen that the statute does provide for the transfer of funds, both temporary and permanent, by complying with the provisions of the existing law.

Section 6230 reads as follows:

"Any councilman or officer of a city or town who shall participate in, advise, consent, or allow any tax or assessment levied by such city or town or by other lawful authority for city or town purposes to be diverted to any other purpose than the one for which it was levied and assessed, or who shall in any way become a party to such diversion, shall be guilty of embezzlement."

A literal reading of Section 6230 would, of course, prohibit the transfer of funds under the sections of the statute hereinbefore referred to. However, it is a well settled rule of statutory construction that statutes upon the same subject must be construed together and all parts thereof given force and effect if possible to do so without doing violence to the language employed. It is manifest, we think, that it was not the intention of the legislature in enacting Section 6230, relating to the diversion of funds, to do away with the provisions of the statute relating to the transfer of funds hereinbefore cited. Therefore, if the city council complies with the provisions of the statutes relating to the transfer of funds in making such transfer, there will be no diversion of funds under the provisions of Section 6230. City councils may make such transfers by complying with the law without incurring the penalty provided in Section 6230.

INSURANCE: State Mutual assessment hail association may issue both assessable and fixed premium contracts.

June 23, 1926. *Commissioner of Insurance:* I wish to acknowledge receipt of your favor of the 24th requesting our opinion on the following proposition:

"Will you kindly give me your opinion as to whether or not a state mutual assessment hail association operating under the provisions of Chapter 406 of the Code of 1924, may issue both assessable and fixed premium contracts, the latter being provided for in Section 9041 of the Code, assuming that the association is possessed of the required amount of surplus."

Section 9041, Code, 1924, to which you refer, reads as follows:

"When the emergency fund of any association reaches an amount equal to one hundred per cent of the average cost per thousand on all policies in force for the full term for which assessment is collected and not less than one hundred thousand dollars or such amount of capital stock as is required of domestic companies, such associations may issue policies of fixed premiums."

Under the plain terms of the statute quoted, an asssociation such as that to which you refer, providing it has met the other requirements, may issue policies at fixed premiums. There is nothing in the statute prohibiting the company from issuing this policy, together with the ordinary assessment or assessable policy. In the absence of a statutory prohibition and in view of the fact that the legislature

has seen fit to authorize both forms of policy, we are of the opinion that if the requirements are met, such an association may issue both forms of policy.

INHERITANCE TAX: (1) Where the proceedings of an insurance policy are made payable to a specific beneficiary it is not subject to the imposition of an inheritance tax. (2) Where the proceeds thereof are made payable to the executor or become a part of the assets of the estate such proceeds are subject to the payment of an inheritance tax. (3) Proceeds of government insurance on the life of a soldier is subject to taxation and made payable to his heirs or other beneficiaries.

June 23, 1926. *Chief Examiner, Inheritance Tax Department:* We have received your letter of June 19, 1926, in which you submit to this Department, certain questions which you have stated as follows:

"The question of the liability for inheritance taxation of Government War Risk Insurance has been before this Department several times and we desire the opinion of your office in regard to its liability for tax. We are presenting the facts as they appear in the above named estate in the hope that since this case is typical of the cases which are involved that the one opinion can be used in connection with all such matters.

The above named decedent died on the 4th day of April, 1918 leaving no property save War Risk Insurance. At the time of his death, his mother who was the beneficiary under the policy was still living. That she died on December 20, 1923 and thereafter the War Risk Insurance was paid to the administrator of the Ralph Rosborough estate for distribution. The questions raised are as follows:

First: Is Government War Risk Insurance to be regarded as an asset of the estate of the deceased for purposes of inheritance taxation?

Second: Since the mother of the decedent survived him and received the benefits of the policy during her life-time, what would be her status in regard to these assets?

Third: If the said War Risk Insurance is taxable and yet is not payable into the estate until the termination of the mother's life, when would interest accrue upon the inheritance tax due?"

Before discussing the provisions of the War Risk Insurance Act of the Federal Government and the proper construction to be placed thereon, we shall discuss the right of the state under the present statutes to levy or assess an inheritance tax on policies of insurance. At one time the statutes of the State contained the following provisions:

"In computing the value of the estate of decedent under the act, there shall be included the amount of insurance taken out by the decedent upon his own life, whether payable to his estate or to other beneficiaries; provided, however, that in computing the value of the estate of decedent passing to beneficiaries named in paragraph "a" of section three (3) of this act, the amount of such insurance so included shall be only the excess, if any, over forty thousand dollars ($40,000)." Chapter 38, 39th General Assembly, Section 17.

However, this section was repealed by Chapter 164, 39th General Assembly. The repeal of this statute evidently indicated an intention on the part of the legislature to change the policy with reference to the taxation of the policies of insurance. We must, therefore, determine whether such policies were taxable before the enactment of the section in question. The rule may be briefly stated as follows:

Where the proceeds of an insurance policy are made payable to a specific beneficiary, it is not subject to the imposition of an inheritance tax. However, where the proceeds thereof are payable to the executor, administrator or legal representative of the deceased, or become a part of the assets of the estate, such proceeds are subject to the payment of an inheritance tax.

Re Knoedler, 140 N. Y. 377; 35 N. E. 601;

Re Einstein's Estate, 186 N. Y. Supp. 931;
Tyler v. Treasurer (Mass.) 115 N. E. 300, L. R. A. 1917 D, 633;
Bullens' Estate, 143 Wis. 512; 139 Am. St. Rep. 1114; 128 N. W. 109;
Re Parsons, 102 N. Y. Supp. 168;
Matter of Sherman, 153 N. Y. 6;
Matter of Hillman, 174 N. Y. 257.

Having discussed the general rules relating to taxation of the proceeds of insurance policies, we shall now turn to the War Risk Insurance Act to determine whether there is anything in the Act that makes the said rules inapplicable to such insurance or exempts the proceeds of such policies from the imposition of an inheritance tax. Section 303 of the Act provides as follows:

"If no person within the permitted class be designated as beneficiary for yearly renewable term insurance by the insured either in his lifetime or by his last will and testament or if the designated beneficiary does not survive the insured or survives the insured and died prior to receiving all of the two hundred and forty installments or all such as are payable and applicable, there shall be paid to the estate of the insured the present value of the monthly installments thereafter payable, said value to be computed as of date of last payment made under any existing award; Provided, that all awards of yearly renewable term insurance which are in course of payment on the date of the approval of this Act shall continue until the death of the person receiving such payments, or until he forfeits same under the provisions of this Act. When any person to whom such insurance is now awarded dies or forfeits his rights to such insurance then there shall be paid to the estate of the insured the present value of the remaining unpaid monthly installments of the insurance so awarded to such person; Provided further, That no award of yearly renewable term insurance which has been made to the estate of a last surviving beneficiary shall be affected by this amendment; Provided further, That in cases when the estate of an insured would escheat under the laws of the place of his residence the insurance shall not be paid to the estate, but shall escheat to the United States and be credited to the military and naval insurance appropriation. This Section shall be deemed to be in effect as of October 6, 1917."

It will thus be observed that the insurance is payable in two hundred and forty installments, and that upon the happening of certain contingencies designated therein, the remaining installments are made payable to the estate of the deceased.

Therefore, unless there is something in the statute itself which exempts the proceeds thereof from the imposition of an inheritance tax, we believe that the rules hereinbefore announced will apply equally to the proceeds of such policies of insurance. Therefore, in the event such insurance is payable to a designated beneficiary it will be exempt from taxation but such portions thereof as are made payable to the estate are subject to the imposition of an inheritance tax.

Section 22 of the Act reads as follows:

"That the compensation, insurance and maintenance and support allowance payable under Titles 2, 3 and 4, respectively, shall not be assignable; shall not be subject to the claims of creditors of any person to whom an award is made under Titles 2, 3, and 4; and shall be exempt from all taxation: Provided, That such compensation, insurance, and maintenance and support allowance shall be subject to any claims which the United States may have, under Titles 2, 3 and 4 and 5, against the person on whose account the compensation, insurance or maintenance and support allowance is payable."

The United States Veterans Bureau in construing the above provisions of the statute held as follows:

"The Bureau in construing this Section has held that the intent of Congress was to insure the beneficiary of the monetary benefits of the Act without reduction or disturbance by way of taxation or creditor claims, but once the fund passes out of the control of the Bureau into the hands of the beneficiary, any privilege or obligation in connection with its expenditure is a matter over which the Bureau has no

control and any question regarding the future exemption from taxation or creditor claims of said funds is one over which the Bureau has no jurisdiction. The question, therefore, whether the proceeds of war risk insurance may be exempted from the state inheritance tax after such proceeds have passed into the hands of the beneficiaries, is one over which the Bureau has no control, and is a question to be determined primarily by the provisions of the State tax law in question."

It is, therefore, apparent that the question under consideration must be determined not under the provisions of the Federal Statute, but under the provisions of the State Statute. We can conceive of no reason why the rules hereinbefore referred to should not apply to war risk insurance passing to the estate of the insured.

We, therefore, hold as follows:

First: That the proceeds of the War Risk Insurance, which are payable to the estate, are subject to the imposition of an inheritance tax.

Second: That so far as the mother of the decedent is concerned, no inheritance tax is due on the part of such insurance payable to her. This is on the theory that insurance payable to a stated beneficiary is not taxable.

Third: That interest should not be computed on the amount of the tax due from the estate until eighteen months from the date of the death of the mother. This is on the theory that the tax is not due until such time.

TAXATION: Discussion of the law relating to the taxation of shares of stock in a building and loan association.

June 24, 1926. *Auditor of State:* We have received your letter of June 1, 1926, in which you submit to this department the following inquiry:

"This department has received the following letter from O. R. Kreutz, Secretary of the Iowa Building & Loan League, asking that an opinion be secured from your office covering the matters therein discussed:

'Anent our conversation of the 25th instant I am writing for definite data on certain tax questions which have arisen recently. I will very much appreciate your getting a definite opinion from the attorney general covering these questions.

'While the law is plain it apparently is not generally understood by local assessors that stock of building and loan associations is not on the same basis as stock of an ordinary commercial corporation. I would like an opinion showing that it is not necessary for the associations to file with the county assessor or county auditor a list of shareholders; further that the loans owned by the association are not to be assessed and taxed to the association; further that merely contingent fund and furniture and fixtures are to be taxed at all.

'These questions have come up so frequently that it would save a great amount of our time to have an opinion direct from the Attorney General's office covering them.'"

Section 7020 of the Code of 1924 provides that shares of stock issued by building and loan associations shall be classified as money and credits for the purpose of taxation. Section 6985 contains the provisions of the law relating to the taxation of moneys and credits and corporation shares of stock except as otherwise provided. Section 6988 reads as follows:

"In making up the amount of money or credits which any person is required to list, or to have listed or assessed, including actual value of any 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."

It will be observed that the above statute permits the owners of building and loan association shares of stock to deduct from the value thereof the gross amount of all debts in good faith owing by them. Section 7015 provides that shares of stock of mutual building and loan associations, exclusively engaged in such business, shall be assessed and taxed to the individual holders thereof at their places of residence.

These sections fully answer the questions submitted by you. We, therefore, answer your questions in the following manner:

1. That the shares of stock of building and loan associations shall be assessed on the same basis as moneys and credits;

2. That the shares of stock shall be assessed and taxed to the individual holders thereof at their places of residence.

3. That the property of the association is not taxed. The shares of stock only are taxed.

4. That the stockholders are permitted to deduct their indebtedness from the actual value of their stock.

ROAD PATROLMEN: Have authority to make arrests while on duty the same as any peace officer.

June 28, 1926. *County Attorney, Waukon, Iowa:* We wish to acknowledge receipt of your favor of the 17th in which you inquire whether or not road patrolmen would have authority to arrest persons using the public highways and violating the intoxicating liquor laws.

Under the provisions of Section 4779, Code, 1924, it is provided:

"* * * Each such patrolman shall take the same oath as any peace officer and shall have the authority of a peace officer."

This would clearly give the patrolman the authority to enforce any of the laws of this state while he is on duty as a road patrolman.

MOTOR VEHICLE: Owner of a motor vehicle is primarily liable for the payment of a license fee and penalty and may be held personally liable for any deficiency over the sale price of the vehicle.

June 28, 1926. *County Attorney, Leon, Iowa:* I wish to acknowledge receipt of your favor of the 24th in which you inquire in substance whether or not the owner of a motor vehicle upon which the license and penalty have not been paid, may be made personally liable therefor, or whether the only recourse for the collection of the penalties and license is to the motor vehicle itself.

Section 4930, Code, 1924, provides as follows:

"The collection of all fees and penalties may be enforced against any motor vehicle, or they may be collected by suit against the owner, who shall remain personally liable therefor until such time as the transfer thereof shall be reported to the county treasurer, or until such time as said vehicle ceases to be in use and all fees and penalties to such date shall be paid."

The subsequent statutes provide for the collection of the fee and penalty by the sale of the motor vehicle.

It is apparent that the owner of the vehicle is primarily liable for the payment of the license fee and penalty. As a means of collecting this fee and penalty, the statutes provide that his car may be sold by the sheriff. Recourse to this means of collection, however, does not relieve the owner from his primary liability, and we are of the opinion that the sheriff or county treasurer may properly proceed against the owner of the delinquent motor vehicle for the collection of the fee, even though the car has been levied upon and sold by the sheriff under the provisions of the statute, providing, of course, that the amount for which the car is sold by the sheriff does not equal the amount of the penalties and costs.

CITIES AND TOWNS: Vacancy occurring in the office of the City Assessor may be filled by the city council.

June 28, 1926. *Auditor of State:* We wish to acknowledge receipt of your favor of the 17th requesting our opinion on the following proposition:

"At our last city election John Huntington was elected city assessor to succeed himself and two days after the election he died and the city council appointed one of his deputies in his office to fill the unexpired term, which would expire January 1, 1927. The city council is anxious to avoid the expense of an election to fill the vacancy for the term commencing January 1, 1927. In the event that an election to fill this vacancy is called at the same time as the general election in the fall, which I believe can be done under the law, would it be necessary to call a primary election to select candidates for such an election? In the event no election is called, and a vacancy exists on the 1st day of January, 1927, for this office, would the city council have the right to fill this vacancy by appointment? The council would prefer to do it in this way, if it is legal, in order to save expense of a special election, or at least a primary election to select candidates for the office if submitted at the same time as the candidates are voted on for the general election in the fall."

Paragraph 8 of Section 5663, Code 1924, in reference to the duties of cities and towns provides:

"Election for filling vacancies. Elect by ballot persons to fill vacancies in offices not filled by election by the council, and the person receiving a majority of the votes of the whole number of members shall be declared elected to fill the vacancy."

The office of assessor is not filled by election by the council, the assessor being elected at the regular city election. This being true, under the statute above quoted, the city council would have the legal authority to fill the vacancy in the assessor's office in the manner therein provided.

SINKING FUND: Governing Board has authority to designate depository of public fund and fix maximum amount.

June 29, 1926. *Governor of Iowa:* I am in receipt of a letter directed to you by Mr. Earl F. Mayer. This letter is in words as follows:

"The writer is a member of the Independent School District of Lyons and finds that it will be necessary to designate depository for school funds, at the Annual Meeting July 1st. In the past it has been customary to carry all these funds in one of the local banks and we would like to make a change and split the funds between two banks in the future.

"Has the Board the authority to instruct the school treasurer as to just how he shall divide the funds or does their authority simply cover the approval of depository? Will you kindly secure an opinion from the Attorney General and have it forwarded to me not later than July 1st? Would also ask that you have him advise the proper amount of the bond which we should require from the treasurer, the maximum balance being about $125,000."

You have requested me to advise you as to the law on this matter. You are advised that the Board of Directors of a school district has the power to designate the depository in which the public funds of the district are to be deposited, and to fix the maximum amount to be deposited in each.

It is the duty of the school treasurer in such cases to obey the mandate of the school board.

CORPORATIONS: A Corporation does not pay a corporation fee upon the value of corporation stock held in the State but only upon property actually used.

June 30, 1926. *Secretary of State:* This department is in receipt of your letter dated June 9, 1926, in which you request an official opinion. Your letter is in words as follows:

"A decision regarding the following situation is requested by this department: A corporation, foreign in character, by the name A. H. BLANK THEATRE CORPORATION recently qualified to do business in this state. According to the Code of Iowa this department charges a filing fee upon the total value of money and all other property the corporation has in use or held as investment in the state, at the time the statement is made." Listed in the assets of this corporation are holdings of stock in other theatre corporations which have qualified to do business in the State of Iowa, amounting to approximately $500,000.00. The balance of the assets, and upon which a filing fee was charged by this department, was the ownership of theatres located in the State of Iowa.

The attorney for the corporation raised the point as to whether or not the State of Iowa should charge a filing fee on the stockholdings of this corporation. An opinion is requested as to whether or not this department should have required this corporation to pay a filing fee on stockholdings as well as the fee on the physical ownership of theatre buildings, the question being raised as to whether or not these stockholdings could be considered 'property in use.'

In connection with the above your attention is respectively invited to the provisions of Section 8421, Chapter 386, of the Code of 1924."

Of course, the corporation would not have to pay the corporation fee upon the value of the corporation stock held by it in this state. The statute refers to property actually used.

TUBERCULOSIS: After a county has been enrolled under the county area plan no names may be removed from the petition.

July 6, 1926. *Secretary of Agriculture:* We desire to acknowledge receipt of your letter of June 23, 1926, in which you submit the following inquiry:

"At the hearing in Muscatine County to determine the sufficiency of the petition in declaring Muscatine County on the accredited area or compulsory area basis those objecting to the petition filed a petition signed by a number of owners of breeding cattle in the county.

"A number of these signers had had their cattle tested and I held that those having had their cattle tested could not withdraw their names from the petition as they had entered into a contract and agreement and received the benefit of the testing.

"A number of the signers on the remonstrance petition had not signed the original petition. Have these signers any influence on determining the sufficiency of the 75% petition?

"Under what condition can names be withdrawn from the original petition under section 2694 and 2695 of the Tuberculosis Eradication law of chapter 129, Code of 1924, as amended by the Forty-first General Assembly?"

Section 2694 of the Code of 1924, as amended by Section 5, Chapter 54, Laws of the 41st General Assembly, reads as follows:

"Whenever seventy-five per cent of the owners of breeding cattle in any county operating under the county area plan, shall have signed agreements with the department of agriculture, the department shall cause a notice to be published for two consecutive weeks in two official county papers of the date and place of hearing on said agreements, which hearing shall be held before the secretary of agriculture in said county not less than five nor more than ten days after the last publication, said date and place of hearing to be set by the secretary of agriculture."

Section 2695 of the Code was repealed and a substitute enacted. Section 6, Chapter 54 of the Laws of the 41st General Assembly, contains the substitute statute and reads as follows:

"If objections are filed with the secretary of agriculture on or before the date fixed in the notice, the secretary shall hear the objectors and petitioners and determine whether or not the county shall become an accredited area. *In passing upon the sufficiency of the petition for establishing the county as an accredited*

area the secretary of agriculture shall count all agreements which have been filed in his office within a period of two years preceding the date of final determination. If the petition is found sufficient, the secretary of agriculture shall make an entry of record establishing the county as an accredited area and shall notify the board of supervisors of such county accordingly. Thereafter every owner of breeding cattle within the county shall cause his cattle to be tested for tuberculosis as provided in this chapter and shall comply with all the requirements for the establishment and maintenance of a tuberculosis-free accredited herd."

The sections just quoted determine the question you have submitted. After a county is enrolled under the county area plan, then no names may be removed from the petitions or agreements authorized by the statute. The statute specifically provides that in passing upon the petition for establishing the county as an accredited area, the Secretary of Agriculture shall count all agreements which have been filed in his office within a period of two years preceding the date of final determination. If such agreements can be withdrawn, or the names thereon removed therefrom, then this portion of Section 2695 would be meaningless.

We, therefore, hold that after a county has been enrolled under the county area plan, no names may be removed therefrom and any names on said petition at that time must be counted by the Secretary of Agriculture in determining the sufficiency of the 75% petition. You have not submitted to us and we do not pass upon the right of petitioners to remove their names from said agreements before the enrollment of the county under the county area plan. When remonstrances have been filed, signed by owners of cattle who have not signed petitions, such remonstrances should be considered by the Secretary of Agriculture but they should be given no weight in determining the sufficiency of the 75% petitions.

BUDGET LAW: Boards of supervisors when acting in drainage matters are not required to comply with the contract and bond provisions of the Budget Law.

July 6, 1926. *Director of the Budget:* We have received your letter of June 28, 1926, in which you submit to this department the following inquiry:

"Will you kindly submit to this department an opinion on the following questions:
Does paragraph 1, Section 60 of the amendments to the Budget Law, passed by the Extra Session of the Fortieth G. A. apply to county boards of supervisors acting as drainage boards in connection with matters concerning the contract and bond chapter of the budget law. (Section 352, 353, 354 and 363, Chapter 23, Code of 1924.)
Does the same amendment apply to all sections of the local budget law? (Chapter 24, Code of 1924)"

Section 369 of the Code, as amended by Section 1, of Chapter 86, Laws of the Extra Session of the 40th General Assembly, reads in part as follows:

"As used in this chapter and unless otherwise required by the context:
Par. 1. The word 'municipality' shall mean the county, city, town, school district (other than rural independent school district and school township divided into sub-districts) and all other public bodies or corporations that have power to levy or certify a tax or sum of money to be collected by taxation, but shall not include any drainage district, township, road district or rural independent school district or school township divided into subdistricts."

Under the provisions of the above portion of the statute drainage districts are specifically exempted from the provisions of Chapter 24 of the Code entitled "The Local Budget Law." Therefore, we are of the opinion that boards of supervisors, when acting in drainage matters, are not required to comply with the contract and bond provisions of the Budget Law. The very purpose of Section 369 is to define the general terms used in this statute.

Therefore, the provisions of this section apply to all of the sections therein contained and governmental subdivisions of the state, which are not specifically included therein, are not required to comply with the provisions of this chapter.

CITIES AND TOWNS: Special Charter Cities have the power to levy taxes not exceeding five mills on the dollar for water, gas, light, etc. A City may pay a deficit due on the contract for services rendered where the amount derived from the said levy is insufficient.

July 8, 1926. *Director of Budget:* You have requested the opinion of this department as to whether or not Section 6211, paragraph 10, Code of 1924 applies to special charter cities of this state. For your convenience we set out subsection 10 of Section 6211, which reads as follows:

"Any city or town shall have power to levy annually the following special taxes:
—10. Gas light, electric light, heat, or power funds. Any city with a population of more than five thousand, not exceeding five mills, and any city with a population of less than five thousand and any town, not exceeding seven mills, which shall be used only to pay the amount due or to become due under any contract for gas light, electric light, heat, or power, including expenses of inspection.—"

There is however a chapter upon cities under special charter, said chapter being 329 of the Code of 1924. Provision is made in this chapter for general taxation by special charter cities and we call your attention to section 6856. Sub-section 8 thereof provides as follows:

"They shall have power to levy annually the following taxes for special purposes:
—8. Tax for water, gas, and electric light or power. A tax not exceeding five mills on the dollar for the purpose of paying the amount due, or to become due, to any individual or company operating water or gas works or electric light or power plants, for water, light, gas or power supplied to the ctiy, the levy to be limited to the property benefited thereby.—"

Under the above section it is our opinion that Section 6211 does not apply to special charter cities but that section 6856 does apply and that sub-section 8 of said section 6856 is pertinent to your particular inquiry.

You have further requested however, as to whether or not a special charter city may enter into a contract for the furnishing of electricity for lighting purposes to the city and where the amount of money raised from the five mill levy is insufficient to pay for services rendered under the terms of the contract, can the said city then proceed to pay for balance or deficit from the general fund.

Section 6759, Code of 1924 relates to special charter cities and provides that chapter 292 of the Code of 1924 would be applicable to cities operating under a special charter. Section 5738, Code of 1924 appears as part of Chapter 292 and defines bodies corporate and enumerates the authority given to such bodies. Said section provides in part that cities and towns shall have authority to contract and to be contracted with. Under the authority of this section there is no question but that a special charter city shall have authority to enter into such a contract as is referred to by you.

The remaining question is as to whether or not the city has authority to pay for the balance or deficit remaining over and above the amount which is raised by five mill levy for the light fund as authorized by sub-section 8 of section 6856. This question has been presented to the Supreme Court in the case of *Waterworks Company v. The City of Creston,* 101 Iowa 687. In that case the City of Creston by ordinance entered into a contract for the furnishing to the city of water supply. A deficit arose under the contract due to the fact that the revenue derived from the five mill levy was insufficient to meet the obligations

of the contract. The question presented was whether or not such balance or deficit could be paid from the general fund. Sepaking of this question the Court said:

"When, within the limit of five mill tax, the supply can be thus paid for, it must be so paid; but when that source is not sufficient the deficiency may be paid from the general revenues."

This case is affirmed in the case of *Marion Water Company v. The City of Marion*, 121 Iowa 306.

In view of these decisions in the Supreme Court, it is the opinion of this department that a special charter city may pay from the general fund, a deficit or balance arising under a contract for the furnishing of electricity to the city where the revenue received from the five mill levy is insufficient to pay for such service rendered.

WORKMEN'S COMPENSATION: Discussion of the liability for an injury caused by one not the employer and the rights of the employer, employee, and the party causing the injury under the Workmen's Compensation Law.

July 8, 1926. *Industrial Commissioner of Iowa:* We have received your letter of June 5, 1926, in which you submit to this department a question relating to the injury of Fred Vandervoort, who at the time of his injury was an employee of the State Highway Commission. Your inquiry is stated as follows:

We desire to know whether or not the state may be relieved from financial obligation through demand upon the third party whose negligence caused injury to the said employee.

In a letter written to Mr. C. R. Jones, Auditor of the Iowa State Highway Commission to your department, which was enclosed with your letter, we find the following statements:

"I hand you herewith a plat showing the location of the accident in which the above named employee was injured.

We are advised that the Ford car which ran down the employee is registered in the name of Ray Weiss of Charles City, Iowa, it being a Ford coupe, 1924 model, engine No. 8747657 and 1926 license number 27-3319.

Our Maintenance Superintendent also advises that he finds that this car is mortgaged under date of February 27, 1926, for $431.56.

We have heard nothing further as to the condition of Mr. Vandervoort than is shown on Part 1 of the Accident Report, but we are making inquiry today as to how he is getting along.

We are also asking our Maintenance Superintendent to advise as to whether or not the injured man has made any demand upon the driver of the Ford or started any action looking toward the collection of damages."

Accompanying the letter was a plat showing the location of the part of the highway where the said employee was injured. The employee was at the time of the accident working on primary road No. 19, just outside of the limits of Charles City. The city limits at the point indicated run north and south. The street which forms a part of the primary road and the continuation of the highway outside of the city limits runs east and west intersecting the city limits but not at a right angle. It appears from the plat that the driver of the Ford automobile who caused the injury to the employee was driving east on the highway. When he reached a point some distance from the place where the employee was working he was flagged or given a signal by the foreman, who was some distance east of the Ford at the time of the flagging. The driver of the Ford, however, did not heed the signal but continued to drive the car and struck the employee who was standing just a short distance west of the city limits. The driver of the Ford did not stop the car until he was some distance east of the city limits.

Section 1382 of the Code contains the provisions of the statute relating to the liability of another than the employer for an injury to an employee and the right of subrogation thereunder. This section reads as follows:

"When an employee receives an injury for which compensation is payable under this chapter, *and which injury is caused under circumstances creating a legal liability against some person other than the employer to pay damages*, the employee, or his dependent, or the trustee of such dependent, *may take proceedings against his employer for compensation, and the employee, or, in case of death, his legal representative may also maintain an action against such third party for damages.* When an injured employee or his legal representative brings an action against such third party, a copy of the original notice shall be served upon the employer by the plaintiff, not less than ten days before the trial of the case, but a failure to give such notice shall not prejudice the rights of the employer, and the following rights and duties shall ensue:

1. If compensation is paid the employee or dependent or the trustee of such dependent under this chapter, the employer by whom the same was paid, or his insurer which paid it, shall be indemnified out of the recovery of damages to the extent of the payment so made, with legal interest, and shall have a lien on the claim for such recovery and the judgment thereon for the compensation for which he is liable. In order to continue and preserve the lien, the employer or insurer shall, within thirty days after receiving notice of such suit from the employee, file, in the office of the clerk of the court where the action is brought, notice of the lien.

2. *In case the employee fails to bring such action within ninety days, or where a city or town or city under special charter is such third* party, within thirty days *after written notice, so to do given by the employer or his insurer, as the case may be, then the employer or his insurer shall be subrogated to the rights of the employee to maintain the action against such third party, and may recover damages for the injury to the same extent that the employee might.* In case of recovery, the court shall enter judgment for distribution of the proceeds thereof as follows:

a. A sum sufficient to repay the employer for the amount of compensation actually paid by him to that time.

b. A sum sufficient to pay the employer the present worth computed on a six per cent basis of the future payments of compensation for which he is liable, but such sum thus found shall not be considered as a final adjudication of the future payments which the employee shall receive and the amount received by the employer, if any, in excess of that required to pay the compensation shall be paid to the employee.

c. The balance, if any, shall be paid over to the employee.

3. Before a settlement shall become effective between an employee or an employer and such third party who is liable for the injury, it must be with the written consent of the employee, in case the settlement is between the employer or insurer and such third person; and the consent of the employer or insurer, in case the settlement is between the employee and such third party, or on refusal of consent, in either case, then upon the written approval of the industrial commissioner.

4. A written memorandum of any settlement, if made, shall be filed by the employee in the office of the industrial commissioner."

Section 2477-6, Code Supplement 1913, which is substantially the same as the above quoted statute, was under consideration and a construction placed thereon by the supreme court in the following cases:

Southern Surety Company v. C., St. P., M. & O. Ry. Co., 187 Iowa 357;
Black v. C. G. W. Ry. Co., 187 Iowa 904;
Fidelity and Casualty Co. v. Cedar Valley Electric Co., 187 Iowa 1014;
Cowley v. Peoples Gas & Electric Co., 193 Iowa 536;
Renner v. Model Laundry Cleaning & Dyeing Co., 191 Iowa 1288.

Considering the provisions of the present statute and the construction placed on

the former statute by the supreme court in the above entitled cases, we deduce therefrom the following rules:

(1) That an injured employee, where the injury is caused under circumstances creating a legal liability against some person other than the employer to pay damages, has the following causes of action or rights and may avail himself of both, subject to the rights of the employer created by the statute: (a) may proceed against his employer for compensation, (b) may also maintain an action against such third party for damages.

(2) When an injured employee brings an action against such third party, a copy of the original notice shall be served upon the employer by the plaintiff not less than ten days before the trial of the case.

(3) A failure to give such notice, however, shall not prejudice the rights of the employer under the provisions of the statute.

(4) If compensation is paid the employee under the provisions of the section, the employer by whom the same was paid, or his insurer which paid it, shall be indemnified out of the recovery of damages to the extent of the payment so made, with legal interest.

(5) The employer shall have a lien on the claim for such recovery and the judgment thereon for the compensation for which he is liable.

(6) In order to continue and preserve the lien the employer or insurer shall, within thirty days after receiving notice of such suit from the employee, file in the office of the clerk of the court where the action is brought notice of the lien.

(7) In case the employee fails to bring such action within 90 days after written notice so to do by the employer or his insurer, as the case may be, then the employer or his insurer shall be subrogated to the rights of the employee to maintain the action against such third party and may recover damages for the injury to the same extent that the employee might. In case of a recovery in an action brought by the employer, the statute prescribes the method of distribution thereof. The statute in the third subdivision thereof contains provisions which will protect the employee, the employer and the insurer in the event a settlement is made by any of these parties with the party liable for damages. The consideration of this portion of the statute is not material to this inquiry. The employee is entitled to recovery from his employer under the Workmen's Compensation Act even though he has a right of recovery against the third party whose negligence caused the injury. This liability extends up to the time that he has actually received full compensation from said third party.

(8) An employee, who has suffered an injury which arose out of and in the course of his employment by the reason of the independent wrong of a third party, may, after collecting compensation from the master under the Workmen's Compensation Act, maintain an action against said third party for all damages suffered by him, but in such action the employer should in some proper manner be brought into the action in order to protect him in the amount paid to the servant.

(9) An employer, who under the Workmen's Compensation Act has paid compensation to his employee, may in order to secure reimbursement intervene in an action by the employee against a third party, whose wrongful act was the proximate cause of the injury.

(10) It may be proper for such intervention to be made after the verdict. There is no prohibition in the statute against the employer intervening at a prior stage in the proceeding.

In the case of *Southern Surety Company v. C., St. P., M. & O. Railway Company*, supra, the supreme court in discussing the proper construction of the former section of the statute which is substantially the same as the present statute used the following language:

"It is apparent from the statute that, when Whitney received his injuries, he was entitled to proceed against his employer under this act. He was entitled to receive from his employer the compensation which is provided for in the act. We must assume that the injury occurred under such circumstances that Whitney's employer was liable to him under the act. We must assume that the compensation paid to Whitney was paid in accordance with the act. The compensation which Whitney became entitled to from his employer, or from this insurance company, rested upon a contractual obligation to pay for injuries received under the circumstances provided for in the statute. When an injury is received under circumstances rendering the employer liable to the injured party under the statute, nothing is left for the employer to do but to make compensation. This compensation is required to be made, though the employer is in no way negligent, and in no way liable at common law for damages. The compensation is purely statutory, and the amount of compensation is fixed by the statute. Its provisions are for the protection of the workingman, as between him and his employer, and in no way affects or controls the right of the injured party to proceed at common law against the actual wrongdoer. In an action at common law, the injured party is entitled to recover all that the common law recognizes as proper to be recovered in suits of that kind. This includes compensation for the injury, loss of time, medical care, and treatment, and all other injuries which are shown to flow as a proximate result of the wrong done. The fact that the injured party proceeded against his employer, and secured compensation under the act, cannot be pleaded by the wrongdoer when suit at common law is instituted against him. He is liable for the full amount of the damage, regardless of any rights the injured party has against his employer, or may have had under the act. * * * * * The obligation of the wrongdoer is the same as if there were no Workmen's Compensation Act. Compensation is one thing, and damages another. He recovers from the wrongdoer all the damages that he sustained by reason of its wrongful act. He recovers only such compensation from his employer as is provided for in the statute. * * * * *

"Now let us see where we are at: The injured party brings an action, at common law, against the actual wrongdoer, and recovers for all the wrong, presumably, that he has suffered. This included compensation for medical services, for loss of time, and other matters provided for in the act; but his right to recover is not limited in amount by the provisions of the act as to any of these matters. The wrongdoer must discharge its entire obligation to the injured party, and pay him for his injuries, loss of time, medical and surgical treatment, and all matters which flow as a proximate result of its wrong. If it does this, the insured party is made whole. If this is done before any claim is made under the act, he has no claim for compensation. He has received compensation. If, before recovery from the wrongdoer, he has received compensation from his employer, he must return it. It is true the statute says that the employer, or person making the compensation, shall be indemnified from the person liable to pay damages. This indemnity may come through an action by the injured party against the wrongdoer for damages, or it may come through an action by the employer against the wrongdoer, under the right of subrogation. The employer may then recover all that his employee could recover. There is but one wrong, and there can be but one action. At the time this action was commenced, this defendant owed Whitney nothing. It had made full reparation for the wrong that it had done. There were no rights left Whitney against this company, to which this plaintiff or the employer could be subrogated. There was one action to recover for the wrong. There cannot be another. The wrong was indivisible, and the right to bring the action was vested in Whitney, and the right of plaintiff rested in subrogation to that. Whitney is not entitled to receive double compensation. Had the employer discharged his obligation to Whitney under the act, and it had been made to appear that this defendant was the negligent cause of the injury, then the employer, or the person who made the payment required by the act, would be subrogated to all Whitney's rights against the wrongdoer. It might have proceeded against the wrongdoer, and recovered the full amount which, at common law, was recoverable against the wrongdoer, just the

same as Whitney could have done, and did. Out of this it could reimburse itself for the amount advanced. The sum thus received at common law, over and above the amount necessary to reimburse itself, would belong to Whitney, the injured party."

Perhaps we have discussed the statute under consideration and the construction to be placed thereon at greater length than is necessary and also phases thereof that are not involved in your inquiry. We have done this because of the importance of the question involved and to indicate in a general way the proper construction to be placed thereon. We will, therefore, answer your question in the following manner.

1. The fact that the employee may have a right of action against Ray Weiss, whose negligence it is claimed caused the accident, will not be a defense to the claim for compensation under the Workmen's Compensation Act.

2. That notwithstanding such claim, the state must pay to the employee the compensation provided in the statute.

3. If the employee brings suit against the said Weiss and recovers thereon, then the state will be indemnified out of the amount recovered to the extent of the amount paid to said employee, with interest.

4. If the said employee fails to bring suit against the said Weiss for 90 days after written notice has been served upon him to do so, then the state as the employer will be subrogated to the rights of the employee to maintain the action against such party and may recover damages for the injury to the same extent that the employee might do.

We have prepared this opinion upon the assumption that the said employee, Fred Vandervoort, was injured in the line of his employment and because thereof, and also that the said Ray Weiss was guilty of negligence and that such negligence caused the injury to the said Vandervoort. We do not pass upon these questions for two reasons:

(1) For the reason that we do not determine questions of fact. We prepare opinions only upon questions of law;

(2) To do so would require knowledge of all of the facts and circumstances attending the injury and we do not have a knowledge of such facts.

LIBRARIES—PUBLIC—FUNDS: Maintenance tax is levied by city council. Building tax must be certified to city council by library board and levy made by council. Board may make contracts to loan books to school districts, etc.

July 8, 1926. *Superintendent of Public Instruction:* You have requested an opinion upon the following proposition:

"Would a library board have the right to levy taxes for public libraries without this levy being approved and authorized by the city council?

"Would a library board have power to use money from public library funds with which to buy books to be placed in public schools and loaned out through teachers?"

In answer to your first proposition you are advised that under the provisions of Section 6211, paragraph 19, of the Code, the tax for the maintenance of a free public library must be levied by the city or town council. The library board as such has no authority to make a direct levy. If a building tax is required, the same must be certified by the library board to the council before the first day of August of each year.

In answer to your second question, you are referred to the provisions of Section 5859, et seq., which provide that a library board may make contracts with school corporations for the circulation of books within school corporations, and also provide the restrictions thereon. Such contracts, it will be noted, must require compensation to be paid for this service, and Sections 5861 and 5863, inclusive, provide for the levy of a tax by the municipality contracted with for the payment of the expense thereof. The books placed in circulation would be such books as are purchased by the board by its general powers, as provided in Section 5858 of the Code.

VITAL STATISTICS: Records may be furnished U. S. Census Bureau without charge. Employee of State cannot be employed by U. S. to copy records during working hours of State.

July 10, 1926. *Governor of Iowa:* You have requested an opinion from this department upon the following proposition:

"Mr. F. H. Paul, Accountant in the Budget Department, reports to me that in the Board of Health Department certain fees have been collected by the Commissioner and certain employees therein in the past for copies furnished the national government for the medical division, Census Department,—the fees being paid to the Department but are taken, as I understand, by certain employees in connection therewith and retained personally.

"I question the practice from an ethical standpoint and also from a legal standpoint. Do not these fees belong to the State instead of to the individuals? I have appointed a new Health Commissioner and would like an opinion as to this matter in order that the new Commissioner may commence with a correct understanding of this legal question. If the fees have been withheld illegally, they should be returned. If they belong to the individuals, then we should have a recognition of that principle and they should be paid them without question."

The reports referred to are copies of records from the Vital Statistics Department in the office of the State Health Commissioner, and are furnished to the United States Census Bureau under the provisions of Section 2429 of the Code 1924, which are as follows:

"The United States Census Bureau shall have the privilege of making, at its own expense and without paying the legal fees, copies of all records and vital statistics provided for in this chapter."

We have carefully searched the statutes for provisions which might directly apply to the situation presented, and have found none. However, we are led to the following conclusion, after carefully analyzing the matter in the light of the theory of the law and from an ethical viewpoint. We are of the opinion that it would be proper and legal for an employee of the United States Census Bureau to have access to the records in question and to prepare therefrom copies for the use of the United States Census Bureau without being charged the legal fees provided by statute for such copies. We are also of the opinion that an employee in the office of the State Health Commissioner might also be employed by the United States Census Bureau to make and furnish copies of these records, provided there is no conflict between the duties required by the State and by the Census Bureau, and also provided that the work done for the Census Bureau is done outside of the hours of employment required by the State. Neither can these reports or copies so made show any official sanction or connection with the State Department, or be certified or furnished over the official signature of a State officer or employee. Thus the employment by the Census Bureau must be separate and distinct from, and have no connection with a State department or the employees thereof.

If these copies and reports are signed or are furnished by a State officer or a State employee as such, or are prepared on State time, the State of Iowa should receive the compensation paid therefor.

I trust that the foregoing observations will sufficiently indicate to you our views on the matter presented.

ELECTIONS: It is only necessary for the Board of Supervisors to have published the total election expense bill for each precinct.

July 14, 1926. *Auditor of State:* We desire to acknowledge receipt of your letter of July 7, 1926, in which you submit to this department the following inquiry:

"I am in receipt of a request for an interpretation of the law concerning the manner of publishing election claims. The question at issue all hinges upon the form in which publication should be made, that is, whether Code Section 5411, Par. 3, would indicate that each of the parties claiming reimbursement for service on the election board should be published with the showing of the amount they receive in the official publication or of claim allowed, or if a publication indicating the amount in total paid to the election board in each of the precincts would be sufficient to comply with the requirements of the statute cited.

"In this connection it may be well for you to have a copy of our form of claim provided for election boards which I am enclosing, also will enclose a copy of a printed list of claims showing the portion of the claims marked that indicate clearly how the matter has been published.

"What we would like to know is, if such publication will meet the requirements of law or if the schedule of bills allowed would be interpreted to require the publication of the name of each judge and clerk of election with the amount drawn by them."

Accompanying your letter was a blank form of election claim that is used in the State of Iowa. This claim includes the amount of the actual cost of conducting the election in a particular precinct, including the amount to which each judge of election is entitled, the expense of delivering ballots and supplies to judges, the expense of returning ballots and supplies to the auditor, rent of room for election day, the cost of arranging booths, and the amount to which the special policeman is entitled. As we understand it, the claim is presented to the Board of Supervisors and allowed as one claim, although warrants are made out for each of the separate items therein contained.

Section 5411 of the Code reads in part as follows:

"There shall be published in each of said official newspapers at the expense of the county during the ensuing year:

* * * * * * *

2. A schedule of bills allowed by said board."

It will be observed that the phrase "schedule of bills" appears in the statute. The solution of your question depends upon the meaning of this phrase. While perhaps a literal reading of the statute, without any reference to the purpose and spirit of the statute, might require a construction that each item in the election expense should be published as a separate bill, however, we are inclined to believe that a substantial compliance with the statute is all that is necessary, and that it is a full compliance with the law to publish the total amount of the election expense for each precinct. We, therefore, hold that in publishing the proceedings of the Board of Supervisors, it is only necessary to publish the total election expense for each precinct.

GRAVEL PITS—COUNTY—HIGHWAYS—GRAVEL FOR HIGHWAYS: Gravel from County gravel pits may be used by townships for road purposes without cost. County cannot pay for gravel used by township on highways, not coming from a county pit.

July 15, 1926. *Auditor of State:* You have requested the opinion of this department upon the following proposition:

"Code of 1924, Section 4657 provides for boards of supervisors condemning land for purposes of obtaining gravel and other suitable material for the improvement of highways and Code Section 4659 provides that the township trustees of any township in the county in order to improve their township roads shall have the right to take material from these lands required by the board of supervisors.

"We are now confronted with a question from one of our examiners as to whether or not the board of supervisors has any authority to pay for gravel used by townships. I presume under Section 4751 that the board of supervisors could justify the payment of 25% from the county road fund under proper conditions but as I understand the question of our examiner relates to payment for all the gravel used on township roads and he states that in Franklin county the board of supervisors has paid for gravel used by the township."

There can be no question but what the trustees of any township have the right to enter upon, take and use gravel from a county gravel pit, for the purpose of improving the highways and roads in the township, under the provisions of Section 4659 of the Code, without paying the county anything therefor. These provisions of law authorizing the county to buy a gravel pit and authorizing the township trustees to use the gravel from such a pit for the improvement of the roads without cost, do not inferentially authorize the Board of Supervisors to buy gravel for the use of the township roads out of the county road fund.

Section 4751 of the Code is a part of the chapter relating to the improvement of the primary and secondary road systems, and provide a method for the improvement of township roads by oiling, graveling, or other suitable surfacing, and the payment of the cost thereof by assessments against the benefited lands and by the payment of twenty-five per cent of the cost from the county road fund, and fifty per cent from the township road funds. The county cannot pay this twenty-five per cent from its county road fund, unless the roads are improved in the manner provided by Sections 4750 et seq.

It is therefore the opinion of this department that where the county does not have a gravel pit of its own, it is not authorized to pay for gravel for use on the township roads, except as a part of the scheme of surfacing, provided in Section 4750 of the Code.

TAXATION—EXEMPTION—SOLDIERS' EXEMPTION: Husband and wife each entitled to tax exemption. Can have same or separate property. Cannot double exemption on property of one.

July 15, 1926. *County Attorney, Pocahontas, Iowa:* You have requested an opinion from this department upon the following propositions:

"1. Under Section 6946—1924 Code and amendments may husband and wife claim each exemption of $500.00 or $1,000.00 together from taxation on their home property acquired in Rolfe, Iowa, in March, 1925, the husband being a veteran of the world war and the wife being a nurse of the world war?

2. Is a man who enlisted in the United States Army in 1908 and served two years in the Philippines, entitled to any exemption from taxes? This man spent 2 years on the island of Cebu, P. I. in the U. S. Service."

Section 6946 of the Code, insofar as applicable, provides as follows:

"The following exemptions from taxation shall be allowed:

1. * * * * *

2. * * * * *

3. The property, not to exceed five hundred dollars in actual value, of any honorably discharged soldier, sailor, marine, or nurse of the war with Germany.

4. The property, to the same extent, of the wife of any such soldier, sailor, or marine, where they are living together, and he has not otherwise received the benefits above provided."

Under the provisions of Paragraph 4 of the Section just set out, it will be noted that the benefit of the exemption is made to extend to the property of the wife or husband entitled to the exemption provided "he has not otherwise received the bene-

fits above provided." In view of this language, it is our opinion that if the property be in the husband's name, he could not receive an exemption of $1,000.00. He could only receive a $500.00 exemption. Likewise the converse would be true if the property is in the wife's name. This is not to be construed, however, as preventing each from receiving the full $500.00 exemption on their separate property.

In answer to the second proposition submitted, under the facts stated, we do not believe that the person referred to is entitled to any exemption under the provisions of Section 6946 of the Code.

CHATTEL MORTGAGES: (1) An assignment of a chattel mortgage is not entitled to be recorded or filed unless it is properly indexed; (2) Assignments of chattel mortgage may be indexed in the chattel mortgage index record; (3) The security of a mortgage follows the ownership of a debt.

July 16, 1925. *Auditor of State:* We have received your letter of June 18, 1925, asking this department to prepare an opinion upon a question relating to the filing of conditional sales contracts and assignment thereof.

We have, also, received a letter from Mr. R. J. Woodard, County Attorney, Oskaloosa, Iowa, asking for an opinion upon a question relating to the same subject.

We have concluded to prepare one opinion covering both of these inquiries.

Your letter is as follows:

"Since receiving your opinion of May 25th covering the matter of fee to be charged when two instruments are executed on the same form, we have received inquiries from several sources raising questions in connection with some of these instruments which we feel are of sufficient importance to justify us in asking an opinion of your office.

One: If a conditional sales contract having an assignment on the same form is used, is it necessary to have an acknowledgment to the assignment?

Two: If there is no acknowledgment required to the assignment, who can release the mortgage?

Three: In indexing chattel mortgage with this assignment, should it be indexed in chattel mortgages and also in assignments?"

The letter of the county attorney is as follows:

"Your opinion relative to the recording of conditional sales contracts under date of May 25th to J. C. McClune, Auditor of State, has been placed in my hands by our County Recorder. He has requested an interpretation of the law governing the release of conditional sales contracts or chattel mortgages, where there has been an assignment of the contract signed by the dealer only, but not acknowledged by him. The precise question is in such a case, whether the release of the chattel mortgage or conditional sales contract should be made by the assignee, the finance company, or whether the release should be made by the assignor, the dealer, it being understood that the release was signed but not acknowledged, as required in such cases for the purpose of recording."

I.

We shall first consider and determine the questions submitted by the county attorney.

Section 10028 of the Code, 1924, reads as follows:

"Any mortgage or pledge of personal property may be released of record by filing with the original instrument a duly executed satisfaction piece or release of mortgage; or by the mortgagee or his authorized agent indorsing a satisfaction of said mortgage on the index book under the head of 'Remarks' in the same manner as mortgages are now released by marginal satisfaction, and when so released on index book, the recorder shall enter a memorandum thereof on the original instrument or on the record thereof, if recorded."

We are of the opinion that the term "mortgagee," as found in the above section,

means the one who holds the obligation secured by the mortgage at the time it is paid and that the satisfaction thereof must be made by such person.

In the article on chattel mortgages, 11 Corpus Juris, on page 668, we find the following language:

"A mortgagee cannot release the mortgage after making an assignment thereof, and a release by him in such case is void. Where the mortgage debt has been assigned, the mortgage cannot prejudice the rights of the assignee as against subsequent bona fide purchasers and mortgagees by releasing or entering satisfaction of the mortgage; and where the mortgagee executes a release after assignment of the mortgage, the mortgagor cannot set up the release as a defense without first paying the mortgage debt, no rights of the third parties having intervened."

A number of cases are cited in the footnotes in the above volume, among which is the case of *Martindale v. Burch*, 57 Iowa 291. An instructive case on this question is the *First National Bank of Chicago v. Baird*, 141 Federal Reporter, page 862.

The security afforded by the mortgage follows the ownership of the debt secured thereby, and when the note, or other evidence of debt secured by said mortgage, is assigned the security of the mortgage becomes available only to the assignee or the owner of the note.

We are of the opinion that the release of a chattel mortgage should be made by the owner of the debt secured thereby and a conditional sale contract released by the assignee who has the right to enforce the payment of the obligation evidenced thereby. The release or satisfaction, however, should be acknowledged the same as the original mortgage.

We deem it advisable to call your attention to the fact that the statute hereinbefore quoted provides that a satisfaction of a chattel mortgage may be made by endorsing the same on the index book under the head of "Remarks". Even then, however, the satisfaction must be made by the one who holds the obligation evidenced by the conditional sale contract.

II.

It will be observed that the statute provides that an instrument conveying or mortgaging personal property where the vendor or the mortgagor retains actual possession thereof must be acknowledged like conveyances of real estate. Section 10015 of the Code, 1924.

Section 10016 of the Code, 1924, also provides that no sale, contract, or lease, wherein the transfer of title or ownership of personal property is made to depend upon any condition shall be valid against any creditor or purchaser of the vendee or lessee in actual possession obtained in pursuance thereof, without notice, unless the same be in writing, executed by the vendor and vendee, or by the lessor and lessee, acknowledged by the vendor or vendee, or by the lessor or lessee, and recorded or filed and deposited the same as chattel mortgages.

It is quite apparent that if any interest in the mortgage of personal property, or in a conditional sales contract is assigned, it must be executed with the same solemnity as the original instrument was executed. However, a mere assignment of the note, secured by the mortgage, is sufficient to transfer all interest in the mortgage. If the mortgage itself is not assigned, of course, there would be no requirement that an assignment should be executed, acknowledged, filed or recorded.

We are clearly of the opinion that such an assignment is not entitled to be recorded or filed unless it is properly acknowledged. As we have already held, a chattel mortgage must be released by the one who owns the obligation secured

thereby or a conditional sales contract by the assignee thereof, provided, of course, that the assignee is the one who holds the obligation evidenced thereby.

We can see no objection to indexing the assignments in the chattel mortgage index. Of course, there may be a separate index for the assignments. In our opinion, this is a matter that should be determined by your department.

TAXATION: Property of a veteran will be subject to taxation only for that portion of the year in which the assessment is made during which he owned the property.

July 19, 1926. *County Attorney, Waterloo, Iowa:* We have received your letter of July 15, 1926, in which you request this department to prepare an opinion upon the question which you have stated as follows:

"I have your favor of the 10th, answering inquiry of Soldier's Widow Exemption from tax. The opinion being one sent to Mr. James L. Cameron of Hardin County.

"I am sure you have answered the inquiry which we need, but in order to make it still clearer for our use here in the Auditor's office to apply to this particular case and to our inquiry number 2, will ask if you do not mean that the Umbaugh Estate would be liable for tax only from May 7th, 1925, or that portion of the year after May 7th, as Mrs. Umbaugh who was entitled to the exemption lived until May 7th, 1925.

"In other words there would be about one-third deduction of the tax for 1925 because of this exemption."

It will only be necessary for us to apply the rule announced in the opinion prepared for Mr. James L. Cameron, the county attorney of Hardin County, to the facts contained in your letter. You are advised that as the property was owned by Mrs. Umbaugh, who was entitled to the exemption of said property from taxation, from the 1st day of January to the 7th day of May, 1925, the year in which the assessment was made, the said property will be exempt from taxation only for said portion of the year. Therefore, the property will be subject to taxation for that portion of the year from May 7th to the 31st day of December, 1925. The basis of apportionment is as follows: Take the tax for the entire year and divide it into two portions,—one for that portion of the year from January 1st to May 7th, and the other for that portion thereof from May 7th to December 31st. The portion of the tax for the first period of the year should be deducted from the total tax; the balance thereof should be paid by the heirs of Mrs. Umbaugh.

MUNICIPALITIES: Plumbing ordinance is subject to rules of state and local boards of health and must conform thereto.

July 19, 1926. *Auditor of State:* We have received a letter from Mr. E. O. Korf, city solicitor of the City of Newton, in which he submits to this department the following question:

"Re: Plumbing regulations, Code Sections Nos. 5775-5776.

"The first mentioned section provides in the last sentence thereof, 'Nothing herein shall be considered as authorizing the annulment of any rules or regulations relating to such plumbing made by the local or state Board of Health, BUT SUCH ORDINANCE SHALL CONFORM TO AND INFORCE THE SAME.'

"QUERY: When a city has passed an ordinance specifying materials of a grade and size as approved by the Plumbing Code Commission of the State Board of Health, and later said Plumbing Code Commission revises their rules, so that the city ordinances impose a more stringent regulation or require materials of a larger size than necessary to comply with the State Code, can said city inforce the more stringent requirement of their ordinance?"

As we entertain the view that the question submitted is important and should

be determined by this department, we have concluded to prepare an opinion for your department, and mail a copy thereof to the city solicitor.

Sections 5775, 5776 and 5777, which are a part of Chapter 292 of the Code prescribing the general powers of municipalities are the sections granting power and authority to municipalities to prescribe rules and regulations for all plumbing constructed within the limits of such municipalities. Section 5775 is the general statute granting such powers. Section 5776 relates to the appointment of a board of examiners to regulate and license plumbers in cities having a population of less than six thousand, and towns. Section 5777 relates to plumbing regulations in cities of six thousand or more inhabitants. We believe, however, that in determining your question, it will only be necessary to consider the provisions of Section 5775. As Newton has a population of 7,665, according to the census of 1925, it clearly comes within the class of cities designated in Section 5777. Section 5775 reads as follows:

"They shall have power by ordinance to prescribe rules and regulations for all plumbing connecting any building with sewers, cesspools, vaults, water mains, and gas pipes; and may prescribe the kind and size of materials to be used in such plumbing, and the manner in which the same shall be done; and to appoint an inspector thereof, and define his duties and powers; and to provide for the assessment of the cost of such inspection and replacing of the pavement to the property; and to prescribe penalties for the violation of such ordinance. *Nothing herein shall be construed as authorizing the annulment of any rules or regulations relating to such plumbing made by the local or state board of health, but such ordinance shall conform to and enforce the same.*"

It is quite apparent that it was the intention of the legislature to make any ordinance adopted by the city council under the authority of the above section, conform to any rules or regulations relating to plumbing established by the local or state board of health. This manifestly does not alone mean such rules and regulations as may be in force at the time of the adoption of the ordinance, but also any rules or regulations that may be adopted by the state or local board of health subsequent to the enactment of the ordinance. This statute specifically requires the city council to make the plumbing ordinances conform to the regulations of either board of health, and also makes it the duty of the city council to enforce the same. We are clearly of the opinion, therefore, that where there is anything inconsistent between the provisions of the ordinance and the rules and regulations of either board of health, the ordinance must yield to said rules and regulations. It, therefore, becomes the duty of the city council to amend the ordinance as often as necessary to make it conform to the rules and regulations adopted by either board of health.

The authority granted under the plumbing statute to municipalities was under consideration in the comparatively recent case of *Ebert v. Short*, 199 Iowa, 147. The following rules are laid down in that opinion:

First. The power conferred upon municipalities is to be strictly construed, and ordinances must conform to the provisions of the statute giving power to pass them.

Second. Municipalities can only exercise such authority as is expressly given to them by charter or statute, or such as are necessarily implied from that given.

Third. When power is conferred upon a city to do a thing through certain means or in a particular manner, there is an implied inhibition against doing it through other means or in a different manner.

Applying these rules to the facts stated in your letter, we are of the opinion that the provisions of the city ordinance must yield to the rules approved by the plumb-

ing code commission of the state board of health; and that the provisions of the city ordinances imposing a more stringent regulation or requiring materials of a larger size than necessary to comply with said code are void and must be amended so as to conform to the provisions thereof.

SCHOOL RECORDS UPON DISSOLUTION: Records of a consolidated school district upon dissolution should be filed and become a part of the public records in the office of the County Superintendent.

July 19, 1926. *Superintendent of Public Instruction:* You have requested an opinion from this department upon the following:

"Upon the dissolution of a consolidated school corporation what disposal of the secretary's records does the law or public interest require."

There is no provision of statute expressly directing the disposal of records of a school corporation when it ceases to exist. There is provision however that such public records shall be turned over by a school officer to his successor in office.

These records are the property of the public and in some instances might become of valuable interest thereto. They are not in any manner or for any reason the property of the individual office holder whose term as an officer of the corporation has been terminated by the dissolution thereof. Since the territory and property are still in existence the records may become the subject of controversy.

It is therefore the opinion of this department such public records should become a part of the permanent records of the County in the office of the County Superintendent, since this is the one depository where there is a continuity of the office.

SCHOOLS: Appeal to the Director of the Budget does not lie from the failure of a school board to construct the school building according to certain plans and specifications.

July 20, 1926. *Director of the Budget:* We wish to acknowledge receipt of your favor of the seventeenth, in which you request our opinion, which follows:

"We are in receipt of information that the Board of Education called for bids on an improvement at one of its schools. After the bids were received and opened the Board rejected all of them and proceeded to construct the improvement by the use of their own equipment and labor.

It is alleged by interested parties that the work is not being constructed in accordance with the adopted plans and specifications under which the work was advertised. Owing to these changes the work is not of the same quality that would have been secured had the specifications been followed and is costing in excess of the price bid by the contractors at the letting.

Will you kindly advise whether this comes within the provisions of section 358 of the Code and whether it is possible for interested taxpayers to appeal to the Director of the Budget under this section."

Section 358, Code of 1924, to which you refer reads as follows:

"After any contract for any public improvement has been completed and any five persons interested request it, the director shall examine into the matter as to whether or not the contract has been performed in accordance with its terms, and if on such investigation the director finds that said contract has not been so performed, and so reports to the body letting such contract, it shall at once institute proceedings on the contractor's bond for the purpose of compelling compliance with the contract in all of its provisions."

We believe it is apparent, after reading the section above quoted, that it does not apply to the facts set out in your request. The statute referred to applies only to cases where contracts have been let for an improvement.

BANKS: State and Savings Banks may deposit with Treasurer of United States liberty bonds to secure postal savings funds deposited in bank.

July 20, 1926. *Deputy Superintendent of Banking:* You have requested the opinion of this department on the proposition of whether or not state and savings banks in Iowa can pledge United States liberty bonds owned by the bank to secure the payment of postal savings deposits.

Attention is directed to Section 9268 of the Code, which provides:

"All state and savings banks existing under and by virtue of the laws of this state are authorized and permitted to deposit with the treasurer of the United States such of the securities of the depositing bank as may be required to secure the postal savings funds deposited therein."

It will be observed that the statute specifically authorizes state and savings banks to deposit with the Treasurer of the United States securities belonging to the bank, in order to secure postal savings funds deposited in said bank. This would undoubtedly include liberty bonds belonging to the bank.

BOARD OF CONTROL—CHILDREN, DESTITUTE—SOLDIERS' ORPHANS' HOME: Destitute Children found in this state without a residence in any county may be committed to Orphans home at Davenport and maintained out of the general support appropriation for the home.

July 20, 1926. *Board of Control:* You have requested the opinion of this department upon the following proposition:

"Under the existing laws governing the Soldiers' Orphans' Home at Davenport, Iowa, is it possible for a court to commit a child to that institution, where said child's residence is impossible of being determined, without thereby fixing the charge upon a county for the care and support of the child? In other words, can a court commit a child, whose residence cannot be determined, to the Soldiers' Orphans' Home and the said child be considered as a state case, that is, the full charge for the care and support being borne by the Soldiers' Orphans' Home?"

Chapter 185 of the Code contains the provisions of law applicable to the Iowa Soldiers' Orphans' Home at Davenport. It is provided in this chapter that the procedure for commitment to said home shall be the same as is outlined in Chapter 180 of the Code. It is provided that destitute children or neglected and dependent children may be committed to this home. Section 3618 of the Code provides that a child is dependent or neglected when it is destitute, homeless or abandoned; is dependent upon the public for support; is without proper parental care or guardianship; is living in a home which is unfit for such child; or is living under such other unfit surroundings as bring such child in the opinion of the court, within the spirit of the law relative thereto. From your statement of facts which precede the proposition submitted in your letter, there can be no question but what the child referred to belongs to each of the classes just described. Section 3646 of the Code provides that the court may enter mandatory commitment of a child, if neglected or dependent, to the Soldiers' Orphans' Home, and it is provided further in Section 3649, that such a commitment shall extend until the child has attained the age of twenty-one years, or until otherwise discharged by law, such as being placed in a proper home, etc.

The mother of the child in question is a prisoner confined at the Women's Reformatory at Rockwell City. The child was born in the institution and has been there for almost a year. It is impossible, you state, to establish a residence for the mother in any county. The child, therefore, has no legal residence in any county. Under these circumstances, it is the opinion of this department that the

child should be committed to the Soldiers' Orphans' Home, under the provisions of Chapter 180, and particularly Section 3646 of the Code.

If the child is committed to the Soldiers' Orphans' Home at Davenport, the question then arises as to whether any county is liable for one-half of the support of the child in the institution. Section 3720 of the Code is a part of the chapter which relates to the maintenance of children in the Iowa Soldiers' Orphans' Home, and provides as follows:

"Each county shall be liable for sums paid by the home in support of all its children, other than the children of soldiers, to the extent of a sum equal to one-half the amount appropriated by the state for the support of each child, and when the average number of children shall be less than five hundred in any month, each county shall be liable for its just proportion for each child of the amount credited to the home for that month. The sums for which each county is so liable shall be charged to the county and collected as a part of the taxes due the state, and paid by the county at the same time state taxes are paid."

The Women's Reformatory at Rockwell City is located in Calhoun County. The Calhoun County District Court was used to commit this child to the orphans' home. Under ordinary circumstances a child would be committed to this home from its own county, but as stated, this child has no residence in Calhoun County, nor in any other county of the State. It will be noted that the provisions of the section just quoted stated that "each county shall be liable for sums paid by the home in support of all *its children.*" The child in question does not belong to Calhoun County. The District Court of that county was used merely because it was available and the child was located within its jurisdiction, although not a resident in that county. We do not believe that the county is liable for one-half the support of the child in question, inasmuch as it is not a resident of that county.

Chapter 218, Section 13, contains the appropriation for the Iowa Soldiers' Orphans' Home at Davenport, including support and maintenance. If the child in question has been committed as outlined in this opinion, it is our conclusion that the cost of the support and maintenance of this child in the institution should be paid from this general appropriation.

MOTOR CARRIERS: A bus, in order to be entitled to exemption from complying with the Motor Carrier Statute must first be owned by the School Corporation, and second, used exclusively in conveying school children.

July 21, 1926. *Secretary, State Board of Railroad Commissioners:* We wish to acknowledge receipt of your favor of the 20th requesting our opinion on the following proposition:

"Does an exclusive school bus come under the Motor Bus Law? The driver of this bus to be paid by the parents of High School pupils and transporting only High School pupils from Eldridge, Iowa, and possibly Long Grove, to Davenport, Iowa, High Schools."

You further state in your letter that the bus is owned by a private individual but used exclusively to convey school children under the above arrangement.

Section 2 of Chapter 4, Laws of the Forty-first General Assembly, in defining what is a "Motor Vehicle," makes the following exception,—"except those busses owned by school corporations and used exclusively in conveying school children to and from school." A reading of this statute will make it readily apparent that in order to be exempt from the operation of the statute, two things are necessary. First, a bus must be owned by the school corporation, and, second, it must be used exclusively in conveying school children to and from school. If either of these requirements are absent, the bus would not be entitled to the exemption.

From the facts stated in your request, it appears that the bus is not owned by the school corporation and it is therefore not entitled to the exemption.

SCHOOL BUILDINGS—ERECTION OF WITHOUT VOTE OF ELECTORS—ANTICIPATION OF REFUND FROM SINKING FUND: The board of directors of a consolidated school district cannot levy a high tax, thus accumulating a large general fund, then transfer funds from general fund to the schoolhouse fund and erect a school building therefrom without a vote of the electors. A school district may anticipate the refund of its funds from the state sinking fund.

July 21, 1926. *Superintendent of Public Instruction:* You have requested an opinion from this department upon the following propositions:

1. "Does the Board of Directors of a Consolidated Independent School District have the power to erect an addition to the School Building by transferring funds from the general fund to the School House fund, without a vote of the electors directing such erection?"
2. "Where the funds so transferred were deposited in a bank now closed for which deposit claim has been made and allowed as against the sinking fund in the hands of the Treasurer of the State of Iowa, may the said Board of Directors issue warrants for the cost of such building, anticipating the refund from the State Treasurer for their deposit in the said bank?"

This department has heretofore held that all building programs of School Districts must have the approval of the electors before they may be carried out.

This opinion is based upon Section 4217 of the Code of Iowa, 1924, which enumerates the powers of electors as follows:

"7—To vote a schoolhouse tax, not exceeding ten mills on the dollar in any one year, for the purchase of grounds, construction of schoolhouses, the payment of debts contracted for the erection of schoolhouses, not including interest on bonds, procuring libraries for and opening roads to schoolhouses."

And the further statutory provision of Section 4177:

"The board of each school corporation organized for the purpose of establishing a consolidated school, shall provide a suitable building for such school in that district, and may at the regular or a special meeting, call a special election to submit to the qualified electors of the district the question of voting a tax or authorizing the board to issue bonds, or both, for any or all of the following purposes:

* * * 3—To repair or improve any school building or grounds, when the cost will exceed two thousand dollars.

All moneys received for such purposes shall be placed in the schoolhouse fund of said corporation and shall be used only for the purpose for which voted."

This latter provision applies specifically to consolidated schools, while the former provision applies to all school districts.

This section of the statute has been interpreted in a recent case in the Supreme Court of this State entitled *"James et al v. The Consolidated Independent District of Stanley,"* 191 N. W. 60, in which case the Court held that the School Board may construct a school building without a vote of the electors if the cost thereof does not exceed $2,000.00 as provided by Statute.

To permit the Board of Directors to levy a high tax and build up a large general fund, to transfer that fund to the School House fund and proceed with the erection of buildings, without the approval of the electors, would in effect give the board power to do indirectly what it cannot do directly, a policy not favored under the law governing the Boards of Municipal Corporations.

The foregoing opinion makes it unnecessary to render an opinion upon the second question submitted. However, it is our opinion if the addition to the building were properly authorized warrants upon this fund could be drawn and if accepted by

the contractor could be secured by the assignment of the claim, or a portion thereof, of the District against the sinking fund as collateral to the warrants.

CORPORATIONS: Corporations operating in Iowa previous to 1886 are exempt from the payment of the fee prescribed in Sections 8423 and 8424.

July 22, 1926. *Secretary of State:* We have received your letter of July 19, 1926, in which you submit to this department the following inquiry:

"An opinion regarding the following, the same having arisen in the routine of this department, is requested:

"A foreign corporation qualified to do business in the State of Iowa is required each year, on the first day of July, to submit an additional statement, setting out certain facts as to the acquisition of additional property or money or both, used in the conduct of the business of such corporation, and acquired subsequent to its date of filing or qualification.

"This statement, (copy of blank form attached) is made in accordance with the provisions of Section 8424, Chapter 386, Code of 1924.

"The Western Union Telegraph Company has protested the payment of this fee. They set out in their protest that 'Corporations operating in Iowa previous to 1886 are exempt from the payment of this fee or tax.'

"The above department is unable to determine as to whether or not the law is applicable in this instance, hence the request for an opinion."

Chapter 386 embracing Sections 8420 to 8432, both inclusive, is the statute containing the provisions of the code relating to permits to foreign corporations to transact business in this state. To determine the question you have submitted, it is only necessary to consider three of the sections in said chapter. Sections 8423, 8424 and 8425 read as follows:

"Before a permit is issued authorizing such corporation to transact business in the state, said corporation shall file with the secretary of state a certified copy of the articles of incorporation, with resolution and statement as previously set forth, and pay a filing fee of twenty-five dollars upon ten thousand dollars or less of money and property of such company actually within the state, and of one dollar for each one thousand dollars of such money or property within this state in excess of ten thousand dollars."

(Section 8423)

"If from time to time the amount of money or other property in use in the state by said foreign corporation is increased, said corporation shall at the time of said increase, or at the time of making annual report to the secretary of state, in July of each year, file with the secretary of state a sworn statement showing the amount of such increase, and shall pay a filing fee thereon of one dollar for each one thousand dollars or fraction thereof of such increase. The secretary of state shall upon request furnish a blank upon which to make report of such increase of capital in use within the state."

(Section 8424).

"Any corporation transacting business in this state prior to September 1, 1886, shall be exempt from the payment of the fees required under the provisions of the two preceding sections."

(Section 8425).

The first section contains provisions with reference to the issuance of a permit authorizing a foreign corporation to transact business in this state. The fee therein provided for is the sum of twenty-five dollars upon ten thousand dollars or less of money and property of such company actually within the state, and one dollar for each one thousand dollars of such money or property within this state in excess of ten thousand dollars. Section 8424 prescribes the fee that must be paid by such a corporation when the amount of money or other property in use in the state is increased. Section 8425 specifically exempts any such corporation transacting business in this state prior to September 1, 1886, from the payment of the

fees required under the provisions of either of said sections. This section is plain and cannot be misunderstood. We are, therefore, of the opinion that if the Western Union Telegraph Company actually transacted business in the State of Iowa previous to September 1, 1886, it is exempt from the payment of the fee referred to in your letter. Of course, satisfactory proof that such company actually did transact business in the state prior to said date should be required of the corporation.

BOARD OF CONTROL: (1) Discussion of the question as to whether Bade Company had exclusive right to sell the products of the Chair and Furniture Industry within the territory specified therein. (2) Discussion of the right of one whom the Board sold property to sell the same in the territory covered by the contract with Bade & Company.

July 23, 1926. *Board of Control of State Institutions:* We have received your letter of July 23, 1926, in which you submit to this department certain questions which you have stated as follows:

"We hand you a copy of a contract with R. A. Bade for selling furniture from the factory at Fort Madison.

"In paragraph three of the contract is stated that the territory assigned him to sell goods in is 'all the territory of the United States east of the Mississippi River.'

"We have a contract with the Harbach Company of Des Moines. The Harbach Company is a wholesale company and they buy from us and all goods are sold to them delivered on cars at Fort Madison. They furnish us shipping instructions and we ship to their trade, but the goods are sold to them and charged to them on the date of the delivery at Fort Madison. Harbachs it seems have some customers in Chicago or in the territory in which Bade has authority to sell. We assume that the contract with Bade does not give him the exclusive right to sell in the territory east of the Mississippi. We assume that we can sell direct if we want to and that Harbachs can sell anywhere they please as they are selling their own goods.

"We would like to have your opinion then on these points:

"Do we have the right to sell direct to customers east of the Mississippi to whom Bade has not sold without paying him a commission?

"If he does not sell as much in the territory as he should can we put another man in the territory to sell without paying him a commission?

"Having sold a carload of goods to Harbach can they sell the goods in Bade's territory?"

The said contract was entered into on the 30th day of April, 1926, between the Board of Control of State Institutions and the R. A. Bade Company, Plymouth, Wisconsin, under the terms of which the Board of Control appointed the R. A. Bade Company as its agent for the sale of goods manufactured at the Chair and Furniture Industry factory at Fort Madison in the territory therein designated.

A determination of the questions submitted requires a consideration of only a part of said contract. The portions we refer to are as follows:

"That the first party has this day appointed second party its agent for the sale of its goods made at the Chair and Furniture Industry factory at Fort Madison, Iowa, consisting of chairs, tables, buffets, and other articles of furniture, for the term beginning May 6th, 1926, and ending December 31st, 1926.

"The territory allotted to second party in which to sell goods shall consist of all the territory of the United States east of the Mississippi River, except that part of Minnesota east of said river, which is reserved; but it is specially agreed that any and all sales made by second party before being accepted by or binding on first party must have the written approval of the Board of Control of State Institutions.

"* * * Second party agrees to undertake energetically to sell the goods manufactured by first party and to do its part in supplying the factory with sufficient orders to keep the factory running to capacity and if at any time first party concludes that second party is not selling the volume of goods it should first party may cancel this contract by giving ten days notice."

It will be observed that the above portions of the contract do not, in specific terms, grant to the Bade Company the exclusive right to sell the products of the Chair and Furniture Industry in the territory specified therein. We are also of the opinion that said portions of the contract may not be so construed as granting to such company the exclusive right to do so.

On the 19th day of April 1926 this department prepared an opinion for the Board of Control upon the question of the right of Mr. C. M. Schaffer, who then held a contract with the Board of Control to sell certain furniture manufactured at the Penitentiary at Fort Madison, Iowa, to recover compensation or commission upon sales made by the Board of Control without the assistance of the said Schaffer.

The provisions of the Schaffer contract were substantially the same as the provisions of the contract with the Bade Company. It was held in that opinion that a contract giving to an agent the right to sell on commission in a limited territory for a limited time with provision for revocation of the agency at any time does not grant to the agent the exclusive privilege to sell in said territory.

That opinion was based upon the following Iowa authorities:

Deering v. Beatty, 107 Iowa, 701;
Tracy v. Radeke, 141 Iowa, 167;
Ingold v. Symonds, 125 Iowa, 82;
Gilbert v. McCullough, 146 Iowa, 333;
McPike v. Siver, 168 Iowa, 149;
Mitchell v. Hagge, 178 Iowa, 926;
Armstrong v. Lownsbery, Simmons & Co., 187 Iowa, 1224.

The said opinion is determinative of the first question you have submitted. We are, therefore, of the opinion that the Bade Company contract does not grant to such company the exclusive right to sell furniture manufactured at the Penitentiary at Fort Madison in the territory specified in the contract, and, therefore, that any sales made by others will not entitle said Bade to a commission on such sales.

It follows as a necessary corollary from this conclusion that, if the Board of Control concludes that Bade and Company are not making as many sales as they believe they should, the Board has the right to put another man in the territory to sell the products of the factory without becoming liable to such company for a commission on the sales made by such agent.

In answer to your third inquiry, it will only be necessary for us to say that, if goods have been sold to Harbach and Company, such company may sell the same in any territory they desire notwithstanding the contract with Bade and Company. This is a necessary result of our conclusion that Bade and Company do not have the exclusive right to sell in said territory. However, if such company does have the exclusive right to do so, it would not prevent Harbach and Company from selling in the same territory. After Harbach and Company acquire title to the goods sold, the control thereof passes from the Board and the contract between the Board and Bade and Company would not be binding upon Harbach and Company.

CHIROPRACTIC: An applicant for license to practice chiropractic must present to the Board of Chiropractic Examiners a diploma from an approved college before a license can issue.

July 23, 1926. *Board of Chiropractic Examiners:* We wish to acknowledge receipt of your favor requesting our opinion in substance as to whether or not an applicant for a license to practice chiropractic in Iowa must present a diploma issued by an approved chiropractic college before the licence can issue.

Section 2557, Code, 1924, states the requirements for a license. The first requirement is that the applicant be a graduate of an accredited high school or secondary school, or have preliminary education equal thereto. The second requirement is in words as follows: "Present a diploma issued by a college of chiropractic approved by the Chiropractic Examiners." The third requirement is that the applicant pass the prescribed examination.

The language of the statute we have quoted is clear and unambiguous. There can be no question but that the applicant must present to the Board of Chiropractic Examiners a diploma from an approved college as therein stated. No license can be issued until the requirements of this statute have been met, and the Board of Chiropractic Examiners cannot waive the statutory requirements for admission to practice.

TUBERCULOSIS—MUNICIPALITIES: Municipalities may provide by ordinance for the appointment of a milk inspector who shall have general direction of the making of the tuberculin test.

July 26, 1926. *Secretary of Agriculture:* We have received your letter of July 23, 1926, in which you submit to this department the following inquiry:

"Would you please give us an opinion on the following question?

"Can city councils who have adopted a milk ordinance requiring that all milk supply to the city come from tuberculin tested cows appoint a city milk inspector with the authority to accept or reject tuberculin tests made by accredited veterinarians?"

On July 15, 1926, this department prepared an opinion for Honorable J. C. McClune, Auditor of State, in which it was held that a city council in this state has no right, under the statute, to require the tuberculin test to be made by a veterinarian to be selected by or acceptable to such council. The owner of cattle furnishing milk to the inhabitants of a city may select the veterinarian to test his cattle, subject only to the limitation that he must be an accredited veterinarian. A copy of the opinion prepared for the Auditor of State is attached hereto and must be read in connection with this opinion.

The section granting to cities and towns the authority to require the tuberculin test is Section 5747, and provides in part as follows:

"Cities and towns, in addition to powers already granted, shall have within their corporate limits the power by ordinance; * * *

* * *

* * *

3. To compel the tuberculin test by an accredited veterinarian for dairy cattle supplying milk for human consumption."

Municipalities, under the power granted, have a wide discretion in determining the method or manner of making a tuberculin test, the character of proof of such test, and the payment of the expense thereof. The owner of the cattle may, however, have the test made by any accredited veterinarian, but manifestly such test is to a certain extent subject to the approval of the municipality and its officers. If the test is made in an approved and proper way, the city officials must accept the same. However, an official of the municipality may be designated to supervise or approve of such tests. He may be vested with authority to determine, within proper limits, whether such test has been properly made, and the results thereof correctly reported. It follows, therefore, that a city council may appoint a city milk inspector with the authority to supervise and to accept or reject tuberculin tests made by accredited veterinarians. Such authority is, however, subject to the limitation that such official should not act arbitrarily, or without reason, and should reject tuber-

culin tests only when not made in an approved and proper way, or when the result thereof is not correctly reported or recorded.

TUBERCULOSIS: (1) After petitions for the enrollment of the county have been filed in the office of the county auditor no names may be removed therefrom. (2) Provisions of the statute requiring a licensed veterinarian to perform the test are constitutional. (3) The head of the ticket within the meaning of the tuberculosis statute means the governor. (4) Discussion of the procedure where 75% of the owners of breeding cattle have signed the petition before the enrollment of the county under the county area plan.

July 27, 1926. *Secretary of Agriculture:* We have received your letter of July 23, 1926, in which you submit to this department four questions, which you have stated as follows:

"The following question has been submitted to me in regard to the tuberculosis eradication from Henry County and I would appreciate an early opinion as the Board of Supervisors will canvass the petition in a short time to determine whether or not Henry County is placed on the county area plan of tuberculosis eradication.

"Under Section 2683 thereof there has been filed in the Auditor's office a petition to the board of supervisors asking the establishment of the county area plan, signed by a few more owners than the 51% required in said section. Under Code Section 2684 of the Code of Iowa parties are filing objections to the petition and many persons who signed the petition asking the plan are signing the objections to its adoption. What they want to know is this. Does the signing of the objections have the effect to take their names off the petition and if enough persons signed the objections to take enough names off the petition so that it did not then have the 51% required could the board then pass it, or should the names who signed on both be stricken off and not counted on either paper.

"Does the restriction in Sec. 2678 constitute a violation of the Constitution of Iowa when it prohibits any one but a licensed veterinarian from applying the test.

"Section 2697. How is the number of signers determined under this section? What is the head of the ticket and what ticket is intended?

Under the figures for the last general election how many signers would be required.

"If proper petitions under both plans were filed which should be acted on first?"

I.

Sections 2683 and 2684 as amended by Chapter 54 of the Acts of the Forty-first General Assembly, read as follows:

"When any number of resident owners of breeding cattle constituting a number equal to fifty-one per cent of the number of owners of breeding cattle in said county, as shown by the last assessors' rolls, petition the board of supervisors for the establishment of a county area eradication plan, such petition including an agreement on the part of the respective signers thereof for the testing of their respective herds, as provided in this chapter, the board shall cause a notice to be published for two consecutive weeks in two official county papers of the date of the hearing on said petition, which shall not be less than five nor more than ten days after the last publication, said date to be set by the county auditor."

(Section 2683).

"If, after such published date of hearing, or if no objections are filed to such petition on or before such date, the petition shall be found sufficient, the board shall make application to the secretary of agriculture for the enrollment of the county under such plan. The application shall be accompanied by a copy of the petition and agreements, together with the action of the board thereon, duly certified by the county auditor. The secretary of agriculture, upon receiving the application, shall enroll the county under such plan."

(Section 2684).

These two sections are the only ones relating to the signing of petitions and the enrollment of a county under the county area plan in the statutes. The first section

designates the number of petitioners required for the establishment of the county under such plan in the following language:

"When any number of resident owners of breeding cattle constituting a number equal to fifty-one per cent of the number of owners of breeding cattle in said county, as shown by the last assessors' rolls, petition the board of supervisors for the establishment of a county area eradication plan."

Section 2684 provides for a hearing on the enrollment of a county under such plan, and also as to the sufficiency of the petition. The statute does not in terms provide that these petitions shall be filed in the office of the county auditor, but this is the plain purport and necessary inference from the language used. It is provided that the application to the Secretary of Agriculture for the enrollment of a county under such plan shall be accompanied by a copy of the petition and agreements, together with the action of the board thereon, duly certified by the county auditor. Manifestly this requires a filing of said petitions or agreements in the office of the county auditor so that they may be made a part of the records in his office. We are clearly of the opinion that after such petitions have been filed with the county auditor, no names may be withdrawn therefrom. Before they are thus filed, however, we can see no reason why the names of the petitioners may not be removed therefrom. Objections filed by persons who signed the petition should be considered by the board at the time of the hearing, but the mere filing of objections does not amount to the withdrawal of a name therefrom. As already stated, it is then too late to do so. We, therefore, answer your first question as follows: The filing of objections does not constitute the withdrawal of names from the petition asking for the enrollment of a county under such plan.

II.

In the determination of your second question it will be necessary to consider Sections 2678, 2679 and 2680, which read as follows:

"The department shall have control of the sale, distribution, and use of all tuberculin in the state, and shall formulate rules for its distribution and use. Only a licensed veterinarian shall apply a tuberculin test to cattle within this state."

(Section 2678).

"The department may appoint one or more accredited veterinarians as inspectors for each county and one or more persons as assistants to such inspectors. Such inspectors, with the assistance of such person or persons, shall test the breeding cattle subject to test, as provided in this chapter, and shall be subject to the direction of the department in making such tests."

(Section 2679).

"An accredited veterinarian is one who has successfully passed an examination set by the state and federal departments of agriculture and is authorized to make tuberculin tests of accredited herds of cattle under the uniform methods and rules governing accredited herd work which are approved by the United States department of agriculture."

(Section 2680).

It will be observed that in Section 2678 the veterinarians therein referred to are described as "licensed veterinarians," and in the two succeeding sections as "accredited veterinarians." A "licensed veterinarian" as the term is used in Section 2678, obviously means one who has become an accredited veterinarian, as defined in Section 2680. We see no reason why the legislature may not provide that veterinarians who administer the tuberculin test on herds of cattle must possess certain qualifications as required by the uniform methods and rules approved by the United States Department of Agriculture. The statute under consideration is a public health measure and any plan that is designed by the legislature to protect the public health of the people will be fully upheld by the courts if possible to do so. Such measures

are liberally construed with a view to carry out the beneficent purpose of the statute. We know of no constitutional provision that would render the provisions of the three sections referred to void. We are, therefore, of the opinion that such sections are constitutional.

III.

Section 2697 reads as follows:

"Whenever any number of electors of the county equal to fifteen per cent of the voters of the county as shown by the vote for the head of the ticket at the last general election, petition the board of supervisors for the establishment of an accredited area plan and file the same in the office of the county auditor, the board shall, if it finds such petition, complies with the requirements of this chapter, submit at the next general election the following proposition: Shall * * * county levy a tax of not more than three mills on the taxable value of the property of the county for the purpose of establishing a county tuberculosis eradication fund and entering upon the accredited area plan?'

What is the meaning of the phrase, "head of the ticket at the last general election?" This phrase evidently means the head of the state ticket, and not the head of the presidential ticket. It is, therefore, manifest that this phrase means the vote on governor in the election held in November, 1924. To determine the fifteen per cent of the voters of the county, as shown by the vote for the head of the ticket at the last general election, the total vote cast for the various candidates for governor in the county should be added, and fifteen per cent of this total should be ascertained. The records in the office of the county auditor, or the vote of the county as published in the Iowa Official Register for 1925-1926 will indicate the total number of votes cast for governor in any county.

IV.

The county area plan and accredited area plan while somewhat similar in their operations, are not identical, but have several points of difference. After a county has been enrolled under the county area plan, then the law relating thereto applies to such county. However after a county has been enrolled under the accredited area plan, all the laws relating thereto apply to and cover the eradication of bovine tuberculosis in the county. If the number of signers equal seventy-five per cent before the completion of the enrollment of the county under the county area plan, and both proceedings are pending at the same time, then the proceedings under these plans should proceed simultaneously, and neither should be abandoned. However, after the county has been enrolled under the accredited area plan, the enrollment under the other plan becomes of little importance because the law relating to the accredited area plan and not the county area plan would apply to and govern in the eradication of bovine tuberculosis. A county should be enrolled under both plans for the reason that there may be some invalidity in the proceedings enrolling the county under the accredited area plan which would not in any way affect the enrollment under the other plan.

MUNICIPALITIES: Transfer of money may not be made from the light and water funds to the city improvement fund.

July 28, 1926. *Director of the Budget:* We desire to acknowledge receipt of your letter of July 23, 1926, in which you submit to this department the following inquiry:

"We are in receipt of resolution passed by the city council of Vinton, Iowa,

requesting permission to transfer $16,000.00, which is part of a surplus in the light and water funds, to the city improvement fund.

"The proposed transfer is to cover a period of ten years and the money so transferred is to be used to pay for paving certain streets, the cost of which will be assessed against the abutting property and paid in installments, but the city desires to advance the money out of funds now lying idle in order to save the taxpayers interest in case bonds were issued.

"This department desires your opinion as to the advisability of transferring funds for a period of ten years and also as to the legality of the use of the money as proposed in the resolution.

"We attach hereto letter and resolution submitted and ask that they be returned with your reply.

The resolution referred to in your letter is as follows:

"WHEREAS, there is at this time under consideration a project for the construction of an improvement in this City by the paving of all of that part of "C" Avenue extending from the North side of the intersection of 13th Street and running thence South to the intersection of the Corporate Line of said City, and also that part of Fourth Street in said City extending from the West side of the intersection of said Street with 'C' Avenue and running thence West to and including the intersection of 'K' Avenue with said Fourth Street, and also that part of 'K' Avenue lying within said City and extending from the South line of the intersection of said Avenue with Fourth Street and running thence North to a point where said 'K' Avenue is only half within the Corporate Limits of said City;

"AND WHEREAS, if the said project is adopted, the Primary Funds of Benton County, Iowa, to the extent of Eleven Thousand Three Hundred Two Dollars Fifty cents ($11,302.50) have been set aside for the aid of said project;

"AND WHEREAS, if the said project is adopted, the part of the said improvement to be paid by the City of Vinton and by the property to be assessed therefor will not be in excess of Sixteen Thousand Dollars;

"AND WHEREAS, there is more than the sum of Sixteen Thousand Dollars in the Water and Light Funds of said City, for which there is no immediate use or need, and if Bonds are issued for the purpose of paying the contractors and other items of indebtedness relative to said improvement, pending the payment thereof by the properties to be assessed therefor, the expenditures for interest alone during said period pending payment will be in excess of the sum of Eight Thousand Eight Hundred Five Dollars; and there is no present income from the said sums in the said Water and Light Funds; and there is not sufficient money in the Improvement Fund of said City at this time to pay for said improvement, pending payments of assessments by the property owners;

"AND WHEREAS, THE USE OF THE SAID sum of money from the Water and Light Funds by way of transfer to the Improvement Fund and disbursement therefrom to pay said indebtedness, pending payment thereof by assessments on the various properties to be assessed if said project is adopted, will amount to a clear saving of approximately Nine Thousand Dollars ($9,000.00) through savings in interest over a period of ten years;

"NOW THEREFORE, be it resolved, that, subject to the approval of the Director of Budget of the State of Iowa, in accordance with Section 78 of Chapter 4 of the Laws of the Extra Session of the Fortieth General Assembly of the State of Iowa; there be transferred from the Water and Light Funds, proportionately, to the Improvement Fund, the sum of Sixteen Thousand Dollars ($16,000.00) and that it is the intent of this resolution that in the event said project is adopted and completed, the said funds, shall, temporarily be used and disbursed from said Improvement Fund, for the purpose of paying the cost of the said project, so far as same may fall upon this City, or property to be assessed therein, pending payment of assessments by the owners of said properties;

AND BE IT FURTHER RESOLVED; that the said money so transferred to the Improvement Fund, shall be returned to the Water and Light Funds, respectively, as soon as may be, and in no event to exceed Ten years (10).

AND BE IT FURTHER RESOLVED, that the Mayor and City Clerk be directed to forward a certified copy of this resolution to the Director of Budget of the State of Iowa, for his approval and the approval of such transfer for such time and purposes, and urging the approval of said Director.

"As instructed, we present said resolution to you by way of petition."

A consideration of the purpose of the resolution may assist in the determination of this question. A reading of the resolution will disclose that it is the purpose of the city council of Vinton to pave certain streets in said city. There is a surplus in the water and light funds of said city, which it is the purpose of the city council to have temporarily transferred to the improvement fund so that the same may be used for the payment of the cost of constructing such pavement, practically all of which will be assessed against the abutting property. We must keep these facts in mind in the further consideration of this question. It will not be necessary to copy in this opinion the provisions of the budget law relating to the temporary transfer of money from one fund to another. It will suffice to say that Section 388 of the Code, which permits the temporary transfer of funds and the retransfer thereof, is specifically made subject to the provisions of law relating to municipalities. This department on two occasions has held that the exercise of the right therein granted is made subject to the provisions of the law in force at the time said section was enacted, and that the provisions of such law must be complied with by municipalities in making such transfers. Therefore, to determine the right to transfer, we must turn to the provisions of the statute in force at the time of the enactment of said Section 388. Section 6215 provides as follows:

"Cities having a population of eight thousand eight hundred or less, and towns, may make either temporary or permanent transfers from the grading fund, improvement fund, sewer fund, the waterworks fund, gas or electric plant fund, water fund, gas or electric light or power fund, to any of said funds by resolution concurred in by a unanimous vote of the council, if approved by a judge of the district court in the county wherein such city or town is located at a hearing had on a day to be fixed by said judge."

It will be observed that under the provisions of the above section, cities having a population of eight thousand, eight hundred or less, which includes the city of Vinton, may make transfers from one to another of the following funds: improvement fund, water fund or gas fund,—by complying with the provisions of the above section, and the following Section, 6216.

For the purpose of determining the purpose of the improvement fund, we will turn to Section 6211 as amended, concerning the taxes that may be levied by cities and towns. This section as amended provides in part as follows:

"Any city or town shall have power to levy annually the following special taxes;
* * * * * *
* * * * * *

3. Not exceeding five mills, *which shall be only to pay for deficiencies in assessments and for plats and schedules as provided by law, and for the construction, reconstruction, and repair of any street improvement at the intersections of streets, highways, avenues, and alleys, and for one-half of the cost of such improvement at the intersections of streets, highways, avenues, and alleys not crossing, and for spaces opposite property owned by the city or town and by the United States, and for the purchase price of property purchased by the city at tax sale and subsequent taxes assessed against such property.*"

It will therefore be noted that the purposes for which such improvement fund may be used are limited, and such fund may not be used to make advance payments on special assessments against property assessed for the payment of the cost of such improvement. Therefore, we are clearly of the opinion that such fund may not be transferred to an improvement fund and used for the purpose of paying special assessments against benefited property, the sum so used to be returned when the special assessments are paid.

HIGHWAYS: The State Highway Commission has authority to enter upon adjoining lands for the purpose of removing obstructions from natural channels.

July 28, 1926. *Iowa State Highway Commission:* We have received your letter of July 27, 1926, in which you submit to this department the following inquiry:

"Section 4791, Code 1924, makes it the duty of the Township Road Superintendent to see that surface water is drained from side ditches of the road in its natural channel and empowers the Superintendent to enter upon adjoining land for the purpose of removing obstructions from such natural channel.

"Section 4778 makes it the duty of the Road Patrolman, upon such Highways as come under the jurisdiction of the Board of Supervisors, to provide side ditches with ample outlets.

"Now coming to the Primary Roads over which the Highway Commission has general authority and supervision of maintenance, does the Commission have authority to enter upon adjoining lands for the purpose of removing obstructions from natural water courses?

"We have numerous instances in which culvert openings and side ditches have become clogged with the wash following heavy rains and with the drift resulting from heavy winds. In many cases the outlets to such ditches crossing adjoining lands are also filled up. The question is, have we authority to enter upon private land? Land owners are denying that we have authority and seek to prevent the reopening the natural channels by us."

Section 4791 of the code referred to in your letter, reads as follows:

"The road superintendent shall not cut down or injure any tree growing by the wayside which does not obstruct the road, or tile drains, or which stands in front of any town lot, farmyard, orchard, or feed lot, or any ground reserved for any public use, or destroy or injure the ingress or egress to any property, or turn the natural drainage of the surface water to the injury of adjoining owners; but it shall be his duty to use strict diligence in draining the surface water from the public road in its natural channel, *and to this end he may enter upon the adjoining lands for the purpose of removing obstructions from such natural channel that impede the flow of such water.*"

It will be observed that the above section empowers the road superintendent to enter upon the adjoining lands for the purpose of removing obstructions from natural channels that impede the flow of water. This section is a part of Chapter 224, which contains the provisions of the statute relating to township road system. A careful search of the statutes has failed to disclose any similar provision in the chapter providing for the improvement and maintenance of the county and primary road systems. While there may be some doubt about the right of the State Highway Commission to enter upon adjoining lands for the purpose of removing obstructions from a natural water course, we are of the opinion that such right does exist because such commission may not maintain the highways in a proper condition without having such right. The highway statutes should all be read together and given such a construction as will amply carry out the authority vested in the public authorities to keep such highways in proper repair and condition. We, therefore, hold that the State Highway Commission has such right and authority.

UNITED STATES SENATOR: Outlining procedure to follow to fill vacancy in case of death of United States Senator

August 2, 1926. *Governor of Iowa:* You have orally called the attention of this department to the vacancy in the office of United States Senator from Iowa caused by the untimely death of Senator Albert B. Cummins. In connection therewith, you have asked us to outline the procedure for the filling of this vacancy.

Your attention is first invited to Section 1152 of the Code, 1924 which provides as follows:

"Vacancies shall be filled by the offices or board named, and in the manner, and under the conditions, following:

1. *United States Senator.* In the office of United States senator, when the vacancy occurs when the senate of the United States is in session, or when such senate will convene prior to the next general election, by the governor."

Your attention is also invited to the provisions of Section 1155 of the Code, 1924, which provides as follows:

"An officer filling a vacancy in an office which is filled by election of the people shall continue to hold until the next regular election at which such vacancy can be filled, and until a successor is elected and qualified. Appointments to all other offices, made under this chapter, shall continue for the remainder of the term of each office, and until a successor is appointed and qualified."

Your attention is also invited to the provisions of Section 1156 of the Code, 1924, which provides as follows:

"Officers elected to fill vacancies, either at a special or general election, shall hold for the unexpired portion of the term, and until a successor is elected and qualified, unless otherwise provided by law."

Under these sections, if the Senate of the United States will convene prior to the time of the holding of the next general election, the Governor will appoint a Senator to serve until his successor is elected and qualified. Such appointee will serve until the time of the issuance of the certificate of election by the Board of Canvassers after the general election in November. This certificate will probably be issued some time about November 23rd.

The unexpired portion of the term of Senator Cummins will be filled at the general election in November, save and alone that portion thereof which will, in the event of the convening of the Senate prior to the issuance of the certificate of election by the Board of Canvassers as stated, be served by the appointee of the Governor.

The next question arising is as to how the nomination for candidates for the unexpired term is to be made. Sections 607 and 609 of the Code specifically refer thereto. These sections are in words as follows:

"Vacancies in nominations made in the primary election, for offices of United States senator, when such vacancy occurs after the holding of the state convention or too late to be filled by said convention and thirty days prior to the holding of the regular November election, shall be filled by a state convention. For this purpose, the chairman of the party's state central committee shall, within ten days after said vacancy occurs, reconvene the delegates to the last preceding state convention." Section 607.

Nominations occasioned by vacancies in office when such vacancies occur after the holding of the county, district, or state convention, or when they occur before said convention, but too late to be made thereby, shall be made by the party central committee for the county, district, or state, as the case may be, except that when the vacancy is in the office of senator of the United States, and occurs thirty days prior to the holding of the regular November election, nomination shall be made by convention as provided in case of vacancies in nominations for such office." Section 609.

You are therefore advised that candidates for the office of United States Senator for the unexpired term will be nominated at state conventions to be held within ten days from and after the date of the vacancy. The vacancy occurred on the day of the death of Senator Cummins, to-wit, Friday, July 30th. The convention must, therefore, be held on or before Monday, August 9th. The delegates to the convention will be the delegates to the last preceding state convention and they will meet at the time and place designated by the party's central committee. There is no provision of the law for notice. However, we believe the notice should be published in at least two daily newspapers of general circulation and that a copy thereof

should be forwarded to the county auditors and to the chairmen of the county central committee for each of the several counties.

BOARD OF CONSERVATION: A county has the authority to purchase a site for a state park providing that expenditure is authorized by a vote of the people.

August 9, 1926. *Secretary, Executive Council of Iowa:* You have requested an opinion of this department upon the following statement of facts:

"I have been requested by a delegation of the citizens of the county who are interested in the establishment of a lake, or rather the re-establishment of a lake formerly known as Beed's Lake which laid about three and one-half miles northwest of Hampton, to write to you and obtain your opinion on the following proposition.

"Has a county authority to purchase real estate for this proposition, providing the same is submitted to the voters of this county under Chapter 265 of the 1924 Code of Iowa?

Section 1827 of the Code seems to give the county this authority, but I would prefer having your opinion as to whether or not this section does in fact give this authority.

Some of these men who are interested in this proposition, have interviewed the representatives of your department at various times and one of these representatives informed them that the county did have authority.

They are very desirous to have this matter submitted to the voters of this county and I will greatly appreciate it if you will give me your opinion as to the county's rights in this matter and the source of your authority for such opinion."

For your convenience we quote Section 1827 Code of 1924 which reads as follows:

"Powers in municipalities and individuals, municipalities, or individuals, or corporations organized for that purpose only, acting separately or in conjunction with each other, may establish like parks outside the limits of cities or towns, and when established without the support of the public state parks fund, the municipalities, corporations, or persons establishing the same, as the case may be, shall have control thereof independently of the executive council; but none of the said municipalities, individuals, or corporations, acting under the provisions of this section shall establish, maintain or operate any such park as herein contemplated for pecuniary profit."

Under the above section it is our opinion that the word municipality embraces counties of the state and, therefore, counties would have the right to expend money for the purchase of a state park site provided the proposition was submitted to the voters and approved by them as contemplated in Chapter 265 Code of 1924.

TAXATION: "Adjusted valuation of the preceding calendar year" used in Section 7162 Code of 1924 construed.

August 11, 1926. *Auditor of State:* You have requested the opinion of this department in the following statement of facts:

"This department has received a letter from Mr. F. G. Pierce, Secretary of the League of Iowa Municipalities, enclosing a letter from Mr. C. W. Wakeman, City Clerk of the city of Fort Dodge, Iowa, which reads as follows:

'Referring to the 1924 Code Section No. 7162 what do the words "adjusted valuation of the preceding calendar year" mean?

'It is my understanding that the adjustments made by the Board of Review in May 1926 are the adjusted valuations of the preceding calendar year meaning 1925. If that is true, the levies that the city council is now making for 1927 would be based upon the valuation as adjusted in May 1926. Our Auditor has always interpreted this to mean that the levies are based on the valuations as adjusted in May 1925.'

Mr. Pierce has asked this department to submit to you the letter from Mr. Wakeman and ask that you kindly give us a ruling on the questions submitted therein."

I call your attention to Section 7114 which provides for the meeting of the assessors upon the call of the county auditor, such meeting to be held before the 3rd

day of January annually. Section 7121 provides for completion of the assessment by the 1st day of April following the January in which the assessors are called together for purposes of making the assessment and Section 7122 provides that the assessment rolls shall be turned over to the Board of Review by the first Monday of April in each year except in cities having a population of ten thousand or more where such rolls must be turned over by the first Monday in May of each year. The Board of Review shall proceed to correct the said list and to certify the same to the county auditor.

Section 7162 to which you refer reads as follows:

"Basis for amount of tax. In all taxing districts in the state, including townships, school districts, cities, towns, and counties, when by law then existing the people are authorized to determine by vote, or officers are authorized to estimate or determine a rate of taxation required for any public purpose, such rate shall in all cases be estimated and based upon the adjusted taxable valuation of such taxing district for the preceding calendar year."

It is our opinion that the preceding calendar year referred to means the calendar year last preceding the year in which the rate of taxation is to be figured. To illustrate, if by vote a levy is authorized in the year 1926 the rate shall be ascertained upon the adjusted taxable valuation of the taxing district for the preceding calendar year, to wit, 1925.

HIGHWAY COMMISSION—TAXATION: Board of Supervisors have no authority to refund taxes voluntarily paid.

August 11, 1926. *Iowa State Highway Commission:* You have requested the opinion of this department upon the following statement of facts:

"Some three years ago an Interurban line having right-of-way within a certain Primary Road Special Assessment District was assessed for benefits. The Interurban raised no objection at the time of hearing on the assessment, did not appeal, nor was any objection raised at the time of paying such assessments.

Subsequently in another District and in another County a Railroad Company was specially assessed for benefits incident to the building of the paved road. This Railroad Company filed objections, appealed, and finally obtained a ruling of the Court holding that in that particular instance and District the Railroad Company had not been assessed properly, and the assessment was cancelled.

Now this Interurban Company against which special assessment was levied and paid, all without objection, files its claim and demands a refund of the Tax paid.

Under these circumstances has the Board of Supervisors the authority to refund the Tax? If you answer in the affirmative, from what fund or source will this refund be made? The special assessment fund has been wholly expended, in other words, the Tax paid in by the Interurban Company has been paid over to the contractor in part payment of the cost of constructing the improvement."

The Supreme Court has uniformly held that where taxes are voluntarily paid the Board of Supervisors is without authority to thereafter rebate or refund any part of such tax. I cite the cases so holding.

Dubuque and Sioux City Railroad Company v. Board of Supervisors, 40 Iowa 16;
Lindsey v. Boone County, 92 Iowa 86;
Bibbins v. Polk County, 100 Iowa 493;
Odendahl v. Rich, 112 Iowa 182;
Ahlers v. Estherville, 130 Iowa 272.

BANKS AND BANKING—TAXATION: The property together with shares of stock of bank now insolvent should have been assessed by the assessor in making the assessment at first of year.

August 13, 1926. *County Attorney, Clarinda, Iowa:* You have requested the opinion of this department upon the following statement of facts:

"This proposition has come up here in Page County and I would like to get your opinion on it. The First National Bank of Shenandoah, Iowa, was closed on the 13th day of May, 1926. When the assessor went to the bank to assess the property, they would not give anything in but kept putting him off and there was no assessment at the time the bank closed. The County Auditor assessed the bank stock, etc., since that time. It seems that there is no question but what the bank was insolvent on January 1st, 1926, altho the bank was open and accepted deposits clear up until the day before it closed. The stockholders are objecting to have the bank stock, etc., assessed, contending that it had no value on January 1, 1926.

I would like to know as soon as possible what the policy is that is followed in such cases. Should the bank stock be assessed? Should the other property of the bank be assessed or should this be free from assessment, inasmuch as the liabilities will exceed the assets by a considerable amount and all of the stock will be assessed for the full amount of the stock in order to pay depositors."

It has been the policy of this department to require all bank stock to be assessed unless the bank is actually in the hands of a Receiver at the time the assessment is made. Thus, in the case you have submitted, it is our opinion that it was the duty of the assessor to assess this stock upon the 1st of January. The question as to its value is a matter to be asserted by the stockholder but does not justify the assessor in not assessing the stock.

It was also the duty of the bank to give in its property to the assessment when requested by the assessor. Section 7004 requires such property to be turned in and provides that an official refusing to turn in the property is guilty of a misdemeanor and subject to a fine of $500.00. Therefore, the assessor should make the assessment and if the bank feels their assets are not equal to their liabilities and that they have been over-assessed, it is a matter they should take up with the Board of Review. However, there is no justification in the bank refusing to turn in the property for assessment.

I assume from your statement of facts, that the assessment has not been made. If this be true, the Auditor can assess the property as omitted property and this should be done. The fact that the bank has become insolvent should not prevent the assessment from being made.

TRANSPORTATION OF CHILDREN ATTENDING PAROCHIAL SCHOOL: Transportation facilities owned by a consolidated school is not authorized to transport children to a parochial school under the provision that public moneys shall not be used in favor of any institution, school, association, or object under ecclesiastical or sectarian management or control.

August 19, 1926. *Superintendent of Public Instruction:* You have requested an opinion of this department upon the following question:

"Will you please advise me if it would be legal for a school board to pay from the school fund for the transportation of children to a parochial school. Would it be legal for the bus of a consolidated school district to pick up children along the way and transport them to a parochial school?"

This matter is covered by Section 5256 of the Code of Iowa 1924 and of Iowa School Laws and Decisions 1925 which provides as follows:

"Money for sectarian purposes. Public money shall not be appropriated, given, or loaned by the corporate authorities of any county or township, to or in favor of any institution, school, association, or object which is under ecclesiastical or sectarian management or control."

It is provided in Article I in Section 3 of the Constitution of the State of Iowa as follows:

"The General Assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; nor shall any person be compelled to attend

any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister, or ministry."

The Supreme Court of this state has held in the case of *Knowlton v. Baumhover*, 182 Iowa 691 that the carrying on with public school funds of a public school in conjunction with and as a part of a parochial school devoted in part to sectarian teaching is wholly illegal and that no lapse of time and no acquiescence of the people therein will give it validity.

The question you submit differs from the case cited only in that in the one case it was the use of a building and in the case you suggest it is the question of using other school property, namely, the transportation facilities. There can be no question but that such transportation facilities used in any manner directly or indirectly would be contrary to the constitution, the statutes and the opinions of our Supreme Court.

There is another phase of this question which you do not raise but which is quite important. The transportation of such children is beyond the authorized power of the board of directors if the bus driver should pick up any person other than a person whom he is authorized to transport and injury should befall that person due to his negligence, the driver would be personally liable for such injury and if the unauthorized transportation were done with knowledge, consent and approval of the members of the board of directors, it is our opinion that they too would become personally liable though the district itself would be free from liability because the act is beyond the authorized power of the public officials and those representing them.

SCHOOLS: (1) Sec. 4274 relating to a student attending school in a district other than his own applies to all school districts. (2) A convenience to the pupil and his family may be taken into consideration in determining the right of a student to attend a district other than his own, but such convenience is not controlling. (3) A child may attend school in an adjoining district if the two school boards agree, or the county superintendent so orders. (4) The fact that Sec. 4274 has in substance been the statute for 50 years or more will make no difference in the construction of the statute.

August 26, 1926. *County Attorney, Nevada, Iowa:* We have received a letter from Mr. George H. Kellogg, county superintendent of Story County, Iowa, in which he submitted to this department five questions relating to the school laws of the state. On account of the importance of the questions submitted we have concluded to prepare an opinion for your office so that it will operate as an official opinion. A copy thereof will be mailed to Mr. Kellogg. The letter of the county superintendent is as follows:

"Would you be so kind as to give me your opinion on the statutes as found in Sec. 4274, Code of 1924 on the following points?

1—Does this section apply to all school districts including consolidated districts where transportation is furnished pupils residing therein?

2—If a pupil residing in a consolidated district is three and one-half miles from his own school but is furnished transportation thereto; and is only one and one-half miles from a school in an adjoining consolidated district could he claim the right to attend such adjoining school under the provisions of Sec. 4274?

3—If same pupil gives as his reason for wishing to attend such adjoining school, that he has to leave home at 7:15 each morning and does not get home until 5:30 or thereabout; and that if he is given permission to attend this adjoining school, he need not leave home until 8:15 and can return home arriving at 4:15; and that his father needs his assistance with chores and other work about the home: would this be sufficient reason for the county superintendent to grant such permission under the provisions of Sec. 4274?

4—Will Hon. May E. Francis's opinion in the case of *W. W. Shaffer et al. v. The School Township of Nevada*, rendered on an appeal from Story County apply in above hypothetical case?

5—Should the fact that Sec. 4274 has in substance been the statute for fifty years or more without change and that it was enacted prior to consolidation and transportation of school children, be therefore considered as made especially for an earlier day and condition?"

Section 4274 of the Code reads as follows:

"A child residing in one corporation may attend school in another in the same or adjoining county if the two boards so agree. In case no such agreement is made, the county superintendent of the county in which the child resides and the board of such adjoining corporation may consent to such attendance, if the child resides nearer a schoolhouse in the adjoining corporation and one and one-half miles or more from any public school in the corporation of his residence. Before granting such consent the county superintendent shall give notice to the board where the child resides and hear objections, if any. In case such consent is given, the board of the district of the child's residence shall be notified thereof in writing, and shall pay to the other district the average tuition per week for the school or room thereof in which such child attends. If payment is refused or neglected, the board of the creditor corporation shall file an account thereof certified by its president with the auditor of the county of the child's residence, who shall, at the time of the making of the next semi-annual apportionment, deduct the amount from the sum apportioned to the debtor district, and cause it to be paid to the corporation entitled thereto."

It will be noted that under the provisions of the above statute a child residing in one corporation may attend school in another in the same or adjoining county, if the two boards so agree. To this right there seems to be attached no conditions or limits. Therefore, if the two boards agree they may consent to any child residing in one corporation attending school in another. However, under said statute in case no such agreement is made the county superintendent of the county in which the child resides and the board of such adjoining corporation may consent to such attendance. However, there is a limitation or condition to the exercise of such power by the county superintendent. Such order may be made by the county superintendent only in the event the child resides nearer a schoolhouse in the adjoining corporation and one and one-half miles or more from any public school in the corporation of his residence. The question of transportation of such pupil does not, in our opinion, enter into the question at all. We will, therefore, answer your questions in the following manner:

1—That said section applies to all school districts, including consolidated districts where transportation is furnished pupils residing therein;

2—A pupil residing in a consolidated district who lives three and one-half miles from his own school but is furnished transportation thereto and lives only one and one-half miles from a school in an adjoining consolidated district may be accorded the right to attend such adjoining school under the provisions of Section 4274 of the Code, if both boards agree thereto, or the county superintendent so orders, as provided therein;

3—The reasons stated in your first proposition are somewhat persuasive but not absolutely conclusive. The child may attend school in the adjoining district if the two school boards so agree or the county superintendent so orders under the conditions therein designated;

4—We believe that the opinion of the state superintendent in the case of *W. W. Schaffer, et al. v. The School Township of Nevada*, rendered on an appeal of Story County applies to the situation under consideration;

5—The fact that Section 4274 of the Code has in substance been the statute for fifty years or more without change and that it was enacted prior to the enactment of the consolidated school statute and the statute relating to the transportation of

school children would make no difference in the application of the rule. All the school statutes should be read together and the statutes construed as though the entire statute was repealed and one statute in the amended form enacted.

McGuire v. Chicago, Burlington & Quincy Railway Co., 131 Iowa 340.

*HIGHWAYS*s (1) Board of supervisors may not purchase or condemn lands for gravel beds outside of the limits of the county; (2) they may, however, purchase gravel in the natural state if the title to the real estate is not also purchased; (3) the Highway Commission may purchase gravel beds at any place in the state for the purpose of providing materials for the improvement of highways.

August 26, 1926. *Iowa State Highway Commission:* We have received your letter of August 25, 1926, in which you submit to this department the following inquiries:

"Certain parties in the western part of the State are contending that the Monona County board of supervisors is without authority to purchase a gravel pit located in Woodbury County.

"It has been our impression that Section 4657, Code of 1924, reading in part '* * or the board may purchase such material outside the limits of their county' means that the board of supervisors of Monona or any other county in Iowa, has the authority to purchase a gravel pit or to purchase gravel or other like material in any other county in the state or even outside the State.

"Now that we have the Development fund, the Highway Commission, on behalf of the State, is buying materials for and letting contracts for road improvements in the various counties paying for same from the Development fund. The right and authority of the Commission to purchase a gravel pit or gravel material from Development funds when the material from the pit is to be used in a county other than in which the pit is located, has been questioned.

"To us it does not seem that there can be any question whatsoever as to the authority of the state, acting through the Highway Commission to purchase gravel pits, gravel materials or other road building materials anywhere in the state or outside of the state so long as same are being obtained at an advantageous price, and that materials so purchased can be used on any project anywhere in the State.

Please advise as to whether we be right or wrong in our interpretation of the statute."

Section 4657 of the Code reads as follows:

"The board of supervisors of any county may, within the limits of such county and without the limits of any city or town, purchase or condemn any lands for the purpose of obtaining gravel or other suitable material with which to improve the highways of such county, including a sufficient roadway to such land by the most reasonable route, and to pay for the same out of the primary or county road funds, or the board may purchase such material outside the limits of their county."

It will be observed that the authority granted to the board of supervisors by the above section may be divided as follows: 1—to purchase or condemn any lands for the purpose of obtaining gravel or other suitable material with which to improve the highways of such counties; (2) to purchase such material.

The first right is limited to the purchase or condemnation of lands, and the second to the purchase of materials. The right to purchase or condemn lands is limited to lands within the limits of such county meaning the county in which the board of supervisors is acting and without the limits of any city or town. The right to purchase such materials is broader than the right to purchase or condemn lands—that is, such material may be purchased outside the limits of the county. We are, therefore, of the opinion that the board of supervisors may not purchase or condemn lands for gravel pits outside of the limits of the county in which they are acting as public officials. They may, however, purchase material with which to improve the highways either in or outside the limits of such county. This conclusion is made necessary by the plain provisions of the statute. In the exercise of the right

to purchase materials the board may purchase not only gravel that has been severed from the land but also gravel in the natural state. There is in the statute a distinction between the purchase of the title to land and the title to the gravel located thereon. Such gravel may be purchased the same as standing timber, buildings or growing crops without also acquiring title to the land itself.

II

Chapter 114 of the Laws of the 41st General Assembly, usually designated as the primary road development law, contains the following provisions which must be considered in the determination of the other question you have submitted to us:

"The highway commission shall have general authority and supervision over the maintenance of the primary roads outside of cities and towns and along the corporate limit lines thereof, and are hereby instructed to co-operate with the various county boards of supervisors to provide and establish an economical policy of primary road maintenance. In cases of disagreement as to policy between the highway commission and the county boards of the various counties the decision of the highway commission as to policy shall be final."

"Before the primary road fund is allotted among the counties each year, there shall be set aside the federal aid road fund and an amount equal to the amount received from the federal government as road aid during the year, to constitute a primary road development fund, which primary road development fund shall be expended under the jurisdiction of the state highway commission for the improvement of primary roads. In the expenditure of the primary road development fund the commission shall have the power to receive bids, award and execute contracts and proceed with the construction work and all the provisions of the primary road law so far as applicable, shall apply to the work done and the expenditure of said fund. The highway commission shall keep a record showing in detail the expenditures from said fund, which records shall show in which counties the expenditures were made and the amount expended in each county.

The highway commission is authorized to purchase road material and machinery for primary roads after receiving competitive bids and to pay for same out of the primary road development fund."

The first section grants general authority and supervision over the maintenance of the primary roads outside of cities and towns and along the corporate limits thereof to the Highway Commission. The Highway Commission, however, is instructed to co-operate with the various county boards of supervisors for the purpose of providing and establishing an economical policy of primary road maintenance. In case of disagreement as to policy between the commission and the boards the decision of the highway commission as to policy is final.

Under Section 3 of the statute the primary road development fund shall be expended under the jurisdiction of the State Highway Commission for the improvement of primary roads and in the expenditure thereof the commission has the power to receive bids, award and execute contracts and proceed with the construction work. All of the provisions of the primary road law, so far as applicable, shall apply to the work done and the expenditure of said fund.

Section 4 empowers the commission to purchase road material and machinery for primary roads after receiving competitive bids and to pay for same out of the primary road development fund. We are inclined to think that the provisions of the statute making applicable to the expenditure of the road development fund all of the provisions of the primary road law so far as applicable and the granting of authority to the commission to purchase road material empowers the commission to purchase gravel beds at any place in the state for the purpose of providing material for the improvement of the highways. Any other construction would in our opinion seriously hamper the state highway commission in carrying out the authority

granted to it by Chapter 114 of the Laws of the 41st General Assembly. Such laws should be construed in such a manner as to effectually and completely carry out the authority therein granted. We believe the construction herein placed on the statute is consistent with the spirit and purpose of the legislature in enacting the statute.

TAXATION: Moneys and credits of a resident of the state should be taxed to the owners thereof in their places of residence even though they are in the hands of an agent. (2) Property in the hands of a trustee should be listed for taxation by the trustee in the jurisdiction where he lives.

August 30, 1926. *County Attorney, Eldora, Iowa:* We have received your letter of August 27, 1926, in which you have submitted to this department three questions which, together with the facts from which they arise, were stated by you as follows:

"I should like to submit a proposition for your decision. The facts are as follows:

"W. M. Fischer, a resident of Hardin County, died some few years ago. His estate was probated and is now closed. The principal assets in the estate consisted of a mortgage on Kossuth County land. There were five heirs, none of whom were residents of Hardin County. Two of them are non-residents of the state and three are residents of Winnebago County.

"For a matter of convenience this mortgage was assigned by the Administrators to the First Trust & Savings Bank of Eldora, Iowa, as trustee or agent of the heirs. The mortgage of course, is held by this bank which collects the interest and remits to the interested heirs. When the mortgage was assigned to the bank, the bank issued a certificate to each of the beneficiaries, agreeing to account for the interest less taxes on the mortgage.

"In January, 1925, W. E. Rathbone, who is President of the Bank, listed this mortgage for taxation as 'W. E. Rathbone, Administrator of the Fischer Estate.' The 1925 taxes were paid and in January, 1926, he again listed the mortgage for taxation in the same manner.

"Winnebago County has employed a tax collector. This tax collector has notified the heirs living in Winnebago County that they are chargeable with taxes on their interest in this mortgage. I understand that Mr. Geo. Osmundson, County Attorney of Winnebago County, holds that this mortgage should not have been listed for taxation in Hardin County, and that regardless of the fact that it has been so listed and the taxes paid, the heirs living in Winnebago County are chargeable with taxes on omitted property.

"I have written an opinion for O. M. Barnes, Treasurer of Hardin County, a copy of which I am enclosing herewith.

"The specific questions which I should like to submit are as follows:

"1st. Should the owner of the legal title, under the circumstances, have listed it for taxation and was it proper that the taxes on it should have been paid in Hardin County, Iowa?

"2nd. Is there any liability on the various ultimate owners to again pay these taxes on it themselves, individually, especially in view of the fact that the certificate that they have, provides that the bank should pay the taxes?

"3rd. The bank having again listed the property for taxation in Hardin County, Iowa, for 1926 taxes, if you hold that each beneficiary should have paid the taxes, is there any way to avoid double taxation for 1926 taxes?"

For the purpose of determining the questions submitted we are assuming that at the time the estate was closed and the administrators discharged the mortgage referred to in your letter was assigned by said administrators to the First Trust & Savings Bank of Eldora, Iowa, as trustee or agent of the heirs upon the consent of said heirs. We are also assuming, although we do not consider this a controlling fact, that the bank is paid a certain sum each year for acting as trustee of the several heirs.

The sections that are material in the determination of the questions you have

submitted are 6956, 6957, 6958 and 6963. The first of the above sections reads in part as follows:

"Every inhabitant of this state, of full age and sound mind, shall list for the assessor all property subject to taxation in the state, of which he is the owner, or has the control or management, in the manner herein directed:

"3. The property of a beneficiary for whom the property is held in trust, by the trustee. * * *"

Section 6957 reads as follows:

"*Any person required to list property belonging to another shall list it in the same county in which he would be required to list it if it were his own,* except as herein otherwise directed; but he shall list it separately from his own, giving the assessor the name of the person or estate to which it belongs."

Section 6958 contains the following provisions:

"Any person acting as the agent of another, and having in his possession or under his control or management any money, notes, and credits, or personal property belonging to such other person, with a view to investing or loaning or in any other manner using or holding the same for pecuniary profit, for himself or the owner, shall be required to list the same at the real value, and such agent shall be personally liable for the tax on the same; * * *"

Section 6963 is in part as follows:

"Moneys and credits, notes, bills, bonds, and corporate shares or stocks not otherwise assessed, shall be listed and assessed where the owner lives, except as otherwise provided, * * *"

It is, of course, well known that moneys and credits, notes, bills, bonds and corporate shares or stock not otherwise assessed shall be listed and assessed where the owner lives, provided the owner is a resident of the state of Iowa. This is true even though such moneys and credits are in the hands of an agent in this state for investment or loans.

Section 6958, making property taxable to an agent, refers only to the property of a non-resident in the hands of an agent in this state. It was so held in the case of The German Trust Company v. The Board of Equalization of the City of Davenport Township, 121 Iowa 325. So, it is manifest that Section 6958 does not apply to the facts under consideration. As already noted, Section 6956 provides that the property of a beneficiary for whom the property is held in trust shall be listed for taxation by the trustee. Section 6957 makes it the duty of any person required to list property belonging to another to list it for taxation in the same county in which he would be required to list it if it were his own, except as otherwise directed in the statute. This section clearly applies to the assessment of property held in trust. We assume that such property was required to be listed by a trustee for the reason that the trustee has the legal title and control and management of such property. This provision of the statute is not limited to non-residents of the state but, in our opinion, relates to all trusts whether the beneficiary thereof is a resident of the state or otherwise.

It has been held in the case of *Ellsworth College v. Emmet County*, 156 Iowa, 52, that as a general rule real and personal property held under a testamentary or other trust is taxable to the trustee or trustees and not to the cestui que trust or beneficiary. We believe this case is controlling in the determination of the question under consideration. We, therefore, believe that the property should have been assessed to the First Trust & Savings Bank of Eldora, Iowa, as trustee. Even though the property was assessed in the name of W. E. Rathbone, Administrator of the Fischer Estate, this fact will not be a matter of any importance in the solution of the problem under consideration. We, therefore, hold that the property was properly assessed for taxation in Hardin County, Iowa. We do this, however, as already stated upon

the assumption that the First Trust & Savings Bank of Eldora, Iowa, held the legal title to the note and mortgage referred to in your letter and that they were managing said property as trustee and not as a mere agent of the heirs.

The answer to the first question will make it unnecessary for us to determine the second and third questions.

SCHOOLS: County superintendent has no right to prevent a student who has completed the 8th grade from taking the examination to entitle him to attend a high school.

August 30, 1926. *Superintendent of Public Instruction:* We have received your letter of August 30, 1926, in which you submit to this department the following inquiry:

"The county superintendent of Page County, Lora G. Culver, has made a ruling that, in order to be eligible to enter the eighth grade county examination, a pupil should be at least thirteen years old by the first of September following the examination.

Will you please advise me if such ruling is legal, and if there is any provision in the law giving to a county superintendent such authority."

The letter of the county superintendent is as follows:

"In order to discourage double promotion and the hurrying of pupils through the grades without sufficient preparation for high school, this office, after consulting with city superintendents, high school teachers, experienced rural teachers, and other county superintendents, made a ruling that, in order to be eligible to enter the eighth grade county examinations, a pupil should be at least thirteen years old by the September following the examination. Up to the present time we have had much favorable comment and very little complaint regarding this measure.

The law in regard to the eighth grade county examinations is very brief, seeming to leave the matter of regulations to your department and to the county superintendent. We have sought to make "such plans as would serve the largest number of pupils, and yet protect the interests of the public schools." If, in looking after the best interests of the many, one individual has suffered, we regret the fact."

The only section relating to the requirements for admission to any high school under the provisions of Chapter 215 is Section 4276 and reads as follows:

"Any person applying for admission to any high school under the provisions of the preceding section shall present to the officials thereof the affidavit of his parent or guardian, or if he have neither, his next friend, that such applicant is entitled to attend the public schools, and a resident of a school district of this state, specifying the district. He shall also present a certificate signed by the county superintendent showing proficiency in the common school branches, reading, orthography, arithmetic, physiology, grammar, civics of Iowa, geography, United States history, penmanship, and music.

No such certificate or affidavit shall be required for admission to the high school in any school corporation when he has finished the common school branches in the same corporation."

This section is plain and is not susceptible of more than one construction. A student who is proficient in the common school branches therein prescribed is entitled to receive from the county superintendent a certificate showing such fact. The county superintendent has no discretion in the matter. If satisfactory proof of proficiency is submitted to the county superintendent, it is his plain duty under the statute to sign a certificate of the character prescribed in the statute. Nowhere in this section or in any other is authority vested in the county superintendent or the state superintendent to add any requirements to those stated in the section. It appears from the letter of the county superintendent that the rule upon which she has been acting was adopted after consulting with city superintendents, high school teachers, experienced rural teachers and other county superintendents. The action of these school officials was exceedingly arbitrary, absolutely unauthorized and

deprives the student in question of a valuable right which was granted to her by the legislature. When the legislature has in a proper manner prescribed certain requirements for admission to any school, including the high school, these requirements are absolutely binding upon the school officials and they or any of them have no right to add any additional requirements to those prescribed in the statute. We, therefore, hold without any reservation that the action of the county superintendent of Page County is absolutely null and void and that the student who has completed the eighth grade is entitled to the right to take the eighth grade examinations for the purpose of determining her proficiency in the common school branches prescribed in the statute.

You should, therefore, at once notify the county superintendent of the opinion of this department and instruct her to at once permit the student in question to take the examinations for the purpose of determining whether she is proficient in such branches.

The laws of this state are intended to give students the right to obtain an education at the expense of the public and no student should be retarded in his progress in the public schools by unauthorized and arbitrary rules adopted by county superintendents. Such officials should follow the plain provisions of the statute and the students given the full protection and educational advantage that the statute prescribes as rapidly as they are able to take the courses of study.

HIGHWAYS: (1) Within certain limits the county treasurer has a right to determine the character of the publication of notice of the sale of highway bonds. (2) Notice of the sale of highway bonds is regulated by Chapter 490 entitled "Publication and posting of notices."

September 1, 1926. *Director of the Budget:* We have received your letter of August 27, 1926, in which you submit to this department the following inquiry:

"Your opinion is requested on the questions set forth in the letter to this department of C. R. Jones, auditor of the Iowa, State Highway Commission, submitted herewith, and the following questions arising in notices published relative to the sale of primary road bonds of Johnson County, Iowa:

Under which section of the Code, should this notice be published?

Has the Treasurer of Johnson County the authority under the laws of Iowa to have or direct this notice to be set in display type and form and have it published in that form?

If you answer the latter question in the affirmative, have the officers of the papers publishing this notice the right or authority to charge for the publication of this notice any rate, other than that set forth in section 11106 of the Code of 1924? Should this section apply to the notice published and the compensation therefor found in The Bond Buyer of New York City?"

Accompanying your letter was a letter from the State Highway Commission, which is as follows:

"I am in a quandary as to the payment of the inclosed bills.

Sections 1172-78 of the Code of 1924, provide that notice of sale of bonds must be published for two or more successive weeks in at least one official newspaper, and Section 4723 relating particularly to primary road bonds, provides that the notice of sale shall be published in at least one official paper and in one newspaper of state-wide circulation, and may be published in one or more periodicals devoted to the interests of investors.

Ordinarily the county treasurer selling primary road bonds has this notice published under the usual heading of 'Official notices' in his official paper and in either the Des Moines Register or Capital under the same heading and the usual price, not to exceed $1.50 a square, makes the cost of this notice run to somewhere in the neighborhood of $7.00.

It appears that the county treasurer of Linn County saw fit to have this notice published in the form of a display ad and has incurred the following bills:

Des Moines Register	$294.00
The Bond Buyer	61.60
Democrat Publishing Co.	50.40
Iowa City Press-Citizen	30.00
Total	436.00

This advertising could have been done in the same papers under 'Official Notices' at a cost of not to exceed $30.00.

Has the county treasurer in this case the authority to advertise in the form of display ads? If the treasurer was within his authority in ordering the notice run as a display, have we authority to pay for such display advertising at rates in excess of $1.50 per square for the two insertions?

If you rule that we must pay at not to exceed the legal rate of $1.50 a square for the space actually occupied, by this display ad, then please advise as to how many squares each of the advertisements figure."

Also enclosed in your letter were clippings from various publications showing the character of the notice published. These notices carry large scareheads and the entire notices are printed in larger type than is necessary and different from the ordinary form of notices.

Chapter 63, Code of 1924, governs the sale of bonds of public corporations. Section 1172 thereof prescribes what notice of the sale thereof shall be given. This chapter deals with all kinds of public bonds and will govern the publication of notice of the sale of primary road bonds unless there is a special section relating thereto.

We now turn to the primary road statute to determine whether there is any special statute relating thereto. Section 4723 contains the following provisions:

"* * * * * *

The county treasurer shall, when so directed by the board, apply any part or all of said bonds in payment of any warrants duly authorized and issued for the particular purpose for which such bonds are issued, provided the same are applied, for at least part of such bonds plus all accrued interest, or the county treasurer shall, when so directed by the board, advertise and sell any part or all of said bonds for the best attainable price, and for not less than par, plus all accrued interest, and apply the proceeds wholly for a like purpose. Said advertisement shall be inserted once a week for at least two weeks in one official county paper in the county, and for a like period in at least one newspaper of general circulation throughout the state, and may include one or more periodicals devoted to the interest of investors. * * *"

It will be noted that the provisions of the above quoted portion of the section relating to the advertisement of bonds for sale are not the same as the provisions of Section 1172. It is well settled that where two provisions of a statute are substantially and necessarily in conflict that provision which is specifically applicable to the case should be given effect rather than the inconsistent provision which is only generally applicable. In other words, that the specific should govern the general terms of the statute.

Kenyon v. City of Cedar Rapids, 124 Iowa 195.

We, therefore, hold that the provisions of Section 4723 with reference to the advertisement of bonds for sale will govern in the sale of primary road bonds and that Section 1172 is not applicable thereto.

It will be observed that there is nothing in Section 4723, or any other part of the statute, that prescribes the character of the advertisement that may be published by the county treasurer. Naturally a certain amount of discretion is vested in such official. However, such discretion should be exercised in a reasonable manner.

We are not disposed to hold that the publication of the advertisement with display heads and printed in larger type than is usual is a clear and plain violation of the statute. We, therefore, hold that the county treasurer was clearly within his rights in publishing such notices. However, we do not want to be misunderstood. We do not mean to infer that the county treasurer may publish any kind of a notice that he desires at considerable expense to the taxpayers. We only hold that within reasonable limits the county treasurer is vested with a discretion in determining the character of the notice published and the amount of space in a newspaper used in doing so. His discretion should not be interfered with except where there is a clear abuse thereof.

Chapter 490, Code of 1924, Sections 11098 to 11107, is entitled "Publication and Posting of Notices." In the first of said sections we find the following:

"All notices, proceedings, and other matter whatsoever, required by law or ordinance to be published in a newspaper, shall be published only in the English language and in newspapers published wholly in the English language." Sec. 11098.

It will be observed that the phrase "All notices, proceedings, and other matter whatsoever," is very comprehensive in its character and in our opinion covers notice or advertisement of primary road bonds for sale. In this chapter we find the following section:

"The compensation, *when not otherwise fixed*, for the publication in a newspaper *of any notice*, order, citation, *or other publication required or allowed by law*, shall not exceed one dollar for one insertion, and fifty cents for each subsequent insertion, for each ten lines of brevier type, or its equivalent, in a column not less than two and one-sixth inches in width." Sec. 11106.

It will be noted that the compensation therein prescribed applies to all notices except where otherwise fixed, meaning, of course, in the statute. We have examined the primary road statutes with care and we have been unable to find any provision therein relating to the price to be paid for publishing the notice of the sale of primary road bonds. Clearly then, the provisions of this section apply to such notices and govern in the determination of the amount that shall be paid therefor, and therefore, the county treasurer or board of supervisors has no right to pay a fee for publishing such notices in excess of the amount therein prescribed.

BANKS AND BANKING—STOCK ASSESSMENT: Two kinds of stock assessments are provided—that to repair depleted capital, and that to pay creditors when the bank is insolvent, the stockholders having paid an assessment to repair depleted capital are also liable for the assessment to pay creditors.

September 1, 1926. *Deputy Superintendent of Banking:* I wish to acknowledge receipt of your favor of the twentieth with the attached letter from Mr. Organ concerning the assessment on the stock of the Farmers Savings Bank of Minden, Iowa. Mr. Organ states the proposition involved as follows:

"The question involved is whether the liability of the stockholders was exhausted by the previous voluntary assessment of 100% of their holdings, upon notice from the Department that the capital stock was impaired and that such an assessment would be required, and if it was exhausted how could an assessment be enforced by sale of the stock held by those who refused to pay, or how could the payment of promissory notes, given by some of the stockholders under the belief that the second assessment could be lawfully made, be enforced."

This proposition is presented in view of the fact that at some prior date the Superintendent of Banking of Iowa notified the officials of this bank that an assessment upon the capital stock amounting to 100% of the face value thereof was necessary to repair the depleted capital of the bank. Accordingly this assessment

was ordered and voluntarily paid by all of the stockholders. Subsequent thereto, the Superintendent of Banking again notified the officials of this bank that another assessment of one hundred per cent, should be made for the same purpose. The last assessment was ordered by the directors, and Mr. Leaders, one of the directors, together with other stockholders, paid the assessment or executed their promissory notes and delivered them to the bank as payment therefor. Mr. Leaders now is attempting to procure the return of his note, contending that the last assessment was invalid, and could not be imposed against the stockholders.

Mr. Organ, the attorney for Mr. Leaders, does not state upon what theory he believes the second assessment to be void. Both assessments were made under the provisions of Section 9246, Code, 1924, for the impairment of capital stock, which assessment is to make good any deficiency by a ratable assessment upon all the stockholders. There is no limitation in the statute or elsewhere as to the number of assessments of this nature. Neither do we believe such a limitation can be implied.

There are two kinds of assessments contemplated by the laws of this state. First, an assessment to repair the depleted capital of a bank, and second, to pay the claims of creditors in the event the bank becomes insolvent. The stockholders and directors of a bank whose capital stock is deemed impaired by the Superintendent of Banking may fix and determine each stockholder's liability by closing the bank and turning over its affairs to the Superintendent of Banking for liquidation. If they elect to continue the banking business and voluntarily pay the assessment necessary in order to restore the depleted capital, they are most certainly estopped from thereafter repudiating the assessment and claiming that it was not a legal or voluntary assessment, and that the money paid by them to satisfy the assessment should be returned.

Had Mr. Leaders so desired, he could have refused to pay a voluntary assessment and permitted the Superintendent of Banking to bring action therefor and sell his stock. Having elected to pay the assessment and retain his stock and continue the bank as a going concern, he is certainly estopped from claiming the assessment was illegal and from asking restitution of the money or notes paid by him.

This question does not appear to have been passed upon by the Supreme Court of this state. There are many authorities in other jurisdictions, however, bearing upon propositions of a similar nature. See

Northwestern Trust Company v. Bradbury, 134 N. W. Minn. 512;
Delano v. Butler, 118 U. S. 634;
Hunt v. Hansen Malting Co., 95 Minn. 206;
Blackard v. Lanford, 176 Pac. (Okla.) 532;
Duke v. Force, 208 Pac. (Wash.) 67;
Golden v. Cervenka, 116 N. E. (Ill.) 273.

We reaffirm our former opinion that the note in question should not be returned to Mr. Leader and that the assessment as to him would be held valid and enforcible if presented to the Supreme Court of this state.

BUDGET LAW—TAXATION—COUNTIES: Board of supervisors may not transfer money from the general or county fund to the drainage fund or vice versa.

September 2, 1926. *Auditor of State:* We have received your letter of August 14, 1926, in which you submit to this department the following inquiry:

"One of our examiners writes us concerning a situation where in drainage district matters only one fund is carried for construction and maintenance work, and for bond and interest coupon payments. Construction or repair work has been done and paid for and now the funds are insufficient to take up the bonds and interest coupons as they come due. Without doubt the drainage district should make additional assessments at once but even if they do so some time will elapse before money is available to take up these bond and interest payments that are due.

"Could the board of supervisors make application to the Budget Director for temporary transfer from the county fund to meet such a situation?

"We have similar situations in other counties so this is a question of considerable importance and trust it shall have your attention and that we shall be favored with an opinion in a short time."

We have carefully considered the question you have submitted and we are constrained to hold that the transfer of money from the general or county fund to the drainage fund may not be made, and we will briefly state our reasons therefor:

1. Section 388 of the Code contains the provisions of the statute concerning the temporary transfer of money from one to another fund of a municipality, and reads as follows:

"Subject to the provisions of law relating to municipalities, and upon the approval of the director, it shall be lawful to transfer money from one fund of a municipality to another fund thereof, and the certifying board or levying board, as the case may be, shall provide that money so transferred must be returned to the fund from which it was transferred as soon as may be, provided that it shall not be necessary to return to the emergency fund or to any other fund no longer required, any moneys transferred therefrom to any other fund."

This section is broad enough to cover the transfer of money from any fund to any other fund of a municipality as therein defined. This section, however, is made subject to the provisions of law relating to municipalities. The section is found in Chapter 24 of the Local Budget Law. The term "municipality" as used in the chapter, is defined in Section 369 as amended by Senate File No. 330, Special Session, Chapter 86, of the 40th General Assembly as follows:

"The word 'municipality' shall mean the county, city, town, school district (other than rural independent school district and school township divided into subdistricts), and all other public bodies or corporations that have power to levy or certify a tax or sum of money to be collected by taxation, but shall not include any *drainage district*, township, road district or rural independent school district or school township divided into subdistricts."

Therefore, by the specific provisions of the above portion of the statute drainage districts are not municipalities within the meaning of Section 388. Therefore, this section does not authorize the transfer of any other county fund to the drainage fund, or money from the drainage fund to any fund of the county.

2. Section 7481 of the Code provides for the disbursement of the drainage funds and reads as follows:

"Such taxes when collected shall be kept in a separate fund known as the drainage or levee fund of the district to which they belong, and shall be paid out only for purposes properly connected with and growing out of the drainage or levee improvement of such district, and on order of the board. Interest collected by the treasurer on drainage or levee districts funds shall be credited to the drainage or levee district to which such funds belong."

It will, therefore, be noted that the taxes or special assessments shall be used only for some purpose properly connected with and growing out of the drainage or levee improvement. The tax or special assessment is raised entirely for the purpose of paying the certificates or bonds that are issued by the drainage district. In reality, such tax belongs to the holders of such bonds and certificates. If a transfer can be made from the county or general fund to the drainage fund, then transfers may also be made from the drainage to the county or any other fund

thereof. In no sense are taxes or special assessments levied in drainage districts county funds. They are raised in a definite specified territory or subdivision of the county and belong to the district in trust for the certificate and bond holders. The counties are in no sense liable on such certificates or bonds. The board of supervisors or the counties they represent are simply the agents through whom the tax is collected and paid.

Wood v. Hall, 103 Iowa, 308 (318).

We, therefore, conclude that the transfer referred to in your letter may not be made.

MOTOR CARRIERS: Sheriff's fees assessed in a motor carrier hearing before the Board of Railroad Commissioners is part of the "Administration & Enforcement" of the Motor Vehicle Law and should be paid from the fund allocated to the Commission.

September 2, 1926. *Secretary, State Board of Railroad Commissioners:* We wish to acknowledge receipt of your favor of the seventeenth concerning the payment of a claim made by the sheriff, Frank B. Martin, of Scott County, for serving subpoenas at the request of the Railroad Commissioners in the case of the *Board of Railroad Commissioners v. L. A. Miller Transfer Company.* We understand the hearing involved an application of the Miller Transfer Company for a permit to operate under the provisions of Chapters 4 and 5 Laws of the 41st General Assembly.

Section 9 of Chapter 4, Laws of the 41st General Assembly provides for the distribution of the proceeds of moneys received under the provision of the act referred to. Paragraph (a) thereof is in words as follows:

"(a) For the administration and enforcement of the provisions of this act and the regulation of motor carriers one-fifth (1/5) or so much thereof as may be necessary shall be paid to the commission by warrant drawn from time to time by the auditor of state upon the treasurer of state."

The hearing referred to was clearly within the terms "administration and enforcement" of the motor vehicle law as used in the section above quoted, and we are of the opinion that any expense incurred for subpoenaing witnesses on such a hearing should be paid from the fund allocated to the Railroad Commission. The claim of F. D. Martin, Sheriff of Scott County, should therefore be paid by you from the fund referred to.

STATE SINKING FUND: Fees of sheriffs, court reporters and other court expense, should be paid from the state sinking fund in cases involving litigation of this fund.

September 3, 1926. *Treasurer of State:* You have orally requested our opinion as to whether or not the fees of sheriffs for serving subpoenas, the court reporter for reporting and transcribing proceedings, and other court expense incurred because of the actions brought by you as Treasurer of State against various sureties on depository bonds under the so-called Brookhart-Lovrien Act should be paid by you from the State Sinking Fund or paid by the Executive Council from the Court Expense Fund.

Under the provisions of the Brookhart-Lovrien Act, Chapter 173, Laws of the 41st General Assembly, as amended, the State, and Treasurer of State are subrogated to the rights of any municipal corporation against sureties on depository bonds after the deposit has been paid from the State Sinking Fund. It is necessary in order to enforce any rights which the Treasurer of State may have under this statute, to sue the sureties on these depository bonds given by failed banks throughout the state. As a necessary incident to such litigation there will always be the

expense of serving notices, subpoenas, filing fees and reporter's fees, as well as other incidental court expenses. The expense referred to was incurred because of the requirements imposed upon the Treasurer of State by reason of the fact that he is subrogated to the rights of the municipal corporation against the sureties upon certain depository bonds. There is no express provision in the statute concerning the payment of the court costs and expenses referred to. However, we are clearly of the opinion that these costs and expenses should be paid by you from the State Sinking Fund.

It is for the benefit of the State Sinking Fund that these actions are prosecuted, and any returns by way of settlements, collections on judgments, etc. because of these suits will be paid into the Sinking Fund, including the court costs.

POLICEMEN: Fees allowed policemen and other municipal peace officers by court order are collected by the peace officers as agents for the city and should be turned over to the pension fund, providing the city by ordinance fixes a salary in lieu of other compensation for such peace officer.

September 7, 1926. *Auditor of State:* We wish to acknowledge receipt of your favor of the first together with a letter from the City Solicitor of Cedar Rapids, Iowa, requesting our opinion in substance as follows:

It has been questioned whether or not the fees allowed police officers of the city of Cedar Rapids in criminal proceedings by a court order should be paid into the policemen's pension fund under the provisions of Section 6313, or retained by the officers.

Section 5670, Code of 1924, provides that a city may, by ordinance, fix a salary in lieu of all other compensation for any city or town officer elected or appointed. This would, of course, include police officers. It appears that the city of Cedar Rapids has, by ordinance provided a salary for the police officers "in full compensation and in lieu of all fees."

Section 11328, Code, 1924, provides in substance that no peace officer shall receive witness fees for testifying in regard to matters coming within his knowledge in the discharge of his official duties unless the fees are ordered and allowed by the court. In the case submitted by you, it appears that the fees in question were properly allowed to the police officers by an order of the court, and were it not for the provisions of Section 5670, supra, and the ordinance of Cedar Rapids, these fees so allowed could be retained by the officers.

In the case of the city of *Des Moines v. Polk County*, 107, Iowa, 525, 530, the Supreme Court of this state in substance held that when an ordinance of the city provided a salary for peace officers "in lieu of all fees," that an officer was only entitled to collect the fees as an agent for the city, and the fees were to be paid into the city treasury. Under the decision in the cited case, the fees of police officers of Cedar Rapids collected under an order of the court should be returned by them to the city treasurer and in the absence of any statutory or municipal regulation, these fees would be paid into the general fund of the city.

Section 6313, Code 1924, however, concerning pension funds for firemen and policemen in part reads as follows:

"All rewards in moneys, fees, gifts, or emoluments of every kind or nature that may be paid or given to any police or fire department or to any member thereof except when allowed or to be retained or given to endow a medal or other permanent or competitive reward on account of extraordinary services rendered by said departments or any member thereof, and all fines and penalties imposed upon members, shall be paid into the said pension fund and become a part thereof."

The exception referred to in the statute just quoted must be some exception

created by statute or by ordinance of the city. It does not appear that there is any exception provided in the ordinance of the city of Cedar Rapids and we find no statute making an exception.

We are therefore of the opinion that the fees referred to are collected by the police officers as agents of the city of Cedar Rapids, and should be turned over by them to the city treasurer, and by him credited to the policemen's pension fund under the provisions of the statutes hereinbefore referred to.

NATIONAL GUARD: National guardsmen not called into service on order of the Governor cannot be paid from state funds.

September 8, 1926. *Adjutant General:* We wish to acknowledge receipt of your favor of the seventh with the enclosed correspondence relative to duties performed by the Howitzer Company, 168 Inf. Iowa National Guard at Clarinda, Iowa, June 16, 1926, immediately following a tornado.

It appears from the correspondence that a tornado struck Clarinda the afternoon of June 16, 1926, causing the loss of several lives and great damage to property; that immediately after the storm Earl Downing, Major 168 Inf. Iowa National Guard, commanding the battalion, to which the Howitzer Company referred to is attached, notified Capt. Johnston of that company to assemble his organization for the purpose of rendering aid to the victims of the tornado, guarding the buildings and property, keeping the streets open and in other ways to assist in maintaining order and preserving the property of the community.

Captain Johnston immediately assembled his organization and proceeded to perform the duties hereinbefore referred to. Apparently this company was on duty for several days. They were not ordered into the service by the Governor of Iowa. Upon this state of facts you inquire whether or not the statutes of this state would authorize the payment of a claim covering the services of the National Guardsmen as above stated.

We have examined the statutes of this state carefully and fail to find any provision which either directly or impliedly would authorize the payment of such a claim. Had the organization been ordered out by the Governor under the provisions of the statute authorizing the Governor as Commander in Chief to do so, the claim could most certainly be paid. However, on the above state of facts, we are of the opinion that such a claim cannot, at this time, be paid.

We would suggest that a claim for the services of the National Guardsmen in question be prepared and filed with this department for the purpose of being presented to the next session of the General Assembly under the statute authorizing such procedure.

MUNICIPALITIES: Waterworks systems may be extended and paid for out of the waterworks fund or the cost thereof may be assessed against the abutting property.

September 11, 1926. *Auditor of State:* We desire to acknowledge receipt of your letter of September 1, 1926, in which you submit to this department the following inquiry:

"This department has received the following letter from Mr. Geo. H. Sackett, City Solicitor of the city of Perry, and I am asking that you render this department an opinion as to the questions propounded therein, at your earliest convenience?

'About six months ago I was in Des Moines and talked to you about a proposed extension of the water mains of the city of Perry which the city council desired to make.

'They had instructed me to advise them how to proceed in the matter. I had advised them that they must proceed under Chapter 118 of the Acts of the 41st General Assembly, and that under this chapter it would be necessary that seventy-five per cent of the resident owners of the property subject to assessment petition for the extension and that the costs of making the extension would have to be assessed against the property owners and that they would, in turn, be reimbursed annually by rebate of the water dues until such time as the amount of the water dues rebated to them equalled the amount of the assessment and interest paid by each owner.

The matter of this extension has again been brought up before the council by the school board of Perry and by the hospital in Perry. In order to refresh your memory I will restate a few of the facts.

The high school is located at Tenth Street between Otley and Willis Avenue; the hospital is located at Fourteenth Street between Otley and Willis Avenue. Otley and Willis Avenue each run east and west. The present water main runs east on Otley about one hundred fifty feet east of Twelfth Street and ends there. The main on Willis Avenue runs about forty feet west of Fourteenth Street and ends there, leaving both of these mains with dead ends.

The council wishes to extend the main so that the Otley Avenue main will run east to Fourteenth Street and then north to Willis Avenue and connect with the Willis Avenue main, thus making a complete circuit of the water and relieving the congestion which occurs at the dead ends.

The water at the hospital and at the high school is full of sediment, in fact, it is so full of sediment that you cannot see through it at times and even when conditions are favorable it is still full of sediment. The city health physician says that the water should not be in such a condition and that it is a menace to the health of those who drink it.

The city wants to know if there are any means by which they can extend this main without assessing the other property owners. My opinion has been that they could pay for such an extension and it has been my contention that they should assess the property owners for the extension. The council says that the property owners are taxed high enough and that they do not want to assess them if there are any other means of making the extension.

At the request of the mayor and the city health physician I am writing this letter to you and asking you to advise us in regard to the matter and if possible, get the opinion of the attorney general's office on the matter.'"

Chapter 118 of the Laws of the 41st General Assembly empowers cities and towns, with certain exceptions noted in the statute, to assess the cost of extending the waterworks to abutting property. As the city of Perry is not one of the cities within the exception noted in the statute it will not be necessary to refer to such portion of the statute.

The first two sections of this statute read as follows:

"Cities and towns which own and operate waterworks *may extend the water mains and assess the cost of such extensions to abutting property* as provided in this chapter." Section 1.

"Such extension, and the assessments therefor, may be ordered only when petitioned for by seventy-five per cent (75%) of the resident owners of property subject to assessment." Section 2.

We think it clearly appears from the provisions of the statute just quoted that the authority therein granted is merely permissive and not obligatory. There is nothing in the statute to manifest or indicate an intention on the part of the legislature to make the authority therein granted exclusive and to deprive cities and towns of the authority to extend the waterworks and pay for the same out of the funds which were available for such purpose prior to the enactment of the statute.

Section 6211 of the Code of 1924, as amended by Chapter 139, Section 1, Laws of the 41st General Assembly, reads in part as follows:

"Any city or town shall have power to levy annually the following special taxes:
* * * * * * * * *

17. If the authorized water rates or rentals are insufficient to meet the expense of running, operating, and repairing the waterworks owned or operated by the city or town and the interest on any bonds issued to pay for the construction, reconstruction, repair, *or extension of such works,* not exceeding five mills, which shall be used only to pay the deficiency."

As there is nothing in Chapter 118, Laws of the 41st General Assembly, showing an intention of the legislature to make the plan therein specified exclusive, we are of the opinion that cities or towns may proceed under the former statute for the extension of the waterworks system, issue bonds therefor, levy a tax as provided in the section hereinbefore quoted and pay for the same out of the fund raised thereby. It is only necessary to follow the procedure outlined in Chapter 118 when it is deemed advisable to assess the cost thereof to abutting property.

TAXATION: If delinquent personal property tax is entered on the delinquent tax list prior to the time of the transfer to real estate, the purchaser of the real estate would take the same subject to the lien. If not on the tax list a purchaser would not take it subject to this lien.

September 11, 1926. *County Attorney, Leon, Iowa:* I wish to acknowledge receipt of your favor of the 9th in further explanation of your request for an opinion from this department of the 1st.

The proposition submitted by you in your letter of the 1st is as follows:

"Mr. Alex Ironside held a real estate mortgage against one P. H. Eivans and the same was foreclosed in the April term 1925. That the sheriff's deed was issued one year later being in 1926. P. H. Eivans had personal property upon this farm and was in possession of the same during the year 1925 up until March 1, 1926. Now the records have been made up and the Treasurer is demanding that Mr. Ironside pay in 1926 the personal tax upon the personal property of P. H. Eivans that is due for the year 1925. Is this personal tax chargeable to A. Ironside?"

In your letter of the 9th you state in substance that the treasurer is unable to collect this tax from P. H. Eivans who is at this time a non-resident of the state and that the treasurer believes that, due to the fact that the title of the real estate was in the name of P. H. Eivans January 1, 1926, the tax became due and was a lien on the real estate on January 1st, the title not passing to Mr. Ironside until June, 1926.

Section 7190, Code of 1924, provides:

"Delinquent personal tax list. The treasurer shall, after October 1st, and before December 31st, of each year, enter in a book to be kept in his office as a part of the records thereof, to be known as a delinquent personal tax list, all delinquent personal taxes of any preceding year."

Section 7192 provides:

"Lien on real estate. Personal tax entered on delinquent personal tax list, as provided in the two preceding sections, shall constitute a lien on any real estate owned or acquired by any such delinquent and so remain until the same has been paid or legally canceled, and taxes not so entered for each year shall cease to be a lien."

The statutes herein quoted plainly provide when the personal property taxes become a lien upon real estate. If the personal property tax in question was entered on a delinquent personal tax list prior to the time the title to the real estate was transferred from the delinquent personal tax owner to Mr. Ironside, then, the personal tax would be a lien upon this real estate, even though it was subsequently transferred to Mr. Ironside. If, however, the personal property tax in question was not delinquent and was not entered upon the delinquent tax list prior to the transfer of the title to the real estate from the delinquent personal property tax owner, to Mr. Ironside, then, the tax will not be a lien upon the real estate and Mr. Ironside could not be compelled to pay the same. The treasurer would have no right to assess delinquent personal property taxes against the real estate in question other than as provided in the sections quoted herein and, if he has done so, he should divide the tax so that its assessment is legal.

TUBERCULOSIS: (1) When petitions containing the names of 51% have been filed, the board must enroll the county under the county area plan; (2) If the petition is held insufficient by the board, names may be added thereto and the county enrolled under the plan if sufficient in number; (3) If a petition has been held insufficient when the same is actually sufficient certiorari is the proper remedy.

September 15, 1926. *Secretary of Agriculture:* We have received your letter of September 9, 1926, in which you submit to this department the following inquiry:

"Two questions have come up relative to the tuberculosis eradication upon which we would like to have an opinion. They will influence the present situation which is found in one or two counties and we would therefore appreciate your early consideration of these problems.

1—Can a board of supervisors act adversely in regard to a petition to enroll a county under the county area plan of tuberculosis eradication if the petition contains 51% of the cattle owners? In case a board does take adverse action by what means could it be determined whether or not the petition is sufficient and what steps should be taken?

2—Is the petition 'dead' if there are insufficient names so that the board of supervisors can not act favorably upon enrolling the county or if the board of supervisors take adverse action as indicated in question No. 1? Would it be possible to add additional names to such petition that is already on file in order to bring it up to the 51% required by law?"

Sections 2683 and 2684 of the Code read as follows:

"When any number of resident owners of breeding cattle constituting a number equal to fifty-one per cent of the number of owners of breeding cattle in said county, as shown by the last assessors' rolls, petition the board of supervisors for the establishment of a county area eradication plan, such petition including an agreement on the part of the respective signers thereof for the testing of their respective herds, as provided in this chapter, the board shall cause a notice to be published for two consecutive weeks in two official county papers of the date of the hearing on said petition, which shall not be less than five nor more than ten days after the last publication, said date to be set by the county auditor." Sec. 2683.

"If, *after such published date of hearing,* or if no objections are filed to such petition on or before such date, *the petition shall be found sufficient, the board shall make application to the secretary of agriculture for the enrollment of the county under such plan.* The application shall be accompanied by a copy of the petition and agreements, together with the action of the board thereon, duly certified by the county auditor. The secretary of agriculture, upon receiving the application, shall enroll the county under such plan." Sec. 2684.

It will be observed that the requirement for the enrollment of a county under the county area plan is that a number of resident owners of breeding cattle constituting a number equal to 51% of the owners of breeding cattle in said county as shown by the last assessor's roll petition the board of supervisors for the establishment of a county area plan. The section provides for the publication of a notice of the date of hearing on said petition.

Section 2864 of the Code provides that if, after such published date of hearing, or if no objections are filed to such petition on or before such date, the petition shall be found sufficient, the board shall make application to the Secretary of Agriculture for the enrollment of the county under such plan. What is meant by the

phrase "the petition shall be found sufficient?" There can be only one answer to this question and that is if the petition is signed by a number of resident owners of breeding cattle constituting a number equal to 51% of the number of owners of breeding cattle in the county, then the petition is sufficient; otherwise not. There seems to be no limit to the objections that may be filed. Any objections that are filed should be considered by the board but if the petition contains the names of the requisite number of owners of breeding cattle in the county, then the Board of Supervisors has no alternative in the matter and such board must make application for the enrollment of the county under such plan.

It is our opinion that if the board of supervisors refuses to make application to the Secretary of Agriculture for the enrollment of the county under such plan when the petition is sufficient those who are interested in the enrollment of the county should file an application or petition for writ of certiorari.

Section 12456 reads as follows:

"*The writ of certiorari may be granted* when authorized by law, and *in all cases where an inferior tribunal, board, or officer exercising judicial functions* is alleged to have exceeded his proper jurisdiction, or is *otherwise acting illegally*, and there is no other plain, speedy, and adequate remedy."

As the law does not provide for an appeal to the district court from the action of the board of supervisors, we believe Chapter 533 containing the provisions of the statute with reference to the action of certiorari directly applies to this situation. We are, therefore, of the opinion that someone or more of the signers of the petition should file an application for a writ of certiorari as provided in Chapter 533.

II.

In determining the second question you have submitted to us, we must keep in mind the general purpose of the statute. The evident intent of the legislature was to secure the eradication of bovine tuberculosis in the state of Iowa. Two plans for accomplishing this purpose were adopted by the legislature, each of which can only be adopted upon petitions signed by a certain number of the owners of breeding cattle in the county. The requirement for the enrollment of the county under the county area plan is, as already noted, that a petition be signed by any number of resident owners of breeding cattle constituting a number equal to 51% of the number of owners of breeding cattle in the county as shown by the last assessor's roll. When such a number has signed the petition then, as already held, it is the absolute duty of the board of supervisors to make application for the enrollment of the county under such plan. It is quite apparent that names may be added to the petition up to the time of the date of the hearing thereon and even afterward, not only for the purpose of determining the sufficiency of the petition for the enrollment of the county under the county area plan but also under the accredited area plan. We are, therefore, clearly of the opinion that even though the enrollment of the county may be denied by the board because of the insufficiency of the petition, names may be added thereto and a new hearing had at a subsequent date after publishing the required notice. The denial of the petition does not operate as res adjudicata within the ordinary meaning of the term. Such a decision by the board only means that at the time of such decision the petition is insufficient but does not preclude the board from holding at a later date that it is sufficient provided, of course, at the later date enough names are on the petition to authorize the enrollment of the county under such plan. Of course, after the denial of the enrollment of the county when names are added to the petition sufficient to equal

the 51%, the enrollment cannot be had until another notice has been published as provided in the statute and a new hearing had thereon.

WORKMEN'S COMPENSATION: Discussion of the law relative to the right of a nonresident alien dependent of an employee who was killed in the line of his employment.

September 21, 1926. *Industrial Commissioner:* We have received your letter of May 26, 1926, in which you submit to this department the following inquiry:

"I submit herewith a letter from the United States Fidelity & Guaranty Company; also letter from C. D. Royal, submitting copy of portions of a treaty between United States and the Kingdom of Italy.

"This correspondence relates to a matter of settlement in the case of non-resident alien dependency, and I would like to have your opinion as to whether or not it is safe to act upon the suggestion of Mr. Royal as to the completion of this settlement without recognition of any interest on the part of the state of Iowa under the terms of the treaty referred to."

Accompanying your letter was a communication from J. Dillard Hall, Manager of the United States Fidelity & Guaranty Company for Iowa, which contains a statement of facts with reference to the claim referred to in your letter:

"The above injury occurred on January 8, 1925, and as a result thereof the employee died in the hospital a few days later, leaving as his sole dependent, his mother, a non-resident alien and a citizen of Italy. We have established to our satisfaction that the mother was at least partially dependent on the deceased and we have an agreement with C. B. Royal as trustee under the compensation act and as consular representative to settle the case on the basis of one-third dependency.

"We understand that except in the absence of treaty that 50% of the compensation due a non-resident alien is payable to the treasurer in the State of Iowa. Mr. Royal writes us the amendment to the treaty between the United States and Italy of February 26th, 1913, providing that the rights of the citizens of the new country, including that form of protection granted by any state or national law which establishes a civil responsibility for injuries or for death caused by negligence or fault and gives the relatives or heirs of the injured body a right of action that this right shall not be restricted on account of the nationality of the relative or heir, and that the heir in this respect shall enjoy the same rights and privileges as are or shall be granted to citizens of this country. In other words that the provision for payment of 50% of indemnity to the State Treasurer does not apply to a non-resident alien who is a citizen of Italy.

"I presume that your department has had this proposition put up to you before and before consummating settlement I would like to have you advise me that we are within our rights in paying all of the compensation to the trustee."

Our inquiry is limited to the question of the right of a non-resident alien who is dependent upon an employee who was killed in the line of his employment under the Workmen's Compensation Law of this state.

Section 1392 reads in parts as follows:

"* * * *

"6. Except as otherwise provided by treaty, whenever, under the provisions of this and the two following chapters, compensation is payable to a dependent who is an alien not residing in the United States at the time of the injury, the employer shall pay fifty per cent of the compensation herein otherwise provided to such dependent, and the other fifty per cent shall be paid into the state treasury. But if the non-resident alien dependent is a citizen of a government having a compensation law which excludes citizens of the United States, either resident or non-resident, from partaking of the benefits of such law in as favorable degree as herein extended to the non-resident alien, then said compensation which would otherwise be payable to such dependent shall be paid into the state treasury."

For the purpose of determining whether the residents of Italy are entitled to

benefits of the above quoted portion of the statute a letter was written by the Royal Italian Consul General of Chicago, Illinois, and contains the following:

"With reference to your letter of the 16th inst., N. 176, I inform you that the laws of Italy do not make any difference about the nationality of a working man, who is injured or dies on account of injuries sustained while at work, in paying to him or to his heirs the compensation due from the insurance.

"Insurance of working men in Italy is obligatory, regardless of the nationality of such working men.

"With reference to my letter N. 5610 of July 12th, last, I inform you that it is up to you to make a translation of it, this office being already loaded with work."

It is, therefore, apparent we think that the laws of Italy are such as to make the above quoted portion of the statute applicable to the situation under consideration and the dependents of the Italian workmen are entitled to 50% of the compensation provided for in the statute, even though they may live in Italy. The other 50%, however, goes to the State of Iowa.

On April 12, 1926, the supreme court of the United States had under consideration Article I of the Treaty executed by the United States government and Italy. (*Liberato v. Royer*, Adv. Sheets, U. S. Supreme Court opinions, May 1, 1926, No. 12 page 470). We believe that in the preparation of this opinion we should make some reference to not only this provision of the Treaty but also the opinion just referred to. This portion of the Treaty reads as follows:

"The citizens of each of the High Contracting Parties shall receive in the states and territories of the other the most constant security and protection for their persons and property and for their rights, including that form of protection granted by any state or national law which establishes a civil responsibility for injuries or for death caused by negligence or fault and gives to relatives or heirs of the injured party a right of action, which right shall not be restricted on account of the nationality of said relatives or heirs; and shall enjoy in this respect the same rights and privileges as are or shall be granted to nationals, provided that they submit themselves to the conditions imposed on the latter."

The question involved in this case was as to whether or not the provisions of the Pennsylvania statute, which provided that "alien parents not residents of the United States shall not be entitled to any compensation" were in conflict with the provisions of the above quoted portion of the Treaty. It was held that they were not for the reason that the provisions of the Treaty relate to actions for damages caused by negligence and do not cover the compensation provided for in the Workmen's Compensation Law. We believe that this opinion is not conclusive upon the question under consideration. The Pennsylvania statute specifically provided that alien parents not residents of the United States shall not be entitled to any compensation under the act. The Iowa statute, as already seen, does provide for 50% of the amount provided in the statute unless the statutes or laws of the country in which the alien dependent lives exclude citizens of the United States from the benefits of the compensation law.

It is, therefore, our opinion that the non-resident alien beneficiaries or relatives of the Italian Cervetti are entitled to 50% of the amount provided in the statute and the state treasury is entitled to the other 50%.

MUNICIPALITIES: If it is necessary in extending an electric light plant to enter into a contract for the payment in one year of more than the anticipated revenue in the electric light fund, then it would be necessary to comply with the provisions of Chapter 319 of the Code.

September 24, 1926. *Auditor of State:* We have received a letter from E. H. Koopman, Mayor of the city of Sibley, Iowa, in which he submits to this department a certain inquiry with reference to the rights of municipalities. While the Mayor is not entitled to an opinion of this department, we have concluded to prepare an opinion for your department and mail a copy to the mayor. The letter of Mr. Koopman is as follows:

"This town has a population of about 1,900, and owns and operates municipal power and heating plants; besides, it has contracts with a number of outside towns to supply them current, which contracts have nearly all been recently sold and assigned by these outside towns to the Northwestern Light & Power Company. The business of our electric power plant has now developed to a stage where we need additional power equipment and the city council is now contemplating building an addition to the existing plant and installing a large steam unit at a total cost of approximately $30,000.00 including the addition to the building, etc. The steam engine and generator will cost $20,000.00, and the city has available cash in the sum of $10,000.00 for the purchase of said engine and generator and desires to purchase the said equipment upon credit, that is—to pay $10,000.00 down and the balance of $10,000.00 upon deferred monthly installments covering a period of one year, and the company from whom the city expects to buy this machinery is willing to enter in such installment arrangements as above stated in a written contract. This arrangement would do away with the necessity of a bond issue, which might not carry in this case. The installments are to be paid out of the electric fund of the city, of course.

The question arises, therefore, will it be legal for the town council to go ahead and purchase a steam unit of $20,000.00 on deferred payment, or the installment plan, by paying $10,000.00 down and pay the balance of $10,000.00 by monthly installments covering a period of one year? Or is the city council trying to do something indirectly what they cannot do directly under the law?"

Chapter 312, Code of 1924, Sections 6127 to 6151, both inclusive, contains the provisions of the statute granting authority to cities and towns to purchase, establish, erect, maintain and operate, within or without their corporate limits, heating plants, water works, gas works, or electric light or power plants, with all the necessary reservoirs, mains, filters, streams, and other requisites of said works or plants.

Section 6134 grants to such municipalities the power to issue bonds for the payment of the cost of establishing the same, including the cost of land condemned on which to locate them.

Section 6211, as amended, contains the following provisions:

"Any city or town shall have power to levy annually the following special taxes:

* * *

10. *Gas light, electric light, heat, or power funds.* Any city with a population of more than five thousand, not exceeding five mills, and any city with a population of less than five thousand and any town, not exceeding seven mills, which shall be used only to pay the amount due or to become due under any contract for gas light, electric light, heat, or power, including expenses of inspection.

* * *

12. *Water or gas works or electric plant bond fund.* Such number of mills as will pay for waterworks, gasworks, electric light and power plants in the periods and proportions set forth in the preceding subsection, which shall be used only to pay the principal of bonds issued for the construction or purchase of such plants.

* * *

18. *Gas or electric fund.* If the authorized rates or rentals are insufficient to meet the expense of running, operating, and repairing gas or electric light or power plants owned by the city or town, and the interest on any bonds issued to pay for the construction of such works or plants, not exceeding five mills, which shall be used only to pay the deficiency."

The above sections are amply sufficient to authorize the city to create a fund to pay the principal and interest on bonds which are issued to pay for the construction or reconstruction of the electric plants and the extensions thereto.

Section 6223, Code of 1924, permits municipalities to borrow money or issue warrants, but this right is limited to the making of such loans or issuing such warrants in anticipation of its revenues for the fiscal year in which such loans are negotiated or warrants issued. It is also provided therein that the aggregate amount of such loans and warrants shall not exceed the estimated revenue of such corporations for the fund or purpose for which the taxes are to be collected for such fiscal year.

Chapter 319, Sections 6238 to 6251, both inclusive, relates to the creating of indebtedness for the purpose of purchasing, erecting, extending, reconstructing or maintaining and operating electric light plants. To exercise the right therein granted certain provisions of the statute must be complied with. We are clearly of the opinion that if it is necessary under the plan outlined in the letter of the mayor of the city of Sibley to enter into a contract for the payment in one year of more than the anticipated revenue in the electric light fund created for such purpose, then it will be necessary to comply with the provisions of Chapter 319 of the Code of 1924. We think, however, that if the city has in its electric light fund available for such purpose the sum of $10,000.00, then this money may be expended for the purchase of the engine and generator described in the mayor's letter. However, the incurring of a larger indebtedness is clearly illegal if by doing so the amount of the indebtedness exceeds the anticipated revenue of the electric light fund for the year in which the contract is entered into.

BANKS—TAXATION: (1) The property of a bank must be taxed to the stockholders; (2) The board of supervisors has no authority to accept a smaller sum than the amount due in full satisfaction of bank taxes until the property has been offered for sale for two consecutive years.

September 24, 1926. *County Attorney, Charles City, Iowa:* We have received your letter of September 15, 1926, in which you submit to this department the following inquiry:

"A question has arisen in Floyd County regarding tax on the stock in banks which have been closed for the last year in which they operated. The stockholders have employed counsel to prevent the collection of this tax. Counsel for these stockholders have approached me on an adjustment of the amount. Does the Board of Supervisors have power to adjust a personal property tax accepting a smaller sum in full of the amount due? The tax in question was for the year 1924, the year in which the bank failed, it being the Rockford State Bank of Rockford, Iowa."

For the purpose of determining the questions submitted to us we are assuming that the bank made the usual statement required by Sections 6997 and 7001, at the proper time, and that the assessment was made on the basis of such statement.

It has been held by the supreme court that the assessor in assessing the property of banks, which, of course, include incorporated and private banks, is merely required to make computation from the statement furnished to him and must in the performance of his duties as assessor assess the shares of stock thereof in accordance with the computation actually made and, therefore, performs purely ministerial duties.

First National Bank v. Hayes, 186 Iowa, 892 (902);
Security Savings Bank v. Board of Review, 198 Iowa, 463 (469);
Langhout v. First National Bank of Remsen, 191 Iowa, 957;
First National Bank v. Anderson, 196 Iowa, 589.

We are also assuming that the bank failed after the assessment was made or, at least, failed after the first day of January in the year in which the assessment was made. Therefore, in our opinion, the assessment of the property of the bank to the stockholders was legal and binding upon them. We now turn to the discussion

of the question of the right of the Board of Supervisors to adjust the personal property tax by accepting a smaller sum in full satisfaction of the amount due.

Chapter 148 of the Laws of the 41st General Assembly contains the following provisions:

"When any property in this state has been offered by the county treasurer for sale for taxes for two consecutive years and not sold, or sold for only a portion of the delinquent taxes, then and in that event the board of supervisors of the county is hereby authorized to compromise the delinquent taxes against said property antedating any tax sale certificate; or being a part of the taxes due for the year for which such property was sold for taxes, and may enter into a written agreement with the owner of the legal title or with any lien holder for the payment of a stipulated sum in full liquidation of all delinquent taxes included in such agreement. A copy of such agreement shall be filed with the county treasurer and county auditor and when payment is made, as by such agreement provided, all taxes included in such agreement shall be thereby fully satisfied and cancelled and the county auditor and county treasurer shall cause their books to show such satisfaction."

It will be observed, therefore, that the Board of Supervisors is not authorized under the provisions of the above statute to compromise the delinquent taxes until the property upon which the same is a lien has been offered by the county treasurer for sale for taxes for two consecutive years and not sold, or sold for only a portion of the delinquent taxes. We know of no other statute authorizing the compromise and settlement of the taxes levied against any person or his property.

We are, therefore, of the opinion that the Board of Supervisors of Floyd County has no authority to accept a smaller sum than the amount due in full satisfaction of the taxes.

TRIALS—JURORS—MILEAGE: Discussion of the amount of mileage to which jurors are entitled to receive in the district courts.

September 25, 1926. *Auditor of State:* We have received a letter from H. W. Henderson, clerk of the district court of Woodbury County, Iowa, in which he submits to this department a certain inquiry with reference to the fees that should be paid to jurors in the district court. While the clerk of the district court is not entitled to an opinion from this department we have concluded to prepare an opinion on this question for your office and mail a copy thereof to the clerk of the district court. Mr. Henderson's letter is as follows:

"Will you kindly give this office an opinion on the following proposition:
"Section 10846 of the Code of 1924, provides for the fees that Petit Jurors shall receive.
"In the volume of Annotations, there is a decision given which prohibits the payment of fees to jurors for any period during which the jurors may have been excused by the court. That is, if the jury panel is excused by the court for a couple of days,and is ordered to return after that, they are not to be paid for the two days for which they have been excused.
"What we wish an opinion on, is the proposition of whether or not the jurors are entitled to receive another mileage award for returning to court after their absence by excuse. As we have always understood it, when the jurors are on duty steadily, they are only entitled to receive mileage for the first day that they report. When the jurors are temporarily excused, however, and go to their homes and then return to court to resume their duties, we cannot find any law or precedent, however, which would guide us in the matter of determining as to whether or not they are entitled to receive another mileage award."

The section of the statute providing the fees that shall be paid for jurors is Section 10846, Code of 1924, and reads as follows:

"Jurors shall receive the following fees:
1. For each day's service or attendance in courts of record, including jurors

summoned on special venire, three dollars, *and for each mile traveled from his residence to the place of trial, ten cents.*

2. For each day's service before a justice of the peace, one dollar.
3. No mileage shall be allowed talesmen or jurors before justices."

It will be observed that the statute fixes a mileage to be paid to a juror at the sum of ten cents for each mile traveled from his residence to the place of trial. While the supreme court, so far as we have been able to discover, has never passed upon this question, we are inclined to think that with certain limitations a juror may be entitled to receive more than one mileage for a term of court. Mileage is allowed not as a compensation for services rendered, but for the purpose of reimbursing the juror for the expense of going from his home to the place of holding court and returning to his home after he is finally discharged. If at the end of a week the jurors are excused until the following week this is a necessary incident of their services as jurors and they would not be entitled to mileage for returning to their homes and then returning to the place of trial the following week. They may or may not, as they so desire, return to their homes. However, if for any cause the jurors are discharged or excused for a stated period and then required to return to the county seat for further services as such jurors they clearly would be entitled to the mileage provided in the statute. This is upon the theory that they are ready to remain in attendance at court and to discharge their duties as jurors and that during the time they are discharged or excused they receive no compensation whatever. Under such a contingency we believe they are entitled to additional mileage for attendance as jurors.

On July 25, 1924, the Attorney General prepared an opinion upon the right of members of the legislature to receive additional mileage when they were compelled to attend the further special session of the legislature after several months adjournment or recess. It was held in this opinion that the members of the legislature were entitled to such additional mileage. This opinion is, of course, not exactly in point but by analogy it applies to and rules the situation under consideration.

We have stated our conclusions in a general way. Because of the character of the question submitted to us we cannot answer it in a more definite or conclusive way. When the question of the right of the jurors to receive additional mileage arises the matter should be submitted to the district court for such an order as it deems it advisable to make. The court is in possession of the facts and knows the reason for excusing or temporarily discharging the jury and he is in a much better position to determine this question in each case than this department or the clerk of the district court.

MUNICIPALITIES: Bonds issued for a sewage disposal plant may not be paid out of the sewer fund.

September 27, 1926. *Auditor of State:* We have received a letter from Honorable W. G. Ray, Mayor of the City of Grinnell, in which he submits to this department the following inquiry:

"We are figuring here on erecting a new disposal plant for our sewer system. Can you tell us whether when we issue bonds we can provide payment for them out of both the sewer fund and the sewage disposal fund?"

As Mr. Ray is not one of the public officials who are entitled to opinions by this department we have concluded to prepare an opinion for your department and mail a copy thereof to Mr. Ray.

Section 6211, as amended, provides in part as follows:

"Any city or town shall have power to levy annually the following special taxes:
* * * * * * * *

"5. *Sewer fund.* If the city or town comprises one sewer district, not exceeding five mills, which shall be used only to pay for deficiencies in assessments as provided by law, and for the construction, reconstruction, and repair of any sewer at the intersection of streets, highways, avenues, alleys, and for one-half the cost of such sewer at the intersections of streets, highways, avenues, and alleys not crossing, and for spaces opposite property owned by the city or town and by the United States, and for the whole or any part of the construction, reconstruction, or repair of any sewer within the limits of said city or town, and for the maintenance and operation of any sewage disposal plant serving said sewer district.

"6. *District sewer fund.* Within a sewer district, not exceeding five mills, which shall be used only to pay all or any part of the cost of construction, reconstruction, or repair of any sewer located and laid in that particular district, and to maintain and operate any sewage disposal plant serving such district. The funds created by this and the preceding subsection may be used to secure control of streams and surface waters flowing into sewers, sewer outlets, and disposal plants.

"7. *Sewer outlet and purifying plant fund.* Not exceeding five mills, which shall be used only to construct sewer outlets and sewage purifying plants and to purchase dump grounds. The levy made under this subsection shall not be considered a part of the levy for sewer funds under the two preceding subsections. * * *"

The sewer fund which is created under the provisions of subsection 5 may be used for the following purposes: (1) to pay for deficiencies in assessments for sewers; (2) for the construction, reconstruction and repair of any sewer at the intersection of streets, highways, avenues, alleys, and for one-half the cost of such sewer at the intersections of streets, highways, avenues, and alleys not crossing, and for spaces opposite property owned by the city or town and by the United States; (3) to pay for the whole or any part of the construction, reconstruction or repair of any sewer within the limits of said city or town; (4) for the maintenance and operation of any sewage disposal plant serving such district.

It will be noted that the said fund may be used only for the maintenance and operation of any sewage disposal plant serving said sewer district but not for the construction or erection of the sewer disposal system. The district sewer fund may be used for the following purposes only: (1) to pay all or any part of the cost of construction, reconstruction or repair of any sewer located and laid in the district; (2) to maintain and operate any sewage disposal plant serving such district. This fund may also be used for the purpose of securing the control of streams and surface waters flowing into sewers, sewer outlets, and disposal plants. It will also be observed that this fund may be used only for the maintenance and operation of any sewage disposal plant serving such district and not the cost of the construction or erection thereof. The sewer outlet and purifying plant fund provided for in subdivision 7 may be used only to construct sewer outlets and sewage purifying plants, and to purchase dump grounds. It is, therefore, obvious that each of these three funds is separate and distinct from the others and that one of said funds may not be used for the purposes for which the other two funds are raised. This is made certain, we think, by the provisions of subdivision 7 that "The levy made under this subsection shall not be considered a part of the levy for sewer funds under the two preceding subsections."

We, therefore, hold that bonds issued for a sewage disposal plant or purifying plant may not provide that the same shall be paid out of both the sewer fund and the sewage disposal fund. They may be made payable only out of the latter fund.

MUNICIPALITIES—TAXATION: (1) Discussion of the right of a city to levy an emergency tax and the use of such fund. (2) Discussion of the law with reference to the levying of the improvement fund and a roadway district fund by municipalities and the purposes of each.

September 27, 1926. *Auditor of State:* We received a letter from Mr. Walter P. Jensen, City Attorney at Waterloo, Iowa, in which he submits to this department two inquiries. As the questions submitted are of considerable importance we have concluded to prepare an opinion for your department and mail a copy to the city attorney. His letter submitting the questions is as follows:

"Will you kindly give me your opinion on the following matters:

1. Can the city of Waterloo legally levy an emergency fund as such under the provisions of Section 373 of Chapter 24 of the Code and use such funds for any emergency that may arise or does the law contemplate that this levy must refer to some particular use and be so specified in the levy? Representatives of the railroad companies are making objections to this levy and we wish to keep within the law in reference to it.

2. Section 6042 of the Code provides for a levy of a tax for street improvement purposes and Section 6043 provides for a levy for the purpose of construction or preparing a roadway within an assessment district where a part of such costs is to be paid by the city. Will you kindly inform me whether in your opinion such roadway district fund as provided for in Section 6043 may be levied in addition to the limit provided for in the improvement fund or whether it must be included in determining whether the limit has been reached in the improvement fund?"

Section 373, referred to in Mr. Jensen's letter, reads as follows:

"Each municipality may include in the estimate herein required an estimate for emergency or other expenditure which amount can not reasonably be foreseen at the time the estimates are made, and such emergency fund shall be used for no other purpose."

It will be noted that the statute does not provide for what purpose such fund may be used except that it must be used for an emergency. We believe this fund may be used for any purpose for which the city may be required to expend its funds provided, of course, that an emergency exists for the use of said fund for any municipal purpose. Of course, as long as there is money in any fund of the city or municipality the emergency fund may not be used for the purpose for which said fund is created. We believe that it is not necessary to state in the estimate or the proposed budget the exact purpose for which said fund may be used. Manifestly, such fund is created for the purpose of meeting an emergency that may arise in the city and is not limited to any particular fund.

An emergency is defined by Webster's Unabridged Dictionary as follows:

"Sudden or unexpected appearance or occurrence; unforeseen occurrence or combination of circumstances which calls for immediate action or remedy; pressing necessity; exigency."

This fund, therefore, is created for the purpose of meeting the expenses or cost of the municipality for some purpose or necessity that could not be foreseen, or for some sudden occurrence or combination of circumstances which calls for immediate action. The use of the fund is, therefore, limited to an expenditure for such purposes.

II.

Sections 6042 and 6043 read as follows:

"When the whole or any part of the cost of the construction or repair of any street improvement shall be ordered paid from the improvement fund, the city shall have the power, after the completion of the work, by resolution to levy at one time such cost upon all the taxable property within such city, and determine the whole percentage of tax necessary to pay the same, and the percentage to be paid each year, not exceeding the maximum annual limit of said taxes, and the number of years not exceeding ten, given for the maturity of each installment thereof." Sec. 6042.

"When part of the cost of constructing or repairing a roadway within an assessment district is to be paid by the city, it may levy an annual tax for such purpose upon all the taxable property in such city, except moneys and credits, but the aggregate of all such levies shall not exceed ten mills; except that in cities having a population of fifty thousand or more, such levies shall not exceed fifteen mills in the aggregate." Sec. 6043.

These sections provide for the levying of two separate and distinct funds as follows: first, the improvement fund which may be used to pay the entire cost of the construction or repair of any street improvement, or a part of the cost thereof; second, roadway district fund which may be used only for the cost of constructing or repairing a roadway within an assessment district.

Section 6212, as amended, provides for the levying of an improvement fund not to exceed five mills. It is provided that, with the exception of cities having a population of 50,000 or more, the levies provided for in said sections shall not exceed ten mills.

It is, therefore, our opinion that the tax of ten mills is a limit on the amount that may be levied for both funds and that the roadway district fund is in addition to the limit provided for the improvement fund in Section 6211. The limit, however, in cities having a population of 50,000 or more is 15 mills in the aggregate. As Waterloo is a city of less than 50,000 inhabitants this portion of the section does not apply.

TAXATION: Discussion of the law with reference to the assessment of corporation shares of stock.

September 29, 1926. *Auditor of State:* We have carefully considered the questions contained in the letter of the Corporation Trust Company of New York City to your department, dated September 13, 1926. We will answer such questions in the order in which they appear therein:

1—Although Sections 6984 and 6985, providing for the assessment of a tax upon moneys and credits and corporation shares of stock, are not contained in Section 7007 of the Code, yet there is a special statute covering, as we view it, the assessment of moneys and credits in special charter cities. This statute is Section 6865, the latter part of which deals with the assessments of moneys and credits in special charter cities. This section is in the statute which relates to special charter cities only. It is Chapter 329, Code of 1924.

2—Under the provisions of Section 7008, Code of 1924, corporation shares of stock shall be assessed at the value of the shares of stock on the first day of January of each year. The matters referred to in the letter of the Trust Company are, of course, to be taken into consideration in determining the value thereof. However, none of them are absolutely controlling, and each must be considered in fixing the value thereof. We know of no rules or opinions of the supreme court covering the second question contained in the letter. The essential thing is to arrive at the true value of the stock on the first day of January of the year in which the assessment is made and any information that may assist in arriving at this value may be considered by the assessor or the board of review.

3—It will be observed that under the provisions of Section 7008, Code of 1924, "In arriving at the * * * of such corporations, the amount of their capital actually invested in property other than moneys and credits shall be deducted from the

actual value of such shares. Such property other than moneys and credits shall be assessed as other like property."

It is our opinion that the amount of moneys and credits on hand enter into the fixing of the value of such stock. Therefore, it will not be necessary for the corporations covered by Section 7008 to pay a tax on the moneys and credits as distinct from the tax on the stock itself.

In answer to this second question we will say that under the statute merchandise and manufacturing corporations are assessed in a different manner from the corporations, the assessment of which is provided for in Section 7008. Under the laws of this state the property of some corporations is assessed to the stockholders and the property of other classes of corporations is assessed to the corporation itself. Our statute recognizes that there are two species of property of a corporation that may be taxed: first, the capital stock thereof; and second, the property of the corporation itself. In the case of *Judy v. Beckwith*, 137 Iowa, 24, it was held that there is a distinction between the capital stock of a corporation and the shares of its capital stock, and each represent different property rights which are the subject of taxation. It has, however, never been the policy of this state to tax both species of property. As already stated, the property of some corporations is assessed through the stockholders and in others is taxed to the corporation itself.

We believe that under the provisions of the statute Sections 6971 and 6972, merchandise and manufacturing corporations must be assessed upon all the property they own, which includes money and credits, accounts and also ordinary stock on hand. We believe that a mere reading of the statute will show that this conclusion is correct.

4—What we have said in the preceding subdivision of this opinion will equally apply to the last questions contained in the letter of the Trust Company. It was the intention of the legislature in enacting subdivision 20 of Section 6944 to exempt the stock of corporations engaged in merchandising and manufacturing from taxation for the reason that the statutes provide that the property of such corporations shall be assessed to the corporation itself and not to the stockholders. This is a clear confirmation of our former statement that it has never been the policy of this state to tax both species of property in corporations.

TAXATION: Bank stock owned by a public library is exempt from taxation.

October 6, 1926. *County Attorney, Red Oak, Iowa:* I wish to acknowledge receipt of your favor of the twenty-ninth in which you request our opinion in substance as to whether or not the Red Oak Public Library is required to pay taxes upon bank stock owned by it in the Red Oak Trust and Savings Bank. It appears that the income from the stock in question is devoted solely to sustaining the library and used for the purpose of purchasing books and for other library purposes.

Paragraphs 8 and 10 of Section 6944, Code of 1924, are as follows:

"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. *Moneys and credits—property of 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."

Under the provisions of Section 10 above quoted, it clearly appears that the bank stock which is personal property would, under the facts stated by you, be entitled to the exemption.

MOTOR CARRIER: The penalty prescribed by statute cannot be waived by the Board of Railroad Commissioners.

October 6, 1926. *Chairman, Board of Railroad Commissioners:* We wish to acknowledge receipt of your favor of the fourth in which you request our opinion as follows:

"Permit me to call your attention to Section 7, Chapter 4, Laws of the 41st General Assembly, which provides when taxes on motor carriers shall be paid and provides for the assessment of the penalties if payment of taxes is not made for the month on or before the fifteenth day of the following month.

Frequently there are cases for instance where the money is not received until the 16th or 17th. Sometimes this has been due to mere oversight on the part of the motor carriers and in the recent case, due to the failure to have the check certified, although it had been made out about ten days before the 15th of the month. By the time in this latter case they had the check certified, it was the 17th before the money was received here.

Where there has been an honest sincere effort to make payment promptly and due to some oversight or accident the money is not received here or was not mailed on the 15th, the Board would like to, if it is within its power so to do, grant relief from the 25% penalty. Can we do so under the statute?"

Section 7 of Chapter 4 to which you refer, reads as follows:

"On or before the last day of each month, the commission shall notify all motor carriers of the amount of the tax due from them for the preceding month, which shall be computed by multiplying the total number of ton-miles operated by the appropriate rate of taxation as herein prescribed and shall be paid to the commission on or before the fifteenth (15) day of the following month. If payment is not made upon the said date there shall be added as a penalty a sum equal to one-fourth of the amount of the original tax, if paid within thirty (30) days of such delinquency. Taxes and penalties shall be a first lien upon all the property of the motor carrier. If payment is not made on or before sixty (60) days from the date when the tax is payable, the property of the carrier, or so much thereof as may be necessary, may be sold to satisfy the said taxes and penalty, interest and costs of sale."

The language of the statute is plain and unambiguous. It leaves no room for interpretation and furthermore, leaves nothing to the discretion of the Board of Railroad Commissioners in regard to the assessment of the penalty. The statute fixes the time when the penalty becomes effective. There is no provisions authorizing the board to extend this time for any period.

If the statute were to be construed that the board might extend the period within which the tax can be paid, for one day past the fifteenth of the month, when the tax is due, then the board would have authority to extend the period for thirty days or for any other length of time. This statute will not bear such a construction.

It is the duty of the carrier to see that the tax is paid on or before the time due. The responsibility rests upon him and he should provide ample time for any delays which might arise.

We are of the opinion that the Board of Railroad Commissioners has no authority to grant relief from the penalty prescribed by the statute under the circumstances related in your request.

SCHOOLS—SCHOOL DISTRICTS: The bare fact of marriage does not disqualify a person otherwise qualified to attend school.

October 6, 1926. *Superintendent of Public Instruction:* You have requested an opinion of this department upon the following question:

Does the fact that a girl is married and leaves school prior to reaching her major-

ity bar her from school attendance in a public high school; and does the Board of Education have authority to adopt a rule that marriage disqualifies a person otherwise qualified to attend such school?

It is provided by statute that persons between five and twenty-one years of age shall be of school age. It is, however, provided that the board may exclude any child whose presence in school may be injurious to the health or morals of any pupils or welfare of such school, or, for a violation of the regulations or rules established by the board, or, when the presence of the scholar is detrimental to the best interests of the school.

In interpreting the above statutes, the court has held that an unreasonable rule cannot be enforced.

Perkins v. Board, 56 Iowa 476;
Murphy v. Board, 40 Iowa 429;
Kinzer v. Board, 129 Iowa 441.

It is our opinion that a rule forbidding the attendance at a public school of persons upon the bare fact of marriage is unreasonable and, therefore, unenforcible.

ELECTIONS: Discussion of the duties of the county auditor under the absent voter's law.

October 7, 1926. *County Attorney, Ottumwa, Iowa:* We have received an oral request from Mr. Ole Michaels of Ottumwa for an opinion upon the question of the rights and duties of the county auditor under the absent voter's law. On account of the importance of the question submitted we have concluded to prepare an opinion for your department upon this question and mail a copy to Mr. Michaels.

It is provided in Section 928 that any voter who is entitled to avail himself of the absent voter's law under the provisions of Section 927 may on any day not Sunday or a holiday and not more than twenty days prior to the date of election make application to the county auditor for an official ballot to be voted at such election. It is also provided in Section 935 that it is the duty of the auditor upon receipt of such application and immediately after the ballots are printed to mail to said applicant, postage prepaid, such official ballot or ballots as such applicant would have the right to cast at such election. Under the provisions of Section 936, if the voter is absent from the county and requests said application by letter, or someone makes the request for him, after the ballots are printed, then the auditor may send to such voter both the application and ballot at the same time. It is also provided in the statute that if the qualified elector applies in person at the office of the county auditor such officer shall deliver said ballot or ballots to such elector. In such case, however, the ballot shall be immediately marked, enclosed in the ballot envelope with proper affidavit thereon and returned to said officer. Under the provisions of Section 938, it is made the duty of the auditor to fold said ballot or ballots in the manner in which they are required to be folded when voted, and to enclose the same in an unsealed envelope to be furnished by him, which envelope shall bear upon the face thereof the name, official title and postoffice address of the auditor.

Section 945 reads as follows:

"In case said voter's ballot is received by the auditor or clerk prior to the delivery of the official ballots to the judges of election of the precinct in which said elector resides, such ballot, envelope, and application, sealed in the carrier envelope, shall be inclosedin such package and therewith delivered to the judges of such precinct."

It will be observed that the above section requires the auditor to enclose in a package and deliver the absent voter's ballots to the judges of such precinct in the event said ballots are received before the delivery of the election supplies to the judges of election.

Section 946 reads as follows:

"If said voter's ballot be received after the time specified in the preceding section, said receiving officer shall at once mail said carrier envelope, postage prepaid, to said judges. Said officer may, in person or by deputized agent, personally deliver said envelope to said judges, if he can so do without expense to the county, city, or town."

This section is limited entirely to the duties of the auditor with relation to the absent voter's ballots that are received after the election supplies are delivered to the judges of election. In view of the fact that there is a maximum but not a minimum limit to the time the ballots may be delivered by the county auditor, the same may be delivered on election day provided the said ballots may be marked, returned and delivered to the judges of election before the polls close. There are no other provisions of the statute imposing any duty or duties upon the county auditor with reference to the delivery of absent voter's ballots.

We are clearly of the opinion that it is not the duty of the county auditor to deliver absent voter's ballots in person on election day. However, in the event a person is ill or physically disabled to vote he may secure a ballot of the county auditor through an agent who may take the application to the auditor, receive the ballot, take it to the voter and after it has been marked by the voter return the same to the county auditor who may then either in person or by deputized agent deliver said ballot to the judges of election in the precinct where the voter resides. The county auditor may not be required to deliver the ballot in person to the voter. It is his duty to remain in his office so as to deliver the ballots to the agent of any person who desires to receive the same.

INSURANCE: Funds deposited with the commissioner of insurance may not be invested in Illinois Special Improvement Bonds.

October 7, 1926. *Commissioner of Insurance:* We desire to acknowledge receipt of your favor of July 22, 1926, in which you submit to this department the following inquiry:

"I would request the opinion of your department as to whether or not Illinois Special Improvement Bonds are qualified and meet the requirements as laid down in Section 8737 of the code of Iowa, 1924, Section 3 thereof.

"The question referred to herein is with reference to Illinois Special Improvement Bonds only, and without reference to like bonds of other states."

Chapter 401 of the Code, 1924, in which is found Section 8737 as amended applies to life insurance companies and associations. Section 8737 as amended by chapters 165 and 175 of the Laws of the Forty-first General Assembly reads in part as follows:

"The funds required by law to be deposited with the commissioner of insurance by any company or association contemplated in chapters 398 and 400, and the funds or accumulations of any such company or association organized under the laws of this state held in trust for the purpose of fulfilling any contract in its policies or certificates, shall be invested in the following described securities and no other:

"1. Federal bonds. The bonds of the United States.

"2. State bonds. The bonds of this state or of any other state when such bonds are at or above par.

"3. Municipal bonds. Bonds or other evidences of indebtedness of any county, city, town or school district within this state or any other state, drainage district bonds of this state, improvement certificates issued by any municipal corporation of this state, such certificates being a first lien upon real estate within the corporate limits of the municipality issuing the same, where such bonds or other evidences

of indebtedness are issued by authority of and according to law and bearing interest and are approved by the commissioner of insurance.

"4. Real estate bonds and mortgages. Bonds and mortgages and other interest-bearing securities being first liens upon real estate within this state or any other state worth at least double the amount loaned thereon and secured thereby exclusive of improvements, or two and one-half times such amount including the improvements thereon, if such improvements are constructed of brick or stone.

"No such improvements shall be considered in estimating the value unless the owner shall contract to keep the same insured in some reliable fire insurance company or companies authorized to do business in the state, during the life of the loan, in a sum at least equal to the excess of the loan, above one-half the value of the ground exclusive of the improvements, the insurance to be made payable in case of loss to the company or association investing its funds, as its interests may appear at the time of loss.

"Before a company or association may invest any of its funds in such securities as are specified in this subdivision of this section in any state other than the state of Iowa it shall first obtain consent of the commissioner of insurance so to do.

"Any mortgage lien upon real estate shall not, for the purposes of this section be held or construed to be other than a first lien by reason of the fact that drainage or other improvement assessments may have been levied against the real estate covered by said mortgage, whether the installments of said assessment be matured or not, provided that in determining the value of said real estate for loan purposes, the amount of the drainage or other assessment tax unpaid, shall be deducted.

"5. Policy loans. Loans upon its own policies, where the same have been in force at least two full years, in an amount not exceeding the net terminal reserve. If such loan is made, the company must describe in the note or contract taken, the amount of the loan, the name of the borrower, the number of the policy, and the terms of such note or contract shall make the amount loaned a lien against such policy and such note or contract shall be numbered, dated, and signed, giving the postoffice address of the insured.

"6. Real estate. Any such real estate in this state as is necessary for its accommodation as a home office; and in the erection of any building for such purposes, it may add thereto rooms for rent.

"Before any company or association shall invest any of its funds, in accordance with the provisions of this subdivision, it shall first obtain the consent of the executive council."

It will be noted that sub-division 3 of the statute prescribed three different classes of what are denominated municipal bonds. They may be stated as follows:

First: Bonds or other evidences of indebtedness of any county, city, town or school district within this state or any other state;

Second: Drainage district bonds *of this state;*

Third: Improvement certificates issued by *any municipal corporation of this state.*

There can be no misunderstanding as to the meaning of this subdivision of the statute. Insurance companies, under this statute, may invest their funds in drainage district bonds and improvement certificates only when issued by municipal corporations or drainage districts in this state. The phrase "or any other state" only relates to the bonds or other evidences of indebtedness of any county, city, town or school district as distinguished from drainage district bonds and improvement certificates. It is, however, the claim that on account of the peculiar provisions of the Illinois Special Improvement or Assessment statutes the bonds or other evidences of indebtedness issued under such statute may be properly classified as municipal bonds or other evidences of indebtedness within the meaning of the phrase as found in the third subdivision of Section 8737, as amended. To determine this question resort must be had to the provisions of the Illinois statute. We have a summary of the sections of such statute. Reference to several of the sections in this statute will show the fallacy of this claim. Unless the municipality constructing the improvement is primarily liable for the cost of said improvement, then such bonds or certificates will not come within the meaning of municipal bonds or certificates but will be properly classified as improvement certificates. Section 83, as disclosed by the summary thereof which we have in our possession, provides that no member of the Board of Local Improvements, nor the municipality, shall be liable for any expense or delinquency of persons or property. Section 57 provides for a new assessment in the event any special assessment or special tax has heretofore been, or shall hereafter be annulled by the city council or board of trustees or set aside by any court or declared invalid or void for any reason whatsoever. Section 60 of the Illinois Statute reads as follows:

"If from any cause any city, village or town shall fail to collect the whole or any portion of any special assessment or special tax which may be levied, which shall not be cancelled or set aside by the order of any court, for any public improvement authorized to be made and paid for by a special assessment or a special tax, the city council or board of trustees may, at any time within five years after the confirmation of the original assessment, direct a new assessment to be made upon the delinquent property for the amount of such deficiency and interest thereon from the date of such original assessment, which assessment shall be made, as nearly as may be, in the same manner as is herein prescribed for the first assessment. In all cases where partial payments shall have been made on such former assessments, they shall be credited or allowed on the new assessment to the property for which they were made, so that the assessment shall be equal and impartial in its results. If such new assessment prove insuffcient, either in whole or in part, the city council or board of trustees may, at any time within said period of five years, order a third to be levied, and so on in the same manner and for the same purpose; and it shall constitute no legal objection to such assessment that the property may have changed hands, or been encumbered, subsequent to the date of the original assessment."

It is quite apparent that it was the intention of the Illinois Statute to require the payment of the cost of all special assessment projects from the assessments levied against the property benefited by the construction of such improvement and that the municipality shall be in no way primarily or secondarily liable therefor. Of course, under the Illinois statute the municipality may be liable for the same in the event that it fails to comply with the statutes relating to the making of the assessment and for this reason the assessment against the property benefited is of no validity whatever.

We, therefore, hold that insurance companies in this State may not invest their funds in Illinois special improvement bonds, or any improvement bonds of any other state. We have not overlooked the memorandum of the proceedings involved in the case of *Burlington Savings Bank v. The Town of Cicero, City of Berwyn, Village of Oak Park, and City of Chicago* in the Circuit Court of the United States, Northern District of Illinois, Eastern Division, at the October Term 1908, which is attached to the summary of the Illinois statute. We do not have the pleadings in that case before us but we gather from the summary thereof the following facts:

"The facts were that the complainant had purchased several thousand dollars of the bonds issued by the Town of Cicero on a local improvement, the assessment for which had become deficient and two supplemental assessments had been spread upon the property and nearly all collected. There were some forfeitures of property to the town because of non-payment of the assessments. The Town of Cicero prepared exhaustive briefs in the endeavor to protect the town against a general judgment. The fact showed that had all of the collections been applied to the payment of the bonds, there would have been sufficient money in the fund for their redemption.

"The Court held that the complainant was entitled to equitable relief and entered a judgment against the Town of Cicero for the amount claimed with interest. This judgment was entered by Judge Kohlsaat June 13, 1911, for $15,000."

It is quite evident that the amount of special assessments collected was sufficient to pay the bonds but that they were not paid because such money was not applied to such purpose. The city, therefore, was evidently made liable, not because such city was primarily liable on the bonds, but because of a misapplication of the funds that were collected for the purpose of paying the bonds. This judgment does not support the claim that such bonds are municipal bonds within the meaning of the Iowa statute.

INSURANCE: A foreign insurance corporation does not have the right to file a schedule of policy loans in lieu of other securities.

October 7, 1926. *Commissioner of Insurance:* We wish to acknowledge receipt of your favor of the Fifth with the attached photographic copy of the agreement made between the Standard Life Insurance Company of Decatur, Illinois, and the Provident Life Insurance Company of Des Moines, Iowa. You request our opinion in the matter as follows:

"Under and by virtue of the contracts entered into by and between the Standard Life Insurance Company of Decatur, Illinois, and the Provident Life Insurance Company of Des Moines, Iowa, and a similar contract entered into by and between the Standard Life Insurance Company of Decatur, Illinois, and the Standard Life Insurance Company of Des Moines, Iowa, the Standard Life Insurance Company of Decatur being known at the time said contracts were entered into as the Protective League Life Insurance Company of Decatur, Illinois; the said contracts above referred having been entered into in the years 1918 and 1920; subsequently on December 27, 1924, the Standard Life Insurance Company of Decatur, Illinois, and the International Life Insurance Company of St. Louis, Missouri, were consolidated.

"I am attaching hereto a copy of the contract by and between the Standard Life Insurance Company of Decatur, Illinois, and the Provident Life Insurance Company of Des Moines, Iowa, and call your attention particularly to Item 4 thereof. The contract by and between the Standard Life of Decatur and the Standard Life of Des Moines is identical insofar as Paragraph 4 is concerned. Under and by virtue of said Paragraph 4, the International Life Insurance Company of St. Louis now has on deposit with the Insurance Department of Iowa $1,575,300.00. The International Life Insurance Company of St. Louis now has in force policy loans on the business of the said Provident Life Insurance Company and Standard Life of Des Moines, approximately $307,000.00, and the said International Life Insurance Company of St. Louis has requested this department to accept such policy loans in lieu of securities now on deposit under and by virtue of Chapter 163 of Acts of the Forty-first General Assembly.

"Your opinion is requested as to the legality of such request."

Paragraph Four of the contract referred to reads as follows:

"Fourth: The said Party of the First Part hereby agrees to maintain on deposit with the Insurance Department of the State of Iowa securities to cover the net cash value of all the Life Insurance Policies assumed under this contract as long as such policies remain in force in accordance with their terms on the books of the said Party of the First Part, all in accordance with the Statutes of the State of Iowa governing such deposits of domestic companies."

Chapter 163, Laws of the Forty-first General Assembly amends Section 8655, Code of 1924, with reference to deposits by life insurance companies to cover the valuation of policies. The amendment referred to adds to this section the following:

"In lieu of the policy loan agreement and policy, or either, any Iowa company may file a verified statement of such policy loan, giving date of same, name of insured, number of policy and amount of loan, with any interest added thereto in accordance with its terms. The company shall, when a list of policy loans has been filed by it, furnish to the commissioner on the first day of each month, a verified report as to any cancellations or additions to such loans during the preceding month. Such lists shall be taken and considered as a security to be deposited under the provisions of Section eight thousand seven hundred forty-one (8741), and shall be checked at least quarterly by the commissioner of insurance."

It will be noted that by the express language of this statute it is made applicable only to Iowa companies. The International Life Insurance Company of St. Louis is not an Iowa company, and in the absence of the language used in paragraph four of the contract hereinbefore referred to, they would not claim any right to file the statement of policy loans authorized by the provisions of the chapter referred to. It is beyond any question that they would not have this right.

The International Life Insurance Company of St. Louis asserts that because of the provisions of paragraph four hereinbefore quoted, they are put upon the same basis as Iowa companies, and therefore may file a statement of policy loans in lieu of the other securities.

We do not believe a reading of the paragraph will bear out this construction. The reference therein to the laws of Iowa was to the laws governing the deposit of security to cover the net cash value of the Life Insurance policies assumed under the contract, as stated in the preceding part of the paragraph. It did not refer to Chapter 163 and could not, for the reason that the contract was entered into some years prior to the enactment of this chapter. The reference to the Iowa laws was to the laws as they existed at that time in reference to the security required for policies written. Neither do we believe the companies could, even with the sanction of the Insurance Commissioner, contract in such a way as to in effect amend or qualify the plain terms of a statute of this state; more particularly a statute not in existence at the time the contract was made or within the contemplation of the Insurance Department when it was approved.

The statute referred to only includes Iowa companies, and we are clearly of the opinion that the International Life Insurance Company of St. Louis would not be entitled to file a schedule of policy loans in lieu of the securities now deposited by them.

TAXATION—CORPORATIONS: Discussion of the proper method of taxing corporations.

October 8, 1926. *Auditor of State:* We have received your letter of October 4, 1926, in which you submit to this department the following inquiries:

"I am in receipt of an inquiry concerning certain matters in connection with the assessment of corporations that I am submitting to you for consideration. The questions submitted are as follows:

"1. Do Sections 7008-7010 apply to incorporated manufacturing companies, grain companies and creamery companies doing business for pecuniary profit, whether co-operative or not?

"2. Should any such company be assessed and pay tax upon moneys and credits as such?

"3. May the sworn statements of corporations or incorporated co-operative associations doing business for pecuniary profit be reviewed and corrected as provided by Section 7155 of the 1924 Code, if so may the same be done under Section 7149 of the 1924 Code?"

Section 7008, Code of 1924, as amended by Chapter 158 Laws of the 41st General Assembly, reads as follows:

"The shares of stock of any corporation organized under the laws of this state, except corporations otherwise provided for in chapters 330 to 341, inclusive, and except as provided in section 7102, shall be assessed to the owners thereof as moneys and credits at the place where its principal business is transacted. The assessment shall be on the value of such shares on the first day of January in each year. In arriving at the assessable value of the shares of stock of such corporations, the amount of their capital actually invested in property other than moneys and credits

shall be deducted from the actual value of such shares. Such property other than moneys and credits shall be assessed as other like property."

It will be observed that the above section excludes from its operation corporations otherwise provided for in Chapters 330 to 341, inclusive, and also those covered by Section 7102, Code of 1924.

On September 29, 1926, this department prepared an opinion for your department upon the question of the proper method of assessing merchandise and manufacturing corporations. It was therein held that under the laws of this state the property of some corporations is assessed to the stockholders and the property of other corporations to the corporation itself. In other words, that our statute recognizes that there are two species of property of a corporation that may be taxed: (1) the property of the corporation itself, and (2) the capital stock thereof. In fact, there is no constitutional provision, either federal or state, which makes it impossible to levy a tax upon both species of property. It was held in the case of *Judy v. Beckwith*, 137 Iowa 24, that there is a distinction between the capital stock of a corporation and the shares of its capital stock and each represent different property rights which are the subject of taxation. However, it has never been the policy of this state to tax both species of property.

Chapter 331 contains the provisions of the statute relating to the taxation of merchandising and manufacturing corporations and also grain dealers. In the determination of the question you have submitted to us it will not be necessary to copy any of the sections of this chapter in this opinion. It will suffice to say that in each and all of these cases it is the property of the corporation and not the stock that is assessed. It is specifically provided in subdivision 20 of Section 6944 that the shares of capital stock of merchandising corporations, as defined in Section 6971, and the shares of stock in domestic corporations engaged in manufacturing, as defined in Section 6975, shall be exempt from taxation.

We are, therefore, of the opinion that Section 7008 and Section 7010 do not apply to manufacturing or merchandising corporations organized in the state. However, stock in foreign merchandising and manufacturing corporations owned by residents of the state is covered by Sections 7008 to 7010 and is taxable under the provisions thereof.

In answer to your second inquiry we will say that, in our opinion, moneys and credits owned by such corporations should be taxed the same as the moneys and credits of individuals. We have so held in the opinion prepared for your department already referred to.

II.

Section 7155 of the Code reads as follows:

"When property subject to taxation is withheld, overlooked, or from any other cause is not listed and assessed, the county treasurer shall, when apprised thereof, at any time within five years from the date at which such assessment should have been made, demand of the person, firm, corporation, or other party by whom the same should have been listed, or to whom it should have been assessed, or of the administrator thereof, the amount the property should have been taxed in each year the same was so withheld or overlooked and not listed and assessed, together with six per cent interest thereon from the time the taxes would have become due and payable had such property been listed and assessed."

It will be noted that under the provisions of this statute the only property that is subject to taxation is such as is withheld, overlooked or from any other cause is not listed and assessed. If property is assessed in the proper manner, even though upon an erroneous theory and under the wrong statute, the assessment thereof is final after it has passed the board of review in the absence of an appeal from such action. Property that has been assessed, even though upon an erroneous theory, cannot be said to be withheld, overlooked, or not listed and assessed.

The following authorities so hold:

Woodbury Co. v. Talley, 153 Iowa 28;
German Savings Bank v. Trowbridge, 124 Iowa 514;
Brainard v. Harlan, 158 Iowa 436;
Security State Bank v. Carroll, 128 Iowa 230;
Peoples State Bank v. Layman, 134 Iowa 635;
Langhout v. First Natl. Bank, 191 Iowa 957.

Neither do we think that the county auditor has a right to change the assessment of the property of such corporations under the provisions of Section 7149, even though the same may be made upon an erroneous theory. This section reads as follows:

"The auditor may correct any error in the assessment or tax list, and may assess and list for taxation any omitted property."

This section, we believe, authorizes the county auditor to make a correction only when the mistake is apparent upon the assessment roll. In other words, where all the facts are stated upon the record showing that the assessment should have been made in a different manner. It does not, however, authorize the auditor to make a new assessment or to make an assessment upon a different theory. This provision does not authorize the auditor to correct an error by which a taxpayer is assessed too much or too little on a particular piece of property, or to assess the same upon an entirely different basis. It was so held in the following authorities:

Polk Co. v. Sherman, 99 Iowa 6;
First Natl. Bank v. Webber, 196 Iowa 1155.

We, therefore, hold that the county auditor has no authority to review and correct the assessment of manufacturing and merchandising corporations under the provisions of either Sections 7155 or 7149. He may only correct mistakes that are apparent upon the record.

MUNICIPALITIES—BONDS: Where the statute does not provide that premiums on public officials' bonds shall be paid out of the public funds there is no authority to pay such premium out of the public funds.

October 9, 1926. *Auditor of State:* We desire to acknowledge receipt of your letter of October 7, 1926, in which you submit to this department the following inquiry:

"I have today received a letter from Mr. M. J. Mitchell, City Solicitor of Fort Dodge, Iowa, relating to the question of the payment of premiums on surety bonds for city officials. While it has always been the understanding of this department that the city had no authority to pay the premium on official bonds for any city official excepting the city treasurer, Mr. Mitchell's letter brings the question up in such a way that I feel we should have a written opinion from your department.

"The letter of Mr. Mitchell follows:

" 'The accountants from your office in checking municipal accounts have just filed their report on the affairs of the city of Fort Dodge. The report, I think, is satisfactory and shows that the accountants were careful and competent, but I think they are mistaken at one point and that is the payment by the city of the cost of the bonds of city officers. This is not an important point, but I feel satisfied the statement that the law does not permit such payment is not correct.

" 'The state law does not require bonds from city officers except the mayor and treasurer, as I understand it. The city has the right to require bonds from other

officers and to fix the amount thereof. The city fixes the salaries of its officers; salaries are not fixed by the state law. Surely there could be no legal objection to the city providing that in addition to the salary fixed, the cost of the bond required should also be paid. That is really what was done here in Fort Dodge, although the record may not be very clear at that point. In fixing salaries the council contemplated as a part of the salary payment for the officers bond.

"'I feel quite sure that if you take this question up with the attorney general's office he will agree with me that there is nothing illegal about such an arrangement, but that on the contrary it is a very proper one.'"

On May 14, 1926, this department prepared an opinion for Honorable E. L. Hogue, Director of the Budget, in which it was held that where the statute does not provide that the bond of a public official may be paid out of the public funds, then there is no authority to pay the premium on such bond. You will find a copy of said opinion attached to this opinion. It will, therefore, be necessary for us to determine whether there is any statute permitting the payment of the premium on the bond of any city official.

Section 1068 of the Code of 1924, which is a part of Chapter 54 relating to official and private bonds, provides as follows:

"The bonds of all municipal officers who are required to give bonds shall each be in such penal sum as may be provided by law or as the council shall from time to time prescribe by ordinance; but the bonds of mayors shall not be in less sum than five hundred dollars each."

It will be observed that there is no provision in this statute and we have been unable to find any in any other statute permitting the city to pay a premium on the bonds of any city officials. In the absence of such a statute we believe that the cost thereof may not be paid out of the public treasury. Under the provisions of Section 1065, the board of supervisors fixed the bonds of city and town assessors. There is no provision in this statute, or any other, permitting the payment of the premiums on the bonds of such officials out of the public funds.

We are, therefore, clearly of the opinion that the expenditure of city funds for the payment of premiums on the bonds of city officials is absolutely unauthorized and illegal. However, the fixing of the salaries of city officials is a matter that is vested exclusively in the sound discretion of the city council. The fact that a public official may be forced to pay a premium on his bond is a matter that may be taken into consideration by the city council in fixing his salary and it may be fixed at such an amount as to fully compensate him for his services and also for the cost of procuring a bond.

SHERIFFS: The sheriff should charge and collect $1.00 for the certificate and $1.00 for the deed.

October 11, 1926. *Auditor of State:* We wish to acknowledge receipt of your favor of the 8th in which you request our opinion as follows:

"We are in receipt of a receipt inquiry from one of our examiners in regard to the fees to be charged by the sheriff under Section 5191, Par. 7, where it is provided that for making and executing a *certificate* or *deed* for lands sold on execution, $1.00 shall be paid. I assume that this would be $1.00 for making the certificate and another $1.00 for issuing the sheriff's deed. Am I right in this conclusion?"

Section 5191 of the Code, 1924, to which you refer enumerates the fees which the sheriff shall charge and collect. Paragraph 7 thereof reads as follows:

"For making and executing a certificate or deed for land sold on execution, or a bill of sale for personal property sold, one dollar."

You of course are familiar with the statutory requirements for the issuance of a

sheriff's certificate upon the sale of real estate under foreclosure or on execution and subsequently after the expiration of the statutory period the execution by the sheriff to the certificate holder of a deed for the property in question. It is thus required that the sheriff execute two separate and distinct instruments and this we believe was clearly recognized by the Legislature as indicated by the wording of the paragraph we have quoted.

We are, therefore, of the opinion that the sheriff should charge and collect $1.00 for the certificate and $1.00 for the deed.

SCHOOLS—SCHOOL DISTRICTS: It is not possible for a minor child to establish a residence separate and apart from her father and thus be entitled to school privileges while she is partially dependent upon her father unless the person with whom she resides is acting in loco parentis.

October 15, 1926. *County Attorney, Leon, Iowa:* You request an opinion of this department upon the following question:

Is it possible for a minor child to establish a residence separate and apart from that of her father and thus be entitled to school privileges in the residence of her choice while she is still partially dependent upon her father for her support though there is no intention that she will ever return to his home or to the district of his residence to live.

It is not possible for a minor child to establish a residence separate and apart from her father and thus be entitled to school privileges in the residence of her choice so long as she is partially dependent upon her father for support. It might be possible for the parent to emancipate the child in such way that she could establish such a residence but the parent would no longer be liable for her support nor would he be entitled to her services.

We have heretofore ruled that where a child maintains its home with others and such others stand in the relationship of parents, in legal phraseology, loco parentis, the residence of the child is with those with whom it makes its home. In other words, the sole question to determine under such circumstances is whether or not the relationship thus established is that of full and complete control as in cases of parents. Under such circumstances the residence of the child is always with those who stand in the position of loco parentis.

NATIONAL GUARD—BONDS: The state is under obligation to pay the premium on the bond of the disbursing officer of the national guard.

October 16, 1926. *The Adjutant General:* We desire to acknowledge receipt of your letter dated October 12, 1926, in which you submit to this department the inquiry which you have stated as follows:

"The office of the Auditor of State has raised a question in reference to the Bond of Major H. D. Coe, State Quartermaster, and United States Property and Disbursing Officer. The Auditor is of the opinion, based on an opinion rendered the Honorable E. L. Hogue, Director of the Budget by your office, dated May 14, 1924, in the case of Mr. Colladay, Superintendent of the Automobile Department, that this office cannot pay the premium on Major Coe's Bond from State funds.

Your attention is invited to the following facts in connection with the duties, function and responsibilities of the position of U. S. P. & D. Officer:

The National Guard of Iowa, as is the case in all States, is Federalized under the provisions of the National Defense Act of June 3, 1916, and all amendments thereto. Under this act, the National Guard is equipped, clothed and paid by the Federal Government, and the proper care and safeguarding of all Federal Property issued to the Guard becomes a responsibility of the State, and the State is accountable to the Federal Government. To insure proper accounting, the Federal Government requires the State to designate and appoint a United States Property and

Disbursing Officer, who they require be bonded. The Regulations governing the question of the Bond is quoted here below:

"United States property and disbursing officers required to be bonded—* * * Before entering upon the performance of his duties as property and disbursing officer he shall be required to give good and sufficient bond to the United States, the amount thereof to be determined by the Secretary of War, for the faithful performance of his duties and for the safe-keeping and proper disposition of the Federal property and funds entrusted to his care. * * *' Section 67 N. D. A.

Amount of Bond—The bond required by paragraph 1 will be for an amount equal approximately to one-half the amount of funds which it is expected will be required ordinarily at any one time, plus $10,000 additional to cover property responsibility and accountability. The rules of the War Department generally do not authorize the placing to the credit of a United States property and disbursing officer of an amount greater than double the amount of the bond. The rate of premium charged by the bonding company must be stated on the face of the bond.

Section 443, Code of Iowa 1924, Bonds of Officers, requires all accountable officers to be bonded. –

This office contends that the premium on the bond of the U. S. P. & D. Officer should be paid from state funds, as he is bonded in the interest of the State as required by the Federal Government."

A consideration of the purpose for the enactment of the national defense act may assist us in the determination of this question. In the constitution of the United States there is a distinction drawn between an army raised by the federal government and the militia maintained by the state governments.

Section 8 of Article I, Constitution of the United States, defining the rights, powers and duties of congress, provides in part as follows:

"The congress shall have power:—

* * *

12. To raise and support armies; but no appropriation of money to that use shall be for a longer term than two years;

13. To provide and maintain a navy;

14. To make rules for the government and regulation of the land and naval forces;

15. To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions;

16. To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States; reserving to the states, respectively, the appointment of the officers and the authority of training the militia according to the discipline prescribed by congress. * *"

As we understand the constitutional provisions and the purpose of the enactment of the federal statute, it was the intention to make the national guard or militia a part of the regular army of the United States and subject to call for any purpose for which an army may be raised by the federal government, as distinguished from the militia. Under this statute the national guard is equipped, clothed and paid by the federal government. The care and safeguarding of all federal property used for military purposes by the national guard is not left by the federal statute in the care and keeping of a state official, as such, but in the care and keeping of the state as a public corporation. The requirement of the statute is not that the officer shall execute a bond to protect the federal government, so far as its property is concerned, but this is a duty imposed upon the state through its proper officer by the federal government. As the federal government, in reality, makes it the duty of the state to require the execution of a bond and no state statute places such duty upon the official, we believe it is apparent that the cost of executing such bond should not be borne by the officer but by the state for the reason that the federal statute makes it the duty of the state to require the execution of such a bond and not the duty of the official to execute the same.

We are, therefore, of the opinion that the cost of executing such a bond should be paid by the state and not by the individual officer, although the bond is to protect the federal government against the acts of the official.

On May 14, 1926, this department prepared an opinion for Honorable E. L. Hogue, Director of the Budget, in which we held that where the statute does not provide that the bond of a public official may be paid out of the public funds, then there is no authority to do so. We do not recede from this opinion but we think that it is not applicable to the question under discussion.

As already stated, no statute of the state makes it obligatory upon the custodian of federal property and the disbursing officer to execute a bond and for this reason the opinion just referred to is not in point. As the duty to furnish a bond or to require the furnishing of a bond is imposed upon the state by the federal government we think a different rule should apply to such a situation. We are attaching to this opinion for your consideration a copy of the opinion referred to.

INSURANCE: Premium includes all income derived from policy holders in payment for their policies even though a part of such income may be termed a "policy fee".

October 16, 1926. *Commissioner of Insurance:* We wish to acknowledge receipt of your favor of the 19th in which you request our opinion as follows:

"It is the practice of a number of domestic and foreign insurance corporations transacting an authorized business in this state to collect a policy fee from the insured at the time the policy is issued. This policy fee is not reported as premium income, but is reported upon the income page of the annual report made to this department by the company.

Domestic insurance companies are taxed under Section 7025 of the Code of 1924, while foreign insurance companies are taxed under Section 7022 of the Code of 1924.

Will you kindly advise if in your opinion the policy fees collected from residents of this state are taxable under the above mentioned Sections of the Code."

The statutes referred to in your communication need not be copied in this opinion, but a reading of these statutes will readily disclose the intention of the Legislature to require the companies to pay a tax upon the income derived from policy holders for insurance as premiums, fees, or whatever term may be applied to the money received. The fact that the companies choose to call a stipulated amount a "policy fee" and do not include it under the term of "premium" would not have the effect of exempting this income from taxation. It is most assuredly a part of the premium or income received from policy holders for business done in Iowa and thus subject to taxation.

STATE HOSPITALS: A hospital patient having received treatment at the state hospital at the expense of his county must be re-committed if he changes his residence to another county.

October 20, 1926. *Iowa State Board of Education:* You have submitted to this department for an opinion thereon the following question:

"We would be pleased to have a ruling on one particular phase of transportation. For example, a patient is committed from a certain county, and after having Hospital care moves to another county; should the return of the patient to the Hospital be charged to the county of commitment or to the county of residence, or should the case be admitted at all without issuance of new papers? Should we continue to charge transportation against the county of commitment without regard to the county of residence?"

For the purpose of this opinion, we are assuming that after the patient received

hospital care, he has returned to his home and has then removed to another county.

Under these circumstances, it is our opinion that it would be necessary to have a re-commitment to the hospital from the county where the newly established residence is located. The county from which this patient was originally committed is no longer the county of his residence and would, therefore, be under no obligations to the patient. The county in which the new residence is established would not be liable until the provisions of the statute for commitment have been complied with.

SHERIFFS:- The county may not furnish coal or pay claims for light, heat and water used in the sheriff's residence when separate from the county jail.

October 19, 1926. *County Attorney, Williamsburg, Iowa:* We wish to acknowledge receipt of your favor of the 13th in which you request our opinion as follows:

"Herewith is set forth facts asking for your construction of Subdivision Eleven (11), of the Code, 1924, Section 5226, with reference thereto.

"The Sheriff's residence in Iowa County, Iowa, is located in close proximity to the County Jail, and is located upon the same tract or lot of land as is the Court House or Jail. The County has heretofore been furnishing to said Sheriff, in connection with his residence, heating, water, and light.

"Is it proper for the County to furnish items of light, heat, and water in connection with the Sheriff's residence, or should these items be paid for by the Sheriff himself?"

This department has held that where the jail and the sheriff's residence are in the same building and heated by one plant which incidentally in connection with heating the jail, heats the sheriff's home, that the supervisors might allow the claim for fuel used in this manner. However, the supervisors are not required to furnish the sheriff with a residence nor to furnish him with light, heat or fuel in his residence. The statute provides that in the event the sheriff is not furnished a residence he is to receive an additional sum of $300.00 per year. This must be held to be exclusive of any other allowances in this connection.

We are of the opinion that where the sheriff's residence is not furnished by the county, the allowance of $300.00 per annum is all that may be received by him and that the county cannot in addition thereto allow claims for light, heat and water used in the sheriff's residence.

CIGARETTES: Minor cannot take out cigarette permit even as a member of a partnership.

October 27, 1926. *Treasurer of State:* You have requested the opinion of this department upon the following propositions, involving an interpretation of certain provisions of the cigarette law:

"In the case of a partnership where one member of said firm is a minor, is it legal for said partnership to hold a cigarette license and offer for sale products therein included?

"If not, is it legal for one member of the partnership to hold a license, independent of the other member of the firm, in that place of business?

"Also, is it legal for a minor to sell cigarettes and associate merchandise, as included in the Iowa State Cigarette Law?"

In answer to your first question you are advised that it is the opinion of this department that a partnership where one member is a minor cannot be given a permit to sell cigarettes.

In answer to your second proposition you are advised that it is the opinion of this department that a person over the age of twenty-one, who is a member of a partnership, may procure a license to sell cigarettes independently and in his individual capacity.

In answer to your third proposition you are advised that it is the opinion of this department that a minor cannot sell cigarettes in this State, for the reason that he is prohibited from having cigarettes in his possession.

TREASURER OF STATE—CERTIFICATES OF DEPOSIT: Treasurer of State can not accept certificates of deposit in a new or reorganized bank unless authorized by decree of Court.

October 20, 1926. *Treasurer of State:* This department is in receipt of your letter dated October 19, 1926, in which you request an official opinion. Your letter is in words as follows:

"It is requested that you give us your opinion as to whether or not the Treasurer of State, as custodian of the State Sinking Fund for public deposits, can accept certificates of deposit in new or re-organized banks, covering deposits of public funds in closed banks, the deposits having been properly assigned to him.

"Your opinion is also requested as to whether or not the Treasurer of State would be authorized to dispose of such certificates of deposit, prior to maturity for the face thereof without interest accrued to the date of disposition."

You are advised that the treasurer of state cannot accept certificates of deposit in new or re-organized banks unless in a proper proceeding in the district court in which the matter is set up the treasurer of state is by decree made a party to the re-organization plan and the order of court directs the acceptance of certificates. If such a decree is present then we see no way is which the treasurer of state can avoid acceptance of the certificate because the statute expressly provides for the reorganization of closed banks by proper court decree.

The treasurer of state would be authorized, so long as he receives the principal due on the certificates, to compromise the certificates for cash. While the statute does not so specifically provide, we do not doubt but that the power is inhered to him as the custodian of the fund to make reasonable compromise, so long as he gets the principal of his debt.

STATE UNIVERSITY HOSPITALS: Physicians and hospital authorities do not have the right to divulge information gained by diagnosis even to the State Board of Vocational Education or any other arm of the State.

October 27, 1926. *Iowa State Board of Education:* This will acknowledge receipt of your inquiry of October 20, 1926, submitting therewith a long line of correspondence in regard to the following question:

Is it legal for the University Hospital of the State University of Iowa to disclose information gained by the diagnosis of a case to the Board of Vocational Education of the state of Iowa without permission from the patient or his legal representative so to do?

The general rule is that physicians or hospital authorities cannot divulge information which they have secured through diagnosis in any manner. There is no exception made in favor of another state department or another arm of the state and, it is our opinion, that the physicians and hospital authorities at the University of Iowa Hospital would not be justified in divulging to the State Board of Vocational Education any information which they secured through diagnosis without the consent of the patient or his legal representative.

TAXATION — MUNICIPALITIES — SECURITIES — TRANSMISSION LINES: Securities issued by municipalities of another State and owned by tax payers in Iowa, are subject to taxation in this State. Transmission lines outside of cities and towns are to be assessed as real estate. This is true of telephone lines.

October 29, 1926. *Auditor of State:* We wish to acknowledge receipt of your favor of the 22nd, in which you request our opinion on the two following propositions:

"1. Are foreign county securities taxable as moneys and credits in Iowa? For instance, if I have several thousand dollars in county warrants in Minnesota, should I be taxed with them as moneys and credits in Iowa?

"2. Should unpaid corporation taxes found in the corporation tax list be transferred to the delinquent personal tax? If this has not been done for the years 1921, 1922 and 1923, also 1924, can it be legally transferred now? If not, can it be collected without being transferred."

Answering your first question, we understand that you mean by this inquiry securities owned by residents of this state and issued by municipalities in another state. These securities would, of course, be taxable as moneys and credits in Iowa.

Your next inquiry taken in the form submitted is almost impossible to answer for the reason that "corporation taxes" are assessed in numerous and diverse ways. It is to be remembered that real estate belonging to a corporation is to be assessed as other real property and not otherwise. (Sec. 6983, Code, 1924.) Personal property of the corporation is assessed in various ways depending on the nature of the corporation. As a general proposition, it may be said that the capital stock of a corporation is assessed as personal property to the various share-holders and if the tax thereon is not paid, should be transferred to the delinquent personal tax list.

We understand, however, that you particularly have in mind in reference to your second inquiry, the tax upon Transmission lines and telephone companies. This Department has held in an opinion given to your Department dated May 15, 1924, that transmission lines outside cities and towns should be assessed as real estate. This opinion is found on page 395, Reports of the Attorney General, 1923-1924. This is the general rule in practically all jurisdictions that telephone and transmission lines are taxed as real estate.

We are of the opinion, therefore, that such property should be taxed as real estate and collected in the same manner as taxes upon real estate.

ELECTIONS—QUALIFICATIONS ARE VOID: One convicted of a felony by a jury is disqualified as an elector pending an appeal from his conviction.

October 29, 1926. *Attorney at Law, Osceola, Iowa:* We wish to acknowledge receipt of your favor of the 22nd, in which you request our opinion as follows:

"Will you please give me an official opinion construing article two, section five, Constitution of Iowa, as applied to one convicted of fraudulent banking and whose case is on appeal to the Supreme Court? Would the appeal to the Supreme Court affect a conviction in the lower court so that the constitutional inhibition would be rendered ineffectual pending such appeal?"

Section 5 of Article 2, Constitution of Iowa, to which you refer, reads as follows:

"Disqualified persons. Sec. 5. No idiot, or insane person, or person convicted of any infamous crime, shall be entitled to the privilege of an elector."

Fraudulent banking, under the statutes of the State, is a felony and as the Supreme Court of Iowa has repeatedly held, one who is convicted of a felony or a crime punishable by imprisonment in the penitentiary has been convicted of an "infamous" crime. (*Blodgett v. Clarke*, 177 Iowa, 575.)

It is a well known fact that the Constitution of Iowa was taken largely from the Constitution of the State of New York, therefore, a decision under the constitutional provision of the State of New York is of great weight in considering a like provision in the Constitution of Iowa. The Constitution of New York contains the following provision:

"Laws may be passed excluding from the right of suffrage persons who have been or may be convicted of an infamous crime."

Under the authority thus conferred, the Legislature of New York provided that no person who had been convicted of an infamous crime should be permitted to vote unless he had been restored to his rights of citizenship. In the New York case considered, a person had been convicted by the jury of an infamous crime but sentence had been suspended and judgment had not been pronnouced. An appeal from a criminal conviction when an appeal bond has been posted in Iowa has the same effect as the suspension of sentence in the New York case referred to. The appellate court of New York in passing upon this proposition said:

"It seems to me quite evident that when conviction is spoken of there is intended the actual finding of the jury that the defendant is guilty, and since the amendment of the penal code in 1901 anyone who has been convicted by a jury of a felony is disqualified to vote unless he had been pardoned, * * *." *People v. Fabien*, 111 New York Supplement 140, 145.

We do not find any decision of the Supreme Court of Iowa directly upon the question herein presented. However, in the case of *Hackett and Freeman v. Graves*, 103 Iowa, 296, our Court in substance held that one found guilty by a jury of a criminal offense had been convicted within the meaning of a statute affecting his credibility as a witness and that an appeal from this conviction did not remove the effect of his conviction pending the appeal.

There are numerous authorities from other jurisdictions holding that the term "conviction" refers to the finding by a jury or the confession of the defendant in open court.

We are, therefore, of the opinion that a person who has been convicted of an infamous crime and who has taken an appeal therefrom, posting an appeal bond, is, during the pendency of the appeal, disqualified as an elector under the constitutional provision that we have referred to.

SCHOOL FUNDS: A school district may deposit its money in a bank at a rate of interest in excess of 2½% on 90% of the average daily balances. But the interest up to that amount must be diverted to the sinking fund upon the call of the state treasurer.

November 3, 1926. *Auditor of State:* You have submitted to this department for an opinion the following question:

"We are confronted with a condition in the examination of the Dubuque School District where the district has placed some of its money on certificates of deposit at a rate of 3½% on 90% of the average daily balances. Since the law fixes a minimum interest rate of 2½% on 90% of the average daily balances, can this school district pay the 2½% to the sinking fund under the Lovrien-Brookhart law or must they account to the sinking fund with the full amount of interest received on these certificates of deposit. Kindly give this matter attention and inform us so our examiner will know how to proceed in setting this matter out in his report."

It is provided by Chapter 173 of the Acts of the 41st General Assembly that the maximum amount of interest which shall be diverted to the sinking fund shall be 2½%. (Section 2, lines 16-18.)

It is further provided in Section 4319 that the treasurer of the school corporation shall deposit the school funds in his hands as such treasurer in some bank or banks at an interest rate of at least 2½% per annum on 90% of the daily balances payable at the end of each month.

It is therefore our opinion that the school district may deposit this money at an interest rate greater than 2½% on the daily balances but that provision should be made with the bank where the funds are deposited to pay to the county treasurer the 2½% required to be diverted to the Treasurer of State for the use and benefit of the sinking fund at the end of each month as is provided by law.

SCHOOLS—MINING CAMP: Executive Council has authority to transfer funds not required from one school to another needing additional appropriations.

November 8, 1926. *Secretary, Executive Council:* You have requested the opinion of this department on the proposition of whether or not the Executive Council has authority to transfer a portion of the funds in the appropriation for the use of one mining camp school to the fund of another mining camp school, said funds not being required by the first school for the reason that the attendance during the period in question has been so greatly reduced as to not require the full expenditure of the money originally appropriated.

Section 40 of Chapter 218 of the Acts of the Forty-first General Assembly contains the appropriation for rural mining camp schools. It is also provided in said section that the State Superintendent of Public Instruction shall, with the approval of the Executive Council and under its direction, divide the total appropriation so made among the several mining camp schools. This action has been taken and the appropriation divided. You have stated to us orally that the Moran school has suffered an unforseen casualty by reason of water having gotten into the basement of the school building and that there are no funds available for the said school to pay the expenses of draining the basement. You have also stated that the condition is such as to seriously endanger the health of the pupils. You have stated also that the attendance in the Oralabor and Carney schools has been so reduced during the past year that the appropriation made for those schools will not all be required and that there will remain a substantial sum in the funds set aside for those schools at the end of the fiscal year.

Under the facts so stated, it is the opinion of this department that the Superintendent of Public Instruction, with the approval of the Executive Council, may transfer the funds belonging to the mining camp school which will not be required to another mining camp school which will require additional funds.

TAXATION FOR PARK PURPOSES: A special tax provided under Section 3668 of the compiled code is valid and authorizes the park board to levy the tax though the said section was omitted from the Code of Iowa, 1924, for the reason that it was considered of a temporary character.

November 10, 1926. *County Attorney, Clinton, Iowa:* You have requested an opinion from this department as to the validity of Section 3668 of the compiled Code of 1919, being paragraph 2 of Section 1 of Chapter 312, Acts of the 38th General Assembly.

In view of the fact that this section of the compiled Code and paragraph of the Acts of the 38th General Assembly was omitted from the Code of Iowa, 1924, we have traced the history of this section and have conferred with Mr. U. G. Whitney, Editor, member of the Code commission, in this matter, and have the following to report:

When the Code of 1919 was compiled, the acts of the 38th General Assembly were incorporated in full, paragraph 2 of Section 1 of Chapter 312 thereof becoming Section 3668 of the compiled Code of 1919. This was carried as the same section in the supplement of 1921 to the compiled Code. At the next session of the Legislature

the Code commission was instructed to omit from the Code, afterwards to become the Code of 1924, all laws of a special or temporary nature. If you will refer to the Supplement of 1923, to the compiled Code of 1919, you will note that Section 3668 is omitted because of its special and temporary nature.

We have also checked the Code commissioners' bills and find that the section in question, paragraph 2 of Section 1, Chapter 312, of the Acts of the 38th General Assembly, being Section 3668 of the compiled Code of 1919, was not the subject of any action by the acts known as the Code commissioners' bills.

It is our opinion, therefore, that this paragraph of the Acts of the 38th General Assembly is still in valid force and effect insofar as it affects the right of boards or of park commissioners to levy the tax in the cities where parks were purchased prior to 1919.

This has been an interesting bit of history and we believe you will be interested in following the tracings we have indicated.

TAXES—MOTOR CARRIERS—BOARD OF RAILROAD COMMISSIONERS does not have authority to accept payment of taxes delinquent in installments.

November 10, 1926. *Secretary, Board of Railroad Commissioners:* We wish to acknowledge receipt of your favor dated October 8, which is apparently a mistake. No doubt the letter was written November 8. However, it just reached our hands.

In this letter you inquire whether or not the Board of Railroad Commissioners would have authority to permit one of the plaintiffs in the above entitled case to pay his delinquent taxes and penalties thereon in installments, the carrier in question being one of those whose temporary injunction was dissolved and his taxes being delinquent more than sixty days.

The difficulty in such a settlement would be that if the carrier did not fulfill his agreement and complete the payment, you would probably desire to call upon the bonding company that was surety upon his injunction bond to make good the deficiency. The surety company would then undoubtedly contend that by accepting the compromise and not insisting upon payment in full, and in the event of failure to pay in full, seizing the carrier's property, that the Board had waived and released security for the payment of the obligation, thus releasing the surety.

We, therefore, suggest that if any settlement be made by the carrier, it be made by him with the surety company and that you insist on payment in full; or, it may be that an agreement in writing could be reached between the carrier, surety company and the Board, whereby the Board's rights against the surety company would not be released by accepting deferred payment.

POLL TAX—TOWNSHIP: Township trustees do not have authority to impose a penalty in addition to the legal amount of poll tax fixed by statute for failure to pay.

November 10, 1926. *County Attorney, Waukon, Iowa:* We wish to acknowledge receipt of your favor of the 8th in regard to the addition of penalty for the nonpayment of township road poll tax.

The provisions authorizing a levy and collection of this tax are contained in Chapter 245, Code of 1924.

We are of the opinion that under the provisions of this chapter, the township trustees do not have authority to impose a penalty in addition to the amount of tax fixed by them for failure to pay by the first day of September of each year.

We do believe, however, that they might fix the amount of the tax at $5.00, which

is the maximum sum authorized by law, and provide that if it is paid in cash by September 1, the sum of $4.00 would be acceptable in full payment of the tax.

Your conclusions is regard to the resolution, a copy of which you set forth in your letter, we believe are correct.

MUNICIPALITIES—DAMS: Municipalities may construct, regulate and maintain dams across streams for any proper city purpose.

November 16, 1926. *Auditor of State:* We have received a letter from Bennett Cullison, attorney at law of Harlan, Iowa, in which he submits to this department a certain inquiry with reference to the municipal laws of the state. The letter of Mr. Cullison reads as follows:

"The Nishnabotna River was a non-navigable river which flows through Shelby County. In 1911 it was straightened and formed into a drainage district in accordance with the provisions of the drainage law, and has continued in that state until the present time.

The city of Harlan, Iowa, maintains a municipal waterworks, and it is operated and managed by a Board of Waterworks Trustees, who were appointed under the statute. They have some wells which furnish a source of water supply for the city, which wells lie in the vicinity of a certain portion of this river. The erosion of the soil has caused the river in its present condition as a drainage ditch to become wider and deeper than it was when it was originally straightened, and the bed of the river now, during the summer months, is level with the sand from which the city water supply is taken. I believe the wells are within a few feet of the river. Consequently, when the summer months come and the water runs low in the river, it takes all of the water from the wells, leaving an insufficient supply for municipal purposes.

The waterworks trustees and their engineer have in mind a plan whereby they will erect, if possible, a dam four or five feet high across the bed of the river. This dam will raise the water level in the river to a point where it will not drain the water from the sand and from the wells which they are using, and it will also prevent a further deepening of the river by any process of erosion.

If possible, I would like to have your opinion for the city as to whether or not such a dam can be constructed without violating the provision of the statute which prohibits the obstruction of drainage ditches. Section 2134 provides that cities and towns have power to condemn land for the construction of dams across non-navigable rivers, and I cannot find any authority which satisfies me that this section will embrace a situation of the kind we have here as I have outlined above.

If there is any information which I have not given in this letter and which is necessary, please let me know."

Chapter 294, Code of 1924, embracing Sections 5814 to 5829, both exclusive, contains the provisions of the statute relating to the river front improvement commission. This statute empowers cities to construct, regulate and maintain dams across streams. This chapter, however, is limited in its application to cities of the first class acting under the general incorporation laws, and cities acting under the commission form of government having a population of less than twenty-five thousand.

We are advised that the city of Harlan is not acting under the commission form of government and, therefore, this chapter does not apply thereto. We mention this statute only for the purpose of showing that the same has not been overlooked.

Section 7768, which is a part of Chapter 363 concerning mill dams and races, reads in part as follows:

"Any person, firm, corporation, or *municipality* making application for a permit to construct, maintain, or operate a dam in any of the waters, including canals, raceways, and other constructions necessary or useful in connection with the development and utilization of the water or water power, shall file with the executive council a written application, which shall contain the following information:

(Then follow the provisions of the statute relating to the contents of the written application.)"

It is evident that it was the purpose of this statute to permit municipalities to construct, maintain, or operate a dam in any of the waters, including canals, raceways, and other constructions necessary or useful in connection with the development and utilization of the water or water power, for any proper municipal purpose as provided in the statutes relating to such municipalities.

It is, therefore, our opinion that the city of Harlan may, by complying with the provisions of Chapter 363, secure a permit for the construction of the dam described in the letter of Mr. Cullison, and may condemn lands for such purpose as provided in Section 7783 of the Code.

TAXATION—BANKS: Discussion of the right of a bank to have a part of the tax refunded where its indebtedness was not deducted from its taxable assets.

November 16, 1926. *County Attorney, Bedford, Iowa:* We have received your letter of November 9, 1926, in which you submit to this department the following inquiry:

"The Farmers & Merchants Bank of Lenox, Iowa, which is a private bank, has filed the enclosed claim against the county for refund of taxes. Their claim is based on the recent decision of our supreme court, found in 210 Northwestern at page 126, which holds that borrowed money, when collateral has been pledged therefor, is not taxable.

"Is it the opinion of your department that this claim should be allowed on that basis by our Board of Supervisors? I understand that the tax was paid under protest during the year 1926."

Accompanying your letter is a claim or application for the refund of taxes paid by the Farmers & Merchants Bank of Taylor County, Iowa, and also a bank statement of the assets and liabilities of said bank as of January 1, 1925, corrected so as to bring the taxation of the bank within the decision of the supreme court in the cases of the *Northwestern Bank of Ireton v. William Van Roekel*, 207 N. W. 345, and *Stacyville Bank of Stacyville, et al. v. Stacyville Bank, etc.*, 210 N. W. 126. It will not be necessary to refer to any portions of either the claim or application for refund of taxes or the corrected statement of the Farmers & Merchants Bank of Lenox, Iowa. It is apparent, we think, that the Farmers & Merchants Bank of Lenox, Iowa, in the year 1925, made to the assessor the statement required by the statute. It does not appear from the statement or from your letter whether the bank appeared before the local board of review and objected to the assessment of the bank, or if it did appear that an appeal was taken to the district court. The fact that the taxes were paid is sufficient evidence of the fact that the bank did not pursue its remedy before the board of review or the district or supreme courts upon appeal. The question you have submitted is, therefore, easy of solution. In the comparatively recent case of *Griswold Land and Credit Company v. County of Calhoun*, 198 Iowa, 1240, it was held quoting from the syllabus:

"The error of an assessor in so classifying assessable property that the tax thereon is in excess of the rate legally prescribed for such property is absolutely waived by a failure to apply to the board of review for a correction."

In the opinion in this case Justice Stevens exhaustively reviews the prior opinions of the supreme court upon the questions involved in that case. It was therein held as follows:

"The rule to be deduced from the various provisions of the statute and the decisions of this court is that, unless the tax is illegal because levied without statutory authority, or levied upon property not subject to taxation, or by some officer or offi-

cers having no authority to levy the same, or is in some other similar respect illegal, the exclusive remedy of the taxpayer is to complain to the board of review, and, in the event that he is denied relief, then to appeal to the district court. Of course, the board of review has jurisdiction to grant relief to the party aggrieved, upon any of the grounds enumerated above. As to such or perhaps other similar grounds, its jurisdiction is not exclusive. In all other matters, it is."

The facts with reference to the assessment of the bank in question do not bring the assessment thereof within any of the exceptions contained in the above quotation.

It was specifically held in the cases of *First National Bank v. Board of Review*, 199 Iowa, 1125, and *First National Bank of Newton v. Board of Review*, 200 Iowa, 131, that the rule announced in the Griswold Land and Credit Company case applies to the assessment of banks. It has also been held by the supreme court of this state, and also the supreme court of the United States and the circuit court of appeals for the 8th circuit that the Iowa statutes providing for the taxation of private, state and national banks are valid and constitutional.

Des Moines National Bank v. Fairweather, 191 Iowa, 1240;
Des Moines National Bank v. Fairweather, 263 U. S. 103, 44 Supreme Court Reporter, 23; 68 L. ed. 191;
First National Bank of Guthrie Center v. Anderson, 70 L. ed. 171, Adv. Sheets Feb. 1, 1926;
Hannan v. First National Bank, 269 Fed. 527.

It is therefore, the opinion of this department that in view of the fact that the Farmers & Merchants Bank of Lenox, Iowa, did not pursue the remedy provided in the statute, it is now too late for the bank to secure a refund of the taxes for 1925, or any part thereof. The recent private bank taxation cases to which reference has been made earlier in this opinion are not authorities in support of the position of the bank for the reason that in all of those cases the banks resisted the assessment, filed objections before the proper officials, appealed to the district court, and were then taken to the supreme court. It is quite manifest, therefore, that these cases are not in point.

TAXATION—BOVINE TUBERCULOSIS: Discussion of the right to levy a tax for tuberculosis eradication after the September meeting under the budget law.

November 19, 1926. *County Attorney, Iowa City, Iowa:* We desire to acknowledge receipt of your letter of November 5, 1926, in which you submit to this department the question which you have stated as follows:

"An opinion from your office is desired upon the following question: Can the Board of Supervisors make a supplemental levy for tuberculosis eradication after they have, by resolution, made the necessary levy at their September meeting, and have had the same spread upon the books? The petition for such aid was not presented to the Board until a day or so ago. It will require extra help in the auditor's office to make up the books if they will have to wait until the publication as required by the budget law. At the September meeting they passed their resolution fixxing the amount to be raised by taxation and authorizing the auditor to proceed to compute the levy. The auditor has already done this and has spread the levy upon the books. Under these facts, would it be legal and proper for the Board of Supervisors to re-open the books and proceed to make a supplemental levy for tuberculosis eradication?"

While your letter is somewhat indefinite, we assume that the board of supervisors at the September meeting made the general levy of taxes but failed to make a levy of a tax for tuberculosis eradication. We prepare this opinion upon the assumption that this statement is correct. It was held by this department in an opinion rendered for Honorable Mark G. Thornburg, Secretary of Agriculture, on October 24, 1924, that the statute requiring the board of supervisors to make the levy of taxes at the regular meeting in September is merely directory, and if the board does not do so at such meeting, the levy may be made at any time before the tax records are actually delivered by the county auditor to the county treasurer, provided the taxpayer is not prejudiced by the delay. This opinion was based upon the following cases:

Hill v. Wolfe, 28 Iowa 577;
Easton v. Savery, 44 Iowa 654;
Perrion v. Benson, 49 Iowa 325;
Burlington Gas Light Co. v. City of Burlington, 101 Iowa 458;
Prouty v. Tallman, 65 Iowa 354;
Hubbell v. Polk County, 76 N. W. 854;
Hawkeye Lumber Co. v. Board of Review, 161 Iowa 504;
Taylor v. McFadden, 84 Iowa 262;
Grout v. Kendall, 195 Iowa 467.

This opinion, however, was prepared before the Budget law took effect. We must, therefore, determine whether or not the provisions of the Budget Law make any change in the rule therein announced.

Chapter 24 of the Code of 1924, entitled The Local Budget Law, as amended, contains the provisions of the Budget Law relating to the levying of taxes by municipalities, which includes counties. This statute requires the filing of estimates which shall be itemized and classified and provides for the publication of a notice of the hearing thereon and the holding of a meeting at which objections to the proposed levies may be made. This statute contains the following provisions:

"No greater tax than that so entered upon the record shall be levied or collected for the municipality proposing such tax for the purpose or purposes indicated; *and thereafter no greater expenditure of public money shall be made for any specific purpose than the amount estimated and appropriated therefor, except as provided in sections 373 and 381.*" Sec. 380.

"No tax shall be levied by any municipality in excess of the estimates published and five per cent additional, except such taxes as are approved by a vote of the people, but in no case shall any tax levy be in excess of any limitation imposed thereon now or hereafter by the constitution and laws of the state." Sec. 381.

It will, therefore, be seen that no tax shall be levied by any municipality which, as before stated, includes counties, in excess of the amount contained in said estimates. Therefore, no tax may be levied after the September meeting without a full compliance with each and all the requirements of said chapter. We are, however, of the opinion that if, after the board complies with the budget statute and makes the levy after the September meeting the county auditor has time before the delivery of the tax books to the treasurer to make the necessary changes on such books, then the levy may be made after the September meeting. In other words, if an effort is made to levy a tax after the September meeting, sufficient time must intervene between the date that the proceedings provided for in Chapter 24 are initiated and the date of the delivery of the books to the county treasurer to enable the board to comply with each and every requirement of the statute and to enable the county auditor to prepare the changes in the tax books.

INDIANS—COUNTIES: Indians are poor persons within the meaning of the statute providing for relief to poor persons.

November 20, 1926. *County Attorney, Tama, Iowa:* We have received your letter of October 28, 1926, in which you submit to this department the following inquiry:

"About two years ago Congress conferred upon the American Indian, citizenship,

which includes the Sac and Fox Indians at the Tama Reservation located in Tama County about three miles west of Tama, Iowa.

"When this right of citizenship was conferred upon the Indians, they were given the right and privilege of the ballot, however, the tribal relationship was not interfered with in the bill that was passed by Congress. These Indians at Tama have been under the supervision and control of the United States Government and a few years ago the trusteeship of the Indians was transferred from the Governor of the State of Iowa to the Interior Department at Washington and the Indians have been considered as wards of the Government.

"There are several Indians at the present time who are asking for relief as paupers; and today some of the Indians have asked for relief from the Trustees of Tama Township, claiming to be destitute and the wife of one of the Indians, Robert Youngbear, has particularly requested relief on account of her husband being confined in the County jail at Toledo, Iowa under sentence for violation of the liquor laws of the State of Iowa.

"The Trustees have asked me for an opinion as to whether they have the right to give these Indians the required relief as being poor persons under their jurisdiction in the several townships. The request by the Indians is based upon the citizenship conferred upon them by an act of Congress.

"This is going to open a very broad field for the Trustees of the different townships, in which the Indians reside, if they are going to be compelled to render assistance to the Indians; and if this is commenced it will mean the furnishing of assistance to practically 350 Indians. These Indians receive an annuity from the Government of $52.00 per head per annum."

The provisions of the Federal Statute conferring citizenship upon an Indian born within the territorial limits of the United States read as follows:

"All non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: Provided, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property." (Act June 2, 1924, C. 233.)

Section 5327 of the Code of 1924 reads as follows:

"The trustees in each township, in counties where there is no county home, have the oversight and care of all poor persons in their township, and shall see that they receive proper care until provided for by the board of supervisors."

It will be observed that this section of the Code applies to all poor persons residing in the township, which is manifestly broad enough to cover Indians, who are citizens of the United States. Therefore, it is our opinion that it is the duty of the trustees to provide relief to such Indians. However, as all Indians are wards of the United States Government, we believe that the matter of extending relief to them should be taken up with the proper Indian agents so that the matter may receive attention on the part of the proper officials of the United States Government. In other words, that such officials should be consulted before any relief is extended to such Indians. Of course, the primary duty of affording relief to the Indians rests upon the United States government, but the failure of such government to grant such relief does not release the trustees from their duty, under the state law, to see that all poor persons, including Indians, are properly taken care of.

BOARD OF CONTROL—CHILD PLACEMENT: The Board of Control has no right in the absence of a violation of the contract to take from the contracting parties a child placed with them under a placement contract.

November 20, 1926. *Board of Control:* We desire to acknowledge receipt of your letter of November 19, 1926, in which you submit to this department the following inquiry:

"On November 8, 1922, the Juvenile Court at Clinton, Iowa, committed Vida Sparks, infant child of Perry Sparks and Alta Sparks, to the Iowa Soldiers'

Orphans' Home, Davenport, Iowa, as provided by the statutes of the state of Iowa covering neglected children. At this time, the mother was committed to Rockwell City for a term of years, hers being a case of continued promiscuous prostitution.

"On August 6, 1925, Superintendent Treat of the Iowa Soldiers' Orphans' Home, with the approval of the Board of Control, placed this child in the home of Mr. and Mrs. Wackerhahn of Sumner, Iowa, under signed Articles of Agreement as provided and required, (a copy of which Articles of Agreement is herewith attached), at which home the child has remained since that time and where she has apparently been made one of the family and has received good care in every way.

"Late in the spring of this year (1926), the mother of the child was paroled from Rockwell City and was immediately married, and with her husband went to Ketchikan, Alaska, where the husband had been employed for a long time and seems to be well established. Now comes the mother, Alta Sparks-Clark, seeking the return to her of this child and her two other children who are still in the Iowa Soldiers' Orphans' Home.

"The question which the Board would like to have decided by you is as follows: Could the Board of Control in view of the Articles of Agreement which has been signed jointly by Mr. and Mrs. Wackerhahn and the Board of Control covering the placement of Viola Sparks with the Wackerhahn family, demand the return of this child to the Iowa Soldiers' Orphans' Home in order that it might be returned to its own mother?"

Accompanying your letter is a copy of a child placement contract signed by F. S. Treat, as Superintendent of the Iowa Soldiers' Orphans' Home, and H. J. and Gertrude Wackerhahn, the contracting parents. The said contract is identical in its terms with the contract involved in the case of *Jennie May Stephens v. Forrest S. Treat*, recently decided by the supreme court of the state, with the exception of the typewritten provisions therein. That this contract is valid is placed beyond any controversy by decisions of the supreme court. The following cases sustain such contract:

Riley v. McKinney, 167 Iowa 508 (509);
Lieshe v. Iowa Children's Home Society, 196 Iowa 144;
Stephen v. Treat, 209 N. W. 282.

The rights of the board of control with reference to the custody of a child placed under such a contract are covered by the provisions of Section 3717, which reads as follows:

"*In case of a violation of the terms of such articles of adoption, or contract,* the board may cause the child to be taken from the person or persons with whom placed, and may make such other disposition of him as shall seem to be for his best interests."

We are clearly of the opinion that under the provisions of this statute the board of control may take the child from the contracting parents only in the event the terms of such contract are not fully carried out. Therefore, the board of control has no right to take the child, Viola Sparks, from the custody of the contracting parents unless such parents have failed to carry out the provisions thereof.

TOWNSHIP FUNDS TRANSFER: Township funds raised by taxation for road purposes may not be transferred to the township building fund and used for the purchase of the township hall without vote of the electors, except that a surplus of funds in the road fund might be transferred temporarily to the building fund if funds had already been voted by the electors for building purposes.

November 22, 1926. *County Attorney, Maquoketa, Iowa:* You have requested an opinion upon the following question:

May a board of trustees of a township transfer money from the road fund to the building fund and use the same for purchasing a township hall?

Your request is made to the Director of the Budget and by that office referred to this department.

Your advice to the township trustees that this transfer cannot be made is correct. Funds for the purchase of building township halls are provided for in Chapter 284 of the Code of Iowa 1924. This chapter specifically provides that the funds for buying such township hall shall be voted by the electors and any attempt to divert funds raised by taxation for that purpose would be beyond the power of the board of trustees. It is provided that funds raised by a vote of the electors may be transferred to the road fund upon certain petition presented to the trustees but there is no provision to transfer funds from the road fund to the township hall fund.

It is a well recognized rule that transfer of funds raised by taxation or otherwise must be specifically provided by statute which shall be strictly construed in order to prevent taxing bodies from indiscriminately imposing taxes.

However, if the funds for the township hall have been voted by the electors as provided by statute but have not yet been collected and paid to the treasurer, a surplus of funds in the road fund could be transferred temporarily under Sections 387, 388 and 389, of the Code of Iowa, 1924, where the said funds would be returned to the road fund upon their collection and payment to the township clerk.

TAXATION: To redeem from a tax sale for less than the total amount of the taxes the entire amount of the taxes, penalty, interest and costs, must be paid.

November 24, 1926. *Auditor of State:* We desire to acknowledge receipt of your letter of November 22, 1926, in which you submit to this department the following inquiry:

"We are in receipt of a request concerning the penalties that would apply in the cases of redemption of property sold at scavenger sale. For instance, in the case called to our attention the total amount of taxes due are $534.97. At scavenger sale this tax was sold for the costs, $25.35. Now the question arises, when this property is redeemed under Section 7275, will the county auditor collect 8% interest and 8% penalty on the total amount of $534.97, or will this 8% penalty simply apply to the item of $25.35 for which the property was sold at tax sale?

"On legal advice in this case in question, the party who desires to redeem is contending that the 8% penalty only applies to the amount of purchase at tax sale, that is on the $25.35."

Section 7275 provides as follows:

"In case a redemption is made of any real estate sold for a less sum than the taxes, penalty, interest, and costs, the purchaser shall receive only the amount paid and a ratable part of such penalty, interest, and costs. In determining the interest and penalties to be paid upon redemption from such sale, the sum due on any parcel sold shall be taken to be the full amount of taxes, interest, and costs due thereon at the time of such sale, and the amount paid for any such parcel at such sale shall be apportioned ratably among the several funds to which it belongs. Real estate so sold shall be redeemable in the same manner and with the same penalties as that sold for the taxes of the preceding year."

It will be observed that in this statute there appears the phrase "taxes, penalty, interest, and costs,". We think the use of this phrase means that the party redeeming must pay not only the sum for which the property sold, but also the total amount of the taxes, penalty, interest and costs upon said property at the time the sale was made. The supreme court of this state has passed upon this question in the following cases:

Soper v. Espeset, 63 Iowa 326, and *Everson v. County of Woodbury*, 118 Iowa 99. The syllabus of the first case is as follows:

"Where land liable to sale for delinquent taxes has been advertised and offered for two years or more, but passed for want of bidders, and is finally advertised and sold for less than the whole amount of taxes, interest and penalty due thereon at the time of sale * * * the owner cannot redeem the same from such sale without paying the full amount of the taxes due at the time of sale, *with the interest and penalty thereon.*"

It is, therefore, our opinion that the owner of the property, under the facts stated in your letter, in order to redeem must pay the full amount of the tax, interest, penalty and costs.

PHYSICIANS—LICENSE: Discussion of the right of a physician whose license to practice has been taken away and who continues to practice to be entitled to a certificate upon passing the examination.

November 24, 1926. *Commissioner, State Department of Health:* We have received your letter of November 17, 1926, in which you submit to this department the following inquiry:

"The State Board of Medical Examiners conducted a hearing last evening to determine whether or not they should admit Dr. C. H. Hanson of Eagle Grove to another examination with the idea of giving him a new license to practice medicine in the State of Iowa.

"As you will no doubt recall from previous correspondence, Dr. Hanson's certificate to practice medicine was revoked about two years ago. It is claimed that he is engaged in the practice of medicine at the present time.

"The Board of Medical Examiners would like to receive an opinion from you as to whether or not, in the eyes of the law, the practice of medicine without a license constitutes an 'offense involving turpitude', as represented by item five under Section 2492 of the 1924 Code referring to grounds for revocation of licenses."

Section 2492 reads as follows:

"A license to practice a profession shall be revoked or suspended when the licensee is guilty of any of the following acts or offenses:

1. Fraud in procuring his license.
2. Incompetency in the practice of his profession.
3. Immoral, unprofessional, or dishonorable conduct.
4. Habitual intoxication or addiction to the use of drugs.
5. Conviction of an offense involving turpitude.
6. Fraud in representations as to skill or ability.
7. Use of untruthful or improbable statements in advertisements.
8. Distribution of intoxicating liquors or drugs for any other than lawful purposes.
9. Wilful or repeated violations of this title, the title on 'Public Health', or the rules of the state department of health.
10. Continued practice while knowingly having an infectious or contagious disease."

We desire to call your attention especially to two portions of this statute, namely, the third and fifth, which read as follows:

"3. Immoral, unprofessional, or dishonorable conduct."
"5. Conviction of an offense involving turpitude."

Sections 2440 and 2441 provide as follows:

"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 upon attaining the age of eighteen years." (Sec. 2440.)

"The department may refuse to grant a license to practice a profession to any person otherwise qualified upon any of the grounds for which a license may be revoked by the district court." (Sec. 2441.)

It will be observed that under the provisions of Section 2440, no person shall be licensed to practice a profession unless he is of good moral character, and that the

department may refuse to grant a license to practice medicine to any person otherwise qualified upon any of the grounds for which a license may be revoked by the district court. Section 2439 prohibits any person from engaging in the practice of medicine and surgery unless he shall have obtained from the State Department of Health a license for that purpose. The penalty provisions of the statute are found in Section 2522, which obviously covers the practice of medicine without obtaining a license and fixes the punishment therefor.

The supreme court in the case of *State v. Hanson*, which involved the right of the doctor about whom you inquire to practice in this state, is reported under the title of *State v. Hanson*, in the 207 N. W. 769. The question of what constitutes moral turpitude was involved in this case. The court, however, did not specifically pass upon this question. We are inclined to the belief, however, that where a physician has been licensed to practice medicine in this state and his license taken away because of a violation of the Harrison Anti-Narcotic Law, and upon other grounds, and notwithstanding the judgment of the court he continues to practice without a license in direct violation of the law, the board may refuse to grant him the right to take an examination and withhold a license to practice from him upon the two grounds hereinbefore stated.

TAXATION: Even though real property is sold at scavenger sale for less than the total sum due as taxes, the property owner has the right to redeem within the time prescribed in the statute.

November 29, 1926. *County Attorney, Maquoketa, Iowa:* We desire to acknowledge receipt of your letter dated November 22, 1926, in which you submit to this department the following inquiry:

"Certain property has been advertised for sale on December 6, 1926, by our county treasurer under Sec. 7255, it having been previously advertised and offered for more than two years and remained unsold for want of bidders.

"Our Treasurer now contends that under that section he is entitled to deliver to the purchaser at said sale, a deed to the property purchased immediately on consummation of the sale.

"I have found no decisions in point on the question but I have advised that he has no such authority and that he must issue his certificate as in other cases, the deed to be issued only upon the conditions of a regular tax sale."

We believe it will only be necessary to consider two sections of the statute in the determination of the question you have submitted to us. Section 7255 provides in substance that the county treasurer shall offer and sell at public sale, to the highest bidder, all real estate which remains liable to sale for delinquent taxes, and shall have previously been advertised and offered for two years or more and remained unsold for want of bidders.

Section 7275 reads as follows:

"In case a redemption is made of any real estate sold for a less sum than the taxes, penalty, interest, and costs, the purchaser shall receive only the amount paid and a ratable part of such penalty, interest, and costs. In determining the interest and penalties to be paid upon redemption from such sale, the sum due on any parcel sold shall be taken to be the full amount of taxes, interest, and costs due thereon at the time of such sale, and the amount paid for any such parcel at such sale shall be apportioned ratably among the several funds to which it belongs. Real estate so sold shall be redeemable in the same manner and with the same penalties as that sold for the taxes of the preceding year."

This section relates entirely to the redemption from the sale of real estate which was sold for a sum less than the taxes, penalty, interest and costs, under the provisions of Section 7255. If no redemption were permitted then why was this section inserted in the statute?

The following authorities also deal with the method of effecting redemption where property is sold for less than the taxes, penalty, interest and costs:

Soper v. Espeset, et al., 63 Iowa, 326;
Everson v. County of Woodbury, 118 Iowa, 99.

We are, therefore, of the opinion that property sold, under the provisions of Section 7255, is subject to redemption on the part of the owner thereof the same as any property sold for taxes.

WORKMEN'S COMPENSATION: An employee is entitled to the compensation prescribed in the statute, notwithstanding the fact that he was merely working during the vacation and was able to resume his school work without loss of time.

December 1, 1926. *Iowa Industrial Commissioner:* We desire to acknowledge receipt of your letter of October 13, 1926, in which you submit to this department the following inquiry:

"I submit department file in the case of S. F. Fillenworth, who was injured in the employ of the State at the University.

"To save you some time in looking up the facts, I may say that this young man is a student and was employed at building operations during vacation. The doctor in charge reported him as being entitled to compensation for total temporary disability to September 20th. At this date school opened at which time Fillenworth was in condition to pursue his studies, but the doctor reports him at that time as being 75% disabled for general earning capacity.

"The fact that he is losing no earnings because of his school pursuits, and that he is able to take up this work, without loss of time, raises the query in my mind as to whether or not the State should further compensate him for loss of earning capacity which he did not intend to exercise.

"Kindly advise me as to whether the State should continue payment in view of this situation?"

We have carefully examined the Workmen's Compensation Statutes of this state and we are constrained to hold that the employee is entitled to the compensation provided in the statute notwithstanding the fact that he was merely working during his vacation and was able to resume his school work without loss of time. There are no exceptions to the right of the employee to receive the compensation provided in the statute for disability, either temporary or permanent, or partial or total. In the absence of such exceptions we are clearly of the opinion that the injured employee is entitled to the amounts therein specified regardless of the fact that he was not a regular employee but was a student at college and was merely working during his vacation.

COUNTIES: The board of supervisors has the right to pay damages awarded by a jury in an action brought against the sheriff for damages resulting from an official act of such officer.

December 1, 1926. *County Attorney, Jefferson, Iowa:* We have received your letter of November 29, 1926, in which you submit to this department the following inquiry:

"Early in the morning of July 3, 1925, the sheriff of this county, was informed by the officers of the City of Jefferson, that certain persons, who had the reputation of bootleggers, had left Jefferson in a certain automobile. These officers advised him that these persons were in the habit of returning at a certain early hour. They gave him a general description of the automobile in which they had left on this particular occasion.

"The sheriff and his deputy, without a warrant, stationed themselves upon the public highway about a half mile east of the city of Jefferson, for the purpose of

intercepting these persons. Before it was daylight, an automobile, answering the description of the one which they were intending to intercept, approached them. The sheriff stepped out on the paved portion of the highway and signalled this approaching car to stop by the use of a flashlight. This automobile was driven directly toward the sheriff and almost touched him as it passed; in fact, the sheriff would have been run over had he not made every possible effort to get out of the way of this automobile.

"Prior to this time, certain threats had been communicated to our sheriff to the effect that certain persons would run over him in case he attempted to stop them upon the public highway. Because of this particular car answering the description of the car which he was seeking and in view of these threats, the sheriff states that he was satisfied that he had the right car. Several shots were fired in an attempt to stop this automobile. Sawed off shot guns were used. A shot struck one of the occupants of the car and inflicted some injury. A suit was brought against our sheriff and the jury awarded damages in the amount of $1,000. A considerable portion of this amount has been raised by popular subscription and has been applied upon the judgment.

"Recently I secured a copy of your opinion addressed to John Weir, County Attorney, of Scott County, under date of February 1, 1926. It seems to the writer that in the light of this opinion, the Board of Supervisors would be justified in assisting the sheriff in taking care of these damages. In fact the individual members of the board are in favor of such an action but desire an opinion from your department relative to this particular case before making such an appropriation."

We are attaching to this opinion a copy of the opinion prepared by this department on February 1, 1926, for John Weir, County Attorney of Scott County, to which reference is made in your opinion. This opinion should be read in connection with the Weir opinion. In the Weir opinion it was held by this department that the board of supervisors in its discretion may pay the costs and attorneys' fees incurred by the sheriff in making a defense in a criminal case in which he was charged with oppression in an official capacity. The authorities cited in said opinion support the rule that a municipality may indemnify an officer against liability incurred by reason of any act done by him while in the bona fide discharge of his official duties and that the municipality has the right not only to employ counsel to defend the officer and to appropriate funds for the necessary expenses incurred by him in such defense but to pay a judgment rendered against him. Therefore, we believe that the Weir opinion is also applicable to the state of facts submitted by you; and also to the question of law arising therefrom.

It is, therefore, the opinion of this department that the board of supervisors has the right to pay the damages in the sum of $1,000.00 awarded by a jury in an action brought against the sheriff for damages resulting from an official act of the sheriff. However, the board has a discretion in the matter and may or may not pay the same out of the public funds as it deems advisable.

COUNTIES—WIDOWS PENSION: The county of a widow's residence must pay the widow's pension even though she has moved into another county, provided she has not acquired a residence in the second county.

December 2, 1926. *County Attorney, Sioux City, Iowa:* We desire to acknowledge receipt of your letter of November 30, 1926, in which you submit to this department the following inquiry:

"Will you kindly advise us your opinion in regard to the liability of a county under Section 3641 of the Code of Iowa, 1924, where a widow with children leaves that county, with the intention of returning at a later time, and resides in a second county for a period of more than one year. The second county served notice on the widow before the expiration of the year exempting itself from liability under this section. The first county now refuses to pay the widow's pension upon the ground that she has resided outside of the county for more than one year. The county in which she now resides denies liability upon the theory that she has never established her residence there, and for the further reason that they served her with the required notice before the expiration of the one year period.

"Under these facts, is the county of her original residence still liable under the section providing 'for aid to widow in care of child.'"

Section 3641 of the Code of 1924, referred to in your letter, commonly known as the widow's pension law, provides for relief to the mother of a neglected or dependent child or children. A reference to three sections of the Code will afford the answer to your inquiry. Section 5311 provides the manner of acquiring a legal residence within the meaning of Chapter 267, which relates entirely to the support of the poor. It will not be necessary to copy this statute, nor any part thereof, in this opinion. Section 5312 reads as follows:

"A legal settlement once acquired continues until lost by acquiring a new one."

Section 5315 provides as follows:

"Persons coming into the state, or going from one county to another, who are county charges or are likely to become such, may be prevented from acquiring a settlement by the authorities of the county, township, or city in which such persons are found warning them to depart therefrom. After such warning, such persons can not acquire a settlement except by the requisite residence of one year without further warning."

It will, therefore, be observed that persons going from one county to another, who are county charges or are likely to become such, may be prevented from acquiring settlement by the authorities of the county in which such persons are found warning them to depart therefrom. After such warning, no person can acquire settlement except by the requisite residence of one year without further warning. As a settlement once acquired continues until lost by acquiring a new one, we are clearly of the opinion that the county in which the widow and her children formerly resided is the county of her residence and that such county must furnish the widow's pension.

WORKMEN'S COMPENSATION: Where an employee is engaged in agricultural work at state institutions, he is not entitled to Workmen's Compensation.

December 2, 1926. *Industrial Commissioner:* We desire to acknowledge receipt of your letter of October 14, 1926, in which you submit to this department the following inquiry:

"We have occasionally been called upon for compensation settlement where employees have sustained injury in agricultural pursuits on farms operated by state institutions. We have a case of this kind before us at the present time.

"The statute, together with the decision in *Sylcord v. Horn*, 162 N. W. 249, definitely and absolutely deny such general coverage, and I am writing to know whether any different rules should obtain in cases such as I have mentioned above."

Section 1361 of the Code of 1924 provides in part as follows:

"This chapter shall not apply to: * * *

3. Persons engaged in agriculture, in so far as injuries shall be incurred by employees while engaged in agricultural pursuits or any operations immediately connected therewith, whether on or off the premises of the employer. * * *"

Section 1362 reads as follows:

"Where the state, county, municipal corporation, school district, or city under any form of government is the employer, the provisions of this chapter for the payment of compensation and amount thereof for an injury sustained by an employee of such employer shall be exclusive, compulsory, and obligatory upon both employer and employee, except as otherwise provided in the preceding section."

It is a well known rule of statutory construction that each and all of the provisions of a statute must be read together and harmonized if possible. Therefore,

these two sections must be read together. Obviously, Section 1362 makes the state and the various municipalities therein described liable under the Workmen's Compensation Law for the compensation provided in the statute only when the injury would be compensable if the injury were sustained while the employee was working for a private employer. In other words, that the exceptions noted in Section 1361 must be applied to the state and the various municipalities described in Section 1362.

Therefore, it is our opinion that an employee who sustains injury while engaged in agricultural pursuits on farms operated by state institutions is not entitled to compensation for such injury. The exception in the statute hereinbefore noted was construed by the supreme court in the case of *Sylcord v. Horn*, 179 Iowa 937 (162 N. W. 249). While the exact question submitted to us was not involved in this case, we are inclined to the view that the language therein employed bears out the construction that we have placed on the statute.

BANKS AND TRUST COMPANIES: A trust company may be organized under the banking statutes without the right or power to receive deposits, subject however, to the right of examination by the Department of Banking.

December 4, 1926. *Superintendent of Banking:* You have submitted to this department for an opinion the following question:

May a trust company be organized under a charter granting to it trust powers without giving to it the right to receive deposits?

It is our opinion that a trust company may be organized without the right or power to receive deposits but to perform the duties of the corporation as outlined in the charter granted with the powers set out in Chapter 9284 of the Code of Iowa, 1924.

It must be organized, however, in the manner as provided for the organization of state and savings banks and must be subject to examination by the Department of Banking under Section 9304 of the Code of Iowa 1924 which makes Section 9223 to 9268 inclusive, applicable to trust companies.

FISH AND GAME: A person walking along the public highway with a rifle can not be presumed to have violated a State Fish and Game statute.

December 4, 1926. *State Game Warden:* We wish to acknowledge receipt of your favor of the 29th, in which you request our opinion on the following proposition:

"I picked up a young man on the public highway one and one-half miles from home carrying a rifle, it being loaded. He had no license. I filed information against him in Mayor Wertz's Court here. He came in to court this afternoon accompanied by his father. They contend that the boy was not hunting. According to their story he had called at a neighbor's place, they having previously borrowed the rifle and as he was returning home they returned the gun to him. The Court dismissed the case pending a ruling from the Attorney General.

"If you have anything that will help the Judge to make a decision, would you kindly forward it to Mr. L. A. Wertz, Grand Junction, Iowa?"

The only provision in the statutes of this State making presumptive evidence of the violation of the provisions of Chapter 86, Code of Iowa, 1924, concerning the protection of game and fish, is found in Section 1794, par. 1, which reads as follows:

"At any time to have in his possession a gun in any field, forest, or on any waters of the state, without a license, except as provided in section 1720."

The exception referred to concerns the owners or tenants of farm lands when upon land owned or occupied by them.

Under the facts stated by you, it appears that the defendant was walking along the public highway and was not in a field, forest, or on any waters of the state. Criminal statutes are to be strictly construed and we are clearly of the opinion that the section referred to would not apply to the facts in the case you present and that the defendant could not be presumed to have violated the provisions of the fish and game law.

HIGHWAY COMMISSION: Members of the State Highway Commission are entitled to be paid a per diem when attending official business outside of the State.

December 7, 1926. *Auditor of State:* We wish to acknowledge receipt of your favor of the 29th, in which you request our opinion as follows:

"Would a member of the highway commission, who has been authorized by the executive council to attend a meeting of the American Association of Highway officials, outside of the state, be entitled to a per diem of $10.00 for each day in traveling to and from and attending such convention?"

Section 4625, Code of Iowa, 1924, provides for the compensation of the State Highway Commission. This section reads as follows:

"4625. Compensation. Each appointive member shall receive ten dollars per day for each day actually employed in the work of the commission, provided said compensation, for each commissioner, shall not exceed two thousand dollars per annum. Each member shall receive all actual necessary expenses incurred in the performance of his duties."

Immediately following, Section 4626 provides the duties of the Commission.

A reading of this section will disclose that the duties of the Commission are broad and comprehensive. It is probable that the attendance of the members of the Highway Commission at certain gatherings or conventions outside of the State might not only be advisable but necessary for them to properly perform the duties imposed upon them by statute.

This matter was presented to the Executive Council of Iowa, who must have found that the attendance of the members of the Highway Commission at the meeting of the "American Association of Highway Officials" was for the interest of the State, and therefore, within the duties to be performed by the Commission.

In view of these facts, we cannot assume that the members of the Highway Commission were not in some manner employed in the work of the Commission while attending the meeting referred to.

We are, therefore, of the opinion that the per diem claimed might properly be allowed and should be paid.

ELECTIONS—CONTESTS: State board for election contest does not have jurisdiction to determine a contest over the election of a Congressman.

December 7, 1926. *Secretary of State:* This department is in receipt of your letter dated December 1, 1926. For convenience we quote your letter as follows:

"In view of the filing of the attached papers of the intention to contest the election of F. D. Letts as representative in congress of the second congressional district of Iowa, I have the honor to request from you a written opinion relative to the following inquiry:

"Under the provisions of chapter 51 of the code of 1924, is a representative in the congress of the United States a federal or a state official within the meaning of the statutes?"

We have given careful consideration to the statement of intention to contest as filed by Mr. Gallagher. It is apparent that Mr. Gallagher questions the eligibility of Judge Letts and seeks to contest the election upon the main ground that the

Judge was ineligible as a candidate and that therefore all of the votes cast for him were invalid votes. The state board does not have jurisdiction to determine contests for the office of congressman or senator in the congress of the United States. Therefore, your board does not have jurisdiction and the Chief Justice does not have power to designate a contest board.

You are further advised that the office of congressman in the Congress of the United States is a federal office and contests relating thereto are to be heard in the House of Representatives and not before a state board.

For your information and in addition to the foregoing, you are advised that the term of office as judge for Judge Letts will expire on January 1st. This being true, he would be eligible to the office of congressman for the next term, the term commencing March 1, 1927. The reason being that at the time of his taking office he would be eligible. There is another reason and that is this,—the laws of Iowa provide for the questioning of the eligibility of candidates, both before the primary and general election. Such a method of procedure is exclusive and prevents raising the question afterward. Therefore, there is nothing for you to do relative to the purported contest.

As I understand there is now a court proceeding involving this question and therefore the whole matter can be ironed out in the proper forum.

STATE HIGHWAY COMMISSION—DIRECTOR OF BUDGET—BRIDGES: 1. The director of Budget, on appeal, with respect to bridges on secondary roads has no authority to relax, change or modify standard plans or specifications of the Highway Commission for bridge work or to permit the use of material or type of construction not admitted by the said specifications or plans. 2. The Director of Budget has no right to make changes in the standard form of contract prepared by the State Highway Commission. 3. The Director of Budget has the right to reject the entire plans on appeal. 4. A contract for a bridge costing $2,000 must be approved by the State Highway Commission. 5. Where two or more plans have been prepared for the same bridge located on a secondary road, which have been approved by the Highway Commission, the Director of Budget on appeal has the right to determine which of said plans shall be adopted for that particular bridge.

December 7, 1926. *Chief Engineer, Iowa State Highway Commission:* We wish to acknowledge receipt of your favor of the 28th, in which you request our opinion as follows:

"Recently an appeal has been taken to the Director of the Budget with reference to certain proposed bridge construction on secondary roads. Objection is made to the

(a) Specifications,
(b) Plans,
(c) Form of contract, and
(d) Estimated cost.

"The specifications for these bridges are the standard specifications of the State Highway Commission prepared and issued under the provisions of said Chapter 4671. The plans for said bridges are the standard plans of the State Highway Commission for such structures suited to the particular locations in question. The form of contract is the standard form of contract included in the State Highway Commission's standard specifications for bridges. This form of contract has been used by the Commission for highway bridge work for the past thirteen years practically without change.

"In order that there may be no confusion as to the duties and authorities of the two departments with reference to such matters, I am writing to ask your opinion on the following questions:

"1. Does the Director of the Budget, on an appeal with respect to bridges on secondary roads, have authority to relax, change, or modify the standard plans or specifications of the Highway Commission for bridge work, or to permit the use of a material or type of construction not admitted by the said specifications or plans?

"2. In the case of a contract for a bridge on a secondary road, costing over two thousand dollars, where an appeal has been taken to the Director of the Budget, and an opinion has been given by the Director, and said contract, plans and (or) specifications have been approved by the Director either with or without modifications, is the approval of the Highway Commission required on said contract before it becomes effective?

"3. Does the Director of the Budget have authority on appeal, to change, alter or modify the standard form of contract which is included in and is an integral and essential part of the standard specifications of the Highway Commission for bridge work?

"4. In a case where two or more plans have been prepared for the same bridge, located on a secondary road, all of which plans have been approved or prepared by the State Highway Commission in conformance with its standard specifications, does the Director of the Budget have authority on appeal, to determine which of said plans shall be adopted for that particular bridge?

"5. In a case where a county board proposes to construct a bridge on a secondary road and an appeal has been taken to the Director of the Budget, does the Director of the Budget have authority to determine whether any bridge at all shall be constructed in said location?

"All of these questions are involved in appeals now pending. Your opinion with reference to these questions will determine our course of action with respect to appeals of this kind. We would, therefore, appreciate receiving your opinion at an early date in order that we may know what course of action to pursue."

The provisions of the Budget Law which are applicable to the proposition submitted are found in Chapter 23, Code of Iowa 1924. Section 357 thereof in reference to the matters which the Director of the Budget is to determine, reads as follows:

"357. Hearing and decision. At such hearing, the appellants and any other interested person may appear and be heard. The director shall examine, with the aid of competent assistants, the entire record, and if the director shall find that the plans and specifications and form of contract are suitable for the improvement proposed and that it is for the best interests of the municipality and that such improvements can be made within the estimates therefor, the director shall approve the same. Otherwise the director shall recommend such modifications of the plans, specifications, or contract, as in his judgment shall be for the public benefit, and if such modifications are so made, the director shall approve the same.

"The director shall certify his decision to the body proposing to enter into such contract, whereupon the municipality shall advertise for bids and let the contract subject to the approval of the director who shall at once render his final decision thereon and transmit the same to the municipality. (40 Ex. G. A., Ch. 4, Sec. 50.)"

It is made the duty of the State Highway Commission to

"Devise and adopt standard plans of highway construction and maintenance, and furnish the same to the counties." (Sec. 4626, Code of Iowa, 1924).

It is also provided

"Standard specifications for all bridges and culverts * * * shall be furnished without cost to the counties * * * by the State Highway Commission, and the work shall be done in accordance therewith." (Sec. 4671, Code of Iowa, 1924).

It is provided

"Any proposed contract which shall exceed the sum of two thousand dollars for any one bridge or culvert, or repairs thereon, shall be first approved by the state highway commission before the same shall be effective as a contract." (Sec. 4672, Code of Iowa, 1924).

It is to be noted that there is a field over which the Director of the Budget does not have jurisdiction on appeal and over which the authority of the Highway Commission and their decision is final. We assume for the purpose of this opinion the jurisdiction of the Director of the Budget on the question submitted.

It is an elementary rule of statutory construction that where two statutes relating

to the same matter can be construed in such a manner as to be consistent one with the other such a construction must be placed upon such statutes. The legislative intent in the enactment of the statutes in question is clear. Specific authority is vested in the State Highway Commission to prepare standard plans and specifications for the construction of bridges on secondary roads. When such standard plans have been adopted the state and the several municipalities of the state are bound to conform therewith. The only board of the state government vested with authority to make changes in such standard plans and specifications is the Highway Commission. The Budget Law vests in the Director of the Budget authority to hear on appeal questions relating to the construction of bridges on secondary roads. Nothing in the Budget Law in any way modifies the plain mandate of the statute relating to standard plans and specifications.

It necessarily follows that while under the Budget Law the Director of the Budget has full power to make changes and modifications in the plans and specifications for the construction of a given structure or structures, such changes must not be inconsistent with the standard plans and specifications adopted as provided by law.

It is likewise manifest that the contract for the construction of bridges is a standard form prepared under the statute and is a part of the standard plans and specifications, and no modifications can be made therein except such change and modifications as will not be inconsistent with the standard plans and specifications adopted.

We believe that what we say here applies not only to the Director of the Budget but to the engineers of the Highway Commission. In other words, in the preparation of plans for a given structure by the engineers, or in the making of changes and modifications therein by the Budget Director on appeal, each must keep within the standard plans and specifications. On the other hand, it is manifest that the Director of the Budget on appeal has a perfect right to reject the entire plans under his authority as an administrative officer of the state government. Such act on his part does not modify the standard plans and specifications but rejects the project for other and sufficient reasons. His power, however, so far as modifications are concerned must be held to be limited, as stated.

We believe we have answered all of the questions submitted by you except the second question. Answering this question, you are advised that the approval of the Highway Commission is required before such a contract as that referred to by you becomes effective.

Answering your fourth question more specifically, you are advised that this question must be answered in the affirmative.

ELECTIONS—VACANCY IN OFFICE: There not being a vacancy in office of representative caused by the death of a person elected but not qualified and his predecessor would be entitled to serve.

December 7, 1926. *Governor of Iowa:* This department is in receipt of your letter dated December 4, 1926. Your letter is in words as follows:

"I am just in receipt of notice from the County Auditor of Appanoose County, announcing the death of Hon. C. H. Scott, the duly elected Representative from that representative district, said election taking place on the 2nd day of November and certificate of election having gone forth to Mr. Scott within the last few days. The question now arises as to whether or not I should call a special election under Code Section 1158 to select a Representative from this District, or whether the old Representative would hold over under the law. May I have your advice in this matter at once in order that I may be governed accordingly?"

It is provided in Article III, Section 3 of the Constitution of Iowa as follows:

"The members of the House of Representatives shall be chosen every second year, by the qualified electors of their respective districts, on the second Tuesday in October, except the years of the Presidential election, when the election shall be on the Tuesday next after the first Monday in November; and their term of office shall commence on the first day of January next after their election, and continue two years, and until their successors are elected and qualified."

It is also provided, Article III, Section 12 of the Constitution of Iowa as follows:

"When vacancies occur in either house, the Governor or the person exercising the functions of Governor, shall issue writs of election to fill such vacancies."

It is also provided, Section 1158 of the Code, 1924, as follows:

"A special election to fill a vacancy shall be held for a representative in congress or senator or representative in the general assembly, when the body in which such vacancy exists is in session, or will convene prior to the next general election, and the governor shall order such special election at the earliest practicable time, giving ten days' notice thereof."

From the foregoing it is to be observed that a representative in the General Assembly of Iowa is to hold office for two years "and until their (his) successors are elected and qualified." It necessarily follows that Mr. Rice now being the representative from Appanoose County will hold office until his successor is elected and qualified. Mr. Scott was elected in November and a certificate of election was issued to him. However, he did not qualify and is now deceased. The question arises under such circumstances,—is there a vacancy in the office of representative from this district? This matter has been determined by the Supreme Court of Iowa. See *State v. Carvey*, 175 Iowa, 344, 351. The Supreme Court says.

"So, too, and quite in point in principle, is the holding by much the greater number of courts that the death of a person elected to office before the time arrives for him to qualify therefor or to enter upon his official duties does not create a vacancy; and this is especially true where, by Constitution or statute, it is provided that the incumbent of such an office shall hold the same for the term provided by law, and until his successor is elected and qualified. See the following cases cited in note to *Commonwealth v. Sheatz* (Pa.), 50 L. R. A. (N. S.) 376; *Kimberlin v. State*, 130 Ind. 120 (29 N. E. 773); *People v. McInver*, 68 N. C. 467; *Lawrence v. Hanley*, 84 Mich. 399 (47 N. W. 753); *State ex rel. Hoyt v. Metcalfe*, 80 Ohio St. 244 (88 N. E. 738); *Commonwealth v. Hanley*, 9 Pa. 513; *State v Benedict*, 15 Minn. 198; *People v. Nye* (Cal.), 98 Pac. 241."

There not being a vacancy in the office of representative from Appanoose County, it necessarily follows that Representative Rice will be the representative from the Appanoose district for the ensuing term.

WATERWORKS BONDS—MUNICIPALITIES — BONDS: The waterworks bonds of Sioux City, issued pursuant to Chapter 359 of the Acts of the 39th General Assembly, are only payable out of the waterworks fund and the revenues derived from the operation of a water plant.

December 8, 1926. *Auditor of State:* We have received a letter from S. F. Moseley & Company of Boston, in which they submit to this department a certain inquiry relating to certain waterworks bonds issued by the city of Sioux City. On account of the importance of the question submitted we have concluded to prepare an opinion for your department and forward a copy thereof to the said Moseley & Company. The letter of the said company reads as follows:

"We have had brought to our attention a bond of the city of Sioux City, copy of which we enclose herewith.

"It will be a great favor to us if you will advise us whether in case the five mill tax and the revenues derived from the operation of the Municipal Water

Works System prove insufficient to take care of these bonds the City of Sioux City must provide the balance through general taxes.

"We are sorry to trouble you in the matter, but assume that this is a point on which the law is very clear and that you can readily answer our question."

A copy of one of the bonds is enclosed with the letter of the said company. It will not be necessary in the determination of the questions submitted to us to copy this bond herein in its entirety. It will suffice to say that the bond is in the usual form and provides for the payment of $1,000.00 lawful money of the United States of America, on the first day of November, A. D. 1935, with interest on said sum from the date thereof until paid, at the rate of six per centum per annum, payable semi-annually on the first day of May and November in each year on presentation and surrender of the interest coupons thereto attached as they severally become due. The bond also contains the following statement:

"This bond is issued by the City of Sioux City, pursuant to the provisions of Chapter 359 of the Laws of Iowa for the year 1921, entitled: 'An Act to legalize certain warrants issued by the City of Sioux City on the Water Works Fund of said city, and to authorize the execution and sale of bonds to fund the same,' approved February 2, 1921, and in conformity to a resolution of the Council of said city duly passed. Both principal and interest of this bond are payable from the water works fund of said city, created by the collection of a tax not exceeding five mills on the dollar for the purpose together with the revenues derived from the operation of the municipal water works system of said city, and for the prompt payment of this bond, both as to principal and interest, the said water works fund is, to the extent necessary irrevocably pledged."

It will, therefore, be seen that by the specific provisions of the bond both principal and interest are payable from the waterworks fund of said city and said fund is irrevocably pledged to the payment of said bond, both principal and interest. For the purpose of determining the scope and purpose of the legalizing act we shall consider certain provisions thereof. It will only be necessary to refer to certain portions of the act. In the preamble we find the following statement:

"Whereas, said city issued warrants on the waterworks fund of said city in the sum of $101,452.25."

Section 1 reads as follows:

"That the *certain warrants issued on the waterworks fund of the city of Sioux City* warrants numbered (then there appear the numbers of the various warrants issued), aggregating the sum of $101,452.25, be and the same are hereby legalized and *declared to be valid claims against the waterworks fund of the city of Sioux City, Iowa.*"

Section 2 thereof provides as follows:

"That the city of Sioux City, through its proper officers, be and it is hereby authorized and empowered to *execute, sell and deliver bonds payable out of the waterworks fund of said city* for the purpose of funding the warrants referred to in section one (1) of this act; said bonds to draw interest at not to exceed six per cent per annum."

We think it is apparent that when considering the terms of the bond and the provisions of the legalizing act it was the intention to make said bonds payable only out of the waterworks fund of said city and that said bonds may not be paid out of any other fund thereof, and we so hold. We do not pass, however, upon the question of the right of the bond holders to bring suit against the city to recover on said bonds in the event the city authorities do not take the necessary steps to make a valid levy within the limits prescribed in the statute to create a fund for the payment of said bonds. This question is not submitted to us and we do not pass thereon.

BUDGET—APPEAL: Withdrawal of signatures not effective if made after appeal perfected.

December 8, 1926. *Director of the Budget:* We wish to acknowledge receipt of your favor of the 6th, in which you request our opinion on the following proposition:

"'I am enclosing herewith a transcript of all the proceedings and the correspondence I have of record in my office pertaining to the construction of the College Street Viaduct in Iowa City, Iowa, payment for which the city proposes to issue judgment bonds in the sum of $15,000.00.

"'A petition was signed by six taxpayers after public notice had been given which under the law makes it necessary for me to certify to the Director of the Budget a transcript of the proceedings. Before the expiration of the ten day period one of the signers filed an affidavit asking to have his name stricken from the petition, which left only five signers. After the expiration of the ten day period another of the signers filed an affidavit asking to have his name removed from the petition.

"'Taking into consideration the two affidavits filed there would only be four signers on the petition, which would not be a sufficient number to take an appeal to the Director of the Budget. Inasmuch as I had the transcript prepared before the second affidavit was filed, I am enclosing the same for a ruling from your office.'

"One of the objectors withdrew his name on November twenty-fourth and the other objector withdrew his name on December second. The date set for the issuance of bonds was November thirtieth. Inasmuch as the second objector did not withdraw his name until after the date set for the issuance of the bonds, we would like to know whether this would deprive the remaining four objectors of a chance for hearing under the budget law."

Section 364, Code of Iowa, 1924, provides as follows:

"At any time before the date fixed for the issuance of such bonds or other evidence of indebtedness, five or more tax payers may file a petition in the office of the clerk or secretary of the municipality setting forth their objections thereto."

It is then provided in Section 365:

"Upon the filing of any such petition, the clerk or secretary of such municipality shall immediately certify a copy thereof, together with such other data as may be necessary in order to present the questions involved, to the director, and upon receipt of such certificate, petition and information, the director shall fix the time and place for the hearing of such matter, which shall be not less than ten nor more than thirty days thereafter. * * *."

The statute above quoted in effect provides for an appeal upon the question of the issuance of bonds to the director of the budget. This appeal is perfected by the filing of a petition in the office of the clerk or secretary, of the municipality, that the withdrawal therefrom of any of the signers would have no effect and would not authorize a clerk or seecretary of a municipality from refusing to certify the proceeding to the director of the budget. In other words, the signing of the objectors is only a prerequisite to the perfection of the appeal. When this is once perfected, the withdrawal or attempted withdrawal of any objectors who signed the petition, would have no effect upon the proceedings subsequent to the time the appeal was perfected.

ROAD—PATROLMEN—BOARD OF SUPERVISORS: Road patrolmen may be employed by the Board of Supervisors and instructed to enforce the provisions of the Motor Vehicle Law.

December 8, 1926. *Mr. James I. Dolliver, Ft. Dodge, Iowa:* We wish to acknowledge receipt of your favor of the 7th, in which you inquire whether or not the board of supervisors of your county may hire a road patrolman to patrol the county roads, particularly endeavoring to enforce the motor vehicle law and pay such patrolman from the general fund of your county.

Chapter 243, Code of Iowa, 1924, provides for the employment of road patrolmen and authorizes the board of supervisors to employ men for this purpose. Their

duties are enumerated in Section 4778 of said chapter. Paragraph 9 thereof provides that they shall:

"Perform such other duties as the board may direct."

Under this general authorization, the board will undoubtedly have authority to direct them to enforce the provisions of the motor vehicle law.

We are of the opinion that the board may employ a patrolman under the provisions of the chapter referred to and instruct him to enforce the provisions of the motor vehicle law.

CORPORATIONS—ASSOCIATIONS: Co-operative associations and non-profit sharing co-operative associations are not required to file an annual report except the one required under the respective statutes regulating such institutions.

December 10, 1926. *Secretary of State:* We wish to acknowledge receipt of your favor of the 7th, in which you request our opinion as follows:

"Section 8439, Chapter 388 of the Code of 1924 requires any corporation organized under the laws of the State of Iowa or under the laws of any other state to file in the Office of Secretary of State, between the first day of July and the first day of August of each year an annual report. The information contained in this report is as follows: name and post office address of the corporation, the amount of capital stock authorized, the amount of capital stock actually issued and outstanding, the par value of such stock designating whether preferred or common stock, and the amount of each kind and the names and post office addresses of the officers and directors, and whether or not the place of business has been changed during the previous year.

"Section 8480 and 8508 of the Code of 1924 and of Chapter 389 and 390 require annual reports to be made by the co-operative corporations organized under these chapters on or about March 1st of each year.

"The question has arisen as to whether or not co-operative corporations making these reports designated under these sections are required to comply with the provisions of Section 8439 and forward to this department an additional report."

Section 8439 to which you refer is contained in the laws relating to corporations generally. This statute was enacted by the Thirty-third General Assembly. Section 8480 is contained in the chapter relating to co-operative associations and was enacted by the Thirty-sixth General Assembly. Section 8508 is contained in the chapter relating to non-profit sharing co-operative associations and was enacted by the Thirty-ninth General Assembly and amended in the Fortieth General Assembly. Each Statute was a part of the law authorizing the particular kind of corporation in question to do business in this State and their formation and organization. Sections 8480 and 8508 have also been amended by Chapter 160, Laws of the Forty-first General Assembly, wherein a notice of delinquency and forfeiture of right to do business and the right to be reinstated is provided in each case. The provisions, therefore, with reference to co-operative associations and non-profit sharing co-operative associations insofar as the annual report, delinquency, and reinstatement for failure to make the report, are concerned, are practically the same as the provisions referring to corporations generally as contained in the provisions of Section 8439. In each instance the statute is complete and practically duplicate the requirements, one or the other.

The statutes in reference to the report, etc., of co-operative associations and non-profit sharing co-operative associations were enacted subsequent to the general corporation statute in reference to annual reports and being complete in themselves, we are of the opinion that a compliance with their provisions by such corporation relieves them from the necessity of making a similar report under the provisions of Section 8439 of the general corporation laws.

TAXATION: Under Section 7271 where notice has been served within eight years tax sales should not be cancelled.

December 11, 1926. *Auditor of State:* We desire to acknowledge receipt of your letter of December 9, 1926, in which you submit to this department the following question:

"I am in receipt of a letter from the County Treasurer of Black Hawk County, which is as follows:

"'Section 7271 of the Code of 1924, reads as follows:

"'After eight years have elapsed from the time of any tax sale, and *no action has been taken by the holder of the certificate to obtain a deed*, it shall be the duty of the county auditor and the county treasurer to cancel such sales from their tax sale index and tax sale register."

"'Ask the Attorney General's office if this means the cancellation of this sale at the expiration of eight years, regardless of the fact that in the meantime the certificate holder may have served a notice for taking tax deed, but did not ask for the deed at the expiration of the ninety days.'

"Kindly inform us at your earliest convenience your opinion in regard to the matter in question."

The determination of the questions submitted turns upon the definition or meaning of the phrase "no action has been taken by the holder of the certificate to obtain a deed." We believe this phrase can have but one meaning and that is, if any step prescribed by the statute to secure a tax deed has been taken by the holder of the tax certificate, then the statute does not apply and the sale cannot be cancelled even though eight years have expired from the date of the sale. If it had been the intention of the legislature to provide for the cancellation of the sale in the event all of the steps necessary to secure a deed had not been taken, then the statute no doubt would have read "and the necessary action to secure a deed has not been taken."

Therefore, we are of the opinion that in view of the fact that the certificate holder served the notice required by the statute, Section 7271 does not apply and that the sale should not be cancelled.

BOARD OF CONTROL—CHILD WELFARE: After children are committed to the orphans' home at Davenport the court making the order retains jurisdiction until after the children are actually placed in the home and the Board of Control has no jurisdiction thereof.

December 14, 1926. *Board of Control:* We desire to acknowledge receipt of your letter dated December 14, 1926, in which you submit to this department the following inquiry:

"At the October term of the District Court in and for Dallas County, Judge W. S. Cooper presiding, a petition presented by Blake Willis, County Attorney, was considered: the petition being in the matter of Wilson, Laura, Warren, Lena, Robert, LeRoy and Guy Fisher, as dependent and neglected children. The proper notices had been served and the parents of the children appeared in court, and after hearing the case, Judge Cooper ordered and adjudged that the said seven children be committed to the State Juvenile Home at Davenport. The commitment of Guy Fisher (baby) who was at the time receiving medical treatment at the King's Daughters' Hospital at Perry, to be withheld until said child had been released by the physician in charge. And it was further ordered that the commitment of LeRoy Fisher be withheld until medical treatment which has been ordered and would be received at the State Hospital at Iowa City, had been completed, and said child had been discharged; and it was further ordered that at said time, commitment in each of said cases shall issue to the State Juvenile Home at Davenport.

"The above order was filed November 27, 1925 and on December 18, 1925, four children, to-wit: Laura, Wilson, Warren and Guy were delivered by the Dallas County officials to the Iowa Soldiers' Orphans' Home at Davenport.

"During last fall and recently, we have had communication from Mr. John Regan, attorney, and from Mrs. Charles, a resident of Perry, concerning the three children, who, under above order, were committed to our orphanage, but were not delivered. Mrs. Charles especially is interested in the baby which at the time of commitment was in the hospital at Ferry. It will be observed that the order of commitment states that when the baby is discharged from the hospital, it shall be delivered to Davenport. This apparently was not done, but rather the child was turned over to Mrs. Charles who has cared for it since that time and last fall began an effort to complete legal adoption. She now writes us that the father of this baby is making threats saying that he is coming to Perry and take the baby, and she is appealing to us for aid in holding the baby.

"Now the point that we would like to know in this case is as follows:

"Has the Board of Control at the present time any right or jurisdiction in the matter of the three children, who, though committed by the court of Dallas County, were not delivered to Board of Control at its Davenport orphanage."

It is quite apparent from the statement of facts embodied in your letter that the District Court of Dallas County obtained jurisdiction of the seven children therein named and that after a hearing they were all ordered committed to the State Juvenile Home or Soldiers' Orphans' Home at Davenport. The youngest of said children, was, at the time said order was made, receiving medical treatment at the King's Daugters' Hospital at Perry, and it was ordered that the mittimus be withheld until said child be released by the physician in charge. It is our opinion that the district court did not lose jurisdiction over the children upon the entry of the order therein but that it retained jurisdiction to see that its order was carried out and the children committed to the institution at Davenport. Therefore, as long as the court retained jurisdiction thereof, the Board of Control would, in our opinion, have no jurisdiction or right over the said three children until they reached the institution at Davenport and we so hold.

Attention of the court should be called to the fact that the three children had not been placed in the institution as ordered, so that the court may make an additional order for the purpose of carrying out the original order.

BANKING—CERTIFICATE: Certificate to engage in banking business can not be issued by the Superintendent of Banking until after proof is furnished that the notice required by statute has been published.

December 14, 1926. *Superintendent of Banking:* We wish to acknowledge receipt of your favor of the 10th, in which you request our opinion as follows:

"The Banking Department desires your opinion on the issuance of a Certificate of Authority to do a banking business.

"Your attention is directed to Sections 9159 and 9161 of the code, in the latter section particularly to the clause 'and he is also satisfied that the preceding sections of this chapter have been complied with and has issued a certificate to that effect.' This clause has always been construed to mean that the Superintendent must require proof that the Articles of Incorporation have been published once each week for four consecutive weeks before issuing Certificate of Authority.

"In the reorganization of closed banks, pressure has been brought to bear on the Department to issue the necessary Certificate of Authority after one publication of the Articles of Incorporation. Will you please give us your opinion as to whether or not this is legal?"

Section 9159 to which you refer provides in substance that a notice of incorporation shall be published in some newspaper of the county wherein the bank is located once each week for four consecutive weeks.

Section 9161 in part provides:

"The corporation may commence business when its first directors or officers named in its recorded articles of incorporation shall have furnished the superintendent of banking proof, under oath, that the required capital has been paid in and is held in good faith by said bank, and he has satisfied himself of such fact, for which purpose he may make a personal examination, or cause it to be made, at the expense of such bank, and he is also satisfied that the preceding sections of this chapter have been complied with, and has issued a certificate to that effect. * * *."

Clearly one of the requirements of the preceding sections is the publication of the notice for the required four weeks. We are, therefore, of the opinion that a certificate should not issue until after proof has been furnished to the Superintendent of Banking that the provisions of the statute requiring publication of notice of incorporation has been complied with.

MUNICIPALITIES: Mayor may not act when outside the state.

December 15, 1926. *Auditor of State:* We have received your letter of December 11, 1926, in which you submit to this department the following inquiry:

"I have received from Mr. Frank G. Pierce, Secretary-Treasurer of the League of Iowa Municipalities, a letter submitted to him by a firm of attorneys at Greene, Iowa, relating to the powers of a mayor of a city or town while absent from the state. The letter in full follows and I am asking that you kindly furnish this department an opinion covering the questions therein submitted at your earliest convenience:

"'Our town clerk wrote you a short time ago, about the situation where the mayor goes away for a temporary visit of a couple of months. We advised him as you did that there was a distinction between authenticating an ordinance and resolution and approving the same. That the chairman pro tem could authenticate the resolution or ordinance and that the mayor could approve the same even though not present. In our particular case the mayor plans on going to California, and of course the ordinances or resolutions could be sent to him there for approval or rejection. The only point I was wondering about was as to the validity of the acts of the town official when performed in another state. I am unable to find much upon this question and if you are unable to find anything definite, we would like to have you get an opinion from the attorney general on the same.'"

Section 5639 of the Code of 1924, as amended by Chapter 126 of the Acts of the 41st General Assembly, prescribes the powers and duties of the mayor. There is no provision in this section, or any other, which permits the duties of the mayor to be exercised by any temporary officer in the absence of the mayor. It has been held that the mayor must sign every ordinance and resolution passed by the city council in order to give the same vitality.

Heins v. Lincoln, 102 Iowa, 69;
Altman v. City of Dubuque, 111 Iowa, 105.

A temporary chairman or mayor is simply the presiding officer for the time being and is not vested with the power of approving or vetoing ordinances.

Moore v. City of Perry, 119 Iowa, 423;
Collins v. City of Keokuk, 147 Iowa, 233.

We find no provisions of the statute, or opinions holding directly that the mayor may not exercise the rights and prerogatives of his office when temporarily sojourning outside of the limits of the state. We are, however, clearly of the opinion that he may not do so. Manifestly, he cannot preside in the mayor's court, or preside at the meetings of the city council, unless he is present and we do not believe that he may sign, approve or veto ordinances when he is outside of the state.

Section 1146 of the Code of 1924 provides what shall constitute a vacancy in a civil office, which includes city or town officers. This section provides in part as follows:

"Every civil office shall be vacant upon the happening of either of the following events:

* * * * * *

3. The incumbent ceasing to be a resident of * * * city, town, or ward by or for which he was elected or appointed, or in which the duties of his office are to be exercised. * * *"

This portion of the statute, however, relates to a permanent change of residence, or what is commonly called domicile, and not a mere temporary residence outside of the limits of the city or town.

State v. Hemsworth, 112 Iowa, 1;
Independent School District v. Miller, 189 Iowa, 123.

We have cited the above statute and the last two authorities merely for the purpose of indicating that we have not overlooked the same. It is our opinion, therefore, that a mayor who is temporarily residing in California may not exercise the rights, powers and duties of the mayor while so sojourning and that he may not either approve or veto ordinances of the city.

MUNICIPALITIES: A municipality owning a waterworks plant has no right to refund any part of the surplus funds to the patrons thereof.

December 17, 1926. *Auditor of State:* We have received your letter of December 14, 1926, in which you submit to this department the following inquiry:

"I have today received from Mr. Frank G. Pierce, Secretary-Treasurer of the League of Iowa Municipalities, a letter written to him by Mr. Will Robinson, a member of the city council of Eagle Grove, Iowa, which reads as follows:

"'Please advise me by letter as soon as possible your opinion as to whether it would be legal for the city council to return to the water users of Eagle Grove, Iowa, a check for their water rent for a three months' meter reading which they have paid to the city and on account of the city having a good surplus feel as they should return to them this quarter year's water rent which has been paid, please advise me and oblige as I would not care to have to pay back to the city the amount refunded to the people in event same was not in compliance with the law when the state checkers check the city's books.'

"Will you kindly have an opinion prepared answering this inquiry."

The statute relating to the construction and maintenance of waterworks plants in cities the size of Eagle Grove is Chapter 312, Sections 6127 to 6151, both inclusive. Section 6142 reads as follows:

"They may sell the products of municipal heating plants, waterworks, gasworks, or electric light or power plants to any municipality, individual, or corporation outside the city or town limits, as well as to individuals or corporations within its limits, and may with the consent of the board having jurisdiction thereof erect in the public highway the necessary poles upon which to construct transmission lines; and shall, from time to time in such manner as they deem equitable, assess upon each tenement or other place supplied with heat, water, gas, light or power, reasonable rents or rates fixed by ordinance, and shall levy a tax as provided by law to pay or aid in paying the expenses of running, operating, renewing, and extending such works, and the interest on any bonds issued to pay all or any part of their construction."

It is provided therein that the city shall from time to time assess upon each tenement or other place supplied with heat, water, gas, light, or power, reasonable rents or rates fixed by ordinance. It is a well settled rule of law that municipalities shall have the following powers only: (1) those granted in express terms, (2) those necessarily implied from the express powers granted, and (3) those inherent in the powers expressly granted or necessary to carry out such powers. If there is any doubt about the right of a municipality to exercise a certain right or power the doubt is resolved against the municipality. These propositions of law are so elementary that it will not be necessary to cite any authorities in support thereof. As there is no express power granted to municipalities to refund any part of the fund received from water rentals, we are clearly of the opinion that such right or power is not necessarily inferred from any power granted to municipalities.

We are, therefore, clearly of the opinion that municipalities may not do so. However, the same result may be reached in another way. If there is a surplus in the waterworks fund this matter may be taken into consideration in determining the rates for another year and the rates may be fixed at such an amount so as to give to the patrons of the municipal plant in effect a refund of such surplus, or give them the benefit thereof.

SCHOOL DISTRICTS—TUITION: No person except parent or guardian who actually pays tax under Section 4269 of the Code of Iowa 1924 is entitled to offset said tax against tuition charged against his own child.

December 17, 1926. *County Attorney, Clinton, Iowa:* You have requested from this department an opinion upon the following proposition:

A tenant operates a farm located in Washington rural school district and Elvira high school district, the buildings being situated in the Washington district. His child finishes the course provided by the rural school district of its residence and enters the Elvira High School under the provisions of Section 4275 of the Code of Iowa 1924 and under that section the Elvira school board demands tuition from the Washington rural school district as the district of her residence. The Washington school board contends that it is entitled to an offset against the tuition of the child of this tenant, the amount of tax paid in he Elvira district by the landlord who owns the farm. Your inquiry is, whether under the statute, the Washington school district is entitled to this offset.

It is provided in Section 4269 of the Code of Iowa 1924 as follows:

"The parent or guardian whose child or ward attends school in any independent district of which he is not a resident shall be allowed to deduct the amount of school tax paid by him in said district from the amount of the tuition required to be paid."

No interpretation has ever been placed on this section by the courts. However, we are of the opinion that the statute would be strictly construed and that no person except the *parent* or *guardian* who *actually pays the tax* and whose child or ward actually attends school in the district where he does not reside but where he does own property would be entitled to offset the tax so paid against the tuition charged.

We are, therefore, of the opinion that the Washington school district is not entitled to have offset against the tuition charged against it under Section 4275 to the child of the tenant the amount of tax paid by the landlord who owns the land within the Elvira district.

TAXATION: 1—Personal property may be sold under distress and sale at any time and the treasurer is not limited to the regular tax sale for such sale. 2.—Notice of such sale is the same as for levy and sale of personal property. 3—Personal property tax is a lien upon any personal property owned by the debtor, subject however, to the lien of a prior mortgage. The sheriff, therefore, could sell such property only subject to the mortgage.

December 18, 1926. *County Attorney, Glenwood, Iowa:* You submit to this department for an opinion the following propositions:

"1. Does Sec. 7189 Code of Iowa, 1924, contemplate or authorize enforced collection of delinquent personal taxes that are a lien against real estate owned, or in which an interest of record may appear owned, by the person delinquent, by distress and sale of such real estate or interest therein, in the interim between the

dates of the annual Tax Sales provided by Sec. 7244 to be held on the first Monday in December of each year?

"2. In the event that it is your opinion that said Sec. 7189 contemplates and authorizes such collection to be made by the levy upon and sale of real estate during such interim, what is the procedure to be followed by the Sheriff as to character of Notice to be given and the time and place sale is to be made?

"3. Please define the rights of the Sheriff in his service of Distress Warrant for the collection of delinquent personal property tax against personal property now owned by the person delinquent, that is covered by a chattel mortgage; 1st, as to the right of the State and County to enforce collection of taxes due and delinquent as a prior claim as against the lien of the Mortgage. 2nd—as to the right of levy and collection of such taxes by sale of personal property now owned by the delinquent person, other than the *particularly described* personal property assessed and upon which the tax now due and delinquent was levied, in case the particularly described property assessed and taxed has been disposed of, and a Chattel Mortgage now covers the personal property owned at the time enforced collection is sought to be made.

3rd. Does the Sheriff proceed as though the property was not under Mortgage, or against any equity above the lien of the Mortgage?"

The statute provides that the treasurer shall collect all delinquent taxes by distress or sale of any personal property belonging to the person to whom the taxes are assessed and not exempt from taxation. The procedure here is by execution and levy and may be done at any time. It is, therefore, not limited to the annual tax sale provided for on the first Monday in December of each year. You are referred to *Collins Oil Company v. Perrine,* 188 Iowa, 295, as bearing upon this question.

The levy to be made by the Sheriff under execution ordered by the Treasurer and notice to be given would be governed by the class of property upon which levy was made whether personal or real property. The execution ordered by the Treasurer is governed by the statute governing executions.

Replying to your third question, we shall say that if the tax is a lien upon specific personal property it would be a prior claim as against a chattel mortgage whether the mortgage was executed prior to or subsequent to the date on which the lien of the tax became effective. If it is sought to collect the tax out of personal property now owned by the delinquent taxpayer but which is not the particular personal property assessed the tax would not be a lien thereon and, therefore, the only property against which the right of the state for taxes can be enforced would be whatever equity there may be above the mortgage.

As to the procedure of the sheriff, we shall say that if it were an execution to sell the specific property assessed under the lien thereon, the levy should be made upon the entire property, but if the excution is to be made upon other personal property owned by the delinquent taxpayer upon which there is an existing mortgage at the time of the levy, the levy should be made only upon whatever equity there is above the lien of the mortgage.

DRAINAGE: Where a drainage assessment against a township which has been paid has been set aside by the supreme court the county cannot be required to pay any portion of said assessment.

December 20, 1926. *County Attorney, Pocahontas, Iowa:* We desire to acknowledge receipt of your letter of December 14, 1926, in which you submit to this department the following question:

"Drainage District No. 181 was established to include about 50 smaller districts and from the inclusion of much of this territory an appeal was taken and the Supreme Court in a decision found in 206 N. W. 624, *Thompson v. the Board,* you will find the facts set out at length in a much better way than I can do in this letter.

"Grant Township appealed from the inclusion and then later it settled the assessment made against it for highways by paying it. But the decision confirmed an order of Judge Coyle excluding from all the district all the land of appellees. Pocahontas County did not appeal and so is in the same position as those who did not take an appeal, unless by virtue of the appeal taken by Grant Township, Pocahontas County is relieved from paying its one third of the assessments that would have been levied against Grant Township, and in fact were paid by Grant Township before the appeal was heard.

"Our question is whether Pocahontas County should be assessed its portion of the assessment made against Grant Township for highway benefits, in view of the fact that Grant Township appealed and the decision was in its favor; although it has paid its two thirds of the assessment."

Section 7470 of the Code of 1924 reads as follows:

"When any public highway extends into or through a levee or drainage district, the commissioners to assess benefits shall ascertain and return in their report the amount of benefits and the apportionment of costs and expenses to such highway, and the board of supervisors shall assess the same against such highway. *Such assessments against primary highways shall be paid out of the county's aliotment of the primary road fund and against all other highways, one-fourth out of the county road fund or county drainage fund, and three-fourths out of the township road fund or township drainage fund.* Such assessments shall draw interest at the same rate and from the same time as assessments against lands."

Under the provisions of the above statute assessments against highways may be made only when the highways will be benefited by the drainage improvement.

Chicago & Northwestern Rd. Co. v. Board, 197 Iowa 1208.

It appears from the opinion in the case you cite (*Thompson v. Board,* 206 N. W. 624) that the Supreme Court set aside and nullified all of the assessments against the township resulting from the construction of said drainage ditch. It also appears from your letter that Grant Township has also paid the assessment for highway benefits. It is our opinion that the county cannot be required to pay one-fourth of the assessment against the township unless the assessment against said township be valid and binding. In view of the fact that the township contested the assessment and appealed to the supreme court the assessment should not have been paid in advance of the final determination of the question in the supreme court. Therefore, we are clearly of the opinion that the county may not be required to pay any portion of the assessment levied against the township.

TAXATION: Drainage warrants, school warrants and tax sale certificates are taxable under the laws of Iowa.

December 20, 1926. *County Attorney, Osage, Iowa:* We have received your letter of December 18, 1926, in which you submit to this department certain inquiries which you have stated as follows:

"We have at the present time in this county tax collectors that are checking upon the tax payers of this county, and the county auditor has submitted several inquiries regarding the taxability of certain moneys and credits that have been questioned by the tax payers of the county. The following are the specific matters in question:

"This county has several drainage warrants that are paying interest and the county is attempting to collect taxes on the same, and the question arises therefore as to whether or not such warrants, whether paying interest or not are taxable as money and credits.

"Some in this county have made it a practice to purchase tax sale certificates and these too are in line for taxation if our present standing is correct. This however, is questioned and we are inquiring as to whether or not they can be taxed

when issued by an Iowa treasurer. The same inquiry stands for foreign tax sale certificates, issued by other states.

"One further question, are warrants on school funds drawn by school treasurers, whether drawn in Iowa or in another state taxable as money and credits? We find that there are a great many of such warrants in the hands of our taxpayers in Mitchell County, and in attempting to collect taxes on same as moneys and credits, we find that we are questioned as to our right to do so.

"These questions are submitted, because I do not find where they are touched on by any supreme court decision in the state of Iowa, and since they are all Iowa tax questions, it seems to me that Iowa law should govern, and since the statute and the supreme court decision do not seem to touch on them specifically, I would greatly appreciate receiving an opinion on the same at a very early date."

At the outset it is well to refer to the well settled proposition of law that taxation is the rule and exemption the exception, and if the statute does not specifically exempt property from taxation it is, therefore, taxable.

Morseman v. Younkin, 27 Iowa, 350;
Trustees of Griswold College v. State, 46 Iowa, 275;
Sioux City v. Independent School District, 55 Iowa, 150;
Cassaday v. Hammer, 62 Iowa, 359;
In Re Boyd's Assessment, 13 Iowa, 583;
Simcoke v. Sayre, 148 Iowa, 132.

It is also the law that the statutes under which exemptions are claimed should be strictly construed.

Trustees of Griswold College v. State, 46 Iowa, 275;
Sioux City v. Independent School District, 55 Iowa, 150;
Cassaday v. Hammer, 62 Iowa, 359;
Davenport National Bank v. Mittelbuscher, 4 McCrary (U. S.), 361.

Therefore, unless there is some statute that exempts from taxation drainage warrants, tax sale certificates, and school warrants issued by school districts in Iowa and in other states, then they are clearly taxable under the laws of this state.

The only statute relating to such exemptions which we must consider in determining the questions you have submitted is Section 6944 which reads in part as follows:

"The following classes of property shall not be taxed:
* * * * * *
5. Bonds or certificates issued by any municipality, school district, drainage or levee district, or county within the state of Iowa. No deduction from the assessment of the shares of stock of any bank or trust company shall be permitted because such bank or trust company holds such bonds as are exempted above. * * *"

It is our opinion that the word "certificates" as found in the statute relates to the same class of securities as are covered by the word "bonds" and that the same does not cover warrants issued on public funds.

It was held by this department on April 1, 1919, in an opinion written for Mr. Wilson Cornwall, County Attorney, Spencer, Iowa, that drainage warrants are not exempt from taxation under the provisions of Section 1304, Supplemental Supplement, 1915, which is similar, if not almost identical to Section 6944.

We believe this opinion is determinative of the questions you have submitted to us. We, therefore, hold that drainage warrants, school warrants whether issued by school districts in or out of the state, and tax sale certificates are taxable under the laws of this state. When a purchaser at a tax sale pays the price bid for the property and receives a certificate of sale he has not ceased to be the owner of a certain species of property. Before the sale he owned moneys and credits, and after the sale he likewise owned moneys and credits, or a claim of a monetary consideration against the property. If the owner of the property redeems from the tax sale, then the purchaser receives the amount paid to effect such redemption. We, therefore, believe that all of the species of property covered by your letter are clearly taxable.

BOARD OF HEALTH—SCHOOLS—VACCINATION: The local board of health and the school board have the right to require vaccination of school children and to equally divide the cost thereof.

December 21, 1926. *County Attorney, Ida Grove, Iowa:* We have received your letter of December 17, 1926, in which you submit to this department the following inquiry:

"I should like to have the opinion of your office on the following proposition:

"The local board of health is desirous of vaccinating all school children in the public school of Ida Grove, Iowa, for the prevention of scarlet fever and diphtheria; the city council has passed a resolution agreeing to pay one-half the expense of vaccination providing the board of directors of the Ida Grove Independent School District will defray the other one-half of such expense. The board is willing to vote this expenditure if it can legally do so, and have requested an opinion from me concerning the use of the funds of the district for that purpose, particularly the contingent fund, so-called.

"I will appreciate an opinion from your department stating whether or not the board has authority to expend the funds of the district for the purpose aforesaid."

The right of the school board and local board of health to require the vaccination of all school children as a condition upon which they might attend the public school was involved in the comparatively recent case of *Baehme v. Independent School District of Manly, Iowa*, 207 N. W. 755. The supreme court, however, did not pass upon this question. The arguments on behalf of the town of Manly and the school district contained the citation of many cases that fully support the right of the school board and the local board of health to require such vaccination. We have no doubt of the right of the public authorities to do so. Therefore, we believe that the local board of health and the school board have a right to require such vaccination and to divide equally the cost and expense thereof.

HIGHWAYS—STATE HIGHWAY COMMISSION: Under the primary road development law an unexpended balance must be considered a part of the primary road allotment for the year in which the primary road fund is available.

December 21, 1926. *Iowa State Highway Commission:* We have received your letter of December 17, 1926, in which you submit to this department the following inquiry:

"We desire your opinion as to the construction to be placed on Section 3-a, Chapter 114, Acts of the 41st General Assembly.

"Assume that on January 1, 1926, a county has an unexpended balance in its Primary road fund of $25,000, the estimated receipts of this county for the year 1927, after deducting the estimated cost of maintenance, being $75,000. This county has $100,000 in bonds maturing on May 1, 1927. How much, if any, of these maturing bonds will be paid off from development fund?

"In other words, does the section referred to above contemplate carrying forward the unexpended balance from 1926 and considering it together with the 1927 estimated receipts, as being available for taking care of maintenance and bond redemption, or does the statute contemplate that we disregard the unexpended balance and, since the 1927 primary road fund will produce but $75,000, draw on the development fund for $25,000 to be used for bond redemption.

"A point to be borne in mind is that we will not have in hand on May 1, 1927, much in excess of 70 per cent of the estimated receipts of the Primary Road fund for the year 1927. It would seem that the businesslike way of doing would be to carry forward and use the unexpended balance of the preceding year before calling upon the development fund to take care of any portion of maturing bonds."

Section 3-a of Chapter 114 of the Laws of the 41st General Assembly reads as follows:

"*Limitation.* If in any year the primary road allotment of any county is not sufficient to maintain the primary roads of said county and pay the maturing principal of primary road bonds authorized by the county prior to April 2nd, 1925, said deficiency shall be made up from the primary road development fund.

"Provided that the county's allotment of the primary road fund plus the amount of the primary road development fund made available to the county under this section shall not in any year exceed the total amount of both of said funds which said county would have received if said development fund had been allotted among the counties on the area basis."

We believe the above portion of the statute should be given such a construction as to permit the carrying out of the evident purpose thereof and a narrow construction that would defeat this purpose should be avoided. We believe that the phrase "If in any year the primary road allotment of any county" includes not only the portion of such fund as is set apart or allowed to the county for primary road purposes each year but also includes any money available for such purpose in the year which, of course, would include the unexpended balance in such fund on January first. Any other construction, we believe, would defeat the purpose of the statute.

We, therefore, hold that such unexpended balance on the first day of January, 1926, must be considered a part of the primary road allotment of the county for the year in which the primary road fund is available.

BANKING DEPARTMENT—RECEIVERSHIP—EXECUTIVE COUNCIL: Executive council is not required to furnish supplies and furniture for the use of the Receivership Department.

December 21, 1926. *Secretary, Executive Council:* You have requested the opinion of this department upon the following proposition:

"Whether or not the Executive Council is required to furnish supplies, such as furniture and stores, to the Receivership Department, under the State Superintendent of Banking."

You are advised that the work involved in the Receivership Department is a part of and the result of the liquidation of closed banks, the cost of which should be paid out of the assets of these closed banks. This department is maintained under the direct supervision of the Superintendent of Banking for the purpose of handling a large volume of work at a minimum cost to the depositors and creditors of these banks. The state should not be required to pay the cost of office supplies, furniture and stores for the maintenance and upkeep of the Receivership Department.

It is, therefore, the opinion of this department that the Executive Council is not required to furnish supplies, furniture and stores to the Receivership Department under the State Superintendent of Banking.

TAXATION: Exemption by reason of agricultural use in city or town is strictly construed and is a fact question as to usage and benefits derived from city projects.

December 22, 1926. *County Attorney, Bedford, Iowa:* You have requested an opinion from this department upon the following question:

"For the past ten years the owner of the premises has been paying taxes on the premises levied by the town council of said town and the Board of Supervisors of said county and the premises have, in fact, all of the time been used as agricultural lands under Section 6210 of the Code of 1924. The taxes have been paid voluntarily by the owner without knowledge that the premises have not been listed as agricultural lands and although he knew that the taxes were high he did not know that he was not getting the benefit of the exemption which applied to agricultural lands under said section. Question: Is the Board of Supervisors authorized, under those conditions, in refunding taxes over a period of five years, which the owner claims have been erroneously levied and exacted?"

It is provided by statute as follows:

"No land included within the limits of any city or town which shall not have been laid off into lots of ten acres or less, or which shall not subsequently be divided into parcels of ten acres or less by the entension of streets and alleys, and which shall also in good faith be occupied and used for agricultural or horticultural purposes, shall be taxable for any city or town purpose, except that said lands and all personal property necessary to the use and cultivation of said agricultural or horticultural lands shall be liable to taxation for city and town road purposes, at not exceeding five mills, and for library purposes."

(Section 6210, Code of Iowa, 1924)

As a general proposition the question as to whether a tract of land is entitled to tax exemption under this statute is determined by the facts of its usage. It has been held that a tract of land so situated that roads lead to it, or streets surround it so that it receives benefits, or if it is held for the purpose of increase in value or if the land is surrounded by platted lots or streets, the mere fact that it is used for agricultural purposes does not entitle the owner to exemption from taxation.

O'Hare v. Dubuque, 22 Iowa, 144;
Durant v. Kauffman, 34 Iowa, 194;
Brooks v. Polk County, 52 Iowa, 460;
Perkins v. Burlington, 77 Iowa, 553;
Allen v. Davenport, 107 Iowa, 90;
Windsor v. Polk County, 109 Iowa, 156.

In order that the taxpayer may recover taxes paid under this statute the burden is upon him to prove that the land is used exclusively for agricultural purposes and that none of the conditions hereinbefore described or set out in the cited cases exist.

If the facts in your case are so clear that there is not room for contest under any of the conditions set out above, then, your board of supervisors would have the power to refund the tax. Taxation statutes are always so construed, however, that exemption is the exception rather than the rule. We therefore suggest that unless the case is a very clear cut one and presents none of the conditions under which the court has held such property subject to taxation that the refund should not be made.

FISH AND GAME: 1. One selling fresh fish is not required to secure a license under Section 1752 of the 1924 Code. 2. There is a distinction between the provisions of Sec. 1752 of the Code relating to the wholesale fish market license and Sec. 7177 relating to a peddler's license.

December 23, 1926. *County Attorney, LeMars, Iowa:* We desire to acknowledge receipt of your letter of December 21, 1926, in which you submit to this department the following inquiry:

"Please send me an opinion on the following at once as we have a case set for Dec. 29th covering the same. Can a person who buys about 200 pounds of fish at a time from Booth Fisheries in Sioux City and who takes it out in a wagon and peddles it from house to house selling it in one and two pound quantities at a time be required to take out a license under Section 1752 of the 1924 Code of Iowa, said fish being fresh fish and sold in Plymouth County outside of cities and towns? Section 7177 excepts them."

Section 7177, cited in your letter, reads as follows:

"The provisions of the three preceding sections shall not be construed to apply to persons selling at wholesale to merchants, nor to transient vendors of drugs, nor to persons running a huckster wagon, or selling and distributing fresh meats, fish, fruit, or vegetables, nor to persons selling their own work or production either by themselves or employees."

It is manifest, we think, that the determination of your question depends upon the definition or meaning of the phrase: "or selling and distributing fresh meats, fish, fruit or vegetables." It is our opinion that the adjective "fresh" not only refers to meats but fish, fruit, or vegetables as well. As the person referred to is selling fresh fish, we are of the opinion that he is not required to procure a license.

On December 5, 1924, this department prepared an opinion for Honorable W. E. Albert, State Fish and Game Warden, upon a question relating to the license fee to be exacted of one conducting a wholesale fish market. There is some language in the Albert opinion that may seem somewhat inconsistent with the construction of the statute in this opinion. However, the Albert opinion construes Section 1752 of the Code of 1924 relating to a wholesale fish market license, and Section 7177 construed in this opinion relates entirely to a peddler's license. These two opinions, therefore, may be harmonized and the rule adopted in one should not be confused with the construction of the other statute.

STATE ROADS: The term "maintenance" as used in reference to state roads, does not mean "construction;" the term "abut" does not mean "adjacent."

December 28, 1926. *Auditor of State:* We wish to acknowledge receipt of your favor of the 17th, in which you request our opinion as follows:

"I am writing you for your opinion as to the construction of an appropriation under Section 14—sub-section 'b' of Chapter 218 of the Acts of the 41st General Assembly, making an appropriation of $20,000.00 for 'maintenance of state roads at any or all state institutions under the Board of Education.' Would this language permit the payment of a claim for paving a street within the city of Ames? In other words, could this be construed to include construction as well as maintenance?

"I also desire to know if Section 4634 of the Code of 1924 would be construed to include state property that does not abut upon but lies adjacent to a paved street within an assessment district?

"There is now pending a claim for paving assessments in the city of Ames against state property that is adjacent to but does not abut upon or extend through said lands, and I am anxious to know if it would be proper to issue a warrant in payment of such claim? Your early opinion on this matter would be appreciated."

Chapter 218, Laws of the 41st General Assembly, to which you refer is what is commonly known as the State Budget Law and Section 14 thereof provides various appropriations for the Board of Education and the part quoted by you is an appropriation made under paragraph b of the section just referred to.

In answering your inquiry, it is first necessary to determine whether or not the term "maintenance" as used in the act referred to is broad enough to include "construction." This term has been defined a great many times by the Courts of last resort in the various states of the Union. The Supreme Court of Iowa, however, has not defined its use in any decision that is applicable to the facts presented by you. Webster's International Dictionary defines the term "maintain" as meaning "to hold or keep in any particular state or condition; to support; to sustain * * *." This definition has been approved by the Supreme Court of Missouri in *Lucas v. St. Louis & Southern R. R. Co.*, 73 S. W. 589, and by the Supreme Court of New York in *Breen v. City of Troy*, 41 How. Prac. 475. In the case last referred to, the

term "maintaining highways" in a municipal charter providing that the common council may in each year cause a sum sufficient to pay all the ordinary and necessary expenses of maintaining the city government, including the "maintaining" of the highways of said city, to be raised by taxation, was held not to include the expense of establishing a grade of an avenue.

The word "maintain" has been defined as not meaning to provide or construct, but as meaning to keep up, to keep from change, or to preserve, (Worcester's Dict.), and in a number of cases it has been held that the terms "maintenance" and "repair" when applied to a street, practically mean one and the same thing. (*Barber Asphalt Paving Co. v. Hezel*, 56 S. W. (Mo.) 449, 451; *Verdin v. City of St. Louis*, 33 S. W. (Mo.) 480, 494.) In the last cited case, it was said that the word "maintain" being equivalent to "repair" in connection with streets, that the maintenance and the reconstruction of a street were separate and distinct things so it has been held that to build and construct a railroad is one thing and to maintain the structure after it is built is another. (*Morehead v. Little Miami R. R. Co.*, 17 Ohio 340, 353.) In the case of *Seaboard National Bank v. Woesten*, 48 S. W. (Mo.) 939, it was held in connection with litigation involving paving of city streets, that the terms "maintenance" and "repair" were synonymous.

The following are a few of the numerous cases in point holding that the term "maintenance" does not include construction but is synonymous with "repair."

Ferguson v. Rockford, 79 Atl. (Conn.) 177, 178;
Missouri K. & T. R. Co. v. Bryan, 107 S. W. (Texas) 572, 576;
State ex rel. City of Chillicothe, v. Wilder, 98 S. W. (Mo.) 465, 467;
Kovachoff v. St. John's Lumber Co., 121 Pac. (Ore.) 801, 803;
Kendrick & Roberts v. Warren Bros., 72 Atl. (Md.) 461, 464.

We have also found a few authorities holding contrary to those we have cited herein. However, these decisions are in the minority and we believe those cited follow the best reasoning as well as being clearly the weight of authority.

We are, therefore, of the opinion that the term "maintenance" as used in this statute should not be so construed as to include "construction."

You also inquire in substance whether or not the term "abut" as used in Section 4634 of the Code of 1924, can be construed to mean "adjacent" property. The statute referred to provides for the improvement of the state roads "which extends through or abuts upon lands owned by the state."

The Supreme Court of Iowa, in *Millan v. City of Chariton*, 145 Iowa 648, had occasion to define the use of the term "abut" as construed in a statute relating to the assessment of abutting property for street improvements and it is therein said "By the term 'abutting property' is meant that between which and the improvement there is no intervening land. 25 Am. Eng. Ency. (2d. ed.) 11a."

There are a large number of decisions by the Courts of last resort in other states following the same line of reason.

We are therefore of the opinion that under the decision of the Supreme Court of this state, the term "abut" in reference to the assessment of property for state or road improvements, does not include "adjacent" property.

LOVRIEN-BROOKHART LAW—PUBLIC FUNDS: 1. Cemetery funds held by cities and towns will be covered by the Lovrien-Brookhart bill. 2. Funds that are deposited for the permanent care and improvement of cemetery lots do not come within the provisions of such law.

December 28, 1926. *County Attorney, Albia, Iowa:* We have received a letter from Mr. A. J. Head, City Clerk of Albia, Iowa, in which he submits to this de-

partment a question with reference to the Lovrien-Brookhart Law. As the city clerk is not one of the officials who is entitled to the opinion of this department we have concluded to prepare an opinion for your office and mail a copy thereof to the city clerk. The letter of the city clerk is as follows:

"The city of Albia, Iowa, has assumed control of the Oak View Cemetery of this city. Prior to this time the control of same was in the hands of a Board of Trustees.

"The funds of the perpetual care fund are invested in U. S. Government Bonds, and the interest from these are transferred to the General Fund and used for the upkeep and care of those having taken out Perpetual Care Contracts, and no part of the original contract price is ever used, nothing but the interest derived from same.

"The improvement fund or which is known on our records here as the Permanent Improvement Fund, has been invested in Certificates of Deposit on local banks, and nothing is ever drawn from this fund, except for the purpose of making permanent improvement or for purchasing additional ground. These certificates have been drawing 3% interest.

"The city as Trustee for the cemetery association now intends to purchase some additional land for cemetery purposes and thereby will have to draw from this Permanent Improvement Fund, and will have to cash in on some of these Certificates of Deposit to make payment for same.

"The question is this:

"Will the state under the Brookhart Lovrien Act draw interest on the Cemetery Funds deposited by the city of Albia as trustee. For if the state does not draw interest on the cemetery funds, we will invest the balance of these funds on hand after the land is purchased, back in Certificates of Deposit, and if they will draw the interest we will just leave it in open account."

The provisions of Chapter 173 of the Laws of the 41st General Assembly, commonly known as the Lovrien-Brookhart Bill, which must be considered in the determination of the question you have submitted are contained in Section 2 thereof, and read in part as follows:

"All interest hereafter collected * * * by city treasurers as provided in section fifty-six hundred fifty-one (5651) of the code, 1924, * * * *and any other interest hereafter collected from depositories of public funds,* as provided by statute, is hereby diverted from the general fund * * * and shall be paid into the state treasury and kept in the fund created by this act, or so much thereof as shall be ordered so paid by the treasurer of state. No part of said interest above two and one-half per cent (2½%) per annum shall be so diverted or collected for said sinking fund."

Therefore, for the purpose of determining the funds of municipalities on which the interest shall be diverted from the general fund under the provisions of the statute, we must turn to the provisions of Section 5651, which is referred to therein. This section reads as follows:

"Treasurers of cities and towns shall, with the approval of the council as to place and amount of deposit, by resolution entered of record, deposit city and town funds in any bank or banks in the city or town to which the funds belong, at interest at the rate of not less than two and one-half per cent per annum on ninety per cent of the daily balances, payable at the end of each month. Interest shall accrue to the benefit of the general fund."

It will be observed that the phrase which appears in the above section is "city and town funds." This section is all embracing in its character and in our opinion covers all of the funds of every kind or character that belong to municipalities and which they, under the law, may accumulate for any proper municipal purpose. It is, therefore, apparent that with the definition thus given to the phrase, cemetery funds will be covered by the Lovrien-Brookhart bill, and the interest thereon must be

diverted from the general fund and such funds are, therefore, protected by the Lovrien-Brookhart Law.

On June 17, 1925, this department prepared an opinion for Honorable J. C. McClune, Auditor of State, in which it was held that cemetery funds created by a tax levy are covered by the provisions of the Lovrien-Brookhart Law.

However, we believe that funds that are deposited with the city for the permanent care and improvement of cemetery lots are not, strictly speaking, city funds and do not come within the provisions of Section 5651. The interest on such deposits is used for the permanent care and improvement of such lots and did not become, under the prior law, a part of the general fund. Therefore, we are clearly of the opinion that such funds are not covered by the Lovrien-Brookhart law.

DRAINAGE: 1. Where land included in a district has been excluded therefrom, by a decision of the courts, a property owner who has paid the assessment may recover said assessment from the county. 2. Even the property owner who has signed a waiver may recover the amount paid if the land is excluded from the district by an order of court.

December 28, 1926. *County Attorney, Pocahontas, Iowa:* We have received your letter of December 23, 1926, in which you submit to this department the following inquiries:

"I received your letter written December 20th giving your opinion regarding the payment of assessments for benefit to highway in Grant Township, Pocahontas County in D. D. 181, which letter was in answer to my inquiry of December 14th.

"Since you have my former letters and the citation of the case, *Thompson v. Board,* 206 N. W. 624, you already have most of the facts in the case.

"Our county auditor has asked me to tell him whether the assessments paid after the appeal was taken, may be refunded to the land owners, now that the lands have been excluded from the district.

"As you know, certain lands were included in D. D. 181 summarily, on recommendation of Engineer J. H. Mayne. From this inclusion appeals were taken and while the appeals were pending the assessments on part of the lands included were paid, in some cases paid in three installments and waiver and agreement (like the one hereto attached) filed as provided by Section 1989-212 of the Supplement to Code of 1897.

"The Board seem to be willing to refund this money to the persons who have paid these assessments on land so included and later, by the decision of the court, excluded, but they do not know whether they have the authority to do so. There are two classes of persons who have so paid their assessments: those who paid it in cash at once, and those who signed the waiver and paid it in three installments.

"We would like to know whether the Board of Supervisors have a right to repay the money paid on the said assessments to:

1. Those who paid it in cash before the decision of the court, and whose lands were afterward excluded from the district;

2. Those who signed the attached waiver and paid in three installments."

The case referred to in your letter, *Thompson v. Board of Supervisors of Buena Vista County* (Ia.) 206 N. W. 624 was an appeal from the action of the joint boards of supervisors of four counties in establishing a joint drainage ditch under the provisions of the Code Supplement of 1913, Section 1989-a54. There is nothing in the opinion to indicate who were the appellants. The opinion in that case contained the following statement:

"The decree of the trial court reversed the finding of the joint board by excluding the lands of the complainants from the operation of the board's order, without prejudice to the validity of such order as to the rest of the district."

However, for the purpose of determining the questions you have submitted to us, we are assuming that the parties to whom your inquiries refer were appellants in

said case. Therefore, our opinion is limited to the determination of the question as to whether or not the payment of the assessments in the one case, and the signing of waivers and the payment of the portion of the assessment in the other case, will preclude the said land owners from insisting upon or requiring a refund of the amounts paid. We are clearly of the opinion that the land owners who paid cash before the decision of the district court, which was affirmed upon appeal by the supreme court, should be and are entitled to a refund of the amounts paid by them.

The difficult question, however, arises in connection with the right of the property owners, who signed waivers and paid in three installments, to have the amount paid refunded to them. Section 1989-a12 of the Code Supplement of 1913, which was in force and effect at the time the assessment in question was made, reads in part as follows:

"* * provided that if the owner of any parcel of land, lot or premises against which any such levy shall have been made and certified, shall, within twenty days from the date of such assessment, promise and agree in writing filed in the office of of the county auditor that in consideration of his having the right to pay his assessments in installments he will not make any objection of illegality or irregularity as to the assessment of benefits or levy of such taxes upon or against his property, but will pay said assessment, then said taxes levied against said land, lot or premises of such owner shall be payable as follows: one third of the amount of said assessment at the time of filing the above agreement; one third within ten days after the engineer in charge of said drainage improvement shall file a certificate in the office of the county auditor that said improvement is one half completed, and the remaining one third within ten days after the said improvement shall have been accepted by the board of supervisors, and if said installments are not paid as above provided, the failure to pay any installment shall cause the whole sum to become due and payable at once with interest at the rate of one per cent per month from the date of filing said agreement, and such assessments shall thereupon be collected as other taxes on real estate, which rate may be later reduced to correspond with the rate specified in the certificates or bonds, as the case may be. * * *"

It is held in the case of *Fitchpatrick v. Fowler*, 157 Iowa, 214, that under the statute providing that owners of land assessed for drainage purposes may waive in writing any objection to the validity of the assessment and thus obtain the right to pay the assessment in installments, with 6% interest per annum, the signing of such waiver created a special contract. In other words, what was before a mere special assessment upon the property is converted into a binding promissory obligation to pay with a specified rate of interest; the payment being secured, of course, by the lien prescribed by the statute.

We find no other authorities in this state construing this particular statute. It is manifest, we think, that even though the signing of the waiver may constitute a promissory obligation to pay, it, like any other obligation, must be based upon a valid and binding consideration. If the lands against which the benefits were assessed were not legally included within the district, but were excluded therefrom by the district court and upon appeal by the supreme court no valid and binding assessment could be made against the property owner or his property. Therefore, although the question is not free from doubt, we are inclined to the opinion that those who signed waivers are entitled to a refund of the amount they paid as special assessments.

SCHOOL DIRECTORS—VACANCY IN OFFICE: Where a school director resigns a vacancy exists under Section 1146 of the Code of Iowa 1924 and if such resignation reduces the board below a quorum an election should be called as provided by statute to fill such vacancy.

December 30, 1926. *County Attorney, Grundy Center, Iowa:* This will acknowledge receipt of your inquiry of December 22, 1926, requesting an opinion from this department upon the following question:

"A, B, and C were members of the School Board of a Rural Independent School District in Palermo Township, Grundy County, Iowa. A died recently leaving his office vacant. B and C have been unable to agree upon a party to fill the vacancy. Now, B has tendered her written resignation to C, who is the temporary, acting chairman of the board. When does the resignation become effective? In lieu of Section 4198 of the Code of 1924, does a successor have to be appointed and qualified before the resignation becomes effective?"

It is provided by statute, Section 4223, Code of Iowa, 1924, as follows:

"Except as otherwise provided by law, when the board is reduced below a quorum, the secretary of the board, or if there be no secretary, the county superintendent, shall call a special election to fill the vacancies, giving notice in the same manner as for the annual meeting."

The foregoing statute applies to school officers.

It is further provided by statute, Section 1145, Code of Iowa, 1924, as follows:

"Except when otherwise provided, every officer elected or appointed for a fixed term shall hold office until his successor is elected and qualified, unless he resigns, or is removed or suspended, as provided by law."

This latter provision applies in general to all office holders and, without question, would govern the case unless the provision of Section 4198 requires that no vacancy be declared until successors are elected and qualified.

The statutes of this state prior to the compilation of 1924 inserted after the word "quorum" in Section 4223 "by resignation or otherwise." It is our opinion that B in the case cited having resigned, a vacancy is created under the general statutes and that the words "by resignation or otherwise" referred to above were omitted by the codifier because of surplusage.

We desire to direct your attention further to paragraph 4, Section 1146 of the Code of Iowa, 1924, which reads as follows:

"The resignation or death of the incumbent."

You will note that in this last cited section there is no provision as to "except as otherwise provided," and we are of the opinion that this section applies to every civil officer and that a vacancy exists upon his filing a resignation with the proper officer.

We are, therefore, of the opinion that in a board of three directors, A, B, and C, A having died, B having resigned, that it is the duty of the secretary of the board to call an election immediately to fill both vacancies. If the secretary refuses to perform this duty it is our opinion that mandamus would lie to compel the calling of such election.

No other conclusion could be reached in this matter. Let us suppose that B, instead of resigning had removed from the district, his successor not having been elected or qualified, he is still a director, which is an impossible situation. Carrying the analogy one step further, let us assume that both A and B died. If the statute is construed that the school officer is an officer until his successor is elected and qualified, a quorum still exists although two men are dead and no provision would be left by the statute to fill the existing vacancies.

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1925

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OF THE BOARD OF

Railroad Commissioners

FOR THE

Year Ending December 1, 1925

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CHARLES WEBSTER, Commissioner.
B. M. RICHARDSON, Commissioner.

GEO. L. McCAUGHAN, Secretary

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